

RSB – ROUNDTABLE ON SUSTAINABLE BIOMATERIALS
RSB Guidelines for Land Rights

**Respecting Rights, Identifying Risks, Avoiding Disputes and Resolving Existing Ones, and
Acquiring Lands through Free, Prior and Informed Consent**

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Note on the use of this document

These guidelines are designed to help operators identify existing rights to land (formal and informal) in the area of proposed operations, and to identify potential risks to the operation and impacts to rights-holders. They are also designed to help operators negotiate with rights-holders and users in line with their right to free, prior and informed consent (FPIC), both in land acquisition and for resolving disputes over land in both proposed and existing operations, in order to help operators avoid and resolve such disputes. The guidelines are intended to guide the operator to apply good practice, minimise risks, respect rights and avoid disputes in relation to land.

These guidelines may also be used by the auditor to gain a better understanding of key aspects to be considered during certification process.

The guidelines are organised into the following sections:

Section 1: Carrying out baseline land rights assessments. A summary of the recommended procedures for identifying land rights and land users in the area of a proposed operation.

Section 2: Implementation guidelines for avoiding risk in land acquisition. A summary of the requirements under the standard and explanation of the various ways by which risks are identified and disputes are avoided.

Section 3: Respecting the right to free, prior and informed consent. A summary of the requirements under the standard and explanation of what operators should do to respect this right.

Section 4: Resolving existing land disputes in line with FPIC. An explanation of how disputes can be resolved retrospectively in line with the right to FPIC.

Annex 1: Key definitions

This document is not a basis for verification of compliance or audits of operators. No aspect of this document is normative. It is intended to advise operators on best practice.



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1. Carrying out a baseline land rights assessment

Before any land acquisition can occur for any project, the operator must first make a detailed assessment of the lands to be acquired to determine who are the existing rights-holders and land users whose interests must be taken into account, what is the extent of the lands over which they have rights which overlap the area of the proposed project, and what properties and improvements there are on the land which must also be taken into account or acquired. This section summarises the steps to be undertaken, while the following sections set out how risks in land acquisition are assessed and how lands must be acquired through ‘willing seller/willing buyer’ processes that respect their right to give or withhold their free, prior and informed consent to the proposed transfer of rights and uses. No lands may be acquired by RSB-certified operators without these peoples’ consent.

Because the circumstances under which lands are acquired for projects is so variable, the exact sequence of actions to ensure just land acquisition will also vary. In some situations it may be advisable to carry out a general survey of risks (as set out in Section 2) before undertaking a more detailed land rights assessment.

- ➔ Where there are regular land markets, tenures are secure, legalised and registered in land cadasters, where landowners are not poor or marginalised, or land acquisition by the operator is not opposed by local communities, then land may be acquired through normal methods of purchase and/or leasing.

However, in defined circumstances, the RSB procedures require that a **baseline land rights assessment** is carried out prior to land acquisition.

1.1 Knowing when a baseline land rights assessment is required

A **baseline land rights assessment** is required in certain circumstances because the lands of poor, illiterate or otherwise marginalised people with weak, informal or customary tenures, notably indigenous peoples, are often not adequately recorded or protected by statutory laws and official systems of land allocation, even though these areas are important for these peoples’ subsistence and livelihoods.

Companies thus need to take extra measures, beyond those explicitly required by the law, to ensure that they do not acquire or develop lands unfairly, without the people’s consent, or in ways which negatively affect current land users.

This baseline land rights assessment is required so that lands can be acquired by the operator in conformity with the RSB standard. Careful attention to the following steps helps to ensure that operations are certifiable, and disputes with land users and rights-holders are avoided. The screening tool guides operators through a number of questions to assess whether a baseline land rights assessment is required.

1.2 Identifying rights-holders and land users, and determining rights and uses

It is critical to ensure that all relevant parties are involved in a baseline land rights assessment. This will include undertaking special measures to ensure the participation of women, lower caste members, poorer sections of communities and other marginal groups. This is required to ensure that the surveys and maps present information about all relevant land rights and land uses, and to ensure that the wider community is satisfied that due process has been followed.

A first step in such an assessment is to [determine who are the rights-holders and land users](#) in the overall area where the operator proposes to acquire or develop lands for the operation. This will require carrying out a straightforward but detailed census in the local communities to identify the names and numbers of the people involved. This census needs to be complemented by field surveys and direct observation, combined with simple questionnaires with community members, to ascertain what uses people are making of the lands in question and who has rights to which areas. To reduce costs and avoid overburdening communities with too many surveys, it may be advisable to combine this survey with the household survey recommended for areas of food insecurity, see RSB-GUI-01-006-01.

Table 1 sets out a simplified typology of land uses and rights-holders which should be born in mind when carrying out this survey. The table's right-hand column emphasises the typical risks and uncertainties which can be expected in dealing with rights-holders and users.

1.3 Clarifying who has which rights

As Table 1 highlights, in any one area rights-holders are likely to be highly differentiated both in terms of the kinds of rights they hold and over exactly which areas they exercise these rights. For example, in Amazonian indigenous communities, it is common for a cluster of communities of one (or even several neighbouring) ethnic group(s) to hold collective rights to their overall territory. Within such a territory, individual villages may discern zones of preferential rights for the use of villagers, while within these zones families may hold their own rights to specific farmlands and fallow areas, to hunting grounds, fishing areas or specific and valued trees. This is what is meant by 'nested' rights. Similarly in Ghana, so-called 'stool and skin lands' – customary lands under the control of chiefs who traditionally dispense justice sitting on stools or skins – are vested in the chief, yet parcels within these lands are held by individuals or families, whose rights also need to be observed. In acquiring lands, it is essential to take account of all these different rights and not assume that a blanket permission to enter a territory provides the operator the right to use and access the whole.

Table 1: Indicative typology of rights holders and land users, emphasising risks

Owners / right-holders / users	Common tenurial challenges and risks
State, Crown or public (national or local)	May be un gazetted, may include multiple claimants and users
Individuals	Land titling and land cadasters may be incomplete, many rights
Tenants	May have different interests from the owners; may have insecure / undocumented agreements with owners

Owners / right-holders / users	Common tenurial challenges and risks
Corporations	May have acquired lands through undue influence. Leases and concessions may overlap other claimants, rights-holders and users
Cooperatives and trusts	May have weak capacity to administer lands
Common property associations	Often not recognised by the State or may have weak governance and downward accountability to commoners
Customary rights-holders and indigenous peoples	Usually complex and multi-layered; often not recognised by the State; customary laws and tenures may be weakened by outside interference; representation may be contested or divided by imposed institutions
Customary users	Often women, foragers, fisherfolk and lower-caste sections have different interests from customary owners and rights-holders
Extensive land owners or users (may include pastoralists, shifting cultivators, hunters, foragers and collectors)	Land rights and uses may be invisible to other stake-holders and may be subject to restrictive policies, laws and regulations
Squatters	May be considered illegal or the legality of their occupation of lands under laws recognising squatters' rights may not be regularised
Seasonal users and gleaners	Rights and interests may be overlooked by other parties, typically poor and politically marginal
Sharecroppers	May have different interests from the owners; may have insecure/undocumented agreements with owners
Landless poor / agrarian reform subjects	May have unclear claims to identifiable areas
Labourers and farm-workers	Often poorly represented and excluded from decision-making but directly implicated by changes in production systems or land transfers

1.4 Establishing the extent of land rights

Because such areas are rarely adequately registered, it is strongly advised that the census, survey and questionnaire are complemented by participatory mapping exercises to determine the full extent of the rights areas which overlap with, and which neighbour, the area that the operator is seeking to acquire or develop. Geomatic technologies, like Global Positioning Systems, are now relatively cheap. Using these it can be quite quick and simple to work with community members to map the boundaries of the community's areas and then survey which areas overlap the area for the proposed operations.

A first step may be to select a joint team of community representatives who will oversee RSB-GUI-01-012-001 – Version 3.0



community involvement in the mapping and who may be accompanied by company observers. The team can then use the GPS devices to survey the boundaries of community lands and establish where there is overlap between these lands and the areas where the company is interested in establishing its operations. More detailed mapping of the areas of overlap can then be undertaken in order to establish exactly who the rights-holders in these areas are, and what the current and historical land uses and cultural values of the areas are.

Achieving clarity about who has which rights to which pieces of land is crucial, not just for buying or otherwise acquiring land, but also for ensuring the return of leased lands to the correct parties at the expiry of any lease.

1.5 Establishing the land users and land improvements

As noted, rights holders and land users are often different persons or groups, and it is thus important to survey not only who has rights to the lands but also who is actually working and using the lands. This needs to be an explicit part of the land survey. The RSB standard requires the participation and consent of land users as well as rights-holders in acquiring lands, so the failure to identify and engage with land users could disqualify certification.

