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DEUTSCHE ZUSAMMENARBEIT



PROMOTING,  
FACILITATING  
AND REGULATING  
RESPONSIBLE  
LAND-BASED  
INVESTMENT:



A MANUAL FOR  
GOVERNMENTS



Implemented by

**giz** Deutsche Gesellschaft  
für Internationale  
Zusammenarbeit (GIZ) GmbH



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## List of abbreviations

<b>BVVG</b>	Bodenverwertungs- und -verwaltungs GmbH
<b>CBO</b>	Community-based Organisation
<b>CCSI</b>	Columbia Center on Sustainable Investment
<b>CDA</b>	Community Development Agreement
<b>CFS</b>	Committee on World Food Security
<b>CFS-RAI</b>	Principles for Responsible Investment in Agriculture and Food Systems
<b>ESIA</b>	Environmental and Social Impact Assessment
<b>ESMP</b>	Environmental and Social Management Plan
<b>FAO</b>	Food and Agriculture Organization of the United Nations
<b>FPIC</b>	Free, Prior and Informed Consent
<b>GIZ</b>	Deutsche Gesellschaft für Internationale Zusammenarbeit GmbH
<b>IAP</b>	Investment Assessment Process
<b>MOU</b>	Memorandum of Understanding
<b>NGO</b>	Non-governmental Organization
<b>OECD</b>	Organisation for Economic Cooperation and Development
<b>SMNA</b>	Stakeholder Mapping and Needs Analysis
<b>USAID</b>	United States Agency for International Development
<b>VGGT</b>	Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security
<b>WB</b>	World Bank

## Preface

Access to and secured long-term use rights of land are essential conditions for rural development, food production and security as well as social peace. The distribution and use of land is connected to other thematic areas targeted in the Sustainable Development Goals like the achievement of SDG 5 gender equality and the implementation of human rights. As land is a limited resource, its distribution is often disputed between a variety of actors. The competition for land may further be aggravated by commercial agriculture and forestry investments. Such investments are often intended to generate value, providing positive impacts for the overall economy via land revenues and taxes, but also for the local communities in terms of livelihood improvement, job opportunities and transfer of know-how. However, if investments do not follow internationally agreed principles and guidelines, they run a high risk of having negative consequences on communities and the environment. Investments may lead to land-use disputes, expropriation, and displacement as well as environmental degradation, worsening the socio-economic situation of already disadvantaged groups.

Population growth, climate change as well as global supply chain disruptions for agricultural inputs and staples caused by the war in Ukraine are some of the drivers of the current downward spiral for food insecurity, poverty and hunger. Investments in land, when committed in a sustainable manner – considering ecological responsibility, social equity, and economic performance – contribute to tackling these challenges. To ensure that investments in land not only generate profit for the investors, but also for other actors, certain aspects must be considered when designing sustainable and profitable investments in land.

This is where the project *Promoting Responsible Governance of Investments in Land* (RGIL), commissioned by the European Union and German Federal Ministry for Economic Cooperation and Development (BMZ) comes in. Implemented by GIZ in Ethiopia, Laos and Uganda, the project aims to ensure that investments in land are productive, contribute to sustainable land management and respect the rights and needs of local populations, in particular vulnerable groups and women. RGIL works together with target communities, political partners and investors as well as Civil Society Organisations, academia and investor associations on the implementation of good land governance based on international principles such as the VGGTs and the CFS' Principles on Responsible Agricultural Investment (RAI).

In this series of guides and manuals, specific information relevant for the different stakeholder groups has been collected to make them accessible and useable to improve the practices in commercial agricultural and forestry investments on a large scale.

The guides and manuals were developed and validated in a participatory and iterative process with the stakeholders, after assessing the actual needs regarding capacity development and analysing existing international and national guidelines, regulations and training material. They combine important elements from existing products and trainings, and apply them specifically to the process of large-scale land based investments and in relation to identified problems in the three countries. The various guides and manuals complement each other thematically and can be used both as individual products and as a complete toolkit in the respective country-specific context.

This manual aims to provide practical guidance to Government staff at central and local level in promoting, facilitating and regulating responsible land-based investments and is meant to be used along with the *Introductory Guide for Communities, Governments and Investors*. It has been written for all three RGIL countries, hoping that it will also be useful for other countries.

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 GIZ Project Coordinator  
 Responsible Governance of Investments in Land (RGIL)

## I. Introduction

Land-based investments in agriculture and forestry can generate many benefits for the countries where investments are made, such as enhancing food security, generating foreign currency, improving natural resource management, creating employment, sharing technology and contributing to overall sustainable development. If not done responsibly, however, these investments can harm affected communities by, for example, dispossessing people of their land, causing food insecurity, disempowering women and youth, damaging the environment, creating unsafe working conditions, overburdening courts with land disputes, reducing land-related taxes and fees or result in unsustainable uses of land (FAO 2015; WB 2017 Note 1).

Governments in the countries where investments are made (host governments) play a critical role in ensuring that land-based investments<sup>1</sup> implemented in their jurisdictions are responsible and contribute to sustainable development. They are tasked with creating an enabling environment for responsible investment and implementing investment promotion, facilitation and regulation policies and practices that lead to responsible investments. In addition, host governments sometimes provide land directly to investors and in so doing should themselves act in a way consistent with principles of responsible investment. The objective of this manual is to provide relevant guidance to help host government institutions at all levels successfully carry out these important tasks.

This manual is meant to be used along with “Responsible Investments in Land: An Overview” (the “Overview”). That guide contains a detailed description of the potential benefits and harm from land-based investments, the basic principles of responsible investments and a discussion of the roles and responsibilities of other stakeholders—communities and investors.

