

Guide to due diligence of agribusiness projects that affect land and property rights

OPERATIONAL GUIDE



Guide to due diligence of agribusiness projects that affect land and property rights

OPERATIONAL GUIDE

PREFACE

The land rush observed since 2008 has prompted numerous initiatives to investigate this phenomenon and understand its impact on local land and property rights. In May 2012 the international community agreed on a set of Voluntary Guidelines for the Responsible Governance of Tenure of Land, Fisheries and Forests. Having played an active role in the international debates that led to the formulation of these guidelines, France now needs to ensure that its institutional actors apply and abide by them. The guide and analytical framework presented in this publication are specifically designed to help them do so.

They were developed as part of a process of reflection and discussion initiated by the 'Land Tenure and Development' Technical Committee, whose other outputs include the 'French Development Cooperation White Paper on Land Governance and Security of Tenure in Developing Countries' (2009), and 'Large-scale land appropriations: analysis of the phenomenon and proposed guidelines for future action' (2010).

This analytical framework and accompanying guide are intended to help all actors and operators – and especially those within the AFD group – who work with private, State and local government investments that affect land and property rights (perennial plantations, agro-industrial operations, hydro-agricultural developments, pastoral and forestry initiatives).

It should also feed into dialogue between France and countries that are reforming their land legislation in order to improve their response to key issues such as development, food security, sustainable natural resource management, social equity and conflict prevention and management.

With the help of this framework and guide, users will be better able to monitor compliance with the recently adopted Voluntary Guidelines, but also with other relevant instruments such as the Principles for Responsible Investment in Agriculture and Food Systems, and thereby address concerns among rural communities and civil society groups that investments in partner countries are sustainable, that the added value they generate is shared equitably between the farmers and enterprises involved, and local land and property rights are respected.

While this framework and guide will undoubtedly need to be further developed to be used for assessing public and local government investments, they nonetheless represent a solid and practical basis designed to enable users to implement international principles on land tenure and responsible investments. The framework and guide are already being used by members of the AFD group, and will hopefully be of interest for other financial institutions working in this field.

Jean-Marc Gravellini
Chief Operating Officer of the AFD Group

CONTENTS

3	Preface
6	List of acronyms
7	Preamble
9	Introduction
11	PART 1. Conceptual and methodological framework
11	Why do we need a guide and framework for project analysis?
13	Why has land become such an important aspect of project analysis?
14	Why look at contracts?
17	PART 2. Guide to the analytical framework
17	Understanding the dynamics and context in which the project operates
21	Analysing preliminary studies and producing complementary studies where necessary
24	Evaluating contract negotiation and management
30	Evaluating the potential economic benefits of a project
35	Ensuring that local people's rights are respected
40	Managing the environmental impacts of a project
45	PART 3. Conclusions
51	Bibliography
54	Other sources of useful information
57	ANNEX. Analytical framework for agricultural investment projects that affect land tenure and property rights
59	Analysis of the national framework for land governance
61	Analysis of the project and associated land contracts
61	<i>Contract negotiation and management</i>
65	<i>Economic evaluation</i>
68	<i>Social component</i>
71	<i>Environmental considerations</i>

LIST OF ACRONYMS

ADB	African Development Bank
AFD	French Development Agency
AGTER	NGO working to improve the governance of land, water and natural resources
AUC	African Union Commission
CFS	Committee on World Food Security
CICID	College for International Cooperation and Development
CSR	Corporate Social Responsibility
DSB	Dispute Settlement Body
EBRD	European Bank for Reconstruction and Development
ECA	Economic Commission for Africa
EP	Equator Principles
ESIA	Environmental and Social Impact Assessment
FAO	Food and Agriculture Organization of the United Nations
GISA	French Inter-ministerial Food Security Group
GRET	Group for Technological Research and Exchange
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICSID	International Centre for the Settlement of Investment Disputes
IFAD	International Fund for Agricultural Development
IFC	International Finance Corporation
IIED	International Institute for Environment and Development
ILC	International Land Coalition
ILO	International Labour Organization
LPI	Land Policy Initiative
NCP	National Contact Point
OECD	Organisation for Economic Cooperation and Development
ON	Office du Niger
PRAI	Principles for Responsible Agricultural Investment
PS	Performance standards
RAI	Responsible Agricultural Investment
RSB	Roundtable on Sustainable Biomaterials
RSPO	Roundtable on Sustainable Palm Oil
SIF	Strategic intervention framework
UN	United Nations Organisation
UNCTD	United Nations Conference on Trade and Development
VG	Voluntary guidelines
WTO	World Trade Organisation

PREAMBLE

This framework and guide have been developed under the auspices of the ‘Land Tenure and Development’ Technical Committee. Co-chaired by the Ministry of Foreign Affairs and the French Development Agency (AFD), this committee provides a unique forum to debate ideas and research findings and develop project experiences. The Committee appointed a consortium formed by Gret, IIED and Agter to lead this collective reflection in a process that unfolded throughout 2013 and 2014. This document was produced in French by Amel Benkahla (Gret), Lorenzo Cotula (IIED), Michel Merlet (Agter) and Thierry Berger (IIED), and translated into English by Lou Leask.

Written and oral contributions were also provided by Pierre-Yves Bertrand (MAEDI), Cécile Broutin (Gret), Perrine Burnod (Cirad), Marianne Chaumel (MAEDI), Jean-Pierre Chauveau (IRD), Aurélie Chevillon (AFD), Gérard Chouquer (FIEF), Odile Conchou (Proparco), Marjolaine Cour (AFD), Jean-René Cuzon (AFD), Teddy Deroy (cabinet ERM), Véronique Dorner, Christophe Ducastel (AFD), Jean-Luc François (AFD), Claire Galpin (géomètres sans frontières), Mathilde Gasperi (AFD), Alexia Hoffman (AFD), Philippe Karpe (Cirad), Philippe Lavigne Delville (IRD), Yann Lavrilleux (AFD), Dominique Lorentz (CSN), Mathieu Le Grix (AFD), Etienne Le Roy, Jean-Philippe Lestang (FIT-conseil), Isabelle Maninben (CCFD), Aurore Mansion (Gret), Jean-Michel Mignot (AFD), Naomi Noel (AFD), Isabelle Ouillon (Ministère de l’agriculture), Vatché Papazian (AFD), Jean-Christophe Péresse (AFD), Caroline Plançon (Banque Mondiale), Justine Plourde Dehaumont (Proparco), Emmanuelle Poirier-Magona (AFD), Mamy Rakotondrainibe (collectif Tany), Jean-Noël Roulleau (AFD), André Teyssier (Banque Mondiale), José Tissier (AFD) and Claude Torre (AFD).

This paper reflects the dominant position among members of the working group, but does not necessarily reflect the position of their respective institutions. One of the group’s greatest assets is the diversity of its members and the insights to be gained from their different concerns and personal positions. The proposed tools were tested on a real project that was being assessed within AFD and Proparco in order to validate their relevance and coherence.

This document was presented at an extended feedback meeting on 19th May 2014, which was attended by members of the Technical Committee and a large number of senior staff from AFD and Proparco. It was also presented to members of the French Inter-ministerial Food Security Group (GISA) on 23rd June 2014.

The opinions expressed in this document are those of the Technical Committee; they do not necessarily reflect the official views of the French Government.

A French version of this document can be downloaded from the ‘Land Tenure and Development’ website (www.foncier-developpement.fr).

INTRODUCTION

International organisations, companies and development finance institutions have developed a wide range of international standards and voluntary guidelines to deal with the growing phenomenon of land acquisition and concentration. Noting that these processes generated multiple frames of reference but produced few operational tools to support their implementation, the French Cooperation asked the 'Land Tenure and Development' Technical Committee to turn its attention to this field.

The task was framed by two key issues: (i) how to ensure that projects supported by the French Cooperation respect the international principles for good land governance and responsible agricultural investments; (ii) how to determine the legality, legitimacy and equity of the tenure relations that underpin these projects.

This publication consists of two elements. The central element is an Analytical Framework designed to help AFD Group officers to carry out due diligence of proposed investment projects in commercial agricultural production that affect land tenure and property rights in low- and middle-income countries. The framework identifies a set of criteria, key questions for each criterion and source of information to tackle those questions. The Analytical Framework is featured as an annex to this publication. To help readers make use of the Framework, the annex is preceded by a Guide providing narrative text and examples to illustrate.

In turn, the Guide is divided into three main sections:

- > The **first part** focuses on the conceptual and methodological framework and the objectives and expected results of this work on the analysis of agribusiness projects that affect land and property rights.
- > The **second section** should be read in conjunction with the framework for ex-ante analysis of agribusiness projects that affect land and property rights, which is presented in the Annex. To help users with their project analysis, it clarifies the meaning of key questions in the analytical framework, identifies points that merit particular attention, and shows how donors can influence the setup of a project.
- > The **third part** draws out the main lessons learned from this work, and makes recommendations for actors in the French Cooperation.

Conceptual and methodological framework

This section presents the objectives and expected results of this work on the analysis of agribusiness projects that affect land and property rights. It summarises the main French guidelines for this type of initiative, efforts by the AFD group to put them into practice, and provides a conceptual and methodological framework for contractual analysis.

Why do we need a guide and framework for project analysis?

● Context and expected objectives

The rush for land and upsurge in agribusiness projects seen in developing countries since the 2008 food crisis have raised concerns that **agrarian systems may be disrupted** and **local people's land rights undermined**. The concerted response and political process that led to the endorsement, by the Committee on World Food Security in May 2012, of 'Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security' represent real progress at the international level.

However, the French Cooperation is concerned that the voluntary nature and often unspecific formulation of the Voluntary Guidelines create challenges in ensuring that States and companies actually put them into practice. **France decided to require its own public operators to respect the Voluntary Guidelines, and to make the same demand of French companies involved in overseas projects that affect landholdings**. This raises the question of how the Voluntary Guidelines can be implemented in countries where land governance and the transparency of transactions involving agricultural land are often problematic issues. It also raises the need for tools to carry out due diligence of proposed agribusiness projects to be implemented in those countries, and that seek financing from the AFD Group.

The 'Land Tenure and Development' Technical Committee provides a privileged space to take this challenge forward, building on discussion of research findings and the experience of field projects that tackle land issues. One of the main aims of this work was to provide a framework to help development practitioners analyse the conditions in which the Voluntary Guidelines can be implemented, and to make recommendations for future actions by the French Cooperation in general and the AFD Group in particular.

This publication describes **tools that can be used to assess proposed agribusiness investment projects**. The main tool is provided by an Analytical Framework to help the AFD Group assess proposed agribusiness projects. The Analytical Framework, which is annexed to

this Guide, is to be used in conjunction with the narrative text of the Guide, which explains certain concepts, presents concrete examples and provides pointers to help readers better understand and use the framework. The guide and the analytical framework are supplemented by a review of existing voluntary frameworks and extracts from the main reference texts used at the international level.

● Methodology and limitations

Work on 'Transparency and contract negotiations' was led by the '**Land Tenure and Development' Technical Committee**, in conjunction with teams from AFD (the Agriculture, Rural Development and Biodiversity division, and the Environmental and Social Support division) and Proparco (Environment, Social and Impact division), which were involved from the very start of the process.

The 'Land Tenure and Development' Technical Committee tasked the Gret-IIED-Agter consortium with coordinating this collective reflection and producing tools that can be used and developed by individual institutions. This work took place over a year, with alternating phases of study, plenary sessions to present and discuss the work, individual interviews and focus group sessions, and expert input from members of the consortium.

The process involved **multi-disciplinary reflection** by researchers from different backgrounds and disciplines (lawyers, anthropologists, socio-economists, agronomists), technical operators, AFD project directors and the heads of AFD and Proparco evaluation units.

This multi-disciplinary, crosscutting procedure led to the development of an iterative and pragmatic approach that enabled the team to adjust the methodology so that it better meets the needs and expectations of French Cooperation actors. In order to directly address their concerns and take account of the realities of their work, the team developed a simple analytical framework that can be used by each institution, based on **analysis of the regulatory texts and voluntary standards promoted at the international level**, and the lessons learned from analysing **ten agribusiness projects** conducted outside the French Cooperation's field of intervention.

Rather than focusing solely on land tenure issues, the exercise took a **holistic approach** that considers the whole range of social, economic and environmental questions associated with land. It also placed **particular emphasis on contracts**, as these determine the terms of an investment. Any serious analyse of proposed projects should include close scrutiny of the terms of the contract and the processes used to establish them. While a 'good' contract is no guarantee that a project will be properly implemented or all commitments honoured, a bad contract will not create the conditions for a desirable project.

In addition to examining the terms of these contracts, the analysis also considered the **broader regulatory and institutional context**, since each project will be affected by the current legislation, the extent to which it recognises local rights and the robustness of local organisations. Particular attention was also paid to **stakeholder consultations and negotiation, monitoring and evaluation processes**, as part of a dynamic analytical approach that covers the whole life of the project (before, during and after the signing of the contract).

The objective of this exercise was to guide thinking on large-scale investments. Given the evidence of their negative impacts, it was certainly not intended to endorse them. Rather than replacing current procedures within AFD and Proparco, the aim was to help each insti-

tution complement their procedures – not by presenting them with ready-made solutions, but by **helping them ask the right questions**, clarify the issues (so that further studies can be conducted where necessary) and ultimately make informed decisions. This second part of this guide explains how this can be done.

Why has land become such an important aspect of project analysis?

● Clear policy guidelines supporting family farming and the implementation of the Voluntary Guidelines

The French position on agricultural development and food and nutritional security is clearly asserted in the new Framework Act on Development Policy and International Solidarity, and AFD's strategic intervention framework for 2013-2016.

"France promotes **family farming**, which creates wealth and jobs and respects ecosystems. It supports initiatives that allow family farming to fulfil its role by adopting coherent agricultural policies, strengthening regional integration, structuring agricultural markets, developing supply chains, supporting farmer organisations, **seeking equitable access to water, securing land tenure** and combating land degradation, facilitating access to finance [...]"

Article 1.3 of the new French Framework Act on Development Policy and International Solidarity states that "The aim of bilateral aid is to make **sustainable improvements to household food security** in rural and urban areas, especially in sub-Saharan Africa, by supporting family farms and supply chains, and agricultural, food and nutritional policies that incorporate sustainable development issues. In order to do this, interventions will contribute to: (i) improved sectoral governance of food security through agricultural, rural and nutritional policies; (ii) economic and social development in rural areas and the conservation of their natural capital; (iii) sustainable, inclusive and employment-generating growth in agricultural supply chains."

In terms of securing land rights, AFD's strategic intervention framework (SIF) for 2013-2016 states that it will "help formulate the French position in international discussions on the implementation of voluntary guidelines, and **accordingly adjust its own procedures for evaluating the environmental and social impacts of proposed projects**, mainly in the context of its private sector funding. To this end, particular attention will be paid to the **land access procedures applicable to agricultural investments**, through ex ante analysis of the tenure status of the farms and territories concerned, and by ensuring that all stakeholders are informed and consulted about decisions that concern them, and act in good faith" (Strategic Objective 1.4).

● A window of opportunity for the French Cooperation

Those policy guidelines from France call for normative or voluntary frameworks relating to tenure rights being put into practice in the development projects in which cooperation actors are involved. By directly addressing land tenure issues in agricultural investment projects, the cooperation gets the opportunity to reaffirm the importance that it attaches to family farms and to their development for reasons of productivity, employment, social and environmental efficiency.

In addition to the issue of private investments, the French cooperation also needs to explore how to assist the States in order to implement land governance frameworks that are more supportive of the transformation of family farms and local land management dynamics. The commitments that many countries have made to implement the Voluntary Guidelines could reinforce AFD's longstanding strategy to support the governance of rural territories and the formulation of new land policies. However, these important aspects are not discussed here, as this guide focuses on agribusiness projects rather than institutional support projects.

Why look at contracts?

This study places a particular emphasis on contracts because rigorous analysis of the proposed terms of the investment and any contracts that the enterprise has already concluded is central to the project assessment or ex-ante evaluation phase, since these contracts determine the terms of the investment and the specific clauses that regulate it.

A thorough assessment should investigate two crucial aspects of the project setup:

- > how the contracts were established and the preliminary consultation process was conducted (or not);
- > the content of the contract (or contracts) and clauses relating to monitoring, control, sanctions, measures to mitigate negative impacts, etc.

● A wide variety of projects with different implications for land tenure

While many projects have implications for land use, the focus of this study is agribusiness projects that affect land and property rights. This type of project can vary considerably, and the land tenure implications will vary accordingly.

Parameters of variability include:

- > size, ranging from several hundred to several hundreds of thousands of hectares;
- > food and non-food production;
- > annual or perennial crops;
- > recent or longstanding settlement in the project zone;
- > the scale of loss of access to natural resources (in areas primarily used for agriculture, wild harvesting, hunting or livestock routes; problems with access to water);
- > different levels of reversibility (deforestation or new hydro-agricultural schemes);
- > different types of arrangement with local people (joint ventures, cooperatives, contractualisation, permanent/seasonal paid labour, lack of arrangements, etc.).

Some proposed projects may not appear to affect landholdings because the investor is already in possession of the land needed to implement the project – for example, where the company acquired land in the past and is now looking to expand or redevelop the plantation, or where the host government cleared the land of its occupiers before allocating it to the company (these issues are referred to in French as *'passifs fonciers'*). Even in these cases, careful consideration of land tenure issues is still essential, including in relation to the means through which the company acquired the land, or the ways in which the government cleared

the land before allocating it to the company. These aspects can have far-reaching implications for contemporary land relations, the perceived legitimacy of proposed investments, and ultimately the reputation of actors involved in the financing of those investments.