Also integral to the land survey is a careful assessment of any improvements and properties attached to the lands to be acquired, for which payment of compensation may be required. Such improvements include but are not limited to: crops and trees, bundling and drainage, terracing and walls, hedges and ponds, irrigation installations and dams, firebreaks and stream channels, bridges, culverts and roads, buildings and other structures, vegetation clearance and management.

1.6 Identifying legal status and legal implications of land use changes

The RSB standard requires that operators respect both formal and informal rights to land, including land use by persons without formal or even customary rights to land. The RSB also requires that 'operators shall comply with all applicable laws and regulations of the country in which the operation occurs and with relevant international laws and agreements' (Principle 1, Criterion 1 RSB-STD-01-001). In some countries, national laws are not fully consistent with the countries' international legal obligations. As some countries do not adequately recognise customary rights and, by definition, do not recognise informal rights, difficulties can be expected in reconciling these requirements.

The RSB standard makes requirements beyond those required by the domestic laws of most countries. In such cases, it is nevertheless possible for operators to go beyond the limited requirements of national law and acquire land in line with the requirements of the RSB standard and international law:

- by recognising customary rights, informal rights and uses, and
- by refusing to develop lands, even when permitted by government, without these peoples' free, prior and informed consent.

However, in some circumstances, it may be that national legal processes for the allocation of land necessarily lead to violations of communities' informal and customary rights and deny their right to free, prior and informed consent. Operations developed in these circumstances will not be certifiable by the RSB.

The baseline land rights assessment should therefore include a careful legal review of the status of the land in question. Such a review should determine:

- whether land is considered by local government agencies to be State, public, private or customary land;
 - which jurisdictions the land falls within (e.g. administrative unit, conservation area, forest reserve, other special designation);
 - what provisions there are to recognise and protect local people's rights and interests in land; and
 - how local people with rights and interests in the land in question will participate when State agencies allocate land for development.
- ➔ The assessment should also make clear what legal process will be used by the operator to acquire land within the area and what if any legal consequences this will have on any informal or customary rights.

This information must be shared with the local rights holders and land users, in a language and form readily intelligible by them, as part of the process of informing them of the implications of the proposed operation.

1.5 Involving all interested parties

Once the census, surveys, legal analysis and participatory mapping have been carried out, community meetings and wider consultations should be held to verify that these assessments are acceptable to all parties. Records should be kept of these meetings in languages that community members can understand, and copies should be shared with community leaders.

Time invested in gaining widely shared approval of all these steps will substantially assist the operator by reducing the chances of conflicts and disputes (see Section 2) and laying the groundwork for an adequate land acquisition process based on free, prior and informed consent (see Section 3).

1.6 Using complementary sources of information

The baseline land rights assessment needs to be based principally on participatory census, surveys, legal analysis and mapping, as set out above. However, the operator should also seek to collate as much information as possible from other sources to complement the field assessment. Sources for such information include:

- Official maps and surveys
- Land cadasters
- Land tax records
- Land use planning and land management maps
- Ethnographic surveys
- Local academic research
- Laws and regulations as well as relevant court judgments
- Local NGOs



1.7 Summary

The RSB standard seeks to protect the interests of land owners, rights-holders and land users. Rights-holders and land users are often not the same persons, and there is a compelling need to protect informal and customary users, especially women.

Remember to:

- Carry out detailed consultation with rights-holders
- Carry out field surveys with land users to identify the lands they use and how they use them
- Identify the full range of both rights-holders and land users
- Get information from the land agency about who holds registered titles and provisional tenures and who is paying land tax (often not the same persons)
- Review cadasters (which are often incomplete)
- Review land use planning maps (which are often contradicted by actual land use)
- Interview local NGOs (they may have more information than State agencies, but any information needs to be cross-checked)
- Carry out detailed participatory mapping where customary rights and informal use are notable or extensive, to ascertain who uses and who has rights to the land being acquired
- Keep in mind that all land may have multiple users and multiple rights-holders

Suggested key indicators of an adequate baseline land rights assessment:

- Census of community members and numbers
- Notes or report of field survey of land rights-holders and land uses
- Report derived from questionnaire about land rights uses and land uses
- Documentation of the specific areas held by land rights-holders that overlap or border proposed operation
- Analysis of legal status of lands and the implications for rights holders of proposed acquisition
- Maps of customary and informal tenures and land uses
- Affirmation from community members (determined through direct, private and personal interviews) that the census, survey, map and legal assessment were undertaken with adequate participation

2. Avoiding risks in land acquisitions: Implementation guidelines

Table 2: RSB Principle 12 and Criterion 12a

Principle 12: Operations respect land rights and land use rights
<p>Criterion 12a: Existing land rights and land use rights, both formal and informal, shall be assessed, documented, and established. The right to use land for operations shall be established only when these rights are determined.</p>
<p>Minimum requirements:</p> <ul style="list-style-type: none"> Where the screening exercise of the RSB impact assessment process reveals a negative impact to existing land rights and land use rights by operations, the operator shall conduct a land rights assessment (RSB-GUI-01-012-01). Land under legitimate dispute shall not be used for operations until any legitimate disputes have been settled through free, prior and informed consent and negotiated agreements with affected land users.

2.1 Identifying impacts to land rights

Operators are expected to take special care in land acquisition where land tenures are weak, where land for the proposed operations was previously used by rural poor people and/or indigenous people for livelihoods or subsistence (including permanent fields, shifting agriculture and fallow, and collective use of forests and rangelands) and where people are unlikely to readily understand the future implications of their choices for customary land uses and income generation.

- Operators must also be alert to the fact that resistance may be expressed in culturally informed ways that may not be obvious to people from other cultures where contestation and frankness are expected patterns of behaviour.

In some societies (e.g. Asian societies) disagreement is often expressed through subtle and indirect means such as avoidance, silence, absence from meetings or indirect complaints passed through third parties. Quiet opposition of this kind may actually indicate far more serious disapproval than an outspoken statement of opposition from a European, which may in fact mean that the complainant just wants clarification of the options rather than being an outright rejection. Be culturally alert! If you need help to interpret local cultural norms, include a specialist.

2.2 Identifying stakeholders and building consensus

For the purposes of gaining general sanction from all these stakeholders for a proposed operation, the RSB's Principle 2 Criterion 2b requires a consensus which is defined as "*an agreement between all stakeholders that arises out of a collaborative effort to find a solution that addresses the interests of all the stakeholders. Consensus in the RSB standard is defined as the absence of sustained opposition. In cases where it is not possible to obtain unanimity (complete agreement), 'overwhelming agreement' should be considered the objective.*"

The guidance on how to identify stakeholders and build consensus is not repeated here, but can be **selectively** applied to address the more specific challenge of land acquisition, which requires a separate procedure under Principle 12.

Consensus through a multi-stakeholder process does not substitute for a negotiated agreement obtained from rights holders and land users in accordance with Principle 12, Criteria 12a and 12b, respecting their right to free, prior and informed consent. Section 3 below expands on how to respect the right to FPIC.

2.3 Identifying risks

The main purpose of identifying rights holders and land users in the proposed operational area is to set up a fair basis for negotiations over land, and then acquire such lands as needed through a process that respects their right to give or withhold their free, prior and informed consent. However, the same process should also be used to identify if the area for the proposed operation is an area of high risk in terms of land acquisition and investment. Section 1, above, sets out the process to be followed in cases where a **baseline land rights assessment** is required.

At the same time as consultations are being undertaken with the full range of stakeholders in line with Principle 2 and to determine water rights in line with Principle 9, and then with land rights-holders and land users in line with Principle 12, due diligence should be applied to assess the land situation from other sources. These sources may include:

- Government land and natural resource agencies
- Government bodies responsible for vulnerable groups, ethnic minorities and indigenous peoples
- Development agencies
- Academic literature
- Ethnographic surveys
- Information from local museums
- NGOs specialising in social justice, indigenous people, land and natural resource matters
- Human rights agencies (including international agencies)
- Legal specialists in land issues knowledgeable of the local laws and current situation
- Legal advisers specialising in land and human rights
- Press reports and media briefings
- Internet searches using key words
- Databases on levels of corruption and illegality

If either the stakeholder consultations or the due diligence uncovers high risk aspects, then the participating operator (PO) should re-assess the investment options and only go ahead with land acquisition (in compliance with Principle 12) after much more detailed land surveys are carried out and after stakeholder consultations provide consensus (in line with Principle 2). Figure 1 illustrates the decision tree, while Table 3 summarises some of the main sources of information that can be used. All other things being equal, it should be noted that areas where land prices are low tend to be areas of higher risk, so low land prices may in themselves be an indication that not all is as it should be.

