This Land Is Whose Land? Navigating Issues of Land Rights and Governance

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Mr. Piaskowy has served as a Land Tenure, Communications and Learning Specialist in the Land Tenure and Resource Management Office at USAID since 2011. He serves as a project manager of all evaluation, research and pilot activities for the office, and oversees implementation of communication and learning strategies. Prior to joining USAID, Piaskowy spent eight years managing U.S. domestic development programs in the public health and housing sectors. He holds a bachelor’s degree in Urban Planning and Development from Ball State University and a master's degree in International Service from American University. Piaskowy has conducted field research in Latin America and Asia and has focused more recently on urban development issues in East Africa.
Ms. Rothenberg is Managing Director of Development Capital Strategies (DCS), an advisory firm specializing in sustainable business development and investment, with a particular focus on sub-Saharan Africa. At DCS, Ms. Rothenberg provides advisory services focused on investor relations, financing, business development, and sustainable project development in accordance with IFC Performance Standards, Equator Principles and other international standards. Ms. Rothenberg has a B.A. with honors in History, Politics, and Africa Studies from New York University, where she also studied Swahili.
Ms. Neyman is a Land Governance and Legal Advisor in USAID’s Land Tenure and Resource Management Office. Prior to joining USAID, Ms. Neyman worked as a corporate lawyer at White & Case, LLP in New York City, and at the World Bank. While at White & Case, Ms. Neyman was involved with several land rights and indigenous rights projects. Most recently, she worked with the UN Global Compact to create the Business Reference Guide to the UN Declaration on the Rights of Indigenous Peoples. Prior to earning her law degree, Ms. Neyman worked as a journalist, and has written for the Huffington Post, Miami Herald, South Florida Business Journal, New York Daily News, Newsday, Washington Times and USA Today. Ms. Neyman has a bachelor’s degree in Journalism from Northwestern University, and a law degree from Columbia Law School.
Ethical Land-Based Investing in Developing Countries: Challenges & Opportunities

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• In many developing countries, “customary” or “informal” land rights exist
  o May be recognized by civil society and some international institutions, but not the central / regional government / agency issuing a land concession
  o When customary and informal rights are not recognized by government, investors can be misled to think they have full rights of way upon issuance of a concession
  o Yet local people may have lived on the land for centuries and be unaware that their governments have leased or sold it

• Sometimes ministries and various divisions of government are not in communication with one another about rights and concessions given to investors
  o The same land concession can be given to multiple investors by different ministries

• Sometimes ministries and various divisions of government are not aligned or motivated by the same incentives
  o E.g. The Ministry of Commerce may wish to increase private investment in a region, while the Ministry of Forestry may be incentivized by conservation funding
  o Local and traditional leaders may also have different interests than the people they represent

• Many governments are eager to attract investment and demonstrate progress on projects quickly
  o Can result in large land concessions
  o Can result in large land concessions with contingencies (e.g. must be developed within a certain number of years or the government can take it back), which causes problems for the project sponsor in attracting capital (projects frequently face delays and cost overruns for reasons beyond the project sponsor’s control)
  o Can result in bilateral non-public contracts that offer land at a low cost, assuming development benefits will occur, but there are often no timelines and / or budgets for development benefits negotiated

• Many international investors from developed countries assume that governments are responsible for the safety, security and prosperity of their people, and that any deal negotiated took the people into account
  • Investors frequently believe the contracts they negotiate with the government are therefore fair and just
Context: Numerous International Efforts to Build Capacity

Principle 1: Review & Categorisation
Principle 2: Social & Environmental Assessment
Principle 3: Applicable Social & Environmental Standards
Principle 4: Action Plan & Management System
Principle 5: Consultation & Disclosure
Principle 6: Grievance Mechanism
Principle 7: Independent Review
Principle 8: Covenants
Principle 9: Independent Monitoring & Reporting
Principle 10: EPFI reporting

Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security
Context: Plight of the Investor & International Access to Capital

• It is frequently difficult to attract equity capital to any start-up or project, but particularly in developing countries, where investors have to consider local law, political framework, currency, culture, among a variety of other additional factors that lengthen diligence, increase risk and make management more burdensome
  o Yet developing countries offer frontier markets with strong growth potential
  o Growth and capital is good for job creation, small business growth and inclusive economic development, when done sustainably