● Stakeholders at different levels

Projects can involve a wide variety of stakeholders and different types of relationship, depending on the regulatory context of the country concerned, the land regime for the area covered by the project, and the existing institutional setup. Different relations may exist between:

- > the host state, which is often responsible for managing the land in question and a signatory to the contract;
- > local governments, particularly where devolved competences for decentralisation include responsibility for land management;
- > representatives of local authorities (village chiefs, customary authorities, etc.);
- > affected communities, who are rarely signatories to the main investment or lease contracts with the enterprise¹ but are nevertheless an important player in assessing proposed investments.

This diversity of stakeholders is reflected in a great diversity of contractual configurations linking the different actors, including contracts between the company and the central government, and, in some cases, contracts with local government bodies or community representatives.

● French Cooperation involvement at different stages of the project

Technical and financial partners may be called in at different stages of the process, depending on the project concerned:

- > during the feasibility study phase before the project starts;
- > in the extension phase of an ongoing project;
- > in the final phase of a project that was set up with other financial partners and is seeking additional funding.

They are often called in at a stage when the company and the host government have already concluded important contracts and the project has been approved.

The level of French Cooperation involvement can also vary according to the type of support provided, meaning that its room to manoeuvre differs according to whether the project receives direct subsidies from the State, preferential government loans, loans from private investors or multiple donors, financial intermediation, and so on.

Multiple contracts may link the technical and financial partner(s) and the enterprise or host government – for example, a framework agreement or funding agreement and its annexes. Giving proper thought to these contracts can enable inclusion of clauses (such as requirements for preliminary studies, monitoring and evaluation mechanisms, accountability to local institutions and local populations, etc.), which can have a significant impact on the implementation and possible reorientation of the project.

1. Although there are some exceptions, such as the case in Sierra Leone shown in Box 6.

Guide to the analytical framework

This section is a guide to the analytical framework for ex-ante analysis of agribusiness projects that affect land tenure and property rights presented in the Appendix. It is intended to clarify the meaning of the key questions in the framework, identify points that merit particular attention and show how donors can influence projects, thereby helping users develop their own analysis of the project in question.

Understanding the dynamics and context in which the project operates

- **What are the host country's overall development objectives and the dynamics of change in its land and agrarian systems?**

The first stage of project analysis should focus on understanding the **dynamics of the land and agrarian systems** and agricultural operations in the project zone.

The Voluntary Guidelines state that responsible investments “should strive to contribute to policy objectives, such as poverty eradication; food security and sustainable use of land, fisheries and forests; support local communities; contribute to rural development; promote and secure local food production systems; enhance social and economic sustainable development; create employment; diversify livelihoods; provide benefits to the country and its people, including the poor and most vulnerable; and comply with national laws and international core labour standards as well as, when applicable, obligations related to standards of the International Labour Organization” (Article 12.4).

A dynamic approach and knowledge of the main local drivers of change are essential in order to assess a project's relevance and potential impact on the affected area and country concerned. What types of farming operation are in place? How do different agricultural (and non-agricultural) activities interact? What spaces do they use productively? What are their dynamics of change? What are their main current constraints? What is being done at the local level and in supply chains to alleviate these constraints? Analysing these different questions can help determine the project's relevance.

» **Conducting an agrarian diagnosis or using existing literature and research and specialist studies can provide a clearer picture of the different production systems that are in place, their respective importance and their dynamics of change. This background knowledge is essential in order to understand how the project could impact on existing livelihood strategies, change current balances and be the source of new opportunities or risks.**

This general assessment of the major dynamics and issues in agrarian systems is a good starting point, but is not enough. It is also important to look at the main trends in changes in land systems, and the legislative and regulatory framework that regulates them, in order to develop a better understanding of the effectiveness of the land management rules and the extent to which local people's land rights are recognised.

● **Does the legislation recognise local people's land rights?**

When considering land matters, it is essential to understand how the national legislation deals with local people's individual and collective land rights. Does it recognise and effectively protect rural land rights, including so-called customary, seasonal and non-formalised rights (for agriculture, hunting, fishing, gathering)? Do local people have rights to fair prior compensation if these rights are taken? Are there authorities that ensure that these rights are respected? And do they enable people to secure these rights, even if they are not formalised?

The legislation introduced by many States reduces the diversity of customary rights and fails to reflect reality on the ground. As a result, the legislation is not always effective.

The Voluntary Guidelines provide that "where States own or control land, fisheries and forests, **the legitimate tenure rights of individuals and communities**, including where applicable those with customary tenure systems, **should be recognised, respected and protected [...]**" (Article 8.2).

Although the term 'legitimate rights' is ambiguous and not clearly defined, it does open the door to recognition of the diversity of rights that many local people exercise and enjoy in their management systems.

These include rights of access, use and extraction; the right to use resources to generate income; to delegate use on a temporary basis free of charge (loans) or in return for payment (rental, sharecropping, labour); the right to pledge and permanently dispose of land through financial transactions (sales) or non-financial transactions (gifts, legacies, inheritance). Not all of these rights are legally recognised; and it is not easy for legislation to take account of the diverse rights held by lineage groups or families, down to individual rights and possible intra-family disputes.

Inappropriate formalisation systems that only recognise a small proportion of local rights and often ignore local regulatory systems (local authorities and previous transactions) can lead to the **erroneous assumption** that land is free of rights, when it is in fact subject to a wide range of informal rights that are not recognised by the State but which reflect well-established, locally recognised regulatory systems. This issue is linked with and affected by land policies. It cannot be resolved in the context of localised investment projects, but does need to be properly understood, with further studies conducted where necessary (see below).

- » **Many studies highlight this discrepancy between the legislative framework and local practices, and are helpful in better understanding the dynamics at work at the local level. Some of these studies and various materials are available on the 'Land Tenure and Development' portal (www.foncier-developpement.fr) and websites of its partner organisations.**

Box 1 – THE DIFFICULT ISSUE OF STATE-OWNED LAND

Many terms are used to describe land to which the State has rights: State lands, national lands, government land, the national estate, public (as opposed to private) state land. The same word can encompass different realities depending on the country concerned, its history, legal regime and the period in question. Generalisations are often misleading, so we need to examine each national context in order to understand how private land ownership emerged in that country. After colonisation, the new sovereign States took back rights appropriated by the colonial authorities and promoted the development of absolute private ownership. This process is riddled with conceptual contradictions, since public land assets are supposed to be protected and only allocated for public use. It is essential to understand the concept of state land ownership and the various forms that it takes when discussing the processes used to assign land rights to investors in Africa (and other continents).

In most countries with a system of *civil law*, the *presumption of state ownership* means that unregistered land is treated as *vacant and ownerless*, even when it has been occupied for a long time. The State considers that it has private rights to this land similar to those assumed by the colonial authorities, rather than the rights of a sovereign who would respect the rights of communities.

The system seems different in countries where the *Common Law* is in force, as the rights of customary authorities are more commonly recognised under national law. However, in many places customary authorities have reinterpreted their rights of custodianship as absolute ownership rights, contradicting the nature of these rights within pre-colonial customary regimes.

Serious misunderstandings can arise when the meaning of the words 'landholding' and 'public domain' is perverted by the power relations between the different parties to land transactions. All landholdings involve some kind of power relation, and are consequently never neutral. There are two pitfalls that need to be avoided here: (i) reasoning in terms of a dichotomous situation with absolute ownership rights on one hand and lack of rights on the other; (ii) equating lack of legal recognition of land rights (in the State legal system) with the absence of legitimate rights, which amounts to not recognising customary rights.

It is important to remember several points when looking at different national legislations in order to avoid getting side-tracked by their subtleties or inconsistencies:

- > The rights of individuals and collective entities (at every level from the family to the State) can coexist on the same piece of land. The *right of ownership* is only ownership of (certain) rights (Merlet, 2010).
- > Each kind of right is defined by different normative frameworks that allow different types of rights holder to manage the rights in their respective sphere of application. The highest framework does not necessarily take precedence when these spaces overlap – it is the balance of power between different actors that determines which one will prevail.

[to be cont.]

> We have to take account of power relations and the way that they evolve in order to understand ongoing processes between investors, government agents and local people.

Bearing these points in mind will enable us to classify *State-owned land* in different countries into different categories (Chouquer, 2011). However, this issue is too complex issue to summarise here. For more information, see the synthesis published by Le Roy (2011).

It is important to be vigilant and always consider each situation of assumed state ownership in its own right, as there are often large discrepancies between the apparent spirit of the law and its application on the ground.

● **Is there a regulatory framework that can deal with the new pressures on land?**

The wave of large-scale land acquisitions that has occurred since the food crisis of 2008 has placed considerable pressure on land tenure systems. The speed and extent of this phenomenon took actors by surprise, accelerating land transactions and concentration, while States and their agencies or public offices often helped facilitate it without establishing effective systems to regulate such transactions.

This raises several questions. What are the main mechanisms and procedures for assigning land to foreign and national investors (sales, long-term leases, etc.)? Who is involved, how is this done, and with whose agreement? Does the country have the institutional capacity to critically assess the project proposals submitted by investors?

The Voluntary Guidelines emphasise the need to “recognise and protect local people’s rights in order to limit the undesirable effects of land speculation and concentration”, and “provide safeguards to protect legitimate tenure rights, human rights, livelihoods, food security and the environment from risks that could arise from large-scale transactions in tenure rights. Such safeguards could include introducing ceilings on permissible land transactions and regulating how transfers exceeding a certain scale should be approved, such as by parliamentary approval” (Article 12.6). It is recommended that these regulatory processes are defined in a participatory manner, and that States can “with appropriate consultation and participation, provide transparent rules on the scale, scope and nature of allowable transactions in tenure rights and should define what constitutes large-scale transactions in tenure rights in their national context” (Article 12.5).

» ***In ex-ante project analysis it is important to take account of the presence or absence of a regulatory framework for land transfers, and the number of institutions involved in decisions. If no such framework exists, the processes that were used to transfer the land need to be examined very carefully, especially the extent to which local people were consulted about and consented to the transaction.***

Box 2 – THE IMPORTANCE OF PROPERLY IDENTIFYING AND UNDERSTANDING LOCAL LAND LAW, WITH ALL ITS NUANCES, EXCEPTIONS AND AMBIGUITIES (AS SEEN IN MADAGASCAR)

Land may be subject to different tenure regimes, with the statutory framework for land tenure (which is often inherited from the colonial period) superimposed onto diverse local normative frameworks that are usually unwritten ('customary rights') and which apply in practice but are not necessarily recognised by the law in the country concerned.

In Madagascar, customary rights coexist with civil statute law (especially private titled rights). Customary rights were not formally recognised until 2005; before then all untitled land belonged to the State and was therefore at its disposal. There is now a presumption that land belongs to its occupants, and customary use rights to occupied land are protected on the basis that it is 'private untitled land' (Law 2005-019 of 17 October 2005). The reform of 2005 allows the State to assign land that is part of its private estate, as long as it is named in the title to this land or if the land in question is untitled and has not been appropriated. However, there is a problem with large tracts of land that are often used as pastures (especially for Zebu) in accordance with ancestral customary rights. They cannot be classified as private untitled lands because the current law in Madagascar does not specify how they should be treated. This means that the State was recently able to assign some of this land to a foreign investor in a transaction that completely disregarded local customary laws, but was apparently perfectly legal due to the lack of clarity or precision in the statutory law².

Malagasy law protects customary rights in theory, but does not always do so in practice. The keys to understanding each system are often hidden in the details and exceptions to the law, so it is essential to properly identify and understand local land laws (and their nuances, exceptions and possible ambiguities) in order to get a full picture of the local normative framework for tenure and ensure that people's legitimate rights are duly respected, regardless of whether they are legally recognised or not.

Analysing preliminary studies and producing complementary studies where necessary

● Were preliminary studies conducted before the contract was signed?

All projects should be preceded by a feasibility study, which should routinely be accompanied by an environmental and social impact assessment (ESIA). Most developing countries have promulgated legislation on environmental impact assessments since the early 1990s, but it is not always implemented and only more rarely does it make provision for social impact assessments, despite calls for this in the Voluntary Guidelines.

"When investments involving large-scale transactions of tenure rights, including acquisitions and partnership agreements, are being considered, States should strive to make provisions for different parties to conduct prior independent assessments of

2. Franchi et al., 2013.

the potential positive and negative impacts that those investments could have on tenure rights, food security and the progressive realization of the right to adequate food, livelihoods and the environment...” (VG - Article 12.10).

- » ***Technical and financial partners need to ensure that such studies are conducted if they are not planned or have yet to be produced. This is particularly important in contexts where local people may be deprived of their rights to access land and natural resources because they are not recognised by the national legislation.***

- » ***These environmental and social impact assessments should be undertaken before any final decisions are made about the project. It will be harder to take their conclusions and recommendations into consideration if all the agreements are already concluded, but if ESIA are conducted in advance, certain elements (such as the environmental and social management plan) can be incorporated into the contract and constitute binding and enforceable clauses for both parties.***

Box 3 – ADDRESSING THE SEQUENCING BETWEEN PRELIMINARY STUDIES AND FINAL AGREEMENT: COMPARATIVE ANALYSIS OF TWO CONTRACTS IN LIBERIA AND LAOS

Agribusiness investment projects can generate economic benefits for their host country, but may also have negative environmental and social consequences, polluting soil and water or displacing local people. Therefore, it is essential to conduct environmental and social impact assessments (ESIA) for all agribusiness investment projects. The question is when this type of assessment should be undertaken.

In a recent concession agreement between Liberia and a foreign investor concerning a very large land area, the investor promised to commission an independent environmental expert to produce an environmental impact assessment and environmental management plan and submit them to the Liberian Government and local environmental protection agency, in accordance with Liberian law. In this case it seems that the agreement containing legally binding commitments relating to the project was signed before the ESIA was produced.

This contrasts with another concession agreement for a much smaller area concluded between Laos and a foreign investor. Here, ESIA were submitted to and approved by the local environment and water resources agency, which evaluated the project's positive and negative environmental and social aspects in the short and long term, and made recommendations to mitigate its negative effects. Environmental and social management and monitoring plans summarising the measures taken to offset the negative consequences of the project were also submitted to and approved by this agency.

The contract containing legally binding commitments was only signed after a Memorandum of Understanding was agreed and an ESIA, feasibility study and topographical surveys were produced and approved.

We would question whether ESIA that are produced after the final agreement has been concluded can really make a difference, as the parties to the contract have theoretically already committed themselves to implementing the project without being able to take

account of any measures needed to remedy its negative social and environmental effects. It is true that, after the contract has been concluded, commencement of the project is often conditional upon producing an ESIA and obtaining the necessary environmental permits. However, this still raises questions about the extent to which the project design can be adjusted at a stage when the contract has already been signed.

Nevertheless, the case in Box 4 below shows that it is possible to take meaningful action and make certain changes to a project after local parties have signed the final agreement.

Donors can also influence the content of impact assessments by formulating the terms of reference according to the risks associated with the project. Studies for projects that are expected to have a significant effect on land and property rights should include or be accompanied by a socio-land survey (see Box 14 below) and other relevant studies (assessing the impact on water resources, for example). These specific studies could form part of the ESIA, or be undertaken separately by a qualified independent expert.

Box 4 – DONOR-LED CHANGES IN PROJECT DESIGN: THE ADB CALLS FOR AN ESIA IN MALI

In 2007 the Malian government and a foreign investor signed a public/private partnership agreement for a project relating to large-scale sugar cane plantations and the construction and operation of a new sugar factory in the Office du Niger area. Project design changed significantly after the African Development Bank (ADB) became involved in its finances. The changes sought to make the project more community-oriented, by introducing a programme for the small-scale farmers who were contracted to plant sugar cane, and allocating 5,600 of the 19,254 hectares of land to local communities so that they could produce their own cereals and vegetables, with certain parcels specifically reserved for women.

As well as complying with Malian legislation, the project also had to respect ADB's environmental and social criteria, which include producing an environmental and social impact assessment. The latter was submitted in 2009 in accordance with both the national environmental and social criteria and those developed by ADB. A resettlement action plan and a poverty reduction plan were also produced in 2009.

It is worth noting that these changes took place after the contract between the investor and the government was agreed. This case shows that donor interventions (which often occur after the contract has been signed) can lead to significant changes in project design, even if they are not written into the binding provisions of the investor-state contract.

Source: Djiré *et al.*, 2012

● **Have these studies been published?**

Social and environmental impact assessments should be made public in order to ensure that they are accurate, relevant, and provide the various parties concerned with all the

information they need for balanced negotiations. Therefore, they should be published and made accessible to the local people and States concerned (possibly in a version that does not contain confidential commercial data).

*“All forms of transactions in tenure rights as a result of investments in land, fisheries and forests should be done **transparently** in line with relevant national sectoral policies and be consistent with the objectives of social and economic growth and sustainable human development focusing on smallholders” (VG - Article 12.3).*

- » ***Some development partners publish the social and environmental impact studies produced by their clients in order to make their management procedures more transparent. The World Bank does this through the International Finance Corporation (IFC), which supports private sector projects and publishes full or summary versions of these reports. Other technical and financial partners could adopt the same policy and publish the results of studies relating to projects that they finance.***

Evaluating contract negotiation and management

- **Who was involved in the negotiations over land and who signed the contract?**

Having noted the conclusions and recommendations of these studies, it is important to look at the local processes and conditions in which the consultations and negotiations over the contract took place. Who was consulted? Who signed the contract? Given the nature of the transaction, how legitimate are the signatories to the contract?