Figure 1: Identifying and avoiding high risk areas

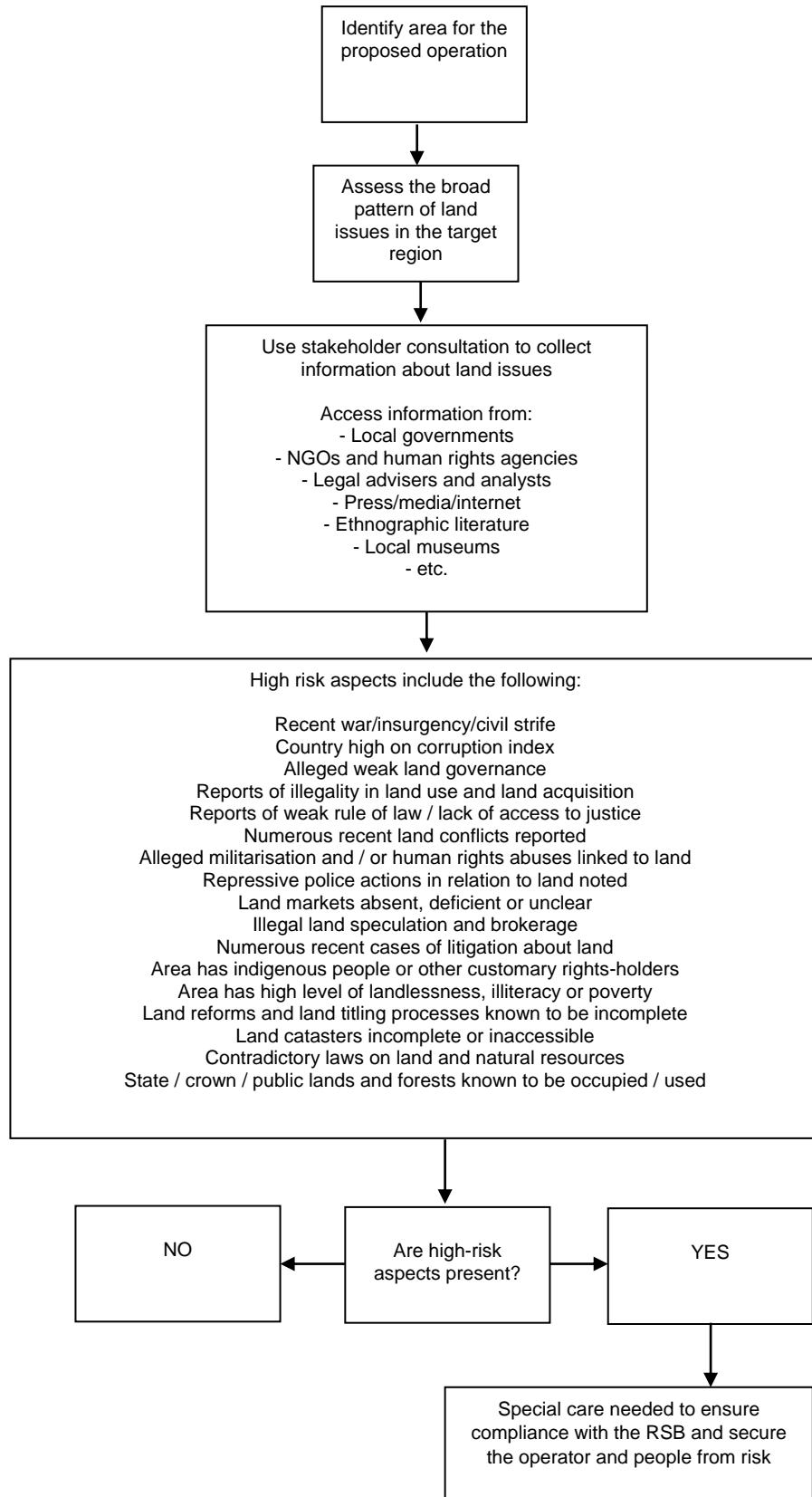




Table 3: Sources of information about risk factors

Risk factors	Likely sources of information
Recent war or insurgency or civil strife	Media, internet searches.
Country high on corruption index	Transparency International corruption index
Weak governance related to land	Development agencies, land tenure specialists, NGOs, World Bank Governance Index
Illegality in land use and land acquisition	Media, NGOs, internet searches
Rule of law weak / lack of access to justice	Human rights NGOs, internet searches, UNDP reports
Numerous recent land conflicts	Media, NGOs, internet searches
Militarisation and/or human rights abuses linked to land	Human rights NGOs, national human rights commission reports, UN reports
Repressive police actions related to land	Media, NGOs, internet searches
Numerous recent cases of litigation about land	Media, NGOs, legal advisers, court reports
Area has indigenous peoples or other customary rights-holders	Indigenous peoples' organisations, NGOs, internet searches, ethnographic surveys
Area has high levels of landlessness, illiteracy and/or poverty	National census data, RSB food security screening tool
Land reforms and land titling process incomplete	Development agencies, NGOs and state land reform agencies
Land cadasters are incomplete or inaccessible	NGOs and development agencies, land tenure specialists
State/Crown/public lands and forests occupied or used	NGOs and state agencies, internet searches
Land markets absent, deficient or unclear	Development agencies, NGOs and land tenure specialists
Illegal land speculation and brokerage	NGOs and land tenure specialists
Contradictory laws on lands and natural resources	NGOs and legal advisers, internet searches

2.4 Dealing with overlapping jurisdictions, rights and uses

In assessing risks in land acquisition, it is imperative that operators recognise that there are likely to be multiple layers, both formal and informal, of jurisdictions, of rights-holders and of users, all of whom may be different. Land may be the subject of many national and local authorities. Multiple line ministries and specialist agencies will have authority over land and resources and these may be regulated by different policies, laws and regulations. In areas of poor governance or where corruption is prevalent, all laws relevant to land transactions are apt to be abused by civil servants for rent-seeking (i.e. taking bribes to give, withhold or falsify needed papers and permits). Poor maps exacerbate the problems of securing clear permissions. In addition, on purpose or by mistake, multiple permits may have been issued to

the same piece of land.

- Where there are many rights-holders and land users whose rights and interest are not recognised in national laws or regularised by national administrative procedures, then there will often be **multiple layers of rights-holders with claims to the same piece of land**.

Some of these multiple layers of rights are sanctioned by customary law. Some are not (see 11.3 below). Customary systems themselves may ignore or deny the rights of some sections such as women, subordinate tribes and castes, and other land users. All these actors and their rights, interests and authorities need to be taken into account in making land transactions.

2.5 Dealing with absent land markets

Ensuring equitable land transactions is especially difficult in places where land markets have historically been weak or absent. Land markets may not operate for a number of reasons. They may be prohibited by custom. The lands in question may be protected by state laws designed to insulate vulnerable peoples from sharp practice. In India, for example, tribal lands cannot (officially) be bought and sold on the open market. In Sarawak, only 'natives' may carry out land transactions in areas classed as Native Area Land.¹ In much of Latin America, indigenous peoples' titled areas are inalienable. In North America, areas of 'native title' can only be ceded to the Crown or federal government. Lands may also be insulated from markets by sectoral laws which set aside lands for special purposes like conservation, forestry or watershed catchments. In a few countries, communist policies also prohibit private land ownership and the operation of land markets. More commonly, land markets are absent from areas where modern infrastructures have yet to be developed, meaning investment has been absent or limited.

Where markets are absent, land values are often - falsely – assumed to be low, when in fact it might be more accurate to say that they are just unrealised. In such circumstances, making a fair payment for the acquisition of lands for which transactions have not previously or have rarely occurred, is difficult.

The fact that open land markets are prohibited does not mean lands are not available for use, as lands may be acquired instead through lease, rental, concession, share-holding or other options that avoid the buying and selling of land or which circumvent the particular prohibition in place. But the lack of land markets does mean that offering a fair deal for using land becomes difficult for a number of reasons, including:

- Prior occupants will probably be unaccustomed to land transactions (and may not even know how to use cash or invest payments).
- They may be unaware of the legal implications of land deals.
- Local institutions may lack key mechanisms: for making rights-holders accountable, for ensuring inclusive participation, and for ensuring transparency.
- People may be tempted to accept even small cash offers for use of their lands as they undervalue or take for granted their current systems of land use, livelihood and social

¹ The State of Sarawak has got around this protection by legally recognising land agencies and land boards as having the legal personality of 'natives'

systems but which in fact may be undermined by the land transfer.

- Communities who are unfamiliar with the ‘willing buyer/willing seller’ principle and FPIC, may feel obliged to surrender land ‘freely’ when government agents or security forces are present or just because the operator has permits from the State which they have learned to fear, respect or be subordinate to.
- Communities with unrecognised rights who have experienced a long history of land grabbing may confuse dealers offering (albeit nugatory) payments for lands as fair, and accept the offers accordingly. They may only realise later that they have been cheated out of fair payment for their lands, or discover that what they assumed was a lease agreement with a company is treated by the State as a land sale.