### Guide

AN INTRODUCTORY  
GUIDE TO  
RESPONSIBLE  
LAND-BASED  
INVESTMENT FOR  
COMMUNITIES,  
GOVERNMENT AND  
INVESTORS



#### The Community Manual

Responsible Land-  
Based Investment:  
How Communities Can  
Prepare for and Decide  
Whether to Support  
Investments.



#### The Investors Manual

Incorporating Re-  
sponsible Land-Based  
Investment Principles  
into Investor Policies  
and Practices.



#### The Government Manual

Promoting, Facilitating  
and Regulating Re-  
sponsible Land-Based  
Investment: A Manual  
for Governments.

<sup>1</sup> The guide covers investments in land by both foreign and domestic investors and includes those involving agriculture, forestry and raising livestock. It does not address investments in infrastructure or energy which tend to raise some unique issues that are beyond the scope of this guide.

## II. Responsible Investment - A Brief Summary

As explained in the Overview, there is no single universally accepted definition of “responsible investment.” The principles underlying a responsible land-based investment in agriculture and forestry are derived primarily from two international instruments: (1) the Voluntary Guidelines on the Responsible Governance of Tenure of Land Fisheries and Forests in the Context of National Food Security (VGGT); and (2) the Principles for Responsible Investment in Agriculture and Food Systems (CFS-RAI).

Recognizing that responsible investment is essential for enhancing food security and nutrition, the CFS-RAI Principles provide a useful definition of a “responsible investment”:

“Responsible investment... requires respecting, protecting and promoting human rights, including the progressive realization of the right to adequate food in the context of national food security in line with... relevant international human rights instruments” (CFS-RAI, para 3)<sup>2</sup>.

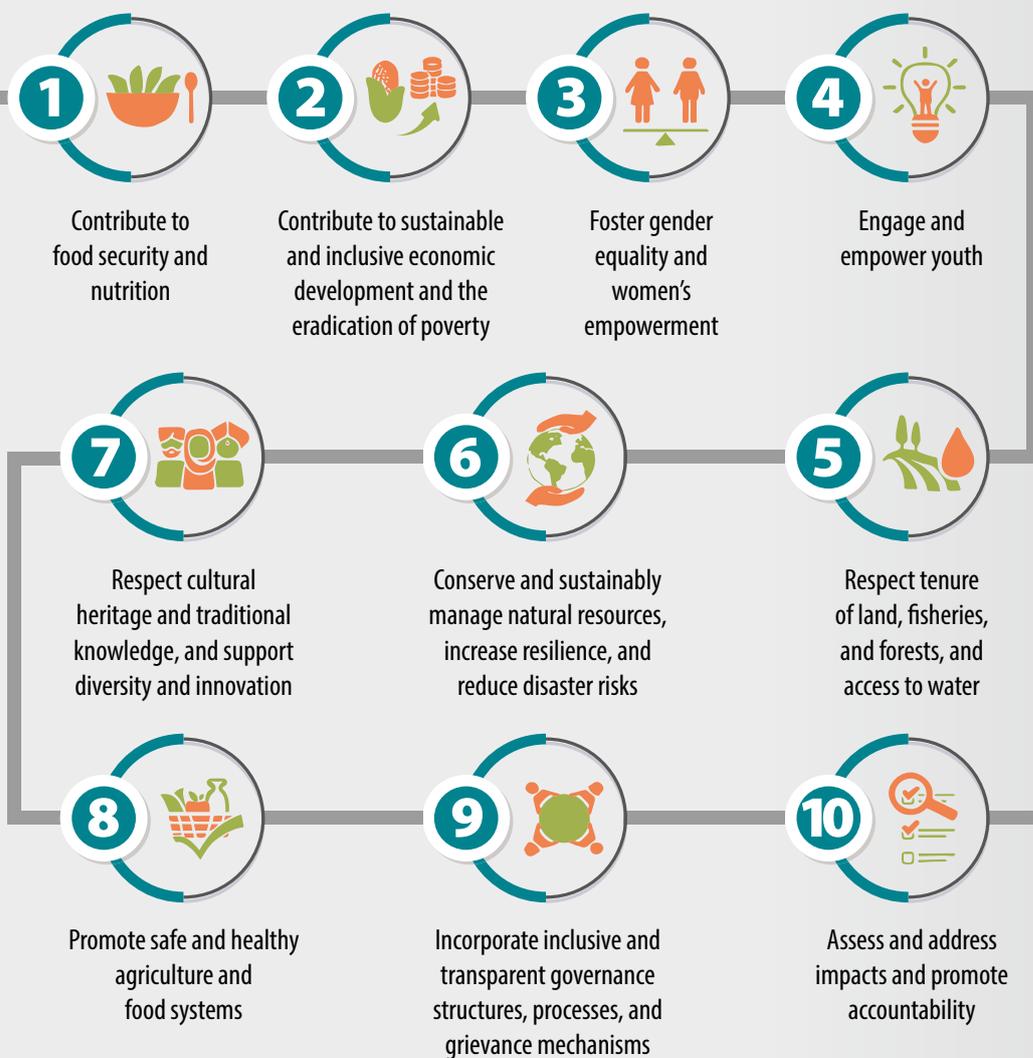


Figure 1: The CFS-RAI Principles<sup>1</sup>

<sup>2</sup> Source: FAO 2020b.