The type of investor also needs to be considered. Do they have solid previous agribusiness experience? If so, how did they acquire the land over which they carry out their activities? Has the use of these lands been contested by local people or caused violent conflict? Could the structure of the enterprise enable it to avoid tax, limit its legal responsibility and avoid possible restrictions on transferring the acquired land rights to third parties? If so, what clauses does the contract contain to limit the risks of tax avoidance?

*“[...] investments should be made working in **partnership with relevant levels of government and local holders of tenure rights** to land, fisheries and forests, respecting their legitimate tenure rights [...]” (VG - Article 12.4).*

- » ***A quick look at a contract will reveal who signed it. If all the signatories are actors at the central level (government, national agency), it is important to determine whether local people and local authorities were involved in the process before the contract was signed.***

Box 5 – NEGOTIATIONS WITH CUSTOMARY CHIEFS WRONGLY DESCRIBED AS ‘LANDOWNERS’

In Ghana, a contract signed in 2007 between the customary authorities (the Traditional Council and the Chief who represents it) and a biofuel production company provides for the progressive rental of 750,000 acres (303,000 hectares) of land for biofuel production, under a 50-year lease that can be extended to 75 years. The project is now up and running, although it has changed considerably as much less land is under production than was initially envisaged, and only a few hundred hectares of jatropha were planted before this crop was abandoned in favour of much larger areas of maize and soya.

Although the contract describes the customary authorities as ‘landowners’, they are actually representatives of a collective or community group that holds these lands (their constituents). This is an important distinction, whose implications become clear when we look at the land status of different parcels. Community lands include two main types of parcel: (i) land that members of indigenous communities use for agricultural purposes, and (ii) ‘common’ land. The latter is not used for private agricultural activities. Members of indigenous communities have rights to use non-timber forest products and wood to make charcoal in the latter land, which also constitutes a land reserve that can be used for new family settlements and to meet the needs of future generations. Because new settlements are authorised by the land chiefs, these areas are known as ‘the chief’s land’, even though the chief has no individual ownership rights under the customary system. Some common land is occupied by migrant communities that have settled there without obtaining prior consent from the land chiefs, who regard them as ‘squatters’ without any rights to the land and resources on their customary territory.

This was the particularly complex context in which negotiations between the chiefs and the enterprise took place. Although there were preliminary consultations with legal (and therefore legitimate) representatives of local communities, it seems that they had not sought the prior consent of their constituents. Furthermore, certain sources claim that the villages concerned were not informed about the contract – which states that it is the ‘landowners’ responsibility to make the necessary arrangements with the occupants of the land so that it can be rented by the Company. The fact that the land chiefs were confused with landowners has had serious consequences for the local population.

● **Were local people consulted and involved in the negotiations?**

It is essential to examine the local consultation process closely in order to determine whether the project has properly consulted and informed the people who will be affected by its activities. This condition is sometimes included in national legislation, but as this is not always the case it is important to ask a number of key questions about the project. Did all the different sectors of the population participate in these consultations, including women, youth, non-resident users, migrants, pastoralists, etc.? Were mechanisms put in place to facilitate communication between local communities, the government and the investor? If so, were these consultation processes documented?

Many international standards promote the principle of consulting local populations, and offer guidance on how this should be done.

*“States should make provision for investments involving all forms of transactions of tenure rights, including acquisitions and partnership agreements, to be consistent with the **principles of consultation and participation** of these Guidelines, with those whose tenure rights, including subsidiary rights, might be affected. States and other relevant parties should inform individuals, families and communities of their tenure rights, and assist to develop their capacity in consultations and participation, including providing professional assistance as required” (VG - Article 12.9).*

International law goes further for indigenous peoples, a loosely defined category that could include many minority groups. In addition, the Voluntary Guidelines and IFC Performance Standards call for the free, prior and informed consent of people who are affected by projects.

“States and other parties should hold good faith consultation with indigenous peoples before initiating any project or before adopting and implementing legislative or administrative measures affecting the resources for which the communities hold rights. Such projects should be based on an effective and meaningful consultation with indigenous peoples, through their own representative institutions in order to obtain their free, prior and informed consent under the United Nations Declaration of Rights of Indigenous Peoples [...] (VG - article 9.9).

These key principles here are:

- > **Free consent:** free of all manipulation, interference, coercion or intimidation.
- > **Prior:** timely communication of information before a final decision is made.
- > **Informed:** mobilising the relevant representative institutions, providing accessible and understandable information such as evaluations, action plans, project summaries, etc. in appropriate languages.

Other points also need to be considered to ensure that local people are involved in the process, and their different and sometimes conflicting interests are taken into account :

- > the process should proceed at an **appropriate pace** to facilitate a sound understanding of the issues and consequences of the project;
- > systems are needed to **represent different groups of actors**, especially those whose interests are most vulnerable due to their social position or absence from local decision-making bodies (women, youth, temporary resource users, migrants);
- > **interventions by a third party mediator** can help ensure that each group of actors' interests are taken into account.

» | **FAO has just produced a technical guide 'Respecting free, prior and informed consent', which is available online in English at: <http://www.fao.org/docrep/019/i3496e/i3496e.pdf>**

- » ***The enterprises or States concerned rarely document these negotiation processes themselves, and it is often necessary to do further research and consult press articles or NGO reports to determine the extent to which actors have been involved in the different phases of project design. Information may be contradictory and vary according to whether it is presented by the enterprise or State on the one hand, or journalists and independent actors on the other. This means that it is important to cross-check different sources of information.***

Box 6 – INDIVIDUAL CONTRACTS SIGNED WITH EACH RIGHTS HOLDER IN SIERRA LEONE

Sierra Leone recently reached an agreement with a foreign investor for a sugar cane plantation that is the first African project to be certified by the Roundtable on Sustainable Biomaterials (RSB). This means that it must comply with RSB principles and other criteria relating to human rights and labour, food security, greenhouse gas emissions, conservation (of biodiversity) and land rights.

RSB Principle 12 prohibits involuntary resettlement, and states that legitimately contested land cannot be used to produce biofuels until all disputes have been resolved with the free, prior and informed consent of the land users concerned, and negotiated agreements reached with them.

In the context of this agreement in Sierra Leone, lease contracts were agreed with the customary chiefdoms and Acknowledgement Agreements signed with the customary owners. The latter are apparently intended to establish that the project will not result in involuntary resettlements, and seem to be linked with the need for RSB certification, which was desirable because the project targets European markets.

However, a recent report (which was contested by the enterprise) criticised the lack of free, prior and informed consent by local people, even though individual agreements were signed with land rights holders. This report argues that the fact that these agreements were signed is not sufficient evidence to establish that everyone affected by the project consented to the agreements. It also points out that while the project would 'avoid' villages and therefore only displace a few isolated individuals, the villages would be surrounded by large pivot-irrigated fields that would reduce residents' lands to one-hectare grids on the spaces between these fields.

● **Were the contracts made public?**

The terms of every contract need to be transparent to ensure that consultations are meaningful and that the public can hold governments and investors to account. It is important to determine whether the contract and impact assessments have been published and made accessible to local people, and whether these people were invited to participate in the contract negotiation process and comment on draft versions of the contract.

"States and other parties should ensure that information on market transactions and information on market values is transparent and widely publicised, subject to privacy restrictions" (VG - Article 11.4).

There have been advances in transparency arrangements applicable to extractive industries, but transparency is still far from the norm in agribusiness projects – although certain countries such as Liberia have established legislation on this issue.

Box 7 – PUBLISHING CONTRACTS: THE EXAMPLE OF LIBERIA

Transparency is a key issue as it enables the public to scrutinise projects, monitor their execution and, where necessary, assert their rights. Transparency is particularly important in (i) the preparatory phases, especially preliminary studies (including ESIA), which should be published and made accessible to local people; and (ii) in contract negotiations. Local people should be given advance warning and invited to participate in the contract negotiation process, and possibly comment on draft versions of the contract.

In theory, all land concession contracts are made public in Liberia under the Liberian Extractive Industries Transparency Initiative Act of 2009, which states that all agricultural investment contracts should be published. It is one of the very few countries to have introduced this kind of measure, which is essential to ensure that decisions about publishing contracts are not made on a ‘case by case’ (i.e. arbitrary) basis.

However, it should be noted that the fact that the final contract has been published is no guarantee that the overall process leading to contract signature will be transparent.

» ***When the country concerned does not have any legislation requiring investment contracts to be published, cooperation agencies can still ask their partners or clients to do this to ensure that procedures are transparent and that consultations and negotiations with local stakeholders proceed with their informed consent.***

● What means do the different parties have to enforce and monitor contract compliance?

There are many cases where large-scale investment projects have been bitterly contested because the investor has not fulfilled its commitments and local people have not enjoyed the expected benefits of the project. In reality, it seems that many contracts contain no formal compliance requirements, and those that do are too vague to be legally enforceable. If they are not specifically mentioned in the contract, commitments relating to the terms of employment or contributions to local development and infrastructure have no value, and it is impossible for the State or local governments concerned to ensure that the contract is enforced.

This raises several questions. Are the clauses written into the contract specific enough to be legally enforceable and allow their implementation to be monitored? Does the contract contain performance indicators and a timetable for periodic assessments? What mechanisms does the government have to ensure that the investor fulfils the conditions of the contract, and sanction failure to do so? How is civil society involved in this monitoring process?

“States and affected parties should contribute to the effective monitoring of the implementation and impacts of agreements involving large-scale transactions in tenure rights, including acquisitions and partnership agreements. States should take corrective action where necessary to enforce agreements and protect tenure and other rights and provide mechanisms whereby aggrieved parties can request such action” (VG - Article 12.14).

Analysis of certain contracts that have been made public has also shown that certain types of clause need to be closely scrutinised, since they can be interpreted as exempting the enterprise from labour laws if the return on the investment is lower than predicted. There are also stabilisation clauses that free the enterprise from having to comply with subsequent changes in legislation or taxation; clauses that exempt the State from having to pay compensation if the project is abandoned or the enterprise is prevented from implementing it; and clauses that provide excessive financial incentives (tax and duty exemptions extending well beyond the period needed for the investment to make a profit) or make land and water resources available virtually free of charge, etc.

Contracts rarely specify the procedures for monitoring and periodic evaluation or monitoring commitments and sanctioning non-compliance by the enterprise, although this is essential in enabling the State to play its role and ensure that the enterprise complies with the terms of the contract. The bodies responsible for resolving disputes and arbitrating conflicts are often specified in the contract.

» ***When assessing projects and contracts have already been signed, it is important to see whether they contain clauses that are specific enough to ensure that they can be enforced. If there is no State mechanism for monitoring contract compliance, the contract can still provide an ad hoc mechanism.***

Box 8 – CLAUSES THAT ARE SPECIFIC ENOUGH TO BE LEGALLY BINDING AND ENFORCEABLE

Any commitments made by the investor should feature clearly and unambiguously in the agreement to ensure that they are legally binding and can be enforced by the State if necessary.

Agribusiness projects in many low- and middle-income countries are typically covered by agreements between the host State and the investor. These can run from anything from two pages to several hundred pages, but it is important to remember that, while a more elaborate contract is more likely to tie down specifics, the size of a contract is no indicator of its quality.³ Some projects generate more substantial [to be cont.]

3. NB: A single project often generates several contracts, such as a Memorandum of Understanding, followed by the agreement containing binding provisions for the project and one or more land leases, etc. The size of the contract therefore depends on the type of document concerned (for example, a Memorandum of Understanding or lease may be shorter than the agreement establishing the project).

contractual arrangements than others, and projects that will lead to major change will probably be more complex than other types of transaction. It is worth bearing in mind that a short contract is less likely to include all the key elements of a complex transaction such as an agribusiness agreement; and a very short contract could indicate that certain essential issues (such as the economic repercussions or social and environmental impact of the project) have not been discussed, considered or regulated in sufficient detail.

One contract (relating to oil palm production) that was analysed covers over 100 pages and contains sophisticated clauses pertaining to the tax regime, job creation, training, development, infrastructures, processing, and social and environmental criteria, while other contracts have much vaguer provisions. If the clauses are not clearly formulated it will be hard to comply with them, and may even be impossible to enforce or monitor their application.

Closer inspection may also reveal that some of the contractual arrangements do not constitute genuinely binding obligations for the investor, but are intended to explore the feasibility of some of the activities they hope to pursue (particularly local processing). This means that an apparently highly sophisticated contract may contain arrangements that do not constitute obligations that are ultimately enforceable.

The governments of host countries are more likely to conclude well-structured contracts if they can mobilise a specialist team capable of negotiating with the investor on equal terms. Then, once the contract has been signed, the government authorities need to have sufficient resources to manage its implementation and ensure that all contractual arrangements are properly put in place, otherwise they will remain dead letter. This obviously has the potential to create significant problems when large landholdings are involved.

Evaluating the potential economic benefits of a project

● Does the project respond to development issues in the host country, and will it be beneficial for society as a whole?

It is important to evaluate the extent to which a project will help respond to **the country's overall development objectives** in terms of social, economic and environmental development.

If the project has significant impacts in terms of population displacement, has an ex-ante economic evaluation been conducted? Did this facilitate an initial comparison between the wealth per hectare that the project will create and that which would be created by existing production systems, or which exist in relatively similar situations (with or without the project)?

Will the project directly or indirectly help create new jobs (in excess of existing jobs that will be destroyed, compromised or which could have been developed with other alternatives)? Are these good jobs with long-term security? Does the contract set out the investor's commitment to create jobs? What are the possible gender implications of these new job opportunities?

"[responsible investments] should strive to further contribute to policy objectives, such as poverty eradication; food security and sustainable use of land, fisheries and forests; support local communities; contribute to rural development; promote and secure local food production systems; enhance social and economic sustainable development; create employment; diversify livelihoods; provide benefits to the country and its people, including the poor and most vulnerable; and comply with national laws and international core labour standards as well as, when applicable, obligations related to standards of the International Labour Organization" (VG - Article 12.4).

It is not a matter of simply analysing a project in terms of how it relates to a given sectoral policy; it also needs to be considered in terms of its potential contribution to national policies on integrated development objectives. Economic evaluations have proved their worth in assessing a project's economic impacts, but seem to have fallen out of favour in recent years.

Evaluating the economic aspects of a project allows going beyond a financial analysis and assess its expected impacts on society as a whole (costs and benefits). In addition to studying possible variants (intensification of labour or capital, productive choices, etc.), the economic evaluation also enables using a more dynamic approach that envisages different scenarios of change in order to compare the possible outcomes with or without the project.

» ***Technical and financial partners should routinely ask large-scale investment projects that affect land and property rights to undertake economic studies. These evaluations are particularly pertinent, given that such projects often have high opportunity costs in terms of resource consumption and social and environmental externalities.***

Box 9 – ECONOMIC EVALUATIONS ARE A VALUABLE TOOL FOR COOPERATION AGENCIES

There is now a certain consensus among the international community about the need to increase investments in agriculture, especially with support from the private sector. Cooperation agencies currently promote two core principles to mitigate the possible negative impacts of these investments:

- > require compliance with some minimum standards of corporate behaviour. This approach is reflected in the IFC Performance Standards, which are widely adopted by national cooperation agencies;
- > encourage enterprises to be 'socially responsible', namely by progressively improving their practices and becoming more accountable to third parties. Several CSR procedures follow this approach (ISO standard 26000, the Global Compact, codes of good practice, company certifications, etc.).

These kinds of approach are certainly necessary, but they are not enough in themselves as they do not involve an economic analysis of how the intended investments will help improve general wellbeing, or how these benefits will be shared between different economic agents. Marc Dufumier⁴ makes it very clear that "an economic *[to be cont.]*

evaluation undertaken for the community in the name of the general interest is very different from the financial evaluations conducted with individual interests in mind". Economic and financial evaluations differ in two key respects, with economic evaluations tending to be more complex than financial evaluations:

- > "the effects (advantages or disadvantages) to be taken into consideration are not necessarily the same depending on whether one looks at them in terms of the interests of each economic agent (financial evaluation) or those of the community as a whole (economic evaluation)";
- > "the market prices that individuals use to calculate profitability do not always reflect the true cost to the community of the resources that projects use, or the enjoyment ('uses') they provide for society as a whole." This means that it is important for project assessments to take account of these environmental or social externalities.

The two main methods devised to help deliver development choices that are in the interests of the greater good are:

- > the 'effects method', which largely came out of the French school and is supported by cooperation actors;
- > the 'reference price method', which is mainly used by the World Bank. Both methods have their weaknesses and can seem excessively costly, but it is possible to vary the depth of the analysis quite considerably.

For example, asking how the wealth generated by the project will be distributed between shareholders, landowners, labourers and society (through taxes) provides the basis for further reflection; while more detailed use of the effects method helps us understand how the added value is distributed at different levels of supply chains. The economic evaluation can provide a framework for meaningful analysis of the equitability of the project and possible options for rebalancing it if it will disadvantage one category of agents (tax distribution, rental income, higher salaries or purchase prices, improving the added value of jobs created at the local level by developing processing activities, etc.).

● Does the project promote an inclusive development model?

The French Cooperation favours business models that are more in tune with its strategic guidelines and intervention methods – hence the fact that AFD's Strategic Intervention Framework clearly promotes family farms and balanced rural development that creates wealth at the local level and protects natural resources.