Operators are warned that the fact that land prices or rents are low, and that communities apparently accept such deals, does not mean that they are bargains.

- ➔ Frequently lands acquired in such circumstances are hidden time bombs, and later resentment of the poor deal explodes into land disputes and even bitter conflicts, when owners or their descendants realise that they have, from their point of view, been unfairly made to relinquish rights and undermine their livelihoods and identities.

Land development in areas of customary tenures is particularly liable to cause problems where customs ascribe personal or family rights to lands within customary territories. Weakening of customary institutions, the influence of the cash economy and surrounding land markets lead to situations where communities accept, or do not prevent, families with such rights from selling or leasing their farmlands to developers. Two problems arise: the families who have transferred lands then seek to develop replacement farms in the reduced area of collective rights putting unsustainable pressure on the remaining lands; and at the same time, those families who do not sell their holdings sometimes find themselves living in isolated ‘enclaves’ within transformed landscapes, which make their own farms or agro-forestry systems socially and environmentally unsustainable.

2.6 Dealing with land speculation, land dealers and spurious claims

Whenever land values rise, and laws and institutions do not prevent it, land markets tend to intensify and rates of transaction increase. This is considered a healthy and desirable aspect of liberal economics. However, the process can be highly problematic in areas where, previously, land markets were absent or quiescent. Sudden increases in the number of land transactions can lead to situations where:

- Community institutions and state agencies alike are unable to ‘scale up’ and adapt to the rapid increase in transactions
- Rapid turnover of land can lead to the marginalisation of those whose rights and uses of land are unclear, unrecognised or nested
- Unscrupulous land dealers emerge who buy and sell lands just coming into markets without due regard for rights and laws²
- Land is brought into the market by land speculators through illegal or contested means such as land clearance, forest conversion, corrupt sales, and unfair purchases or outright take-overs of community lands.

² Li Ping and Nielson 2010.

- ➔ Obviously, acquiring land in such circumstances can put investors at risk as they are, in effect, also acquiring the land conflicts, illegalities and violations of rights undertaken by the speculators.

It is imperative that operators acquiring land, especially in high risk areas, check the history of land deals for the parcels or areas on offer to make sure that the land they are being offered is legitimate and not encumbered with disputes. This problem can arise both when the intermediaries are private operators and when government agents are tasked with freeing land of claims in order to sell or lease them on to third parties.

Another challenge where land values are rising due to incoming investment is the proliferation of false claims, which can be easily introduced into land markets when land titles are unclear or ownership is contested, where government land registers are incomplete, poorly managed, and/or where records are open to manipulation. In such circumstances, distinguishing between just claims and assertions of rights and spurious claims can be very difficult. Clarifying legitimate from spurious claimants usually requires detailed, inclusive, participatory mapping of customary rights and then inclusive discussions with different sets of rights-holders and/or repeated meetings with different officials. On the other hand, operators should guard against the temptation of assuming that any subsequent claimant requesting compensation for any land already 'acquired' is making a spurious claim. As noted, land may be encumbered simultaneously with multiple layers of rights and subject to multiple uses, so it is common that in acquiring land all these claimants have to be dealt with, separately or simultaneously.

A common phenomenon which may be experienced by the operator, which is much harder to deal with, is when the same rights-holders, having from the operator's point of view already concluded a negotiated agreement, return to the operator to claim additional compensation. There may be a number of reasons for this behaviour, some of which are legitimate if, for example, the people find that lands have been ceded without the legal consequences being made known to them³ or without them appreciating the longer-term social, economic and environmental impacts. These challenges may arise from people's unfamiliarity with land markets and can be met by ensuring a much better provision of information to rights-holders in land negotiations.

It is also common in situations of rising land values and inward investment in land development that previously quiescent land disputes are again activated by claimants who feel their rights are being affected. Distinguishing such claims from false and speculative claims requires detailed land surveys – as recommended in Section 1 - but in some cases may require adjudications by customary tribunals or local courts.

³ For example, studies in Indonesia show that most oil palm companies negotiating land deals with customary law communities don't inform them that under the Basic Agrarian Law (No. 5/1960) at the expiry of a company lease such lands revert to the State and not to the customary owners who have relinquished their rights. In effect, while the communities usually think they are *temporarily* leasing their lands to the palm oil company, by law they are *permanently* extinguishing their rights. Since this matter was pointed out, in West Sumatra a local law has now been passed which allows for leased lands to revert to customary owners. This is not the case in the rest of Indonesia. Few communities are aware that under the Plantations Act, leaseholds, originally for 35 years, can also be extended by the company subject to government approval for as long as 120 years without reference to the community.

2.7 Dealing with inconsistencies between national and international laws

Most countries have signed international human rights treaties which assure citizens and communities of fair treatment by the State. Such rights may be brought into law by the fact of ratification, through the Constitution or through specialist acts of the legislature. Countries are also bound to uphold international human rights laws by virtue of their membership of the United Nations.⁴

International human rights regimes guarantee a variety of rights including basic human rights, the right to property, and rights to basic resources such as water and food. In the case of indigenous peoples, international law - through specialist conventions (such as ILO Conventions 107 and 169), and the jurisprudence of international human rights courts and treaty bodies - has also clarified their enjoyment of collective human rights as peoples and constituent communities, notably in this context their rights to their customary land and territories. These rights to land and territories are recognised as existing independent of any act of the State, and state efforts to extinguish such rights have often been judged to be null and void for not having observed due process or respected other rights. These rights have been consolidated in the United Nations Declaration on the Rights of Indigenous Peoples adopted by vote of the General Assembly in 2007.

It remains the case that the land laws and policies of many countries are inconsistent with these international laws. While it is a laborious process to get treaty bodies and human rights courts to adjudicate on any particular situation, information on prior cases in the country or sub-region in question is readily available on the internet.

- ➔ Operators considering acquiring lands in countries with indigenous peoples and other groups asserting customary rights should scan this jurisprudence and related literature to clarify if the area they are investing in is contested. Where they are, then specialist human rights NGOs and legal advice will be required to help operators avoid areas of high risk or navigate the legal complexities.

3. Respecting the right to free, prior and informed consent

Table 4: Summary of RSB Requirement: Criterion 12b

Principle 12: Operations shall respect land rights and land use rights
Criterion 12b: Free, prior, and informed consent shall form the basis for all negotiated agreements for any compensation, acquisition, or voluntary relinquishment of rights by land users or owners for operations.

3.1 Understanding the right to free, prior and informed consent

Respect for the right to **free, prior and informed consent (FPIC)** is a fundamental aspect of

⁴ The processes by which international laws become binding in national jurisdictions are complex, and also vary depending on the Constitutions and particular laws of the country in question.



the RSB standard, which does not permit the certification of lands acquired forcibly or coercively, by subterfuge, unfairly or against the will of prior rights-holders and land users.

Free, prior and informed consent (FPIC)

Is the **right to give or withhold consent** as expressed through the **rights-holders' freely chosen representative institutions** through processes that are **non-coercive** and entered into **voluntarily**, carried out **prior** to new investments or operations, based on an **open sharing** of all relevant information via appropriate forms and languages, including assessments of impacts, proposed benefit sharing and legal arrangements, and according to an iterative process that respects the wishes and customs of the rights-holders and is acceptable to them. The right of indigenous peoples, local community rights-holders and land users to say 'no' (i.e. to refuse to relinquish rights) must be respected by the operator.

The right to FPIC has been evolved and consolidated in international law mainly in reference to indigenous peoples as an expression of their collective rights both to self-determination and to their customary lands and territories. The courts have extended the same right to tribal peoples and indigenous communities in the Americas and to pastoralists in Africa. The Convention on Biological Diversity extends the right to FPIC to indigenous and local communities in relation to the use of traditional knowledge and genetic resources and the establishment of protected areas. Voluntary standard-setting has also extended the right to local communities affected by palm oil (RSPO) and REDD projects (CCBA, UNREDD and RECOFTC) and in relation to the lands of all rural communities in developing countries (IFAD). Oxfam Australia also applies the right to FPIC to local communities in developing countries. As is commonly the case, practice is ahead of the law. The RSB requires the free, prior and informed consent of all land owners and land users, irrespective of whether they claim to be "indigenous people".

3.2 Establishing the basis for FPIC

Figure 2 (see Section 3.6 below) sets out in a simplified flow chart the main steps to be followed in ensuring respect for free, prior and informed consent in land acquisition and project development. In the real world, operators are likely to have to repeat certain phases and engage on a repeated basis with the affected parties to collect information, gain consent and build mutual understanding. The topics below follows this idealised step-by-step sequence, but different situations will mean that the sequence in which they are followed will vary.