The VGGT add the following directions for investors:

- “Responsible investment should do no harm, safeguard against dispossession of legitimate tenure rights holders and environmental damage, and should respect human rights.” (Paragraph 12.4)
- Investors “have the responsibility to respect national law and legislation and recognize and respect tenure rights of others and the rule of law.” (Paragraph 12.12)

Through 10 broad principles, the CFS-RAI encompass the entire range of activities involved in the production, processing, marketing, retail, consumption, and disposal of agricultural and food products. (See Figure 1). Together the two instruments (VGGT and CFS-RAI) serve as a framework to guide the actions of all stakeholders engaged in agriculture and food systems by promoting principles and practices that can promote much needed responsible investment, enhance livelihoods, and guard against and mitigate risks to food security and nutrition.

The VGGT and CFS-RAI, together with other guidance and experience to date have generated an understanding of the essential elements of a responsible land-based investment (see Box 1). Refer to the Overview for more about these elements.

#### Box 1: Essential Elements of a Responsible Land-based Investment

- Respect Legitimate Tenure Rights
- Equitable Benefit-sharing
- No Harm to Food Security
- Impact Assessments
- Grievance Mechanisms
- Environmental Sustainability
- Effective Consultation and Participation
- Minimal Large-scale Transfers of Tenure rights
- Respect Human Rights
- Empowerment of Women and Youth
- Transparency and No Corruption
- Monitoring

### III. Creating an Enabling Environment for Responsible Investments

As described briefly above, host governments play three primary roles in promoting responsible land-based investments: (1) creating the enabling environment for responsible investments; (2) applying that enabling environment to attract, facilitate and monitor investments through a transparent and effective investment assessment process; and (3) identifying and acquiring land to transfer to investors. The first role is addressed in this section.

Governments have the leading role in creating a legal and policy environment that is more likely to lead to responsible land-based investments. The enabling environment consists of coherent policies, laws, in-

centives and the institutional and administrative framework. It covers investment promotion, facilitation and monitoring. The aim is to create a policy, legal, regulatory and institutional environment, including appropriate safeguards, that fosters responsible land-based investment, treats all investors fairly and equitably and takes into consideration the specific needs and interests of members of local communities, all in line with the provisions of the VGGT and CFS-RAI (CFS-RAI paragraph 36; UNCTAD 2016).



Figure 2: Elements of Effective Multi-stakeholder Engagement

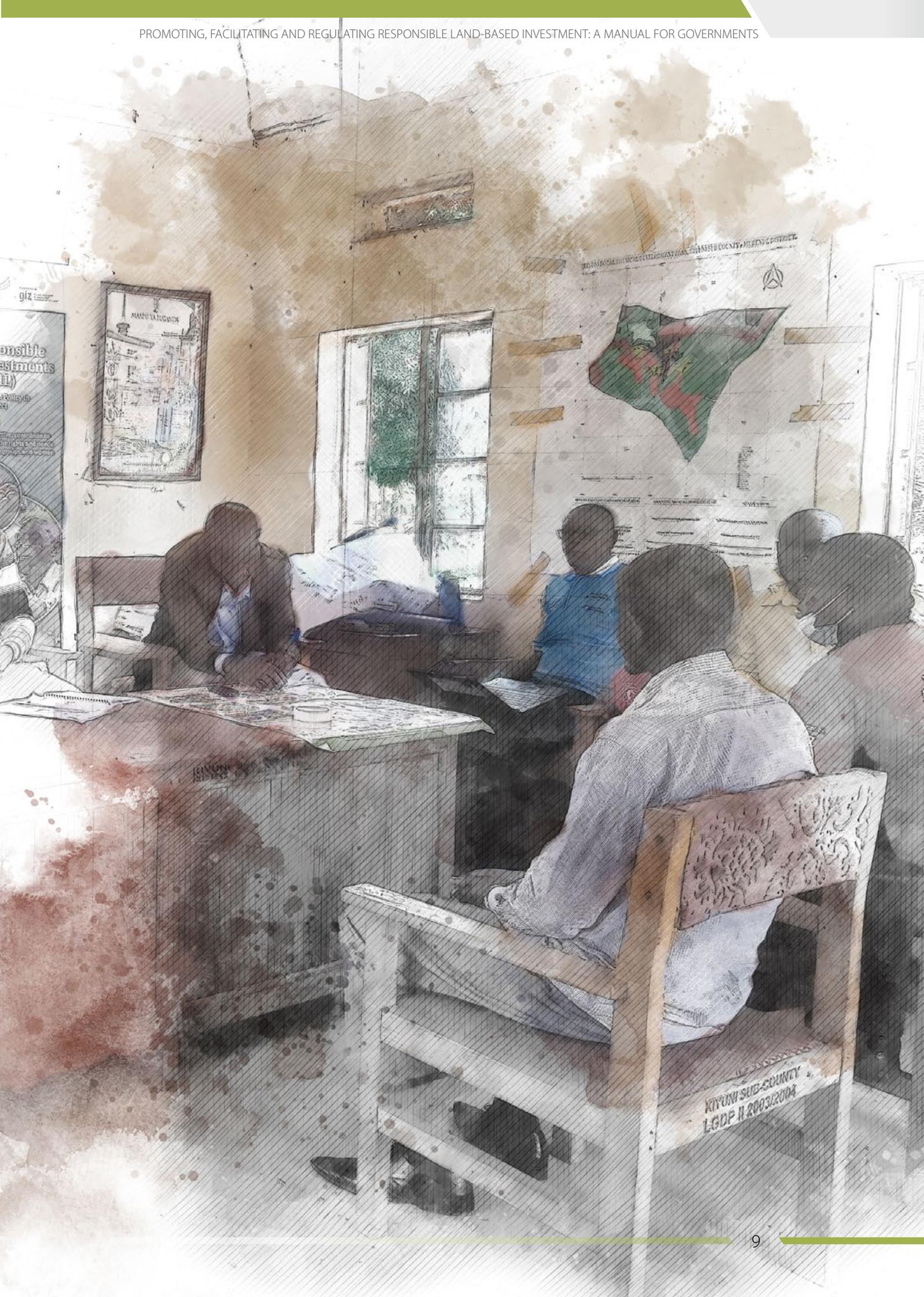
The entire process of reviewing, revising and ultimately implementing the enabling environment should entail inclusive, multi-stakeholder engagement (see Figure 2) and transparency, possibly through multi-stakeholder dialogues and forums. (See Box 2 for one example of a multi-stakeholder forum.) Local communities and other stakeholder groups may lack the resources, knowledge or skills to participate meaningfully. They may require time, resources, capacity-building, access to legal or technical advisors and, of course, timely access to comprehensive information. Moreover, it is important to put in place measures to ensure that typically marginalized groups, which may include women, youth, the elderly, and ethnic minorities, among others, are able to meaningfully participate in the development of relevant reforms to legal, policy or institutional frameworks. The outputs of these processes should be incorporated into the drafting of policy and other activities involved in creating the enabling environment (FAO 2015).