This raises questions about each project's proposed business model. Does it recognise and value local practices? Does it strengthen the resilience of local production and subsistence systems in a context of climate change, or weaken them?

How are production, processing and marketing organised? Does the project use paid labourers (permanent or temporary)? Does it use small businesses, groups or farmers as suppliers? If so, what are their current contractual conditions, how much decision-making power do producers have, and how are risks shared? If there is a service delivery component, what role do service providers actually play in organising the production process and making decisions? What impact could the proposed business model have in terms of gender?

4. Dufumier M., *Les projets de développement agricole. Manuel d'expertise*, CTA, Karthala, 1996, p. 184.

The Voluntary Guidelines mainly focus on this aspect: “considering that smallholder producers and their organisations in developing countries provide a major share of agricultural investments [...], **States should support investments by smallholders as well as public and private smallholder-sensitive investments**” (Article 12.2) and “consider promoting a range of production and investment models that do not result in the large-scale transfer of tenure rights to investors, and should **encourage partnerships with local tenure right holders**” (Article 12.6).

- » ***There are different types of arrangement between local producers and enterprises that allow producers to retain their rights and give the enterprise the produce that it needs: partnerships with cooperatives, contract farming, joint ventures, etc.***
- » ***Precedence should be given to plans that include mechanisms for contracts with local producers and which strengthen their skills, structures and ability to access production factors (inputs, supplies, water) or markets (processing, marketing), with incentives or conditions to encourage public and private investors to change their projects in this way.***

Box 10 – INCENTIVE MECHANISMS SHOULD INCLUDE COMPONENTS THAT HELP DEVELOP LOCAL PROCESSING

One palm oil production contract that was analysed includes a number of sophisticated provisions, such as a requirement to meet certain key performance indicators (KPI) in order to extend the project (for 33 years).

The main KPI requirements stipulate that the project should pay average wages and provide other employee benefits equivalent to or in excess of the average rate for the oil palm sector; also, that 70% of the 100 most senior management positions be occupied by citizens from the host country. In environmental terms, the effectiveness of environmental management should equal or exceed current best practices in the oil palm sector. KPIs also require over half of the investor's oil palm production to be processed into products that generate added value for the host country.

● **What are the main factors in the project's profitability?**

The determinants of a project's financial profitability should also be considered. In private investment projects, profitability is one of the most important criteria for both the enterprise and the institution whose financial support it is seeking. A recent World Bank study of 179 agricultural investment projects in 32 countries found that half of them were regarded as partial or complete financial failures due to fundamental flaws such as inappropriate sites, poor crop choices or over-optimistic planning assumptions (World Bank, 2013).

In addition to the question of whether the project will be profitable, it is also interesting to see where this profitability comes from. Is it linked to the production project itself (technological innovations, market demand, comparative advantages, low labour costs), to incentives put in place by the government or local authority (direct or indirect subsidies, tax and duty

exemptions, etc.), or to capture of economic rent (protected market, expected increase in land values, carbon credits, etc.)?

Another area that needs attention is the revenue that the project generates for the State or local governments. Does the contract anticipate any rental income? If so, is it in line with market prices (when available) and indexed to changes in the land market or the viability of the project (indexed to production prices)? Who receives this income: the State, local governments, rights holders? Does the distribution of income between these different actors seem sufficiently equitable to limit the risk of conflicts? How does the overall tax regime relate to the tax regime for comparable projects in terms of supply chain and geography? If the project benefits from tax exemptions, is this due to national legislation or were they negotiated by the investor? Does the contract (or relevant legislation) stipulate how the State will raise the relevant tax (publishing audits, safeguards on transfer pricing, etc.)?

In offering enterprises highly favourable tax conditions for their proposed projects, many States are depriving themselves of the basic resources they need to pay for public investment and contribute to the economic development of their country. International principles advocate limiting these exemptions and following the national regulatory framework.

The Voluntary Guidelines state that “agreements for investments should **comply with national legal frameworks and investment codes**” (Article 12.8), while the OECD Guidelines for Multinational Enterprises “generally recommend that **enterprises refrain from seeking or accepting exemptions not contemplated** in the statutory or regulatory framework related to human rights, environmental, health, safety, labour, taxation, financial incentives, or other issues” (extract from page 19, OECD (2011), OECD Guidelines for Multinational Enterprises, OECD Publishing. <http://dx.doi.org/10.1787/9789264115415-en>).

- » ***Analysing contracts between investors and states can help scrutinise the tax deal embodied in the project, including to establish that the tax deal does not grant unfair tax benefits to the project and to ensure that mechanisms are in place to combat tax avoidance (see Box 11).***
- » ***Another important issue is the extent to which local people receive a share of the revenues generated by the project (for example, by creating a development fund via a local government, when it exists).***

Box 11 – NEGOTIATING SOUND TAX ARRANGEMENTS

The tax implications of a project are very important, as tax can be used to enable the State and local communities to benefit from the investment. The main danger is that even if a project generates substantial profits, the investor may find a way of paying very little tax or duties in the host country. If this does happen, it will undermine the host government's capacity to improve public services for its citizens, support poverty reduction programmes or promote sustainable development in their country.

One reason why national legislation often permits various tax exemptions and reductions in duties is to encourage foreign enterprises to invest in the country. The OECD Guidelines for Multinational Enterprises recommend that the tax provisions of a contract should not create any additional exemptions to those that are already in place under local law (mainly to avoid the risk of corruption among local government officials).

If the relevant legislation does not already do so, contracts can include provisions to ensure that local people enjoy a share of the revenues generated by the project. This can be done by sharing revenues with the local government or creating development funds. In a contract in Liberia, the foreign investor promised to contribute up to US\$5 per hectare per annum to a community development fund to improve local community structures and benefit local communities affected by the project. The contract stipulates that the fund should be managed by a committee of up to 10 people appointed by local communities, the Government of Liberia and the investor, who will nominate half of the members.

Finally, to ensure that their provisions are more than a mere paper exercise, contracts should include mechanisms to enable the State to collect taxes and prevent tax avoidance, if the relevant legislation does not already do so. Such mechanisms include safeguard measures on transfer pricing to prevent the manipulation of prices of transactions between the enterprise based in the host country and one or more enterprises that are part of the same group and which are incorporated in jurisdictions with lower tax rates than those of the host country. The aim of such transactions is to relocate profits to tax havens and therefore artificially reduce the tax bill in the host country.

Ensuring that local people's rights are respected

● Does the framework for the investment project recognise and protect local land rights?

Agribusiness investments that affect land and property rights have significant impacts on local people's living conditions and access to land and natural resources. Where land tenure regimes give little or no recognition of these rights, it is essential to produce studies within the framework of the project so that **rights holders can be identified, consulted and compensated** if the project deprives them of some of their rights, or in the worst case leads to expropriation.

"Non-State actors including business enterprises have a responsibility to respect human rights and legitimate tenure rights. [...] - "[Enterprises] should include appropriate risk management systems to prevent and address adverse impacts on human rights and legitimate tenure rights [...] Enterprises should identify and assess any actual or potential impacts on human rights and legitimate tenure rights in which they may be involved [...]" (VG - Article 3.2).

"[...] States should ensure that existing legitimate tenure rights and claims, including those of customary and informal tenure, are systematically and impartially identified, as well as the rights and livelihoods of other people also affected by the investment, such as small-scale producers[...]" (VG - Article 12.10).

Does the contract recognise the existence of local rights holders? Does it take account of their dependents' situation (women, younger family members, migrants, pastoralists, etc.)? Does the enterprise and/or government routinely use socio-land surveys for a systematic and impartial review of the rights affected by the project? Does this review take account of the different possible land uses in the territory (agricultural, pastoral, fishing, gathering, etc.), the existence of dependents (women, younger siblings, migrants, etc.) and overlapping and seasonal rights? Have these rights and possible overlaps between them been mapped? If so, is this map comprehensible and has it been locally validated by different strategic groups of actors? Was the social impact assessment used to develop a plan to manage the social impacts of the project? Does this plan adequately address all aspects identified by the impact assessment? Is it included in the project contract? Are the planned monitoring and sanctioning mechanisms effective?

There are many cases where communities receiving support from local or international NGOs have complained that investors and governments deny their very existence, along with that of their villages and land rights. Force is used to get them to leave their land, and when compensation is paid it often falls well short of what is needed to resettle displaced communities and re-establish their livelihoods elsewhere.

» ***One way of tackling this problem is to conduct socio-land surveys to systematically survey rights holders, and propose alternative solutions that will enable them to quickly re-establish their livelihoods and benefit directly or indirectly from the impacts of the project (resettlement in redeveloped parts of the project zone, rehousing, etc.). These approaches are often adopted by public projects, and should also become the norm in private investment projects. Even if investors are given assurances that the land they hope to use for their project is free of rights, such assurances are bound to be empty.***

Box 12 – USING SOCIO-LAND SURVEYS TO IDENTIFY RIGHTS HOLDERS IN CÔTE D'IVOIRE

A rubber plantation company wanted to use a particularly innovative model in Côte d'Ivoire to develop a project with a community dimension that struck a balance between obtaining land concessions and furthering local development. It intended to negotiate 99-year leases to villagers' land so that it could create 'small' rubber plantations (of 200 to 1000 ha). In return, 'landowners' would receive rent or a share in the profits, the villages would receive an income, and signatories would get assistance in obtaining land titles. The company also had a policy of encouraging individual rubber plantations by giving every beneficiary one rubber plant for each one planted on land managed by the company. The aim was to create a win-win situation for both the industrial plantations and the village operations, allowing them to increase the amount of land under rubber, use what was previously regarded as uncultivable land, and increase jobs and incomes. However, the socio-land studies that AFD requested in order to assess an application to fund an extension of this project showed a different reality, and the application was rejected.

One of the main problems that the studies identified was beyond the control of the project as it related to *Ivorian land law*. In essence, it meant that the project would result in an insidious but radical transformation of the land tenure regime. The project wanted to secure the contracts it had agreed with villagers by issuing *land certificates* to the signatories of the leases, which would make them the sole individual or collective owners of the land used by the project and the revenue it generated. By law, these

certificates have to be converted into title deeds within three years of being issued, and as title deeds can only be issued to individuals, this meant that the parcels covered by collective certificates would have to be subdivided.

The socio-land studies showed that the land concessions in two of the villages concerned were held by families, lineage groups or the village community, and could not be classified as the private property of the individuals who had been selected to sign the contracts. In addition to this, the Ivorian civil code contradicts local customary practices by stating that land certificate or title holders' rights go to their biological children when they die.

It had been hoped that getting extended families and villages to organise the signing of the contracts with the enterprise would make the operation more convenient and more transparent. In reality, it created a potentially explosive situation within the community as the population was largely illiterate and ill-informed about the consequences of the operation. No account was taken of the way that families actually function, or the vital role that family councils play in validating transactions involving family land. Although they lack any legal status, it is family councils that validate the decisions made by the head of the family, who is entitled to sign documents in their capacity as the mandated representative of all family members. The enforced transition to individual private ownership triggered by the project will concentrate land rights and wealth among a small number of individuals, and will inevitably create tensions. The socio-land studies also showed that these changes and the promotion of individual rubber plantations exacerbated conflicts between indigenous and migrant producers.

In the end, an apparently 'balanced' proposal that would benefit both villagers and the enterprise, and negotiations that allowed industrial plantations to access under-used family and village lands resulted in the destructuring of village lands and a radical challenge to local people's land rights.

There are also cases where local people cannot be consulted because they no longer occupy the land affected by the project. This may be due to conflict, population displacement, natural disasters or policies to promote agribusiness. Even if this situation is not directly linked to the project, it is important to investigate the conditions in which the land was acquired. This requires the analysis of any potentially problematic acquisitions (*'passif foncier'*). This mainly involves determining whether the land was acquired by force, threats or violence against local people enacted by the enterprise itself or through the intermediary of the State.

Even when these acquisitions go back several decades, it is also useful to determine whether they are still contested or causing conflict with local people who may have been relegated to the margins of these lands. If this is the case, it is legitimate to question the project's lack of social acceptability, the risks associated with the situation, and the prospects for local economic and social development.

» ***If local people are now absent from the project site (regardless of whether it was acquired by the enterprise or the State, and whether it is a recent or longstanding acquisition), it is important to research the history of land tenure in the area (its *passif foncier*) in order to determine whether local inhabitants left as a result of force or intimidation. When local communities are largely or entirely restricted to the peripheries of the land, specific surveys should be undertaken to determine what rights they held. This information should then be published and consideration given to how the enterprise can compensate affected communities.***

It is always important to protect local people's land rights in order to ensure that projects use as few resources as possible, and to **minimise displacement**. There are too many cases where the authorities have displaced local people on the grounds that a project will serve the general interest, even though the venture in question was of a commercial nature.

"Subject to their national law and legislation and in accordance with national context, States should expropriate only where rights to land, fisheries or forests are required for a public purpose. States should clearly define the concept of public purpose in law, in order to allow for judicial review [...] They should respect all legitimate tenure right holders, especially vulnerable and marginalized groups, by acquiring the minimum resources necessary and promptly providing just compensation in accordance with national law" (VG – Article 16.1).

"States should, prior to eviction or shift in land use which could result in depriving individuals and communities from access to their productive resources, explore feasible alternatives in consultation with the affected parties, consistent with the principles of these Guidelines, with a view to avoiding, or at least minimizing, the need to resort to evictions" (VG – Article 16.8).

- » **The economic evaluations mentioned above are appropriate tools for identifying other practicable solutions, and should be undertaken for all projects that result in expropriations.**

If the economic evaluation shows that the project will generate economic benefits, the value of the land concerned and amount of compensation to be paid to local people will need to be calculated. The question of compensation (in cash or in kind) is a real issue here, not only in terms of the amounts involved, but also in the sense of what happens if the enterprise or the State fails to provide compensation.

"States should ensure a fair valuation and prompt compensation in accordance with national law. Among other forms, the compensation may be, for example, in cash, rights to alternative areas, or a combination" (VG - Article 16.3).

"To the extent that resources permit, States should ensure that implementing agencies have the human, physical, financial and other forms of capacity to accomplish their mission" (VG - Article 16.4).

- » **Where the legislation does not take account of the international principles on resettlement conditions and compensation for expropriation, the AFD group should ensure that the project takes account of this issue and the States and enterprises concerned respect their commitments to local people.**

● **Does the contract comply with national labour laws?**

Although this issue does not always feature in the pre-contract negotiations, it may be useful to recall that the enterprise should agree to abide by local labour laws and the international labour standards and obligations laid down by the International Labour Organ-

ization (ILO). Some States have signed contracts with clauses that allow the enterprise to violate workers' rights by reducing pay to below the legal minimum wage if the project is less profitable than anticipated.

"Responsible investments should [...] comply with national laws and international core labour standards as well as, when applicable, obligations related to standards of the International Labour Organization" (VG - Article 12.4).

IFC Performance Standard n°2 makes a number of recommendations regarding work conditions:

- > to promote the fair treatment, non-discrimination, and equal opportunity of workers;
- > to establish, maintain and improve the worker-management relationship;
- > to promote compliance with national labour and employment laws;
- > to protect workers, including vulnerable categories of workers, such as children, migrant workers, workers engaged by third parties, and workers in the clients' supply chain;
- > to promote safe and healthy working conditions, and the health of workers;
- > to forbid the use of forced labour.

A number of texts are used as reference points for labour law, and are systematically incorporated into all voluntary standards, codes of good practice and benchmarks used by financial institutions (IFC Performance Standards, the United Nations Global Compact, Voluntary Guidelines, etc.). These are: ILO Convention 87 on the Freedom of Association and Protection of the Right to Organise, Convention 98 on the right to organise and collective bargaining, ILO Convention 29 on forced labour, ILO Convention 105 on the abolition of forced labour, ILO Convention 138 on the minimum age (for employment), ILO Convention 182 on the worst forms of child labour, ILO Convention 100 on equal pay, ILO Convention 111 on discrimination (employment and occupation) and Article 32.1 of the UN Convention on the Rights of the Child.

These conventions focus on the following principles:

- > Freedom of association and the effective recognition of trade unions (see Conventions 87 and 98, which affirm that workers have the right to form and join trade unions, prohibit discrimination against unionised workers and promote trade union negotiation to determine working conditions).
- > The prohibition of all forms of forced labour (see ILO Conventions 29 and 105).
- > The prohibition of child labour (see Conventions 138 and 182).
- > The prohibition of discrimination (see Conventions 100 and 111, which prohibit all forms of discrimination in access to employment on the basis of race, colour, sex, religion, political opinions and social origin).

» ***Examining the contractual clauses and findings of the environmental and social impact assessment enables us to determine the extent to which labour laws are respected, and use the monitoring measures in the action plan to regularly evaluate progress in improving workers' living conditions. To make it more effective, this management plan can be attached to the agreement between the enterprise and the donor as an annex.***

Box 13 – CONTRACTUAL COMPLIANCE WITH NATIONAL LABOUR LAWS IN CAMEROON

An agreement between Cameroon and a foreign investor set out a plan to employ 7,500 people, and specified that 80% of employees should be Cameroonian nationals within 5 years of the contract coming into force. The contract states that the investor will pay employees “equivalent to the minimum wage based on criteria of productivity and efficiency”, and will be “able to freely negotiate labour contracts specifying [...] the conditions for the suspension and dismissal of employees.” The contract also stipulates that “In the event of conflict between [the contract] and a law, with the exception of the Constitution of Cameroon, starting from the date [that the contract comes into force], the rights, duties and obligation of one party will be those prescribed by [the contract].”