3.3 Building trust through iterative engagement

Securing FPIC is not a one-off box-ticking exercise. It implies a process of good faith engagement whereby the operator agrees to respect communities' rights, engages in dialogue, explores options and provides information, acts respectfully, agrees to back off where requested, enters into negotiations where this is agreed to, and accepts and abides by decisions that are reached.

local rights-holders and land users with whom the operator is dealing. However, it needs to be understood that communities are not homogeneous and comprise many different interest groups, so inclusive forms of engagement are needed to ensure that all parties are fairly represented.

It is important to understand that whereas operators may typically be looking for **decisions** that secure their investments from risk, communities are typically looking to build **relationships of trust** that they can rely on in their future dealings with the operators who, if they are persuaded to give consent, are likely to be their neighbours for a long time to come.

Trust-building, transparency, good communication, and establishing personal relationships are thus critical ingredients for a process undertaken in good faith. Demonstrations of accountability and respect must include an acceptance of peoples' decisions as the basis for all future engagement.

3.4 Allowing self-chosen representatives

By observing due RSB process and using the screening tool early on in project development, the operator will have identified stakeholders and, where indicated, will have carried out a detailed baseline land rights assessment to identify rights-holders and land users. Once these have been identified, the operator should engage with the rights-holders and land users to establish how they wish to represent themselves in any negotiations with the operator.

They may choose to represent themselves through one or several bodies, and these may include but are not limited to:

- Customary institutions
- Cooperatives
- Local administrative bodies
- Novel representative associations
- Religious bodies or secular associations

Provisions should also be made to ensure the inclusion of representatives of users who may not be rights-holders under national or customary laws, such as women, the landless, those from lower castes, and labourers, whose livelihoods will probably be affected by the proposed operations.

It is especially important that the actual land users and those customary owners who are most directly implicated by land decisions are involved. This is to avoid the problem of distant government or customary authorities, such as tribal chiefs, making decisions about land allocations that favour their personal interests but not those immediately affected.⁵

This is a good moment to obtain a preliminary response from these representatives about whether they are prepared to consider an operation on their lands or that will affect their livelihoods. If the answer is 'no' then this is a time to leave and look elsewhere, and not waste time and resources on further detailed and expensive impact assessments.

⁵ Saramaka People v Suriname 2007, 2008; Deininger and Feder 1999:6.

3.5 Clarifying the area subject to negotiation

In areas with clear property rights and good administrative institutions, getting information about who has rights and makes use of which lands in the proposed project area only requires following normal process with the local land agency and other relevant state bodies, and then engaging in negotiations with identified land owners and/or state agencies, usually through lawyers who specialise in land conveyance (real estate transactions). In developed land markets, individual sellers (whether private persons or entities with legal personality and the right to hold land) have the right to refuse sale (or rental or lease or other transfer of rights) – in effect their consent is required by law. The RSB accepts such land deals as equivalent to FPIC.

However, in cases where this information is absent, state institutions are weak, and/or where there are many people with informal and customary rights and/or a large number of other land users and poor people, then detailed field surveys will be required to clarify whose interests will likely be affected by the proposed operation (these procedures are set out in Section 1 above).

Depending on the scale of the proposed operation and especially when dealing with customary rights holders, the easiest and most comprehensive way to ascertain rights-holders will be through participatory mapping, aided by GPS technologies.⁶ Maps should extend over the whole of the land area in question, including a wider area than that being sought by the operator to ensure that any the implications of any land use allocations agreed through negotiations can be understood in their wider context.

This is the time to obtain consent for the next stage of project preparation, which is to identify the implications of the operations for the rights-holders and land users, for which the main tools used in the RSB are the assessment procedures. If the negotiating parties do not want these impact assessments carried out, this is another moment to step away.

3.6 Carrying out participatory impact assessments

The RSB expects all operators to carry out impact assessments, but the detail of the assessments and the number of specialist assessments required is determined by following the procedures set out in the screening tool. The Convention on Biological Diversity has developed comprehensive guidelines for social and cultural impact assessments for operations that may affect indigenous peoples' and local communities' customary lands.⁷

Ensuring that negotiating parties feel adequately informed depends on the quality and acceptability of the information coming from these assessments, so operators should ensure the direct involvement of affected parties in assessments to help them identify impacts to values and resources of importance to them.

Engaging affected parties in assessments helps to establish shared understanding of the local situation, and helps develop mutually credible base-line information against which changes incurred by the project – if it goes ahead – can be measured and agreed to. This will pay dividends if and when unforeseen impacts arise.

⁶ See also FPP 2008 and Anderson 2011 for useful additional details.

⁷ CBD 2004 available at: <http://www.cbd.int/doc/publications/akwe-brochure-en.pdf>

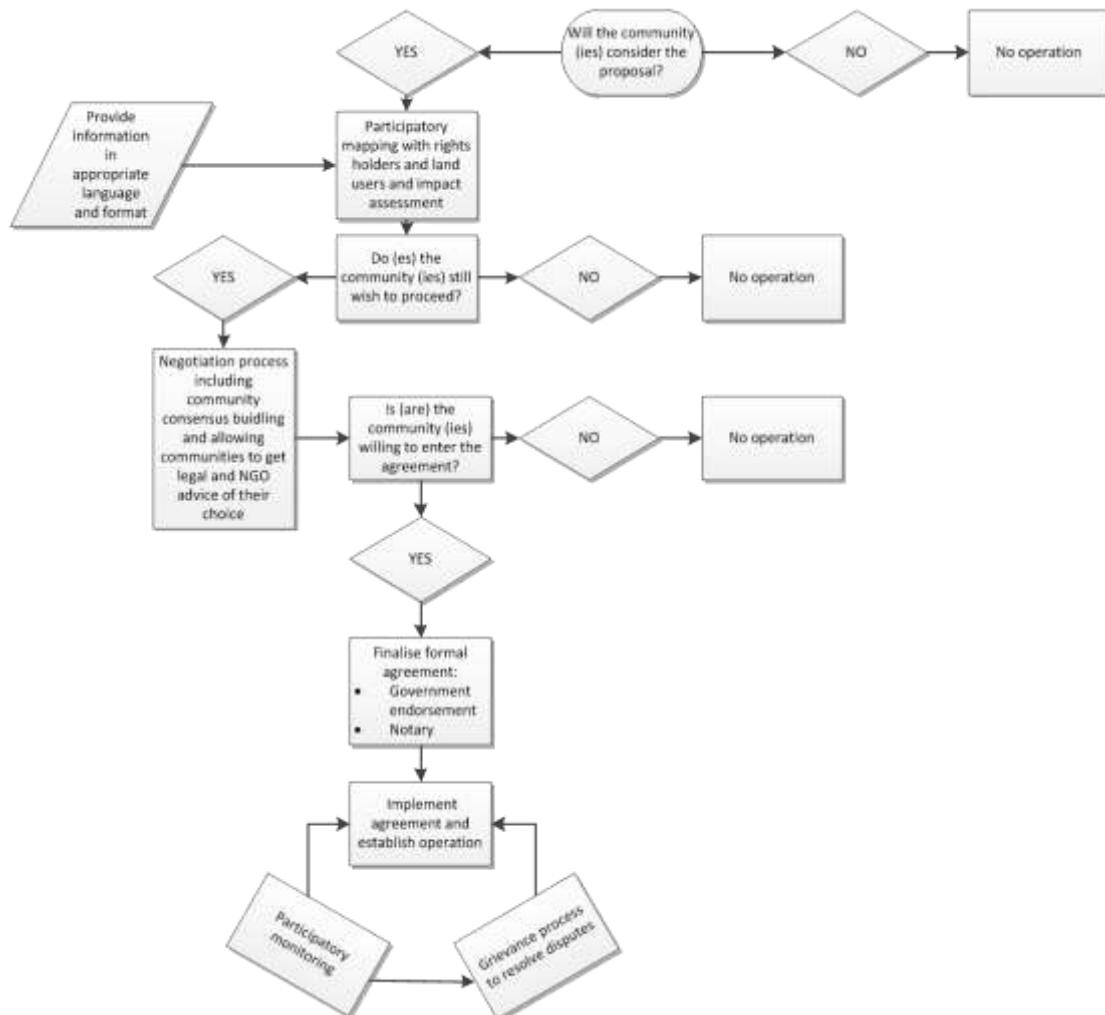


Figure 2 Free, prior and informed consent as an iterative process

3.7 Ensuring consultations and decisions are ‘free’

Ensuring all consultations and negotiations are free requires operators to carry out all dealings with the communities in ways that are:

- Non-coercive
- Carried out without the presence of security forces, para-militaries or police
- Open and transparent without the prevention of access by advisers chosen by the representatives
- Allow adequate time for culturally appropriate consultations (though they should also respect agreed deadlines);
- Without bribes, unfair inducements
- In locations chosen by the rights-holders
- Respectful and accepting of community decisions.

