

## Supplemental Resource

# Key Contract Elements

## How to Use this Resource

This resource accompanies Phase 3, Task 1, Step 1 of the Model Guidebook for Government. It provides guidance on the terms and elements that should be contained within the Letter of Intent (LOI) and final contract between the company and community, as well as within any lease agreement between the business enterprise and the government.

## Contract Elements

### Parties

- Depending on the country context, the parties to the lease may be limited to the business enterprise and the government.
- Communities whose rights are affected by an investment may not be included as parties to the lease, but they should be designated as third parties or beneficiaries to the contract, be included as a party to a memorandum of understanding between the enterprise the community, or both. Under any scenario, commitments made to the community in exchange for releasing its land should be memorialized in writing and signed by both the business enterprise and the community. During the process of creating such a document, the community should receive legal representation.

### Tenure Rights

- Define the rights of the business enterprise to use, access, and exclude others from the project site.
- Include a map as an annex to the contract, and include clear geographical boundaries for the project area, bodies of water, and any features on the land

that the parties have agreed are to be left intact (such as forests, wetlands, sacred areas, trees, etc.).

- Acquiring large expanses of land can give rise to resentment and encroachment and can erode a business enterprise's social license where community members give up their land and then watch it sit idle. Consider establishing an option clause for phased acquisition of additional parcels to avoid encroachment issues that become complicated to resolve over time. Responsibilities for policing the boundaries of the leased land should be clearly assigned to one of the parties.
- Business enterprises might also consider setting aside limited use rights to land that is not immediately or fully used so that community members may continue to make productive use of any idle land. The enterprise should be aware, however, that beginning to use the land may be viewed as a hostile act by the community that could erode social license.
- Another option is to include a clause that establishes rights reserved by the community, such as harvesting tree nuts, gleaning crops after harvest; and using marginal or buffer lands. This approach can be especially important for women or of marginalized groups who use these lands in "secondary" ways.

## Lease Term

- The term, or duration, of a lease will likely depend on the requirements of the investment. Some leases may endure for decades and as the years pass, and the community comes to realize that it has foregone land assets that later members may need to sustain their livelihoods, social license may erode correspondingly.
- The term should set the date on which the lease commences (often referred to as the Effective Date).
- The parties may agree to establish periodic reviews or may consider shorter terms with provisions for extension or renewal of the lease.

## Impact Mitigation Clause

- The results and mitigation plans of impact assessments should be incorporated as legally binding obligations in the lease (and memorandum of understanding).

- The lease should also contain a requirement for annual reporting on the implementation of the impact mitigation plan, with the reports to be made public and accessible to local communities.

## Financial and Non-Financial Terms

- Annual rental payments are a common and should be paid to both government and community members.
- An agricultural investment contract thus may offer additional detail on payments owed by the business enterprise or may describe tax or fee exemptions.

## Economic and Social Development Obligations

- Economic and social development promises are compensation paid in addition to ground rent. Leases for the long-term rights to use land and/or natural resources commonly include compensation commitments by the business enterprise to provide material or in-kind support of the community's restoration of individual and collective livelihoods and future community development.
- Where a business has committed to such standards as the VGGT, the commitments should be included in the lease if they can be directly related to the obligations and responsibilities anticipated under the lease.
- Leases for the long-term rights to use land and/or natural resources often include compensation commitments by the business enterprise to provide material or in-kind support to the community's development. Details should provide that it be made clear that these benefits are provided to the community by the business, even though local government may serve as a means of delivery.

## Grievance and Dispute Resolution Mechanisms

- The lease should call for or include clearly defined grievance mechanisms, which give parties access to an effective non-judicial means of dealing with grievances and which are periodically assessed to ensure they function effectively. They should be proportional to the size and potential impact of the project, culturally appropriate, accessible to all affected community members (including women and vulnerable groups), and transparent.<sup>1</sup>

- These mechanisms should not “prejudice or restrict access to State-based or other non-State based complaint mechanisms...”<sup>2</sup> Clauses should stipulate that mechanisms should:
  - Be in place from the beginning.
  - Be “simple to understand, but not simplistic in its dealing with people and issues.”<sup>3</sup>
  - Include stakeholders from the community and the enterprise in the design of the grievance mechanism in order to ensure accessibility.
  - Be able to deal with a wide range of concerns, including multi-party or multi-issue complaints.
  - Include culturally appropriate ways to access them, including ways for women to access without the intercession of their husbands or other male family members.
  - Be responsive to the local culture, including a variety of approaches to cater to differences in personal preferences and in culture.
  - Have a central point of coordination in order to facilitate the development and implementation of the mechanisms.
  - Report back to the community and relevant stakeholders about how the mechanism is doing and on types of cases received.

## Disclosure and Transparency

- Transparency is critically important to ensure that laws are followed, benefits to communities and to the host country are maximized, and communities are reassured that the government is acting in the public interest.
- The lease should expressly provide for sharing and a community briefing of the contract and its terms, along with regular reporting to named individuals and groups.

## Monitoring and Enforcement

- Establishing clear reporting requirements within the lease will aid the government in tracking adherence to financial, social and environmental development and mitigation obligations.

- Terms should also establish requirements for an enterprise monitoring its own compliance through internal reviews and self-reporting to government or third-party compliance evaluations.
- Lease should clearly outline how a neutral third party will work with the enterprise and the community to monitor whether the project complies with the terms of the contract and that it is not causing adverse social impacts.<sup>4</sup>

## Equitable Compensation

- The lease should be specific about compensation by outlining mechanisms that ensure land holders and users (both women and men) and communities, in particular vulnerable populations, receive the agreed-upon compensation.

## Gender

- The lease should stipulate how the project will identify and address women's livelihoods and compensation issues, paying particular attention to ensuring that women benefit equally and are not made worse off by the investment.

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<sup>1</sup> See United States Agency for International Development (USAID), *Operational Guidelines for Responsible Land-Based Investment* 52 (2015).

<sup>2</sup> *Id.* at 20

<sup>3</sup> See IFC Office of the Compliance Advisor/Ombudsman (CAO), *A Guide to Designing and Implementing Grievance Mechanisms for Development Projects* 4 (2008), available at <http://www.cao-ombudsman.org/howwework/advisor/documents/implemgrieveng.pdf>.

<sup>4</sup> USAID, *Operational Guidelines for Responsible Land-Based Investment*, at 51.