#### Box 2-A Multi-Stakeholder Platform in Sierra Leone

“The first step towards implementing VGGT in Sierra Leone was the creation of an inclusive Multi-stakeholder Platform for improved dialogue on tenure governance. The platform has more than 100 stakeholders, including traditional leaders, representatives from national and local government, civil society, the private sector, academia and international development partners. It convenes annually to present recommendations related to tenure governance priorities for the land, fisheries and forestry sectors, and to discuss the way forward for implementing VGGT in Sierra Leone. The platform provides a forum where members of a constituency can actively engage in tenure governance and discuss with the Government in a public arena how to improve the way in which land, fisheries and forest resources are managed in Sierra Leone. It also plays an important role in monitoring, tracking progress and achievements.”

Source: FAO 2016a at 2

Activities required to create and improve the enabling environment can be separated into two phases: (1) preparation, and (2) implementation.



## A. Creating the enabling environment – the preparation phase

The activities involved in this first phase can be grouped into five sets of activities: (1) identification of the country's main concerns, priorities and principles related to land-based investments; (2) carrying out a stakeholder mapping analysis that identifies all of the relevant stakeholders in the country and their needs related to land-based investments; (3) identification and classification of relevant policies, laws and incentives; (4) identification of the relevant components of the institutional framework (including roles and responsibilities); and (5) comparing the existing legal and institutional frameworks with the responsible investment principles to identify gaps and necessary changes (FAO 2020). While this analytical framework may give the impression that creating the environment is a linear process, it is important to recognize that, in reality, the process is usually complex and reiterative. That is, some of the steps discussed may occur simultaneously and may stop and re-start as necessary.