“Free” also implies that rights-holders have been informed of their right to say ‘no’ and to negotiate conditions, and are given sufficient time to consider all the information provided, and to undertake their own discussions and decision-making procedures independently and at a pace acceptable to them.

3.8 Ensuring consultations and decisions are ‘prior’

The operator must seek to engage with the community as early as possible in the development of the operation, which should be before seeking government permits and securing investors. As noted, preliminary consent should be sought to identify representative institutions and again to carry out impact assessments. Consent should be sought to decide on who should be involved in mapping and whether the maps developed are acceptable, and who outside the community should be allowed to see and use them – usually this requires extensive deliberations in the community. Consent should then be sought for agreeing on a process of negotiation that is acceptable to the community.

3.9 Providing the right information in appropriate ways

Impact assessments should provide the majority of the information being sought by communities in assessing the proposed project, but additional information should also be provided where requested. At a minimum, it should be made clear:

- Exactly which lands are being sought by the operations and whose rights and uses are thought to be at stake
- Which representatives have been chosen by the communities, and that the operator has accepted them, to represent the rights-holders and land users in any subsequent negotiation
- Who will be representing the operator in the negotiation and who has the authority to make decisions on behalf of the operator during such negotiations
- What are the expected impacts of the operation
- What are the expected benefits of the operation
- Who is financing the operation
- What risks have been identified and who would bear those risks
- What are the legal implications for the current owners, rights-holders and users of any land transfer
- What proposals are being made for the negotiation process.

All such information must be provided in the right forms and languages to make it readily intelligible to the community concerned. For large-scale operations in remote areas, a locally adapted communications programme may be a necessary part of assuring adequately informed consent. Operators will need this to maintain good relations and trust.

3.10 Allowing communities to get the right advice

As noted in Section 2 on ‘Avoiding risk’, it is frequently the case that rural communities in developing countries have little experience of commercial land transactions, and they may lack the institutions and capacity to handle such deals on their own. The community has the right to third party assistance from agents of their choosing including NGOs, human rights agencies and

lawyers. Subject always to the agreement of the communities, such agents should be allowed unimpeded access to their clients, and the operator should avoid making any payments or offering inducements to these advisors. Likewise, operators should respect communities' demands for time to obtain training, secure capacity building, and seek awareness-raising before they feel ready to engage in negotiations.

3.11 Obtaining independent land valuations

The RSB standard also requires that operators obtain independent land valuations to ensure that those giving up their rights to land for an operation receive a fair deal. While there is no perfect method for assessing the value of land, where tenures are secure and land markets are active and transparent, adequate land valuations can be readily obtained from land registries, real estate agents and chartered surveyors. In many countries, such land agents are regulated by law and are registered or certified operators. Even so, care must be taken to inform land owners of the implications of transfers, and of the fact that land values will vary considerably over time owing to the changing values of, *inter alia*, farm produce, market access, transportation, interest rates, government subsidies and transaction costs. Since land values tend to rise when land holdings are consolidated, sellers of land may be justified in demanding higher prices for their land from large-scale operators than the estimates of land values given by independent valuations.

Obtaining independent valuation where land markets are 'thin' or absent, because rights are insecure, areas are controlled by customary tenures, and/or state agencies claim land ownership or control land transactions, is however much harder. Usually, there is a corresponding lack of legal regulation of land valuation and sales and an absence of certified evaluators. In such circumstances, land valuation, through the conventional 'comparable sales approach', becomes unworkable owing to the lack of reliable comparable data and independent expertise.

Sometimes values can instead be approximated by calculating the value of the land in terms of the income that can be generated from the property over time, taking into account discount rates. However, such valuations tend to underestimate non-monetised land uses, the cultural and spiritual values of land, and the importance of intergenerational inheritance and security. The value of land on the market may not be the same as the value of land to the user or owner who may choose to hold lands for reasons neither evident in the market nor to a third person. Moreover, where land markets are absent, markets are often also absent or imperfect in farm produce, farm labour and farm-related services, making the calculation of land value based on income generation also problematic.⁸

In areas of incipient land markets, land rental markets tend to emerge before land sales markets, and estimates of land rentals are also easier to calculate.⁹ Often customary or communal tenure regimes permit land rentals but not outright sales. In such circumstances it may be preferable for potential operators to seek to lease community lands rather than seek outright land purchases.¹⁰

Operators who discuss tenure options and land values transparently with current rights-holders

⁸ Holden, Otsuka and Place 2008.

⁹ Deininger and Binswanger 1999; Swinnen and Vranken 2005.

¹⁰ Deininger and Byerlee 2011: xlvi.

reduce the risks of later land disputes.

Investors may also consider a variety of other options for compensating local communities for the use or purchase of their lands, including through the provision of equivalent land, through setting up a community fund to provide public services, or through providing the community an equity stake in the investment. Alternatively, in place of land acquisition, investors and prior land users may prefer to consider smallholder schemes or out-grower options.¹¹

Problems for RSB operators will arise where land purchases or leases are contracted with state agencies, while the operators simultaneously face claims from customary owners or informal users for relinquishment of rights and compensation for the curtailment of uses.¹² Because state agencies do not recognise the same rights as the RSB, operators seeking compliance with the RSB standard face the prospect of 'buying the land twice'. To avoid this problem, these issues need to be discussed in advance with the relevant government agencies and community representatives, to ensure that proposed transactions are both recognised by the government and acceptable to the communities involved.

3.12 Negotiating agreements

Negotiations between the operator and the community should then ensue according to an agreed process, which should:

- Be undertaken in places acceptable and convenient to the community
- Allow ample time and opportunity for the community representatives to revert to the wider community for discussions and decisions
- Ensure full translation into local languages and explanation of terms and concepts being used
- Be respectful of local beliefs and traditions, and subject to customary norms and laws where requested

Respect for these points and/or others that the community may insist on are essential aspects to make sure any ensuing decisions are free and informed. Negotiations should then clarify all the details related to any issues of concern to the community. These are likely to include negotiations about:

- Exactly which lands are being acquired and what deals are being made with which rights-holders
- How benefits will be shared among all rights-holders
- Exactly how other affected parties will be compensated for any changes of land use or environmental and social circumstances that may affect them
- What mitigations, suggested by the impact assessments, by the operator or by the community, will be undertaken
- What measures will be taken to protect rights livelihoods and social, environmental, cultural and religious values
- What financial arrangements will be made to ensure transparent and accountable transfers and what fiduciary bodies will be set up to ensure this
- What insurance or other measures will be taken to secure all parties against risk

¹¹ Vermeulen and Cotula 2010.

¹² Cotula et al. 2009:92.

- The exact legal arrangements that will ensue and how the legal status of the parties will be affected by any agreement
- What dispute resolution mechanism will be established to resolve any grievances or difficulties (it is impossible to foresee all eventualities)
- Which (preferably participatory) monitoring process will be set up to ensure shared understanding of the actual impacts and benefits of implementation

The exact content of any negotiation will depend on a multitude of circumstances, and this list should therefore be treated as indicative and not prescriptive.

3.13 Giving or withholding consent

A key aspect of the negotiation and decision-making that will ensue is that the communities' representative institutions are given space, time and opportunity to freely consult and discuss their options among themselves and with other interested parties. Customary decision-making, in particular, often requires lengthy debates in community forums between community representatives and the wider society. Such meetings are often interspersed with periods when decision-making is paused while further consultations and informal discussions are carried out at home and in council with other parties. Moreover, community representatives are often constrained in negotiations with operators by explicit mandates which require them not to make precipitous decisions but to bring interim offers and options back for wider discussion. This is required to allow communities to build consensus and confidence and to consider their options based on more detailed information. It is vital that operators respect these processes if they want to ensure that amicable and consensus-based decisions are reached among the community and with the operator. Precipitating decision-making without full discussions will often fracture communities and may trigger long term disputes, which are often much harder, more costly and more time-consuming to resolve than the time needed to wait for good community deliberations.

- ➔ At the end of these iterative engagements, decisions on whether or not to go ahead will be reached.

If the conclusions are 'no' these decisions must be respected. Likewise the conditions and terms under which 'yes' decisions are secured should also be respected.

3.14 Dealing with divided communities

As noted, communities are rarely homogeneous. They may be differentiated along class, caste, ethnic, gender and generational lines and different persons may make use of the lands in question or hold different rights to them. It is thus not unusual for community members to have different views about the desirability or otherwise of investments on their lands. Where the majority of land users and land owners strongly oppose an operation, it is strongly advisable not to pursue the investment. Where views are more or less equally divided, the operator may consider improving the terms on offer to secure broad agreement. Customary communities are likely to have their own systems for deciding when and whether there is sufficient consensus to reach an agreement, and these systems should be respected. It is imperative that operators respect the right of communities to withhold consent.

Even in cases where consent is broadly given by the community's representative institutions, it is important to ensure that all land acquisitions respect the rights and interests of the individuals

and families making use of specific areas of lands. Where persons or families having clear rights or interests in specific parcels of lands object to the operation, these lands should not be acquired by the company for the operation.