• Any venture must be scalable to produce the necessary risk:return profile to attract capital – in primary agribusiness, this generally requires a significant amount of land
  o Can be achieved through smallholder / outgrower programs, which can be more sustainable than large scale nucleus-based agribusiness
  o But some international investors aren’t familiar with this model and / or may feel it is too costly or time consuming

• Project finance and project related corporate loans are a practical way to finance agribusiness projects
  o If financed all in equity, the risk:return profile would no longer be attractive to those very equity investors

• Projects usually raise ~30% in equity to start the project, then ~70% in debt to complete it
  o A certain level of development typically occurs prior to debt financing
  o Burn rate of equity capital must keep pace with debt financing – puts pressure on project timeline and budgets prior to financial close with the lenders

• Ironically, if the government places a timeline on how quickly a project should be developed (e.g. to avoid speculation), then the project sponsor is even more incentivized to develop faster, potentially cutting corners
Problem: Varying Values & Timeframes of Stakeholders

• Since many investors have little early-stage capital available, there’s a tendency to hold off on full commitment to IFC Performance Standards until debt financing

• Many international lenders require the IFC Performance Standards, but investors frequently rely on local regulation prior to that point
  o Environmental (& Social) Impact Assessments (EIs, ESIAs, SEIs) may be conducted according to local law and need to be later refined to meet international standards
  o Staff trained according to local law (Environmental & Social Management Plans and Systems, or ESMPs and ESMS, may need to be refined to suit international best practices)
  o International standards related to Free & Prior Informed Consent / Consultation (FPIC) may not have been considered
  o International standards for Resettlement Action Plans (RAPs) may not have been considered

• Lenders typically require a “gap analysis” to identify where the borrower (project sponsor) needs to improve on environmental and social risk management
  o If significant gaps must be closed, financing may be withheld or delayed
  o Work may need to be redone, adding costs
  o Many investors don’t realize this upfront

• Multinational corporations are more likely to incorporate sustainability standards as opposed to smaller scale individual project sponsors since they face international scrutiny on a regular basis and because they have the resources and scale to address sustainability issues upfront

• The above poses a challenge for attracting new capital and entrepreneurs to scalable agribusiness projects in developing countries
Problem: Varying Values & Timeframes of Stakeholders (continued)

Project Sponsor / Developer

Host Country National Government & Ministries

Customary Rulers, Elders

International Civil Society

Equity Investors

Host Country Regional & Local Government & Ministries

Local Community Members

Biodiversity

Debt Investors

Sponsor Country National / Regional Government & Ministries

Disadvantaged & Under-represented

Customers

Note: These stakeholder groups are not all-inclusive and may vary by investment. Furthermore, there may be subsets of further stakeholder groups within those listed above.
Solutions: Highlight Risks & Create Incentives Early On

What happens when a project sponsor has the best of intentions early on but faces all or some of the challenges described above?

What can NGOs do to be helpful vs. threatening at this stage?

Can concessionary capital be made available to help companies do the right thing early on?

The life and death of a master of the universe

How the suicide of a Blackstone unit CEO shows the difficulties of doing well and doing good

Lawrence Delevingne | @delevingne
Solutions: Highlight Risks & Create Incentives Early On (continued)

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| o Sources of concessionary capital can hold required training workshops on topics including FPIC   | o NGOs can be threatening and cause companies to shy away from disclosure, or encouraging and support companies  
 ✓ Attempt to engage a company prior to “naming and shaming” it                                   | o Can efforts be made to encourage developing countries to incorporate the IFC Performance Standards into their regulatory requirements? |
| o New forms of concessionary capital can be structured to enable project sponsors / developers to invest in international standards from the very start of the project | ✓ Can NGOs help shape forms of concessionary capital that support early adoption of international standards? |
|                                                                                                    | ✓ Can NGOs work collaboratively with investors to build their capacity?                        | o Can more developed countries train their investors on best practices for responsible investing in developing countries? |
| o Develop an Equator Principles Association for equity investors in addition to lenders             |                                                                                               |                                                                                      |

USAID has created a constructive tool-set for investors and development practitioners in the form of the Operational Guidelines for Responsible Land-Based Investment
Thank You!