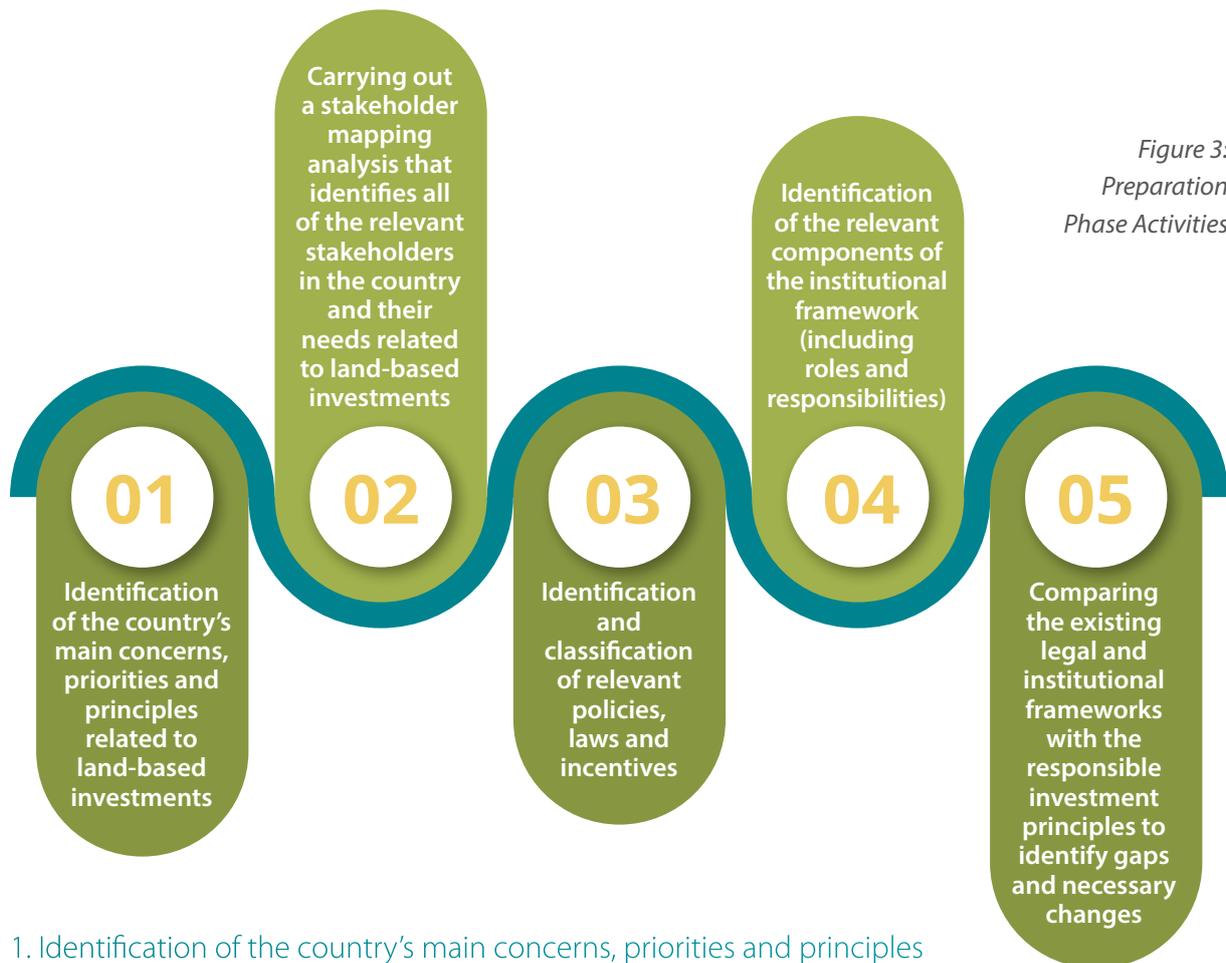


Figure 3:  
Preparation  
Phase Activities

### 1. Identification of the country's main concerns, priorities and principles related to land-based investments

This context analysis is an essential element of an environment that fosters responsible land-based investments. The relevant concerns, priorities, and objectives that are identified can be used to inform a national strategy and revised legal and policy framework for the promotion and facilitation of responsible investment (FAO 2015).

While no two settings are alike, the concerns, priorities and objectives that are identified by this analysis should reflect:

- The country's long-term vision and development plans. These may be expressed in the form of long-term or medium-term development plans, agricultural investment plans, forest protection

plans, investment laws or the like. Often with the support of donors, many countries have adopted development plans to guide their overall development efforts. (See Box 3.)

### Box 3: Laos' Investment Principles

“Lao People’s Democratic Republic’s 2016 Investment Promotion Law, which applies to domestic and foreign investments, states as principles of investment promotion (art. 5) that investments should: 1) aim to improve the livelihood conditions of people; 2) be in compliance with laws and regulations; 3) protect the legitimate rights and interests of the State, people and investors; and 4) protect and use natural resources effectively in compliance with the policy of green growth and sustainability.”

*Source: Jansen and Andrade Correa 2021 at 18. Full text of the law can be found at <https://investmentpolicy.unctad.org/investment-laws/laws/177/lao-people-s-democratic-republic-investment-law>.*

- The different local contexts and community-level conditions (social, cultural, geographical, institutional, etc). In essence, this inquiry focuses on how well the country currently performs on the key issues set forth in the CFS-RAI, such as food security and nutrition, poverty alleviation and sustainable development, empowering women and youth, respecting tenure rights, managing natural resources, etc.
- The nature and extent of the national agricultural sectors, food system and value chains at country level and beyond. While this manual focuses on land-based investments, recall that the CFS-RAI define agriculture and food systems as all activities, inputs and outputs involved in the production of food and other agricultural goods from farm, forest or water sources. Thus, undertaking the context analysis should not be limited to land-related investments. See Box 4 for a list of questions related to a country’s agricultural and food sector.

### Box 4: Questions Related to the Agriculture and Food Sector

- What crops do we grow and in which regions?
- Is our agriculture dominated by small, medium or large-scale production?
- What are our existing resources and comparative advantages? Based on weather, soil quality and other factors, which crops and businesses are likely to thrive in comparison with other countries?
- How much of our agricultural production is for export?
- To what extent is our agricultural production processed domestically versus after export?
- What is the nature and amount of investment in the agriculture and food sector in our country?
- Who are the main investors and are they primarily foreign or domestic?
- Are agricultural inputs (seeds, fertilizer, etc.) produced in-country or mostly imported?
- What is the quality and availability of water for agriculture?
- How good is the infrastructure (roads, electricity, etc.) required for the agriculture and food sector?
- To what extent do women and youth participate in the workforce for agriculture and food production?
- How will climate change affect our agricultural sector in the near and medium term?

*Source: FAO 2020 (e-learning analysis course)*

- The important challenges, opportunities, interests and concerns of all affected stakeholders. (See discussion of stakeholder mapping below).

The enabling environment ultimately adopted should reflect the concerns, priorities and objectives identified in this part of the preparation phase.

2. Carrying out a stakeholder mapping analysis that identifies all of the relevant stakeholders in the country and their needs related to land-based investments in agriculture and forestry

As referenced above, both government and non-government stakeholders must play a meaningful role in developing the enabling environment. This requires ascertaining the relevant needs and priorities of those stakeholders. Key stakeholders who should participate include government institutions at national, regional and local levels (including those involved in investment promotion, land administration, etc.); civil society organizations and legal empowerment organizations; organizations representing farmers and other small-scale producers; workers and worker organizations; other organizations representing communities, indigenous peoples and those potentially directly affected by investments; and private sector organizations.