3.15 Making agreements effective

Where an agreement is secured, measures then need to be mutually agreed on and undertaken to make it binding for all parties. This may be done through a variety of means which are not exclusive:

- Signing a legally binding contract between the parties, witnessed by local authorities
- Registering the contract with the local government or notary
- Carry out a locally sanctioned ceremony or ritual to make the agreement binding in terms of local customs and beliefs

3.16 Monitoring implementation

Maintaining trust and good faith is a critical part of any FPIC-based process. Joint monitoring to maintain transparency and demonstrate compliance with the agreement contributes to this. Parties should select representatives to the joint monitoring teams and make periodic reviews of the progress being made in terms of implementing all the terms of the agreement. Public meetings should be carried out to report back the findings of the review teams. Both parties should have the right to rotate or replace members of monitoring teams.

3.17 Dealing with grievances

No operation ever develops wholly as expected. To avoid difficulties escalating into disputes and even conflict, there should be readily accessible and previously agreed grievance mechanisms by which representatives of both parties can raise their concerns with each other and gain redress. Grievance mechanisms should involve due process whereby concerns are recorded and the details of what actions were agreed and taken are logged, and where resolutions are mutually agreed, these are also recorded. The operator should refer to the RSB Grievance Procedure (RSB-PRO-65-001). Implementation of agreed resolutions should be reviewed through the joint monitoring procedure.

Serious differences may need to be resolved by revisiting the procedure by which FPIC was secured and renegotiating the agreements (see Section 4 below). Special measures will be needed to address problems arising from failed investments and the sale of companies. These eventualities should be insured against, as part of the guarantees offered to communities in negotiations.

3.18 Obtaining independent verification

Independent verification of the outcomes of FPIC processes may not only help to assure auditors of good practice, but also encourage all parties to fulfill their obligations. On the other hand, there have been too many examples where third party verification has been controversial

and even corrupted.¹³

To ensure good practice, verification should:

- Be carried out by independent parties accepted and agreed to by both parties
- Include reviews of baselines, assessments, information, procedures, outcomes, monitoring and implementation, including grievance and redress where relevant
- Include wide-ranging interviews with a wide range of representatives, rights-holders and land users, paying particular attention to marginalised sections such as labourers, the landless, women, lower caste and class members
- Protect identities and allow anonymity where requested or advisable
- Include a public meeting at which the preliminary findings of the verification review are discussed and open to comment. Where the verifiers findings are seriously contested, the findings should be reviewed by the verifier, or a second verification team should be brought in, to avoid disputes
- All documents (with due provision for anonymity) compiled during the verification process should be retained for scrutiny by all parties

4. Resolving existing disputes in line with FPIC

Full respect for the right to FPIC, by definition, depends on rights-holders being allowed to make decisions ‘prior’ to the imposition of measures that may affect their rights. Yet operators will face numerous situations where such impositions have already occurred, either before they became involved at all, or before they were involved in the RSB, or because laws and regulations forbid project developers approaching communities before initial permits have been obtained, or because of regrettable mistakes. In some cases, government agencies may have responsibility to resolve land claims and compensate for the relinquishment of land rights before such areas are leased or sold to investors, and prior rights-holders may be dissatisfied with the treatment they received (see also Section 2 above). All such impositions may have led to violations of people’s rights.

The right to remedy

‘Under international law, violation of a human right gives rise to a right of reparation for the victim(s). Reparation is intended to relieve the suffering of and afford justice to victims “by removing or redressing to the extent possible the consequences of the wrongful acts and by preventing and deterring violations”. In human rights law, the availability of effective remedies is a right in and of itself that complements other recognised rights. Remedies include: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.’¹³

All persons (and by extension, peoples) enjoy the right of remedy in the case of violations of their rights by omission or commission, and this includes the right to redress and/or restitution of their land, territories and resources and other properties and intangible values taken or affected without their consent.¹⁴

¹³ Colchester 2010; Colchester and Ferrari 2006.

¹⁴ MacKay 2002.

The RSB will not certify operations that are subject to legitimate disputes, and this applies to inherited disputes as well as disputes caused by the operator. Experience shows that retrospective application of FPIC, as set out in the previous section, can be an effective means of remedy. The RSB requires such an approach.

Disputes between government bodies

Sometimes, owing to overlapping jurisdictions, disputes also arise between government agencies about an operator's right to use transferred or leased lands (for example between the ministries responsible for land and those responsible for mining or forests) and likewise there may be disputes between different tiers of government (between the local administration, state agencies and federal bodies, for example). These cases will need to be resolved by recourse to senior government officials or even national courts, except in the case of foreign operators who have secured their investments through international treaties, who may thus have recourse to international tribunals. The RSB requires that such legal disputes be resolved (in line with Principle 1) for operations to be certified.

Some key obligations fall on the operators to make such processes successful. The operators must accept that:

- The communities or other affected parties have legitimate rights to the land and resources in the dispute
- They also have a right to remedy for violations of such rights
- The communities also have the right to say 'yes' or 'no' to the operation continuing
- Negotiations to ascertain and deliver remedies will proceed according to mutually agreed steps and that both parties have the right to pause in these negotiations while they take counsel and review their positions

Experience also shows that such processes of redress face considerable obstacles because the breakdown of trust, occasioned by the violations and the grievances of victims that result from the abuse of their rights, impede problem-solving. Commonly, redress thus requires mediation in one way or another by ombudsmen, professional mediators, arbitration bodies or conflict resolution specialists. It is vital that the persons so selected are: acceptable to both parties; do not have any conflicts of interest; have the time and resources to see the process through to a fair conclusion, which includes fulfilment of the terms of any agreement reached; and are familiar with FPIC and the procedures of the RSB.

Both as a confidence-building element and a demonstration of good faith, the operator may be required to suspend operations for the period of the negotiation. Just what 'suspension' means may be negotiable and will depend on the local situation and nature of the dispute. Typically, if the dispute is about land acquisition, then the operator should halt all land negotiations, avoid all intrusions on the disputed land, and suspend any land clearance until the negotiations have ended or the community is satisfied that a fair outcome is in sight. In the case of longer-standing disputes, the RSB will accept the exclusion of disputed areas from an area to be certified, so long as biofuel production in the excised area is halted until the dispute is resolved.

It is also important to realise that, very commonly, land disputes lead to divisions in local communities, and it may take special measures to heal or circumvent these divisions in acceptable ways. Where communities are divided by disputes, it may be necessary for the mediators to meet with several parties separately but with transparency and the assent of all concerned. Choosing an agreeable location for such mediations may also be critical. If there has been violence or serious conflict within the community, neutral ground outside the community but acceptable to all may have to be found. Remedies may include but are not limited to:

- The return of unceded lands (i.e. lands taken over by the operation without consent or due process)
- Restoration of damaged ecosystems and/or resources
- Payment in cash or in kind for ceded lands or use of lands
- Compensation for damages and infringements of rights
- Compensation for losses of both livelihood and income incurred while access to lands was curtailed
- Payment of the costs of securing reparations, engaging in negotiations and getting advice
- Agreement either to permanently suspend operations in the disputed area and/or to go ahead subject to newly negotiated agreements which would involve all the terms of an FPIC agreement as set out in Section 3
- Guarantees of non-repetition

Typical steps may include:

- Participatory mapping to determine the exact areas of dispute
- Land rights and land use identification to identify both the rights-holders and prior users of the disputed land who are entitled to reparations
- Reassessment of processes of representation to ensure that aggrieved parties agree on the representatives in the negotiation (in divided communities this may require involving multiple parties)
- Mechanisms to ensure that reparations are paid to affected parties
- Establishment of transparent and accountable community funds to receive community reparations or secure means of providing agreed community benefits
- In other respect the process for renegotiation is substantially similar to the process required for FPIC as set out in Section 3
- Distinguishing between legitimate and spurious claims (as noted above, clarifying whether claimants are legitimate or not usually requires detailed, inclusive, participatory mapping of land titles and/or customary rights and then inclusive discussions with different sets of rights-holders and/or repeated meetings with different officials)

Annex 1: Key definitions

Land

Land means the full set of assets in a given area including the land area, associated soils, forests, woods and waters, and their tangible and intangible values. Land may include sub-surface resources, depending on local, customary or national norms.

Land rights

Land rights is an all-encompassing term that refers to any rights to land as defined (see above) held by any person or entity. Such rights to land may be very varied and range from full, private ownership of alienable and inheritable freeholds through communal tenures, to seasonal use rights, and to limited rights of use access and transit. Rights may include rights to own, control, occupy, manage, use, farm, access and/or use resources, graze, benefit from, sell, inherit, mortgage, transfer, lease, rent or mortgage. Rights may be limited and regulated by laws and customs and may or may not extend to sales and commercialisation of assets. Tenures vary greatly and may change over time.