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Questions and Answers
Operational Guidelines for Responsible Land-Based Investment

July 29, 2015
Yuliya Neyman
U.S. Agency for International Development
Background – Framing the Issue

Increased Land-Based Investment: In developing countries, especially Africa, where land governance is weak and rights are not documented.

Increased Risk: Investing in these vulnerable areas can displace, disadvantage, or negatively impact local communities, and lead to financial, operational and reputational risks for the investor and for USAID projects.

Increased Awareness: Private sector companies increasingly want to be positive actors in the community. They understand that good community relations, and inclusive projects, are a key to sustainable investment.

Increased Commitment: Private sector companies are increasingly committing to respect local land rights throughout their supply chains, comply with VGGT and eliminate land grabs.
The Problem

The private sector wants to invest in agriculture in Africa, and understands that in order to successfully invest, it must address land tenure considerations.

But, it doesn’t know how.
Purpose of Guidelines / Audience

In response to private sector inquiries, and as part of a larger movement to clarify the question of sustainable agricultural investment USAID has developed Operational Guidelines to provide practical advice, at every stage of the investment lifecycle, on how to structure responsible land-based projects. They align with relevant elements of the VGGTs and other standards.

Not an endorsement of large-scale land acquisition in exclusion of smallholder farming, but a recognition that it is happening and should be done responsibly.

Audience

• Primary: New Alliance partners and USAID Missions
• Primary: Projects considering land acquisition; Secondary: Companies monitoring supply chains, and to some extent lenders/ institutional investors
• Primary: Agricultural projects; Secondary: Any project involving potential land acquisition
Contents: Land-Based Due Diligence

• **Identify possible project location:** Preliminary identification of proposed project site and current land ownership and occupancy, based on existing maps and information.

• **Carry out due diligence:** Who will be affected by land acquisition, and how. Understand legal, institutional and bureaucratic framework.

• **Conduct Environmental and Social Impact Assessments.**
Contents: Stakeholder Engagement

• **Raise Awareness:** Within the local community and other stakeholders about the proposed project.

• **Consult:** With the local community and other stakeholders about their interests in the land that will be used in the proposed project, as well as several other factors.

• **Interim Agreements:** Consultations may lead to interim agreements, such as MOUs, with local community/other stakeholders.
Contents: Mapping

• **Map proposed sites** to ID land claims, occupancy, uses, land disputes and existing natural assets.

• **Participatory mapping:** Local stakeholders must be part of the mapping process.

• **Include women and vulnerable groups** in mapping process.
Contents: Contract Negotiations

• **Alternatives to Acquisition:** Contract farming, outgrower schemes

• **Who to Negotiate With?** Who has rights to the land in question (legal vs. legitimate rights)? Government? Community?

• **Type of Acquisition:** Sale; Lease; Land for Equity/Benefit Sharing

• **Fair and Adequate Compensation:** Land valuation; types of compensation; delivery of compensation
Contents: Project Operations

• **Continuing Engagement:** Meet regularly and as needed with stakeholder groups; form oversight committee.

• **Monitoring:** Ensure project (i) complies with the terms of the land acquisition contract; (ii) complies with any regulatory obligations relating to the land acquisition not captured in the contract; and (iii) is not causing adverse social and environmental land-related impacts.

• **Grievance Mechanisms / Dispute Resolution:** Mechanism should be proportional; culturally appropriate; accessible; transparent; and offer appropriate protection from reprisal.
Subsequent Developments

- *Analytical Framework for Investors Under the New Alliance: Due Diligence and Risk Management for Land-Based Investments in Agriculture*
  - Heavily references Operational Guidelines
  - Grow Africa managing roll-out
THANK YOU!
Questions and Answers
**Top Take-Aways**

1. Educating potential developing country investors about local law and international standards is necessary.

2. Practitioners and governments need to actively build capacity of project developers through structuring concessionary sources of capital and educating investors on risks.

3. Land Tenure risks must be mitigated in land-based investment in environments where land governance is weak or land rights are undocumented.

4. USAID’s Operational Guidelines help private sector companies and Missions to mitigate Land Tenure risks.

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