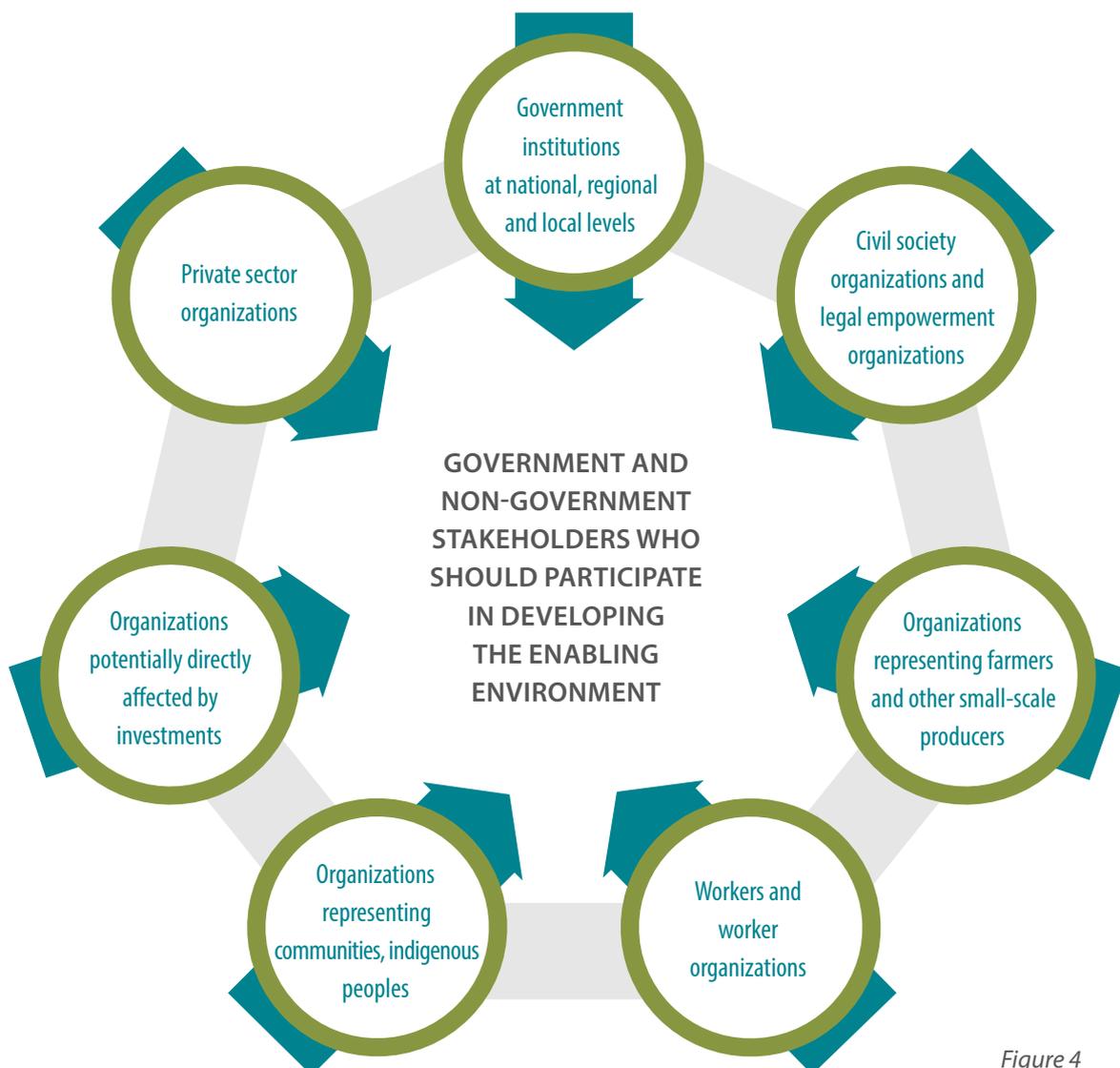


Figure 4

This is done by conducting a Stakeholder Mapping and Needs Analysis (SMNA). An SMNA identifies stakeholders and their interests in relation to a particular issue or project and also assesses how to address those interests. Thus, in this context governments should identify those who may be affected by land-based investments and their needs and concerns. Those needs and concerns then can be considered in the process of creating the enabling environment. See Box 5 for key questions that should be asked when conducting an SMNA.

#### Box 5: Key Questions for an SMNA

- Who are the key stakeholders in the project or policy reform being undertaken or proposed?
- What are the interests of these stakeholders?
- How will they be affected by the project or reform?
- Which stakeholders are most important for the success of the project?
- How influential are different stakeholders?
- What can be done to encourage stakeholder support?

Techniques to collect the information required for the SMNA will vary. But they are likely to include: (1) desk research to gather background information on relevant issues and constraints to effective government policy making; (2) key informant interviews and group workshops that identify and seek input from diverse groups of specific stakeholders or those who represent stakeholder groups; and (3) survey work and analysis of secondary data to verify assumptions about stakeholder influence and interest. (FAO 2020).

Techniques to collect the information required for the SMNA

Figure 5



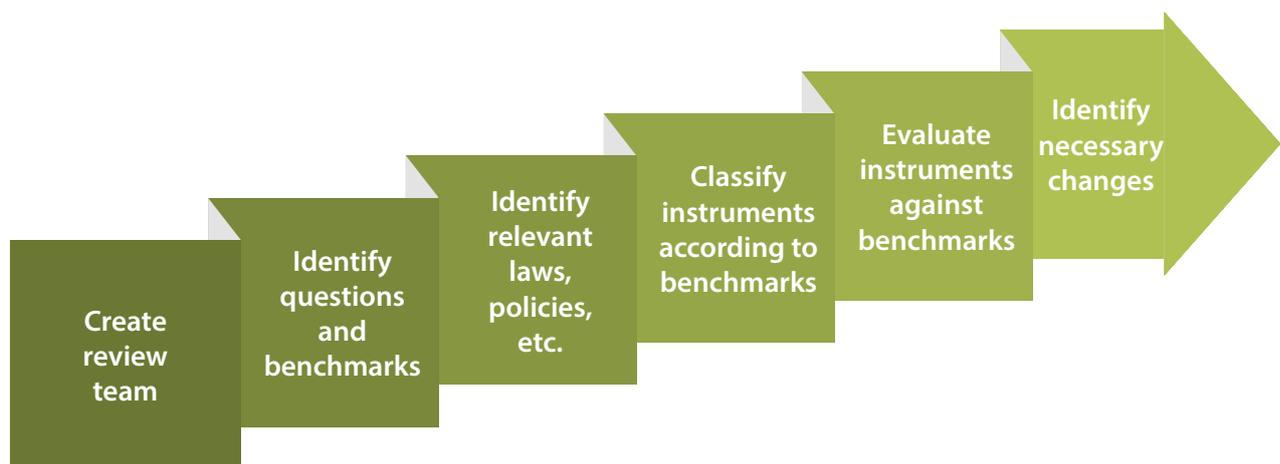
Note again that special measures may be required to ensure that the voices of all stakeholder groups are truly heard. For example, ensuring that women's voices are heard in relation to developing the enabling environment for land-based investments can be challenging as how to do so will depend largely on national and local cultural norms and practices. Thus, in some cultures women may be discouraged or even prohibited from attending or speaking openly in meetings where men are present, making it difficult