Land rights may be held by the Crown, the State, the public, as well as by individuals, companies, other legally incorporated bodies and trusts, settlements, villages and townships, parastatal bodies, legally and informally incorporated user groups, as well as customary institutions ranging from whole peoples and 'tribes' to 'clans', 'bands' and other sections of communities including families and individuals. Land rights may be held though formal and informal tenures (see below for formal and informal rights) and through custom (see customary rights). Land rights may be held simultaneously and for the same or overlapping pieces of land by several persons or entities and this may be expressly recognized in state laws, customary laws and/or through informal arrangements. Land rights may also be claimed in accordance with international laws. Land rights may include rights to control access to, or own, sub-surface resources including waters and minerals.

Land use rights

Land use rights are recognised in situations where the owner of the land and the user of the land are different actors. The persons or entity with land use rights may include all rights-holders mentioned above and may range from all citizens to specifically defined land users such as tenants, sharecroppers, farm-workers and companies with leases on state lands or in public forests. Forms of tenancy vary widely, ranging from transferable and inheritable rights which approach full ownership, to much more limited rights which endure for a specific term and/or for a specific use. Tenancies may be defined by statutory law, contracts with the owner (including the State) and/or formal or informal arrangements with the owners. Leaseholds held by corporate entities on state or public lands are also a form of land use right. Land use rights may be narrowly defined as rights, for example, to collect defined forest products, transit, seasonal occupation and use of defined assets for specified purposes. Land use rights may derive from statutory laws and ordinances, local regulations and bylaws, contracts with owners and from customary law and informal agreements. Sometimes the term 'access' or 'access rights' is used to encompass such use rights.

Formal rights

Formal rights exist where rights-holders derive their rights from statutory law, by legal precedent

under common law systems, by regulation, by decision of the courts, and by legal contracts with owners. In countries where custom is given the force of law by ratified international treaties, by national constitutions and/or by statutory laws and ordinances, customary rights may also be considered formal rights (see customary rights). In some cases informal rights, such as squatters' rights, may be formalised after unchallenged occupation over a defined period, such rights are often legally acquired prior to regularisation by overstretched land agencies. Formal rights in land may also derive from land reform laws which authorise the reallocation of unused areas or large properties to landless and land-poor farmers. In many countries, agrarian reforms are under-funded and incomplete, meaning that many people with legitimate claims to identified plots of lands lack formal title as the land agencies have not kept up with land occupations and settlements.

Informal rights

Informal rights refer to rights held by land users or owners without formal state recognition. Such rights may be recognised through custom, as well as by a very wide range of informal arrangements between land users and land owners, and through unilateral occupation and use of land. A large part of state lands and forests are in fact subject to informal rights that in many countries are not recognised or even acknowledged by the State.¹⁵

Customary rights

Customary rights in land derive from traditional ownership, occupation or other use in accordance with customary laws and customary practices. Such rights, which may be differentiated, may extend over settlements, farmlands, areas of shifting cultivation, areas used for collection of natural resources for subsistence and sale, wider hunting grounds, historical and ancestral lands, and areas sacred to or of religious significance to the people concerned. Rights in land may range from full ownership and territorial control to limited rights, for example, seasonal use rights that depend on people's customs and the rights of neighbours. Customary land rights may be held by diverse institutions, and rights may be 'nested', for example where inheritable family rights to farm lands are recognised by custom within wider customary territories that belong to the wider community or people, or, for example, where pastoral peoples' cattle are permitted access to farming peoples' lands after harvest. Customary rights may be held simultaneously by numerous different rights-holders over the same areas. Customary rights may be vested in persons or whole peoples, ranging from chiefs to commoners, but the person or entity in whom rights are vested often does not have unfettered rights to negotiate lands and rights without due process, as defined by customary laws and practices.

Customary rights are notably flexible and change over time as custom, which is far from static, adjusts to changing circumstances within the customary society and the wider nation. In many societies, customary courts or equivalent bodies exist to adjudicate and allocate rights. Customary rights and customary courts may be recognised in national laws and constitutions, by local ordinances and through court decisions.

Customary laws often restrict or prohibit the sale or lease of customary lands and in some countries, such as the Philippines and in much of Latin America, collective land titles issued by the State may also be inalienable, cannot be leased, cannot be mortgaged and cannot be used as collateral.

¹⁵ See also FAO 2011 page 6.

Customary rights may include legal notions such ‘aboriginal rights’ and ‘native title’. However, in many cases the customary rights recognised in national laws and court decisions are weaker or more limited than the customary rights defined by customary law and as recognised by international courts and treaty bodies. Customary rights may thus exist simultaneously as ‘formal’ and ‘informal’ rights, extending over different areas and implying different rights-holders and rights. Customary rights are recognised in international law and are upheld by the RSB standard.

Land acquisition

Land acquisition refers to the process of acquiring rights to use land, in the RSB case for operations producing biofuel or biomaterial feedstocks. Land acquisition may involve outright purchase (i.e. obtaining freehold title), obtaining permits, concessions and leases in accordance with statutory laws, or negotiating leases (and leasebacks) with customary owners or through negotiated payment of rent for land use. Except in some cases of outright purchase, land acquisitions are normally conditioned, and have defined and limited terms which must be observed by the operator.

‘Willing buyer/willing seller’

The RSB standard does not accept compulsory purchases, obligatory land transfers or forced resettlement. The term ‘willing buyer/willing seller’ refers to freely made transactions in land in which formal and informal rights-holders, including customary rights-holders, accept terms developed through negotiated agreements, for a fixed term or permanently, to rent, share or transfer their lands, and/or suspend or relinquish some or all of their rights, in exchange for shares, benefits, payments and/or compensation through a process which fully recognises their rights including their right to free, prior and informed consent to the negotiations and eventual deal.

Free, prior and informed consent (FPIC)

The right to give or withhold consent as expressed through the rights-holders’ freely chosen representative institutions, through processes that are non-coercive and entered into voluntarily, carried out prior to new investments or operations, based on an open sharing of all relevant information in appropriate forms and languages, including assessments of impacts, proposed benefit sharing and legal arrangements, and according to an iterative process that respects the wishes and customs of the rights-holders and is acceptable to them. The right of indigenous peoples, local community rights-holders and land users to say ‘no’ (i.e. to refuse to relinquish rights) must be respected by the operator.

Note: The RSB does not certify operations wherein lands have been acquired through compulsory acquisition against the will of rights-holders and land users nor through the exercise of the State’s right of ‘eminent domain’ (i.e. compulsory transfer or reallocation in the national interest.)

Relinquishment of rights

Relinquishment of rights refers to the result of processes whereby, subject to their free, prior and informed consent, rights holders agree to permanently or temporarily relinquish some or all of their rights in land to the operator through negotiated agreements. Where the operator fails to uphold the terms of the agreement, such arrangements may lapse or be considered invalid.

Legitimate dispute

A legitimate dispute is any dispute in which an affected individual, incorporated body or group

asserts that their rights, interests or negotiated agreements have been violated either previously or by the operator or a state agency that has permitted the operation.¹⁶

These may include but are not limited to disputes about land, water or other resources; the extent of rights and acquisitions; overlapping claims; contested permits; persons or groups with identifiable claims who assert their rights and were ignored in negotiations; lack of compliance with agreements; negative impacts which were not adequately explained in negotiations. Disputants may include but are not limited to: holders of titled tenures; customary owners and users; seasonal or cyclical land and water users (such as transhumant pastoralists, shifting cultivators, hunters, foragers, fishers); squatters with claims that can be entertained by national laws; specific land reform claimants with claims to an identified piece of land; dispossessed or relocated owners with legally justifiable rights to restitution; long-term formal or informal tenants, sharecroppers, land-working employees or laborers of the principal landowners; formal, competing permit holders and; holders of overlapping or neighbouring tenures who assert they have suffered impacts that have not been fairly addressed. Many disputes are not overt (and are best settled peaceably before actual conflicts ensue).

Participatory mapping

This is the preparation of maps with the full participation and control of local rights-holders and land users. Often made using geomatic technologies (e.g. Global Positioning Systems) and specialist software (Global Information Systems), such maps are especially valuable in areas where government maps are imprecise, land cadasters are weak or incomplete, there are many overlapping rights, claims and systems of land use and/or many land users have informal rights or access to land. Participation refers not only to the collection of information for the cartography, but also to the process of map-making based on field data (selection of legend, symbols and representation, etc.), the verification of maps' accuracy and validity by the communities and control of the subsequent use of the maps by the communities. Special procedures are normally undertaken to ensure the participation of women, lower caste members and poorer sections of communities, and other marginal groups to ensure that maps present information about their land rights and land uses.

¹⁶ This includes agencies or individuals contracted or paid by the operator or government.

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