A number of civil society organisations argued that these contractual clauses could be interpreted as allowing the investor to trump the provisions of Cameroonian labour law, especially those regarding remuneration, which could vary (and possibly diminish) according to unspecified and potentially arbitrary ‘efficiency criteria’. It has also been argued that the ability to ‘freely’ negotiate the conditions for dismissal, and the inclusion of a clause giving the contract priority in the event of a conflict with Cameroonian law, could allow the investor to trump certain provisions of Cameroonian labour law.

Source: Nguiffo and Schwartz, 2012

Managing the environmental impacts of a project

We have already noted that all projects should be subject to a prior social and environmental impact assessment that identifies the risks associated with the project, and proposes measures to mitigate and manage these risks through an environmental and social management plan. Looking beyond the content and results of these studies, particular attention should be paid to several key questions that may require further study.

● Will different users still have equitable access to water resources?

Attention is often focused on the amount of land assigned for a project, without proper scrutiny of the contractual provisions for water use. Does the contract give certain actors priority access to water, with guaranteed flow levels that could lead to water being appropriated by some users to the detriment of other groups? If so, how have these impacts been identified and addressed in the project setup? Were the public institutions that are responsible for water management involved in approving the project? Are there effective safeguards (rights, institutions) to protect third parties’ access to water?

Sometimes the investor is granted priority access to resources, seemingly with no account taken of other users and the consequences this could have for their activities. This is particularly true in irrigated sites and areas around water points where local communities grow crops or water their livestock. Reducing access to water will effectively deprive them of some of their rights. This question requires particular attention, even if it is not addressed in the national legislation.

There are clear international standards on this issue. The Voluntary Guidelines state that “All should respect the long-term protection and **sustainable use** of land, fisheries and forests” (VG - Article 4.3), and that “responsible investments should do no harm, [and] **safeguard against the dispossession of legitimate tenure right holders**” (Article 12.4). The World Bank advocates the promotion of more sustainable use of resources, including energy and water” (IFC Performance Standard n°3).

Box 14 – COMPETITION OVER WATER RESOURCES

Although some contracts make no mention of access to water resources, this is crucial for agribusiness projects, and investors will probably demand guaranteed access to water for projects involving crops that need to be irrigated.

This point is illustrated by the contract for a private-public partnership in Mali to produce and process sugar cane (which has been abandoned). The Malian government made important concessions to the investor, especially in terms of granting priority rights of access to water. It effectively guaranteed access to water for the purposes of the project, initially up to a maximum of 20 m³/sec every day of the year (thereby potentially compromising the policy on rice paddy fields that has been led in Mali for decades). Charges for water use were initially capped at the price paid by other big water consumers in the area, and the government agreed that it would support all necessary applications to the authorities in charge of water in the region, including the Office du Niger (ON), or provide assistance with such applications.

The agreement also contained measures giving the project priority water allocations in the event of a drought unless this contravened the flow requirements determined by international treaties (see below). A new impact assessment study was conducted in 2010 after technical and financial partners working in the ON area expressed particular concerns about the availability of water.

Although the investor had agreed to use water “efficiently in accordance with good sugar cane production practices”, the water use regime put the project in a more favourable position than other users during periods of drought, especially small-scale farmers. This could have resulted in sugar cane taking precedence over other food crops, which would have compromised food security in the region.

This case highlights the concerns about water availability that large agribusiness projects generate among third parties – from small local users whose rights are often based on customary systems, to neighbouring States – hence the urgent need for all ESIAAs to consider water, and for specific studies on this issue (as in Mali).

Mali has concluded a number of international treaties with neighbouring states along the River Niger and its tributaries and sub-tributaries (the ‘Niger basin’). One of these treaties created a supra-national organisation, the Niger Basin Authority (NBA), whose role is to promote cooperation between neighbouring countries and ensure integrated development in the Niger basin. Member states have made specific commitments to cooperate on the evaluation and implementation of projects that could influence the conditions for agricultural production in the Niger basin, and promised to inform the NBA about all projects and works that they intend to undertake in the basin (including this project in Mali).

Sources: Djiré *et al.*, 2012; Skinner and Cotula, 2011 and 2014; African Development Bank, 2009.

● Does the contract or national legislation contain environmental safeguards?

Project arrangements should contain measures to manage the environmental risks and impacts of the project, particularly if the national legislation is insufficiently robust in this respect. It is important to determine whether the environmental impact assessment was used to develop a plan to manage the environmental impacts of the project. Does this plan adequately address all the issues identified by the impact assessment? Is it incorporated into the contractual aspects of the project? What mechanisms exist to ensure that each party fulfils the environmental commitments in the contract, and to monitor their implementation? Are these mechanisms effective? Do they cover remediation and compensation for possible environmental damage? In the event of such damage, what modes of recourse are envisaged for the State and affected communities?

All projects should normally undertake an environmental impact assessment and use it to produce a plan to manage the environmental risks. This can be attached to the contract as an annex to make it legally binding. It is the main document setting out the investor's commitment to prevent, minimise, mitigate and improve the project's possible harmful environmental impacts on soils, water sources and other natural resources.

*"[...] Responsible investments should not contribute to food insecurity or **environmental degradation** (VG - Article 12.12), [they] should do no harm, [and should] safeguard [...] against environmental damage" (VG - Article 12.4).*

The IFC **environmental, health and safety guidelines** set out international good practices with different performance levels and standards. In theory, these should apply if they are more stringent than the regulations of the host country.

These guidelines advocate that irrigation should be managed according to the principles of **Integrated Water Resources Management (IWRM)**. This involves:

- > determining the quantity and quality of water required for crop production;
- > evaluating surface and underground water resources, and working in collaboration with national and regional institutions to ensure that the project takes account of existing or ongoing plans to manage and monitor water resources;
- > selecting crops according to the availability of water;
- > where possible, maximising rainwater harvesting by limiting runoff, diverting flows from the watershed onto crops, and storing runoff collected during rainy periods in reservoirs;
- > conserving irrigation water by reducing evaporation, not irrigating in the middle of the day, using drip or spot irrigation, avoiding sprinkler systems, using infiltration and covers to reduce water loss from irrigation channels, keeping a water management register with information on rainfall and water supplies, etc.

With regard to the use of pesticide, the IFC standards recommend **avoiding sprays and focusing instead on integrated pest and disease management**.

This involves:

- > providing training on the identification of pests, weeds and field reconnaissance for those responsible for decisions about spraying pesticides;
- > rotating crops to reduce pests and weeds in the vicinity;
- > cultivating varieties that are resistant to crop pests;
- > using mechanical and/or thermal weeding methods;
- > using beneficial organisms such as insects, birds, mites and microbial agents for organic pest control;
- > protecting natural enemies of pests by providing suitable habitat, such as shrubs to protect nesting sites and other native plants that can serve as habitat for natural pest predators;
- > allowing livestock to graze particular areas to manage vegetative cover;
- > using mechanical means of pest control such as traps, barriers or light and sound to eliminate, displace or repel crop pests.

Where this type of integrated pest control is insufficient, any **use of pesticides should follow very strict good practices:**

- > personnel should be trained in the application of pesticides and have the relevant certificates or equivalent training if such certificates are not required;
- > the manufacturer's instructions on maximum dosage or recommended treatment should be consulted, along with published reports on reducing application rates without loss of effectiveness and applying the minimum effective dose;
- > when spraying pesticides it is important to take account of field observations, meteorological data, timing and dosage, and to keep a register of this information;
- > avoid using pesticides listed in Categories 1a and 1b of the World Health Organisation Recommended Classification of Pesticides by Hazard;
- > avoid using pesticides listed in Category II of the World Health Organisation Recommended Classification of Pesticides by Hazard if the country in which the project is being implemented does not impose restrictions on the distribution and use of particular chemical substances, or if they are likely to be accessible to people without the training, equipment and facilities to handle, store, apply and dispose of these products properly;
- > avoid using pesticides listed in annexes A and B of the Stockholm Convention, except in the conditions defined in the convention; also avoid pesticides that are banned or being phased out at the international level;
- > only use pesticides that are manufactured under licence, approved and registered by the competent authority in accordance with the FAO's international Code of Conduct on the Distribution and Use of Pesticides;
- > only use pesticides that are manufactured and labelled in accordance with international norms and standards, such as the FAO's revised Guidelines on Good Labelling Practices for Pesticides;
- > choose technologies and application procedures that are designed to reduce the risk of unintended consequences or accidental spills, as specified in the integrated pest management programme, and only use them in well-defined conditions;

- > store and calibrate application equipment in accordance with the manufacturer's recommendations; only use materials that are registered in the client country;
- > establish untreated buffer zones around and along water sources, rivers, ponds, lakes and ditches to protect water resources;
- > avoid using pesticides associated with local-level problems and environmental risks.

These standards are now applied in all French agricultural operations, which are regularly checked to ensure that they fulfil the conditions for agricultural subsidies. Farmers have to provide clear traceability for all their interventions to show that they follow good practices.

- » ***Enterprises supported by the European Cooperation must be able to prove that they follow good environmental practices, provide evidence of traceability to that effect, and undergo regular check by independent certifying bodies.***
- » ***There are equally detailed standards for soil erosion, risks of water eutrophication, impacts on biodiversity, management of crop residues and other solid waste, air emissions, etc. These standards are adapted to the project context and type of crop (annual crops, plantations, agro-industrial processing, etc.), and should be systematically consulted during the project appraisal.***

Conclusions

This third and final section summarises the main lessons learned from the work on transparency and contract negotiations for agribusiness projects that affect land and property rights. It also presents several recommendations for actors in the French Cooperation.

FOLLOWING THE PUBLICATION of its analysis and proposals for large-scale land appropriations, France worked with many countries and international institutions to develop Voluntary Guidelines for the Responsible Governance of Tenure, arguing for the need to take account of local people's 'legitimate' land rights, regardless of whether they are formalised or not. Since the adoption of these voluntary guidelines, France has also endeavoured to ensure that they are implemented promptly and respected by all French operators involved in public and private interventions abroad. The 'Land Tenure and Development' Technical Committee investigated this issue in order to provide a common reference point for the French Cooperation, along with an analytical framework that would enable it to change its internal evaluation procedures and ensure that its interventions respect the principles enshrined in the voluntary guidelines.

This work complements the French Cooperation's long and rich experience in land issues, especially in West Africa. The key principles it has supported and promoted since the 1980s are now framed in the Voluntary Guidelines. These include recognising the many kinds of tenure rights that exist, and promoting inclusive land policies that take account of this diversity and are based on informed debate within the societies concerned. The French Cooperation has always defended these positions when working with governmental and other development partners to contribute to policy dialogue and support development projects.

Actors in the French Cooperation, and especially the AFD Group, also recently reaffirmed their support for family farming, rural development and food security (see SIF 2013-2016). Their approach does not look at land policies or land investments in isolation, but considers them in the overall context of agricultural development and in light of the agricultural, food security and trade policies that are being formulated at the national level or in regional integration spaces. Those policies also need to take into account the existence of economic and demographic challenges that many countries, in particular on the African continent, must face today and in the coming decades.

This work on transparency and contract negotiations for investments that affect land and property rights has generated a number of new findings and opened up several avenues for further analysis and reflection by the French Cooperation.

1. Compliance with national legislation does not automatically protect local people's rights

National legislation often fails to reflect the reality on the ground or recognise local people's rights to the natural resources on their territory. This is particularly true when it comes to land tenure and natural resource management. Local communities are often not consulted about investment projects and are easily dispossessed of their rights, as legislation rarely calls for social impact assessments to help determine how a project will impact on local land rights, or adequately protects those rights.

All project analysis should question how the land for the project has been or will be acquired, and how this will impact on the communities in this territory. **Specific procedures for socio-land surveys should be established as soon as possible, based on predetermined initiation criteria.** The French Cooperation is responsible for doing this in the projects that it supports; it should also encourage its governmental partners to adopt mechanisms to regulate investments, along with land legislation that recognises the great diversity of local land rights, takes account of the specific needs that they express, and helps ensure that these rights are recognised and secured.

2. All projects that will displace people should be subject to an economic evaluation

Financial evaluations focus on the benefits for the investor, while economic evaluations consider the benefits that a project will generate for the host country. They help determine its real impacts and benefits for local people, and the way that added value will be distributed among actors. Without an economic evaluation it is impossible to assess the overall benefits of the project for local communities, the State and local governments, and it will therefore be hard to determine whether it is appropriate in a country where food security and poverty eradication are major issues.

The countries hosting these investments should be the first to commission such studies. It would also be useful to incorporate them into the specific procedures and conditions that French Cooperation actors are developing in partnership with national governments, so that all public and private investments that affect landholdings are subject to an economic assessment. Study findings should be made accessible, and should help provide the States and local governments involved in negotiations with solid arguments on the socio-economic consequences of the project (job creation, support for infrastructures, partnerships with local producers, taxation, etc.).

3. The transparency and inclusiveness of the processes to negotiate contractual arrangements is an indicator of more equitable agreements that benefit all the parties concerned

The requirement for transparency applies to all actors, including those in the French Cooperation. The results of preliminary social and environmental impact assessments should be published, and this should encourage enterprises to be more transparent about the contracts agreed at different stages of the negotiation process (although they would not be obliged to publish confidential commercial data).

The whole negotiation process should be transparent in order to avoid or at least limit the opportunities for corruption, which is a major risk in projects involving land transactions.

This will also ensure that stakeholder consultations and negotiations are based on shared information, with local actors being able to access relevant information at different stages of the process. All parties to the agreement should benefit from a transparent and inclusive negotiation process: the investor will be in a more secure position if local actors consent to and are stakeholders in the project, while local people and governments are more likely to conclude a better balanced and more advantageous agreement.

4. The need for a process to rebalance asymmetric relations between private investors on the one hand, and the State, local governments and local people on the other

Transparency at every stage of the negotiated agreement does not necessarily guarantee an equitable final agreement. Asymmetries of information, competences and general power relations are often so pronounced that specific support is required to redress the balance.

This calls for flexible processes and support from specialist negotiators that can be adapted to the issues and cyclical nature of consultations and negotiations (legal and other experts to support the government, NGOs to support local people, etc.). The costs of such support cannot always be covered by national stakeholders, and should be shared with the investor. This should be part of the conditions for French Cooperation support for investors, and should be discussed with the governments that will host these investments.

5. Contractual clauses need to be specific, with clear conditions for their implementation, monitoring and control

Contracts can only be effective if they are specific enough to provide guarantees for all parties concerned. Many contracts are deficient in this respect, leading to results that fall well short of expectations. This is another area where expert help can make a difference. If the enterprise or government have not already requested such assistance, the financial partner should do so, and make regular monitoring and evaluation of this assistance part of the conditions for financial support.

The mechanisms for monitoring, controlling and sanctioning implementation of the contract should be defined when the contract is concluded. States usually have limited resources to fulfil these functions, and here too it is necessary to anticipate the costs and identify who will be responsible for covering them in order to ensure that monitoring does take place. The participation of civil society through monitoring to ensure that the evaluations that are undertaken are genuinely independent can also be desirable but insufficient. The various land governance actors must be involved in the follow up of projects throughout their implementation in order to ensure that the rights from local populations will be respected, also in the event the project fails.

6. Capacity building for civil society actors is still a key issue

Civil society actors (farmer organisations, NGOs, research organisations, etc.) can play an important major role in agribusiness investments, even though they are not party to the contracts. In fact, this independence is an important asset for both the enterprise and the government, and crucial for an effective citizen monitoring mechanism that can provide impartial judgements and safeguard commitments to respect local people's rights.

To be able to play this role, civil society actors may need capacity support interventions on the issues associated with rural development, land policies and the characteristics of this type of contract. Specific support should be planned accordingly (in the contracts themselves, or by the State or technical and financial partners), for example to ensure that civil society actors can support local people in negotiations, and monitor implementation of the resulting agreements.

7. Prioritise the creation of a network of experts on land matters

Priority should be given to training actors and mobilising the expertise required to properly address land issues. The questions that need to be tackled in this domain call for a wide range of specific skills, and it is not always easy to mobilise the relevant expertise in land issues, project funding, local cultures, sectoral issues, local languages, contracts, etc. at short notice in the countries where projects are being assessed. The 'Land Tenure and Development' Technical Committee now has a network of partners who can be mobilised for this kind of work, and is building on their expertise.

The Committee also provides a unique framework for analysis, exchange and reflection that can help French Cooperation actors make the best possible use of research findings and development actions. There is a clear need to sustain this committee and broaden its field of intervention to include the theme of this component, by reinforcing its collaborations with land experts in developing countries and actors from civil society and the French Cooperation (directors of AFD projects, staff responsible for evaluation within AFD and Proparco, technical assistants from MAE).

Information is widely disseminated via the 'Land Tenure and Development' portal (www.foncier-developpement.fr), thematic study days and workshops, and by publishing analytical documents, organising training sessions and opening up new fields of research. All these tools and methods are helping spread the word about land issues, build a community of thought and establish a panel of actors capable of properly identifying, analysing and addressing these issues.

8. Thinking about large-scale investments raises broader questions about the local governance and agricultural models that should be promoted for the future

Although this component has focused on a specific field of action – analysing contracts in investment projects that affect land and property rights – we are aware that large-scale investments raise broader questions about the public policies that are being implemented, the development visions promoted by different States, and the preferred model of agriculture. This type of prospective approach should not be overlooked, as it enables us to determine whether today's choices will still be valid tomorrow.