for them to participate in multi-stakeholder forums. Similar barriers may apply to other groups. But they must be overcome to ensure that all voices are heard (FAO 2013; FAO 2020).

### 3. Identification and classification of relevant policies, laws and incentives

The next step involves identifying all of the policies, laws, incentives and processes that relate to investment promotion or facilitation. Once identified, they can be classified according to subject matter and relative importance to the overarching framework for land-based investment. This is necessary to allow for an assessment of the extent to which the legal framework is aligned with responsible investment principles. It is also important for harmonizing the legal framework by eliminating inconsistencies during the implementation phase. (Jull 2016).

This step requires a systematic and comprehensive process to assess the legal, administrative and regulatory framework. It should be guided by a carefully organized and phased plan that clearly identifies who will be responsible for each task. Done well using an inclusive multi-stakeholder approach, this analysis can help to build broad support for implementation from key stakeholders. As discussed above, the analysis should be informed by the country context and the results of the SMNA (FAO 2020).



*Figure 6: Approach to Assessing the Legal and Policy Framework*

A detailed description of how to conduct this context analysis is beyond the scope of this manual. However, a systematic approach to a self-assessment of the legal and policy framework related to land-based investment could include the following (see FAO 2020 and Figure 3):

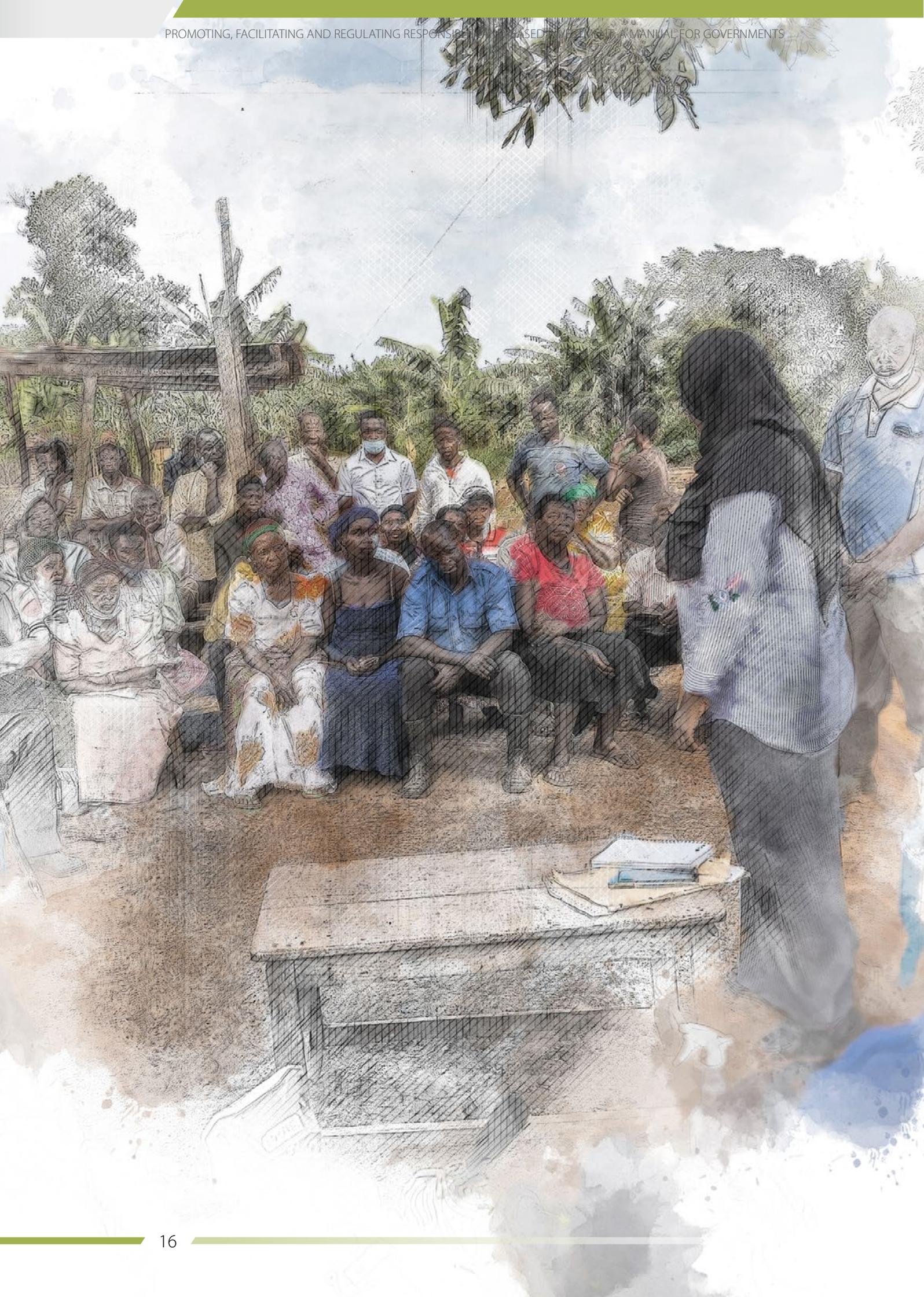
- **Create a review team.** The team members must have the capacity and resources to conduct the analysis and are likely to require the support of outside experts. Depending on the context, the team could include knowledgeable people from the relevant government institutions, NGOs and the private sector.
- **Identify questions and benchmarks.** The team needs to be aware of the basic principles that will guide the analysis. In the case of land-based investments, these principles should reflect the relevant provisions of the VGGT and CFS-RAI. See Box 6 for some important benchmarks related to land tenure.