Land concession agreements often last for several decades, and therefore affect several generations. This means that we need a broader debate about the issues facing the country concerned (economic development, employment, food security, etc.), the vision of development the State hopes to promote, its implications for existing farms, and the policy instruments that will help put this vision into practice (land, agricultural and even structural policies, etc.). These instruments should also be used to modernise and develop existing farms (the vast majority of which are family-run), support the most vulnerable sectors of society (who will ultimately be unable to live off agricultural activities alone) and regulate private investments.

9. Technical and financial partners play a key role in helping governments and private enterprises respect the principles of the voluntary guidelines

Finally, analysis of these contracts has shown that external action – and especially external action by technical and financial partners – can play a significant role in the direction taken by this type of large-scale project. As a result of interventions by these partners, a number of projects that started out with the sole aim of making a profit for the investor have incorporated components to ensure that they provide greater benefits for the local producers and villagers concerned. The new internal procedures adopted by technical and financial partners have created the leverage to change practices and encourage agreements that are more beneficial for local actors.

This issue cannot be tackled by France alone. Therefore, it would be useful to share our reflections and findings with other European and international actors to ensure that the international principles defended in the voluntary guidelines and other frameworks are put into practice as quickly as possible.

BIBLIOGRAPHY

- ACTION AID (2013), *Broken Promises. The Impact of Addax Bioenergy in Sierra Leone on hunger and livelihoods*.
Available on: http://www.actionaid.org.uk/sites/default/files/publications/brokenpromises_0.pdf
- AFRICAN DEVELOPMENT BANK (2009), *Projet sucrier de Markala, Résumé exécutif de l'étude d'impact environnemental et social*.
Available on: <http://www.afdb.org/fileadmin/uploads/afdb/Documents/Environmental-and-Social-Assessments/mali%20fr.pdf>
- CHOUQUER G. (2011), *Aspects and characteristics of State-owned land in West Africa*, Briefing Notes, "Land Tenure and Development" Technical Committee.
Available on: http://www.agter.asso.fr/IMG/pdf/2011_ctf_fiche-pedag_chouquer_domanialite_en.pdf
- CHOUQUER G. (2012), *Les acquisitions massives de terres dans le monde. Bulle foncière ou opportunité de développement*, Interviews with Charlotte Castan, Eds FIEF and Publitopex.
- CHOUQUER G. (2013), "Vivre dans les interstices de la firme. Sierra Leone, Cambodge, Tchad", Article in *Etudes rurales* No. 191 sur les Agricultures de firme, p. 149-168.
Available on: http://www.cairn.info/resume.php?ID_ARTICLE=ETRU_191_0149
- COCHET H., MERLET M. (2011), *Land grabbing and share of the value added in agricultural processes. A new look at the distribution of land revenues*, Paper for the international conference on "Global Land Grabbing" 6-8 April 2011, organised by the Future Agri-cultures Consortium and the Institute of Development Studies (IDS), University of Sussex, Brighton, UK, 16 p.
Available on: http://www.agter.asso.fr/IMG/pdf/cochet_merlet_land-grabbing-conference-vers_fr_2011-03-15.pdf
- "LAND TENURE AND DEVELOPMENT" TECHNICAL COMMITTEE (2010), *Large-scale land appropriations. Analysis of the phenomenon and proposals for future action*, AFD, MAEE, June 2010, 56 pages.
Available on: http://www.agter.asso.fr/IMG/pdf/lappropriation_en_web-finale.pdf

- “LAND TENURE AND DEVELOPMENT” TECHNICAL COMMITTEE (2010), *Large-scale land appropriations and responsible agricultural investment. French position paper*, “Land Tenure and Development” Technical Committee, MAEE, AFD, Gisa.
Available on: <http://www.agter.asso.fr/IMG/pdf/french-position-paper.pdf>
- COTULA (2011), *Land deals in Africa, What is in the contracts?*
Available on: <http://pubs.iied.org/pdfs/12568IIED.pdf>
- COTULA (2010), *Investment Contracts and Sustainable Development. How to Make Contracts for Fairer and More Sustainable Natural Resource Investments*, London, IIED.
Available on: <http://pubs.iied.org/17507IIED.html>
- COTULA (2014), “Foreign investment, law and sustainable development: A handbook on agriculture and extractive industries”, *Natural Resource Issues* No. 26, London, IIED.
Available on: <http://pubs.iied.org/17513IIED.html?a=Lorenzo%20Cotula>
- COTULA and BLACKMORE (2014), *Understanding agricultural investment chains: Lessons to improve governance*, Rome and London, FAO and IIED.
Available on: <http://pubs.iied.org/12574IIED.html>
- DJIRÉ, KEITA and DIAWARA (2012), *Agricultural investments and land acquisitions in Mali: Context, Trends and Case Studies*, London, IIED.
Available on: <http://pubs.iied.org/pdfs/10037IIED.pdf>
- DUFUMIER M. (1996), *Les projets de développement agricole. Manuel d’expertise*, CTA, Editions Karthala.
- FAO, CSA (2012), *Voluntary Guidelines on the Responsible Governance of Tenure of land, fisheries and forests in the context of national food security*, 49 pages.
Available on: <http://www.fao.org/docrep/016/i2801f/i2801f.pdf>
- FRANCHI G., RAKOTONDRAINIBE M., HERMANN RAPARISON E. and RANDRIANARIMANA P. (2013), *Accaparement des terres à Madagascar. Echos et témoignages du terrain*, Roma, Re:Common.
Available on: http://terresmalgaches.info/IMG/pdf/Rapport_Accaparements_de_terres_Madagascar_2013.pdf
- LE ROY E. (2011), *La terre de l’autre. Une anthropologie des régimes d’appropriation foncière*, Ed. LGDJ.
- MERLET M. (2012), *Accaparement foncier à l’échelle mondiale et devenir de la petite paysannerie*, Communication à l’Académie d’agriculture de France, 13 June 2012 “Agro-business et petite paysannerie : concurrences et complémentarités”, Published in the proceedings of the Académie d’Agriculture, Vol 98 # 3, Nov 2012.
- MERLET M. (2010), *Rights to land and natural resources*, Briefing notes, “Land Tenure and Development” Technical Committee.
Available on : <http://www.foncier-developpement.fr/publication/rights-to-land-and-natural-resources/>

- MUJENJA F. and WONANI C. (2012), *Long-term outcomes of agricultural investments: Lessons from Zambia*, IIED. Available on: <http://pubs.iied.org/12571IIED.html>
- NGUIFFO Samuel and SCHWARTZ Brendan (2012), *Herakles' 13th labour? A study of SGSOC's land concession in southwest Cameroon*, Centre pour l'Environnement et le Développement, Yaoundé.
Available on: <http://www.forestpeoples.org/topics/palm-oil-rspo/publication/2012/ced-publication-herakles-13th-labour-study-sgsoc-s-land-conces>
- SKINNER and COTULA (2011), *Are land deals driving "water grabs"?*, London, IIED.
Available on: <http://pubs.iied.org/17102IIED.html>
- VERMEULEN S. and COTULA L. (2010), *Making the Most of Agricultural Investment: A Survey of Business Models that Provide Opportunities for Smallholders*, Roma/London/Bern, Food and Agriculture Organization of the UN (FAO), International Fund for Agricultural Development (IFAD) / International Institute for Environment and Development (IIED) and Swiss Agency for Development and Cooperation (SDC).
Available on: <http://pubs.iied.org/12566IIED.html>
- WORLD BANK (2013), "Investing in Agribusiness: A retrospective view of a development Bank's Investments in Agribusiness in Africa and Southeast Asia and the Pacific", *Agriculture and environmental services discussion paper* No. 1, 67 p.
Available on: http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2013/09/23/000356161_20130923144055/Rendered/PDF/810830REVISED00ting0in0Agribusiness.pdf
- WORLD BANK, UNCTAD (2014), "The practice of responsible investment principles in larger-scale agricultural investments. Implications for Corporate Performance and Impact on Local Communities", *Agriculture and environmental services discussion paper* No. 8, 57 p.
Available on: http://unctad.org/en/PublicationsLibrary/wb_unctad_2014_en.pdf

OTHER SOURCES OF USEFUL INFORMATION

International Labour Organization

- ILO Convention 29 on forced labour (1930). Available on http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C029
- ILO Convention 105 on the abolition of forced labour (1957). Available on: http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C105
- ILO Convention 138 on the minimum age for admission to employment (1973). Available on: http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C138
- ILO Convention 182 on the worst forms of child labour (1999). Available on: http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C182
- ILO Convention 100 on equal pay (1951). Available on: http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C100
- ILO Convention 111 on discrimination (employment and occupation) (1958). Available on: http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C111
- UN Convention on the Rights of the Child (1989). Available on: http://www.unicef.org.uk/Documents/Publication-pdfs/UNCRC_PRESS200910web.pdf

FAO and CFS

- FAO, CSA (2012), *Voluntary Guidelines on the Responsible Governance of Tenure*. Available on: <http://www.fao.org/docrep/016/i2801e/i2801e.pdf>
- FAO (2013), "Governing land for women and men. A technical guide to support the achievement of responsible gender-equitable governance of land tenure", *Governance of tenure technical guide* No. 1. Available on: <http://www.fao.org/docrep/017/i3114e/i3114e.pdf>
- FAO (2013), "Improving governance of forest tenure", *Governance of tenure technical guide* No. 2. Available on: <http://www.fao.org/docrep/018/i3249e/i3249e.pdf>
- FAO (2014), "Respecting free, prior and informed consent. Practical guidance for governments, companies, NGOs, indigenous peoples and local communities in relation to land acquisition", *Governance of tenure technical guide* No. 3. Available on: <http://www.fao.org/docrep/019/i3496e/i3496e.pdf>

World Bank

- *IFC Performance Standards on Environmental and Social Sustainability* (2012). Available on: http://www.ifc.org/wps/wcm/connect/c8f524004a73daeca09afdf998895a12/IFC_Performance_Standards.pdf?MOD=AJPERES
- *International Finance Corporation, World Bank Group Environmental, Health and Safety Guidelines* (2007). Available on: <http://www.ifc.org/wps/wcm/connect/554e8d80488658e4b76a-f76a6515bb18/Final+-+General+EHS+Guidelines.pdf?MOD=AJPERES>

Other reference texts

- *United Nations Global Compact* (2000). Available on: <http://www.unglobalcompact.org>
- *Equator Principles* (2006). Available on: www.equator-principles.com
- *OECD Guidelines for multinational enterprises* (2008). Available on: <http://www.oecd.org/investment/mne/1922428.pdf>

“Land Tenure and Development” Technical Committee

- “Land Tenure and Development” Technical Committee portal. Numerous online resources on land are available on: <http://www.foncier-developpement.fr/>
- “Land Tenure and Development” Technical Committee (2010), *Large-scale land acquisitions and responsible agricultural investment. For an approach respecting human rights, food security and sustainable development*, AFD, MAEE, June 2010, 56 pages. Available on: <http://www.foncier-developpement.fr/publication/large-scale-land-acquisition-and-responsible-agricultural-investment/>
- “Land Tenure and Development” Technical Committee (2010), *Large-scale land appropriations. Analysis of the phenomenon and proposed guidelines for future action*, MAEE, AFD, GISA. Available on: http://www.agter.asso.fr/IMG/pdf/appropriation_en_web-finale.pdf
- “Land Tenure and Development” Technical Committee (2009), *Land Governance and Security of Tenure in Developing Countries. French Development Cooperation White Paper*. Available on: <http://www.agter.asso.fr/IMG/pdf/land-governance-and-security-of-tenure-in-developing-countries.pdf>
- “Land Tenure and Development” Technical Committee (2009), *Décentralisation, acteurs locaux et foncier: Fiches pays*, Edited by Alain Rochegude and Caroline Plançon. Available on: <http://www.foncier-developpement.fr/publication/decentralisation-acteurs-locaux-et-foncier-fiches-pays/>
- “Land Tenure and Development” Technical Committee (2011), *Briefing Notes to improve our understanding and ability to ask the right questions and take effective action on land matters in West Africa*. Available on: <http://www.foncier-developpement.fr/qui-sommes-nous/le-comite-technique-foncier-et-developpement/publications/>

Analytical framework for agricultural investment projects that affect land tenure and property rights

This analytical framework is intended to help project leaders and experts who are responsible for evaluating the environmental and social aspects of applications for project financing. The main focus is on investments in commercial agricultural production that affect land tenure and property rights in low- and middle-income countries. It is hard to set a single, pre-determined threshold for this framework to be applicable because local contexts, production systems and average family farm sizes or number of hectares under cultivation vary considerably from one country or region to another.

The Land Matrix, which regards all operations covering more than 200 hectares as large-scale land acquisitions, provides one example of this kind of threshold. It is used by several organisations, which bring their own refinements and additional criteria to the exercise (average size of family farms in the project zone, number of affected people, their level of vulnerability, how long the area has been settled, etc.).

Projects covered by this framework may include cases where the investor has already agreed a lease or concluded direct transactions with local rights holders. It is generally assumed that the negotiation process is already under way at the local level (as is often the case when projects are submitted to technical and financial partners), and that it may include several stages, which means that the financial partner can reorient certain aspects of the project. The framework has been designed with these considerations in mind.

The analytical framework is based on the principles set out in the Voluntary Guidelines (VGs) for the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security, and where relevant the key principles of other existing voluntary frameworks for private sector investment, such as the International Finance Corporation (IFC) Performance Standards (PS) and environmental, health and safety (EHS) guidelines, the Equator Principles (EP), the UN Guiding Principles on Business and Human Rights, and the OECD Guidelines on Multinational Enterprises and the recently adopted Principles for responsible investment in agriculture and food systems (CFS-RAI). These principles shaped the criteria presented in the framework, which can be used to consider different aspects of each project proposal.

This framework is divided into five main sections, which cover different aspects of the project and related contracts:

- > the general framework of land governance;
- > the negotiation process and management clauses in land allocation contracts;
- > analysis of the project's economic benefits for society in general (wealth creation and distribution);
- > the social component of the project and recognition of local land rights;
- > environmental considerations relating to the project.

Possible sources of documentation for each of the criteria have been identified to facilitate project analysis. These include key project documents (contract or memorandum of understanding, existing preliminary studies, business plan, etc.), potential sources in national legislation (decrees, laws, policy documents) and documents that can be obtained from civil society organisations (research reports, studies by NGOs, press articles, etc.). These different sources of information need to be cross-referenced in order to get an accurate picture of the key issues and realities on the ground, and to understand the implications and possible risks and benefits of the project. The criteria in the framework have been ranked, with the most important questions shown in bold. Finally, each component of the framework includes a number of 'red lines' or alerts that might lead to a decision not to proceed further with a project.

Analysis of the national framework for land governance

This first list of criteria helps provide an overview of the framework for natural resource governance, and determine the extent to which it already incorporates the principles set out in the voluntary guidelines for responsible governance of land tenure regimes, especially in terms of protecting local land rights and regulating land transactions.

CRITERIA	KEY QUESTIONS	POSSIBLE REFERENCE TEXTS (i) AND SOURCES OF INFORMATION (ii)
» Status of land and recognition of local land rights		
<p>General framework: status of land and recognition of natural resource users' land rights</p>	<p>Is the legal framework for land management enforced, effective and recognised as legitimate by local people (across the whole territory and in the project area)?</p> <p>Does national legislation recognise and effectively protect rural land rights, including so-called customary rights, seasonal rights and non-formalised rights (for agriculture, hunting, fishing and gathering)? Do local people have the right to fair prior compensation if these use rights are taken?</p> <p>Are there administrative, legal or customary authorities that act as guarantors of these rights and/or collective management rules? If so, are they effective, and do they help secure these rights or rules even if they have not been formalised?</p> <p>Does national legislation recognise and effectively protect rural land rights, including so-called customary rights, seasonal rights and non-formalised rights (for agriculture, hunting, fishing and gathering)? Do local people have the right to fair prior compensation if these use rights are taken?</p> <p>Is the country generally characterised by secure land tenure, or is it affected by serious insecurity and conflicts as a result of its political history, natural disasters, increased pressure or conflict over land, major population displacements, heavy emphasis on large-scale agri-business, or tensions between users over natural resource management?</p>	<p>(i) Voluntary Guidelines, CFS-RAI, UN Guiding Principles on Business and Human Rights, Decrees and laws relating to land and natural resource management, Laws on expropriation, Framework agricultural law or national strategies for food security and rural development, Forest Code, Environment Code, Texts relating to pastoralism, Laws and decrees regarding territorial organisation and management.</p> <p>(ii) Country files on "decentralisation, local actors and land", 'Land and Development' portal, Research and civil society reports.</p>
» Regulation of land transactions		
<p>Regulation and transparency of land transactions</p>	<p>What substantive (sales, long-term leases, etc.) and procedural (by whom, how and with whose agreement) means can be used to grant land to foreign or national investors?</p> <p>Does the country have the institutional capacity to critically analyse investors' project proposals?</p>	<p>(i) Voluntary Guidelines – Articles 8.5, 8.7, 11.2, 11.3, 12.5 and 12.6; CFS-RAI – Principles 9 and 10; OECD Guidelines; Investment laws and codes; .../...</p>

CRITERIA	KEY QUESTIONS	POSSIBLE REFERENCE TEXTS (i) AND SOURCES OF INFORMATION (ii)
	<p>Are land transactions (and related contracts) with foreign and national investors made public? And are they publicised in a way that gives local people timely and useful information about what is happening? Are there effective mechanisms for regulating land concentration, securing local people's rights in the event of conflict, and offering mechanisms for recourse so that affected people can challenge land allocations?</p>	<p>Land laws and decrees.</p> <p>(ii) Investment promotion agency documents, Reports produced by NGOs and research bodies.</p>
<p>Consultation with affected communities</p>	<p>Does the national legislation make land allocations conditional upon consultation with local people and/or obtaining their 'free, prior and informed consent'? If it does, to what extent is this legislation actually respected in the country in general, and the project area in particular, and what are the mechanisms for ensuring that local people are meaningfully involved in such consultations (bearing in mind the fact that they are often illiterate, do not necessarily speak the language in which the national law is written, and regard their relationship with the land in a different way from the State)?</p>	<p>(i) Voluntary Guidelines – Articles 9.9, 12.7 and 12.9, Equator Principle n° 5, CFS-RAI Principle 9, IFC PS n° 1, 5 and 7.</p> <p>(ii) Reports produced by NGOs and research bodies.</p>
<p>Environmental and social impact studies</p>	<p>Does the national legislation call for a systematic assessment of both the environmental and social impacts of the project? Do what extent is this requirement actually respected in the country, and more particularly in the project zone?</p>	<p>(i) Voluntary Guidelines – Article 12.10, CFS-RAI – Principle 10, IFC PS n° 1 to 8, Investment law.</p> <p>(ii) Investment promotion agency documents.</p>
<p>Cross-border issues</p>	<p>Assuming that the land transaction could affect natural resources shared with one or more neighbouring States (such as a transboundary watercourse), does national or international law define criteria for the equitable use of shared resources, provide for the setting up of effective supra-national institutions to manage or coordinate resource use at the inter-state level, and include requirements for an environmental and social impact assessment?</p>	<p>(i) Voluntary Guidelines – Articles 4.3, 12.11 and 12.12; IFC PS n°1; Existing bilateral or regional treaties.</p> <p>(ii) FAO database (http://faolex.fao.org/water-treaties_fra/index.htm), Websites of relevant ministries and institutions.</p>
<p>Special safeguards and advantages associated with the land granted to foreign investors that can lead to uncompetitive practices</p>	<p>Does prospective investment legislation give foreign investors special safeguards and advantages (property tax exemptions, long-term leases not usually available to other categories of actor, unusually low land rents, etc.)? Could these advantages distort competition with local farms and businesses?</p> <p>Does the tax regime (including national legislation) enable local people to share in the profits generated by the project (sharing revenues with local government and administrative, legal or customary authorities, etc.)?</p>	<p>(i) Voluntary Guidelines – Article 12.8, OECD Guidelines, Investment Code, Sectoral laws, Tax laws and decrees.</p> <p>(ii) Websites of relevant ministries (finance, budget, foreign affairs, etc.), Droit Afrique (http://www.droit-afrique.com).</p>

Analysis of the project and associated land contracts

The criteria presented below aim to provide a framework for analysis of the project and related land contracts. The information available in project documents, contracts (or draft contracts), preliminary studies, ex-ante evaluation documents and different legal sources in the broad sense (international, national and customary law) can be used to determine the extent to which the project meets the criteria for each key question.

● Contract negotiation and management

This first category of criteria relate to the negotiation process that led to the signing of the contract, and to clauses in general. Rather than looking at specific elements of the contract, these criteria mainly refer to aspects of the process that occur before the contract is signed, or which go beyond the scope of the contract. They can be researched using other sources of information, such as environmental and social impact assessments, ex ante evaluations, decrees, press articles, case studies, international and national law, etc.

CRITERIA	KEY QUESTIONS	POSSIBLE REFERENCE TEXTS (i) AND SOURCES OF INFORMATION (ii)
» Contract negotiation		
Nature of the transaction	What types of land transaction have taken place (or are planned) – long-term leases, purchases, rentals, easements or rights of use? Do these transactions comply with the national legislative framework?	(i) Memorandum of Understanding, contract. (ii) Various sites publish contracts or information about contracts. See, for example: Land Matrix (http://landmatrix.org/en/), Oakland Institute (http://www.oaklandinstitute.org/publications), farmlandgrab.org (http://www.farmlandgrab.org/home/post_special?filter=contracts).
Parties to the contract and strategic actors	Do the investors have solid previous agribusiness experience? If so, how did they acquire the land over which they already carry out their activities? Has the use of these lands been contested by local people or caused violent conflict (previous State expropriation, displaced people who continue to claim their land rights, etc.)? Is there a pre-identified risk linked with the investor's reputation and/or conflicts associated with their activity in other countries or regions? What are the expected consequences of these conflicts for the project? Does the available information indicate that the company's structure allows it to avoid tax, limit its legal responsibility and avoid possible restrictions on transferring .../...	(i) Voluntary Guidelines – Articles 5.6, 12.4 and 12.11, CFS-RAI – Principles 5 and 9. (ii) Memorandum of Understanding, contract; Project documents, feasibility studies, investor's Articles of association; Research and NGO reports.

CRITERIA	KEY QUESTIONS	POSSIBLE REFERENCE TEXTS (i) AND SOURCES OF INFORMATION (ii)
	<p>the acquired land rights to third parties? If so, what mechanisms are there to limit the risks of tax avoidance?</p> <p>Who was involved in negotiations over the land, and who signed the contract (a central authority such as the government or ministries concerned, the local government, customary authorities)? Are the local authorities or representatives of local people also co-signatories (chiefdom, customary owners, farmer organisations)?</p> <p>Do the people who signed the contract have the legitimacy and legal authority to do so, in terms of both national law and customary norms? More specifically, do they have the capacity to represent all members of their community and the different groups of natural resource users (farmers, herders, hunters, gatherers)?</p>	
<p>Local consultation and popular consent</p>	<p>Were the affected local people consulted before the contract was concluded (including women, youth, non-resident users and holders of local grazing, hunting and fishing rights)? Were the organisations and institutions that represent local people involved? Were the specific conditions of women and youth discussed?</p> <p>Did these consultations enable indigenous populations to reach free, prior and informed consent? Was specific account taken of the interests of different groups of actors?</p> <p>Was this consultation process documented, and were the consultation outcomes and ensuing decisions incorporated into specific and binding documents?</p> <p>What mechanisms have been put in place to facilitate communication between local communities, the government and the investor during the period covered by the contract, and to ensure that all commitments are respected?</p>	<p>(i) Voluntary Guidelines – Articles 9.9, 12.4, 12.7 and 12.9; Equator Principle n°5; CFS-RAI – Principles 5 and 9; IFC PS n°1,5 and 7.</p> <p>(ii) Reports on these consultations (process and commitments), Research and NGO reports.</p>
<p>Preliminary studies</p>	<p>Have environmental and social impact assessments (ESIAs) that cover land-related issues been produced?</p> <p>Were these evaluations undertaken before or after the contract was signed? If they were conducted afterwards, did this result in any changes to the project and/or amendments to the contract?</p>	<p>(i) Voluntary Guidelines – Article 12.10; CFS-RAI – Principles 9 and 10; Equator Principles n° 2, 3 and 4; IFC PS n° 1 and 5; UN Guiding Principles on Business and Human Rights – Articles 19, 20 and 21.</p> <p>(ii) Environmental and social impact assessments, .../...</p>

CRITERIA	KEY QUESTIONS	POSSIBLE REFERENCE TEXTS (i) AND SOURCES OF INFORMATION (ii)
		Amendments to the contract, Operational guidelines of development banks involved in the project (AFD group, ADB, etc.).
Transparency in the negotiation process	<p>How transparent was the preparation of the project, production of the preliminary studies and negotiation of the contract?</p> <p>Was the contract (or some of its content) made accessible to the local actors concerned? Have the impact assessments been published and made accessible to local people so that they can make an informed judgement about the project?</p> <p>Were local people given advance warning and information about the project, and were they invited to participate in the process of negotiating the contract and commenting on draft versions of the contract?</p> <p>Is information about the transactions that have taken place and the market value of land assets transparent, and has it been disseminated? Does the contract respect national legislative arrangements, or does it give the enterprise additional advantages, suggesting an element of corruption in the process?</p>	<p>(i) Voluntary guidelines – Articles 11.4, 11.7 and 12.3; Principle 10 of the United Nations Global Compact; United Nations guidelines for multinational enterprises.</p> <p>(ii) Contract, impact assessments and summary documents; Research and NGO reports.</p>
RED LINES	<ul style="list-style-type: none"> • Local challenges to ongoing projects having given rise to violence. • Signatories to the agreement without authority. • Lack of local consultation and no free, prior and informed consent by indigenous people. • ESIA's not undertaken or not published. 	
» Contract management		
Contract management, including mechanisms for monitoring and implementing commitments	<p>Does the contract allocating land cover a long time-frame? Is this period justified by the project cycle?</p> <p>Are the contract's clauses sufficiently specific to be legally enforceable and allow its implementation to be monitored? Does the contract set out performance indicators? If so, what are they?</p> <p>Is it envisaged that the contract will take precedence over national legislation?</p> <p>Does the contract cover monitoring of the project's impacts and the extent to which each party fulfils their commitments?</p> <p>Does the contract make provision for communities .../...</p>	<p>(i) Voluntary Guidelines – Articles 8.11, 12.8 and 12.14; CFS-RAI – Principle 10; IFC PS n°1; Equator Principles n° 7, 8 and 9.</p> <p>(ii) Contract, Investment Code.</p>

CRITERIA	KEY QUESTIONS	POSSIBLE REFERENCE TEXTS (i) AND SOURCES OF INFORMATION (ii)
	<p>affected by the project to participate in this monitoring? Are there plans to inform them of its findings?</p> <p>What mechanisms does the government have to ensure that the investor performs the contract, and for sanctioning non-compliance?</p>	
Exit and renegotiation clauses	<p>Are the terms of the contract evenly balanced between the enterprise and other stakeholders (national and local governments, customary authorities, etc.), or do they allow the investor to pull out of the project with limited restriction? Under what conditions can the investor withdraw?</p> <p>What financial guarantees does the investor have to provide, and how can they be enforced?</p> <p>Does the contract or relevant legislation allow the government to renegotiate the contract? If local people are party to the contract, can they withdraw from it? If so, under what conditions?</p> <p>Was the contract drawn up so that it could be adapted to changes in national legislation, or is there a stabilisation clause intended to make it exempt from future legislation? If there is such a clause, is it really justified by the nature of the project and the risks taken by the investor?</p>	<p>(i) Voluntary Guidelines – Article 8.1.</p> <p>(ii) Contracts and their annexes.</p>
Conflict resolution mechanisms	<p>Are the conflict resolution mechanisms for the State and local people effective, swift and accessible?</p>	<p>(i) Voluntary Guidelines – Articles 3.2, 4.9 and 21.1; Equator Principle n° 6; CFS-RAI – Principle n° 9; IFC PS n° 1, UN Guiding Principles on Business and Human Rights 27, 28 and 31; OECD Guidelines.</p> <p>(ii) Contracts, bilateral and multilateral investment treaties, investment law or Code; Local law firm.</p>
RED LINES	<ul style="list-style-type: none"> • Clauses in the contract that allow the investor to pull out of the project with limited restrictions. • Clauses in the contract that allow it to take precedence over national legislation. • Clauses in the contract are not specific enough and lack of an appropriate mechanism for independent monitoring. • No mechanism for monitoring the extent to which commitments are fulfilled or sanctioning non-compliance. 	

● Economic evaluation

These criteria can be used to analyse the proposed investment model and the extent to which it contributes to (or hinders) improvements in the inclusion of small producers, food security, rural development, sustainable social and economic development, and the situation of the most vulnerable people.

In order to do this, it is important to differentiate between the financial evaluation (project viability) and the economic evaluation (impacts on the local and national economy) during and after the project.

CRITERIA	KEY QUESTIONS	POSSIBLE REFERENCE TEXTS (i) AND SOURCES OF INFORMATION (ii)
» General context		
Current dynamics and relevance of the project	<p>What is the economic and historical context of the project? What are the current changes in the agrarian system (demographic, agronomic and social trends, pressure on land, etc.)?</p> <p>How does the project help bring about advances/innovations on the one hand, or risk creating blockages/tensions on the other?</p> <p>Does the project target the local or international market? How is it relevant to the context and issues that have been identified? How does it respond to the demands of the different markets in which it will operate?</p>	<p>(i) Voluntary Guidelines – Articles 8.7 and 11.1; CFS-RAI – Principles 1, 2 and 8.</p> <p>(ii) National strategy documents, Research and prospective studies, Project documents.</p>
Consistency between the project's stated objectives and national and international development objectives	<p>Is the project consistent with agreed national and international social, economic and environmental objectives (including poverty eradication, food security, sustainable land and natural resource management, contributing to rural development, promoting inclusive investment models, sustainable economic and social development, creating jobs, diversifying local livelihoods, etc.)?</p> <p>Does the project recognise and value local practices? Does it respect local people's cultural heritage, landscapes and traditional knowledge?</p> <p>In a context of climate change, does the project foster or weaken the resilience of local production and subsistence systems (through large-scale monocropping, need for high levels of contributions and inputs, etc.)?</p> <p>Could the benefits that the project brings to the country and its people be obtained by promoting other investment models? If so, what conditions would this require, and how would the initiative be financed and implemented?</p>	<p>(i) Voluntary Guidelines – Article 12.4; CFS-RAI – Principles 1, 2, 7 and 8; IFC PS n° 8; OECD Guidelines (II.1).</p> <p>(ii) Poverty reduction and food security strategy documents, Agricultural investment plan, rural development strategy, Project feasibility study and impact assessment.</p>

CRITERIA	KEY QUESTIONS	POSSIBLE REFERENCE TEXTS (i) AND SOURCES OF INFORMATION (ii)
Business model	<p>Does the business model tie in or break with pre-existing forms of production (cropping and livestock systems, farming practices, etc.)? Have there been any major changes in production systems?</p> <p>How is production, processing and marketing organised in the project? Is the project based on waged labour (permanent or temporary)? Does it use small businesses, groups or farmers as suppliers? If so, what are their current contractual conditions, how much decision-making power do producers have, and how are risks shared? If there is a service delivery component, what role do service providers actually play in organising the production process and making decisions?</p> <p>What impact could the proposed business model have on gender issues?</p> <p>What changes in the model are envisaged during and after the project? How much leeway will the donor have to move towards more inclusive business models, including joint ventures with local producers? Does this model include a specific place for women?</p>	<p>(i) Voluntary Guidelines – Articles 12.2 and 12.6; CFS-RAI – Principles 3, 4 and 7; OECD Guidelines for Multinational Enterprises (II.3).</p> <p>(ii) Voluntary guidelines – Articles 12.2 and 12.6, OECD guidelines for multinational enterprises (II.3).</p>
» Financial and economic evaluations		
Financial evaluation	<p>Is the project commercially viable? Have financial evaluation tools been used to conduct a rigorous evaluation of the value of the project, and to verify the estimates and calculations presented by the investor?</p> <p>Does the expected rate of return mainly arise from:</p> <ul style="list-style-type: none"> • Profitability of agricultural production? If so, are the projected profits based on technological/management innovations, access to profitable markets, cheap labour, direct/indirect subsidies, etc.? • Capture of rent, such as expected increase in land values, carbon credits, etc.? • Other factors? 	(ii) Financial evaluations of the project.
Economic evaluation: jobs and opportunities for small producers	<p>If the project has significant impacts in terms of population displacement, has an ex-ante economic evaluation been conducted? Did this facilitate an initial comparison between the wealth per hectare that will be created by the project, and that which would be created by the production systems that are already in place or which exist in similar situations (with or without the project)? .../...</p>	<p>(i) Voluntary Guidelines – Articles 8.7, 12.2, 12.4 and 12.6; CFS-RAI – Principles 2, 3 and 4; IFC PS n°2 on employment.</p> <p>(ii) Ex-ante economic evaluations; Contracts and their annexes.</p>

CRITERIA	KEY QUESTIONS	POSSIBLE REFERENCE TEXTS (i) AND SOURCES OF INFORMATION (ii)
	<p>Does the project have a direct/indirect effect on the ability to create new jobs (more than existing jobs that have been destroyed or compromised and which could have been developed with other alternatives)? Are these good jobs with long-term security? Are the investor's job-creation commitments included in the contract? What are the possible gender impacts of these job changes?</p> <p>Does the project intend to include local producers (supplying raw materials, etc.)? If so, are there any indications of how this corresponds with local aspirations, and are these issues specifically and effectively covered in the contract?</p> <p>Is the amount of land that has been acquired proportionate to the amount of land under cultivation? Are there any clauses regarding the recovery of land if part of the allocated land is not put to productive use?</p>	
<p>Economic evaluation: income generation and tax revenues</p>	<p>Does the contract include any expected rental income? If so, is the rent in line with market prices (when available) and indexed to changes in the land market or the viability of the project (production prices, produce from hunting, gathering, fishing, livestock rearing, etc.)?</p> <p>Who receives this income: the State, local governments, rights holders? Does the distribution of income between these different actors seem sufficiently equitable to limit the risk of conflicts?</p> <p>How does the overall tax regime relate to the tax regime for comparable projects in terms of supply chain and geography? If the project benefits from tax exemptions, is this the result of national legislation or were they negotiated by the investor?</p> <p>Does the contract (or relevant legislation) provide safeguards to ensure the State can collect taxes due (e.g. safeguards on transfer pricing, etc.)?</p>	<p>(i) Voluntary guidelines – Article 19.1, OECD guidelines (chapter X - taxation).</p> <p>(ii) Contracts and their annexes, Investment Code, Investment promotion agency documents.</p>
<p>Economic evaluation: development of economic and social infrastructures or services</p>	<p>Does the contract contain specific commitments regarding local development and support for local producers? This may involve:</p> <ul style="list-style-type: none"> • contributing to the setting up of infrastructures; • development activities; • providing inputs for local producers; • strengthening producers' skills, organisational abilities, etc. <p style="text-align: right;">.../...</p>	<p>(i) Voluntary Guidelines – Article 12.4; CFS-RAI – Principles 1 and 2.</p> <p>(ii) Contracts and their annexes; Local planning documents: diagnostic studies, investment plans and programmes.</p>

CRITERIA	KEY QUESTIONS	POSSIBLE REFERENCE TEXTS (i) AND SOURCES OF INFORMATION (ii)
	<p>Does the contract envisage a process of local change, and include specific conditions or incentive mechanisms for such a component? If so, what are the conditions for this activity?</p> <p>Were these arrangements negotiated with local producer organisations and women’s groups in the project area?</p> <p>Which mechanisms are used to finance these infrastructures (direct construction by the enterprise, one-off payment, creating a support fund managed by local organisations or institutions, a system of taxing the enterprise, etc.)?</p>	
Estimated distribution of added value between different actors	How is the added value distributed between workers, local producers, land owners, the enterprise, its financiers and taxation?	<p>(i) Voluntary Guidelines – Article 12.4; CFS-RAI – Principle 2.</p> <p>(ii) Economic evaluations.</p>
» Monitoring economic commitments		
Monitoring and implementing commitments	<p>What are the mechanisms for ensuring that the economic commitments set out in the contract are monitored and implemented (tax implications, creating jobs, including local producers, creating added value at the local level, developing economic and social infrastructures)?</p> <p>Are there effective sanction mechanisms to enable affected parties to seek redress?</p>	<p>(i) Voluntary Guidelines – Article 12.14; CFS-RAI – Principle 10.</p> <p>(ii) Contracts and their annexes, Internal monitoring and evaluation mechanisms within the enterprise.</p>
RED LINES	<ul style="list-style-type: none"> • Project not compatible with the social, economic and environmental objectives of poverty eradication, food security, territorial development and sustainable land and natural resource management. • No economic evaluation of projects that will displace large numbers of people. • Project with a strong speculative component. • Lack of mechanisms for monitoring and sanctioning failure to fulfil commitments. 	

● Social component

These criteria help determine whether investments will deprive local people of their legitimate land rights or undermine their working conditions. This is done by looking at the commitments made by all parties concerned (the formulation and legal value of their commitments; monitoring indicators and mechanisms; clauses dealing with failure to fulfil commitments; modes of monitoring and sanctioning non-compliance, etc.).

CRITERIA	KEY QUESTIONS	POSSIBLE REFERENCE TEXTS (i) AND SOURCES OF INFORMATION (ii)
» Impact assessment		
Impact assessment	<p>Was the social impact assessment (see above) used to develop a plan to manage the social impacts of the project? Does this plan adequately address all aspects identified by the impact assessment? Is it included in the project contract? Are the planned monitoring and sanctioning mechanisms effective?</p>	<p>(ii) Impact assessments; Plan to manage the social impacts of the project; Contracts and their annexes; Operational guidelines of development banks involved in the project (AFD group, ADB, etc.).</p>
» Recognition of local land rights		
Recognising the land rights of people affected by the project	<p>Does the contract recognise the existence of local rights holders? Does it take account of their dependents' situation (women, younger family members, migrants, pastoralists, etc.)?</p> <p>Has the enterprise and/or the government used socio-land surveys to conduct a systematic and impartial review of the rights affected by the project? Does this review take account of the different possible land uses in the territory (agricultural, pastoral, fishing, gathering, etc.), the existence of dependents (women, younger family members, migrants, etc.) and overlapping and seasonal rights? Have these rights and possible overlaps between them been mapped? If so, is this map comprehensible and has it been locally validated by different strategic groups of actors?</p> <p>Are there individual or collective agreements with local rights holders? Have arrangements been made to ensure that different dependents consent to agreements concluded with a single individual (public validation session, minuted family council meeting, etc.)?</p>	<p>(i) Voluntary Guidelines – Articles 3.2, 4.4, 11.8, 12.10, 12.15 and 20.3; CFS-RAI – Principles 5 and 9; Principles 1 and 2 of the United Nations Global Compact; OECD Guidelines (II.2); IFC PS n° 1, 5 and 7; White Paper produced by French Cooperation actors.</p> <p>(ii) Project feasibility studies, Model terms of reference for AFD projects.</p>
Historical issues concerning the acquisition of the land (' <i>passifs fonciers</i> ')	<p>When the investor had already acquired the land before signing the contract relating to the funding application (which could relate to an extension of the activity on other lands), under what conditions did this pre-project acquisition take place? Is it contested by local people, and are there any claims of abuses? Has the investor profited from any advantages associated with a specific historical period (colonial heritage, buying out a public company with huge landholdings during controversial programmes to privatise state-owned companies, temporary government policy of large-scale land concessions, period of political instability or social crisis, etc.)? Is the acquisition .../...</p>	<p>(i) UN Guiding Principles on Business and Human Rights.</p>

CRITERIA	KEY QUESTIONS	POSSIBLE REFERENCE TEXTS (i) AND SOURCES OF INFORMATION (ii)
	<p>still contested by the local people who used to occupy these lands, who may still occupy their periphery? Is there a significant risk of conflict between the company and local people?</p> <p>If the land was acquired by a third party such as the State, and granted back to the enterprise, how did the third party acquire the land? Were any abuses committed against local populations, or claims that such abuses were committed? Is this linked with a specific historical period (colonial heritage, socio-political crisis, recent land reform, etc.)? Are these third-party acquisitions still contested by the local people who used to occupy the land, who may still occupy adjacent lands? Is there a significant risk of conflict between local people and the company that was granted the land?</p>	
<p>Conditions for resettling and compensating local people for expropriated land</p>	<p>Does the project use the minimum land resources needed in order to limit the physical or economic displacement of local people? Have appropriate studies been made of possible alternative solutions? Have these aspects of the project been documented? Have local people been consulted, and do they have the opportunity to participate in the planning and implementation of resettlement programmes?</p> <p>Is the displacement of communities justified in terms of genuine public interest?</p> <p>What conditions do local people need to fulfil in order to receive compensation? How is this compensation calculated? Does it comply with the relevant national regulations or more rigorous international standards? Is it based on a fair estimate of the land value of the acquired rights? If the project results in loss of access to natural resources, have arrangements been made to favour compensation in kind and ensure continued access to these resources? Do the mechanisms that are in place allow people to re-establish their livelihoods to at least the equivalent of the pre-project situation?</p> <p>Who is responsible for this compensation (the enterprise or the State), and what standards are applied? If it is the investor, are there pre-defined ceilings for compensation? If the State or the enterprise fails to fulfil its commitments, what plans are there to ensure that local people will actually receive compensation?</p> <p>Do local communities have the opportunity to access, use and pass through the land covered by the project, and can they do so safely?</p>	<p>(i) Voluntary Guidelines – Articles 16.1 to 16.9; CFS-RAI – Principles 5, 9 and 10; IFC PS n° 5 and 7; World Bank Operational Policy 4.12; International Covenant on Political and Civil Rights (ICCPR); International Covenant on Economic, Social and Cultural Rights (ICESCR).</p> <p>(ii) Resettlement plan or resettlement policy framework; Functional framework defining the participatory process that allows displaced persons to participate in the resettlement process.</p>

CRITERIA	KEY QUESTIONS	POSSIBLE REFERENCE TEXTS (i) AND SOURCES OF INFORMATION (ii)
» Working conditions		
Working conditions	Does the contract require signatories to comply with national labour laws? Is the national legislation compatible with the principles of international labour conventions, especially the International Labour Organisation Declaration on fundamental principles and rights at work?	(i) Voluntary Guidelines – Article 12.4; CFS-RAI – Principle 2; IFC PS n° 2 Principles 3, 4, 5 and 6 of the UN Global Compact; OECD Guidelines for Multinational Enterprises (IV 1-3); International Labour Organisation Declaration on Fundamental Principles and Rights at Work (http://www.ilo.org/public/english/standards/relm/ilc/ilc86/com-dtxt.htm). (ii) Contracts and their annexes.
Monitoring and implementing commitments	What mechanisms are there to ensure that the social commitments made by parties to the contract are monitored and implemented? In particular, what measures has the State taken to enforce these commitments, especially those regarding recognition of local land rights, conditions for resettling and compensating local people for expropriated land, and working conditions? What mechanisms have been put in place to enable affected parties to seek such recourse?	(i) Voluntary Guidelines – Articles 12.14 and 26.1-26.5, IFC PS n°1 and 5.
RED LINES	<ul style="list-style-type: none"> • Failure to produce a social impact assessment and/or a plan to manage the social impacts of the project. • Failure by the project to recognise local people’s land rights (main rights holders and their dependents). • Previous land acquisitions involving the use of force or abuse, or which are still contested by local people. • Expropriations that are not justified in terms of public interest. • Derogations from labour laws. 	

● Environmental considerations

These criteria consider the impact of investments on natural resources, and should make it possible to ensure that environmental considerations have been duly factored in. They look at the commitments made by each party to the contract: the formulation and legal value of their commitments, monitoring indicators and mechanisms, non-compliance clauses, means of monitoring and sanctioning non-compliance, etc.

CRITERIA	KEY QUESTIONS	POSSIBLE REFERENCE TEXTS (i) AND SOURCES OF INFORMATION (ii)
» Impact assessment		
Environmental impact assessment	<p>Was the environmental impact assessment (see above) used to develop a plan to manage the environmental impacts of the project? Does this plan adequately address all the issues identified by the impact assessment? Is it incorporated into the contractual aspects of the project? Are the planned mechanisms for monitoring and sanctioning effective?</p>	<p>(i) Environment Code; Forest Code, Water Code.</p> <p>(ii) Impact assessments and plans to manage the environmental impacts of the project; Operational guidelines of development banks involved in the project.</p>
» Equitable access to natural resources		
Conditions of natural resource use	<p>Does the contract include clauses guaranteeing reasonable and sustainable use of natural resources?</p> <p>Does the contract give the investor priority conditions of access to certain resources (for example, guaranteeing specified amounts of water), and if it does, what are the possible implications for other resource users?</p> <p>Does the contract include a requirement to comply with national legislation on the environment and protected areas?</p> <p>Does the contract stipulate that the project must avoid or reduce negative impacts on human health and the environment by reducing or avoiding pollution generated by its activities?</p> <p>Does the contract anticipate that the project will reduce its greenhouse gas emissions and contribute to adaptation to climate change or mitigation of its effects?</p> <p>Does the contract stipulate that the project must respect international standards such as the IFC environmental, health and safety guidelines, or those associated with a particular supply chain, such as the Roundtable of Sustainable Palm Oil (RSPO)?</p>	<p>(i) Voluntary Guidelines – Articles 4.3 and 12.12; CFS-RAI – Principles 6 and 8; IFC PS nº 3 and 6; Principles 7, 8 and 9 of the United Nations Global Compact; IFC EHS Directives; OECD Guidelines (V.4).</p> <p>(ii) Contracts and their annexes.</p>
» Environmental safeguards		
Project reversibility	<p>Can the project be reversed, within a reasonable timeframe?</p> <p>If the project is called off, does the contract stipulate that the enterprise will be responsible for remedying its main environmental impacts? What mechanisms are envisaged to ensure that these arrangements are implemented?</p>	<p>(i) Voluntary Guidelines – Article 16.5, Environment Code.</p> <p>(ii) Contracts and their annexes, Precautionary principles adopted by the enterprise.</p>

CRITERIA	KEY QUESTIONS	POSSIBLE REFERENCE TEXTS (i) AND SOURCES OF INFORMATION (ii)
Water resources	<p>Could the project exacerbate competition over access to water, given the possible fluctuations in the availability of water resources associated with climate change? If so, how does the project setup identify and address these impacts?</p> <p>Were public institutions responsible for water management involved in approving the project? Are there effective safeguards to protect third parties' access to water (rights, institutions)?</p>	<p>(ii) Impact assessments, Most recent studies estimating the availability of water; Policy and strategy documents of agencies responsible for developing/managing irrigable areas.</p>
Clauses applicable in the event of environmental damage	<p>Does the contract or relevant legislation effectively manage remediation and compensation in respect of environmental damage (preparing contingency plans to prevent, remedy and control possible damage to the environment and local human health, commitments to collaborate with the local population in the event of an emergency, alert the authorities promptly and cover the costs of compensating local people and the State if the enterprise is found liable, etc.)?</p> <p>What kind of recourse is planned in the event of environmental damage?</p>	<p>(i) Voluntary Guidelines – Article 12.4; CFS-RAI – Principles 6 and 10; UN Principles – Article 22; IFC PS n°1 and 6; OECD Guidelines on multinational enterprises; Environment Code.</p> <p>(ii) Contracts and their annexes; Precautionary principles adopted by the enterprise.</p>
Monitoring and implementing commitments	<p>What mechanisms exist to ensure that the environmental commitments made by each party to the contract are monitored and implemented?</p> <p>In particular, what measures has the State taken to enforce these commitments, and especially to ensure that commitments regarding the conditions for natural resource use and possible environmental damage are respected. What mechanisms have been put in place to enable affected parties to ask for such measures to be taken?</p>	<p>(i) Voluntary Guidelines – Articles 12.14 and 26.1-26.5; CFS-RAI – Principles 6 and 10; IFC PS n°1.</p> <p>(ii) Contracts and their annexes; The enterprise's own monitoring and evaluation mechanisms.</p>
RED LINES	<ul style="list-style-type: none"> • Failure to produce an environmental impact assessment and/or plan to manage environmental impacts. • Investor granted priority access to water which is detrimental to local users where water resources are limited and fluctuating. • Serious risk of irreversible environmental damage (pollution of ground or surface water, soil erosion, destruction of wetland areas of ecological interest, proliferation of invasive species, etc.). 	



Guide to due diligence of agribusiness projects that affect land and property rights

The recent surge in large-scale land acquisitions has prompted the international community to launch numerous initiatives to deal with this phenomenon. So far, the greatest progress has been made in 2012 with the endorsement by the Committee on World Food Security (CFS) of the Voluntary Guidelines on the Responsible Governance of Land, Fisheries and Forests in the Context of National Food Security. The main focus for the French Cooperation in this exercise was establishing analytical tools and internal procedures to ensure that these principles are practicable and are respected in all activities supported by French institutions.

This publication draws on the work undertaken by members of the 'Land Tenure and Development' Technical Committee set up by AFD and MAE. It presents an Analytical Framework and a Guide that each institution can now appropriate and use to change their internal project evaluation procedures.

The holistic approach used to develop these tools looks beyond the land tenure aspects of projects. It also considers their social, economic and environmental dimensions, allowing potential donors to focus on matters that are sometimes overlooked, examine the economic considerations, analyse how the added value generated by a project is distributed between actors and fully factor in

social and environmental considerations. This contextualised analysis takes account of the overall land governance framework and dynamics of change in agrarian systems, using a historical approach to better understand the current situation. As such, it represents an important step to promote evolution in the standards currently used by international cooperation agencies.

These tools also use a dynamic approach that places particular emphasis on contractual arrangements for investment projects and on the processes through which those arrangements are developed. In this context, transparency is framed not simply as a matter of publishing contracts, but as something to be taken into account throughout the whole process – from publishing environmental and social impact assessments to consulting local populations and conducting and concluding the final negotiations.

The challenge for the French Cooperation was being able to translate very general texts into practical tools. This work is now being taken forward within the AFD Group, and feeding into reflection by other technical and financial partners and groups of actors involved in negotiating or monitoring agribusiness projects that affect land holdings. In doing so, the French Cooperation is helping promote and facilitate more transparent governance of land tenure.

The 'Land Tenure and Development' Technical Committee is a working group composed of French Cooperation experts, researchers and decision-makers. Since its creation in 1996 it has worked in conjunction with numerous French and international actors to support the French Cooperation in developing strategies and supervising actions on land issues. In addition to the White Paper by French Cooperation actors (2009), it has produced an analysis of large-scale land appropriations (2010) and many other works and tools intended to improve our understanding and efforts to address the challenges associated with land issues in developing countries. Full versions of all these outputs can be found on the 'Land Tenure and Development' portal

(www.foncier-developpement.fr), which the Committee set up to provide access to accurate and up-to-date information on the sector.

Gret is a French development NGO that tackles poverty and inequality through interventions in the field and in policy formulation. It has supported land policy actors through different activities over the last 35 years, and plays a leading role in the scientific work done by the 'Land Tenure and Development' Technical Committee (www.gret.org).

IIED is a policy research institute that works at the interface between development and the environment. It has played a leading role in documenting how large-scale investments are affecting local users' rights, and promoting

a rethink of the national and international legal frameworks regulating agricultural investments (www.iied.org).

AGTER is an international association created under French law that works on issues relating to the governance of land, water and natural resources. It also runs an international network whose members discuss and reflect on possible proposals and alternatives to the current challenges posed by natural resource management (www.agter.asso.fr).

The Gret-IIED-Agter consortium was appointed by the 'Land Tenure and Development' Technical Committee to lead the reflection for this component on transparency and contract negotiation, and to produce this document.