### Box 6: Land Tenure Benchmarks to Guide the Enabling Environment

- Limit or avoid resettlement of local people. Instead explore alternative options to land acquisition such as contract farming, management contracts and other inclusive business arrangements. Resettlement should be a last resort.
- Recognize and respect all legitimate land rights for individual land holders and users (both women and men) and communities including those with customary, secondary, seasonal and other use rights.
- Investors should assess any actual or potential impacts on human rights and land tenure rights implicated by the potential investment.
- Recognize the different needs and challenges facing women and men in terms of accessing and exercising rights to land and natural resources and aim to close gender gaps through specific provisions aimed at improving gender equity.
- Adhere to free, prior and informed consent (FPIC) principles when engaging with land holders and users and communities, particularly during the negotiation, contracting and enforcement stages of the investment process.
- Establish land valuation methodologies that establish the price/value of property using market and non-market values such as social, cultural, religious, spiritual and environmental values to ensure that compensation and benefits are fair, just and equitable for land holders and users (both women and men) and communities.

*Source: Landesa 2021b at 18*

- **Identify policies, laws, regulations and incentives relevant to the benchmarks previously identified.** Relevant elements of the legal framework may be found in the national constitution; parliamentary legislation, such as acts or statutes; subsidiary instruments, such as ministerial regulations, decrees, bylaws and orders detailing operational procedures that are consistent with the statutes they are supposed to implement; policy documents, strategies and visions affecting land-based agricultural investments; international trade agreements and applicable laws and investment treaty obligations which usually have the force of national law; international and regional human rights instruments which bear on many of the considerations addressed by responsible investment principles; and investment incentives that the government may use to attract investment. (For the sake of brevity, this collection of policies, laws, regulations and incentives is referred to hereinafter as the “instruments.”)
- **Classify instruments according to benchmarks.** In this step, the team categorizes the instruments by subject matter such as food security, land tenure, non-discrimination and empowerment of women and youth, labor, environmental protection, FPIC and others such as those set forth in Figure 1 and Boxes 1 and 6.
- **Evaluate the identified instruments against the key benchmarks.** This begins with assessing whether the identified instruments cover and are consistent with all of the key principles of land-based investments to reveal any gaps. See Box 7 for key questions to ask in this step.



### Box 7: Key Questions for Assessing Instruments in the Legal Framework

- How does the policy, law, regulation or incentive apply to responsible land-based investments?
- Does the instrument adequately address the relevant thematic area, taking into account the multi-disciplinary context?
- Are relevant international obligations adequately addressed?
- Is the overarching objective of the instrument, including rights and obligations, defined in a clear and consistent manner?
- How does the instrument fit into the hierarchy of other relevant policies, laws and institutions?
- Are relevant instruments operational on their own or do implementing or enabling regulations need to be developed or adopted before they can be applied? What are the constraints (human/ financial) to effective implementation?

*Source: FAO 2020*

- **Identify and prioritize necessary changes to the legal framework.** The final step for the review team is to identify and prioritize all of the changes that must be made to the previously identified instruments. This list is likely to include recommendations to repeal, modify or add new instruments. Institutional and resource capacity constraints make prioritization imperative. Aligning legal frameworks may take many years to implement at considerable expense to national governments and taxpayers. The prioritization exercise should balance the relevant importance of the modification with institutional requirements—for example, it may take far longer to enact a new law than to amend an existing regulation—and financial cost.

#### 4. Identification of the relevant components of the institutional framework (including roles and responsibilities)

Similarly, it is important to identify all government bodies involved in investment promotion, facilitation, monitoring and enforcement as well as the roles and responsibilities assigned to each institution. These government entities should have been identified in the stakeholder mapping stage discussed previously. The information gathered in that stage can be used to help to define specific roles and responsibilities of the entities that are involved in government activities related to land-based investments in agriculture and forestry.

Here, too, this is required to support later measures for institutional harmonization and to check alignment with responsible investment principles. Changes to the legal framework may require some changes to the related institutional framework and bolstering the human and financial resources available to those institutions.

#### 5. Comparing the existing institutional frameworks with the responsible investment principles to identify gaps and necessary changes

As with the legal framework, the review team must conduct a careful analysis of the current institutional framework and determine how it does and does not adequately allow for the implementation of a legal framework that is consistent with responsible investment principles. This allows the team to add institutional modification to the plan for changes in the legal framework (see above) to be carried out in the implementation phase. (See Box 8 for sample questions that may be relevant to this comparison.)

### Box 8: Some Key Questions for Assessing the Institutional Framework

- Does the existing institutional framework cover all of the key activities that are relevant to responsible land-based investment, or are there gaps?
- Does the institutional framework incorporate effective mechanisms for oversight and enforcement, as well as grievance mechanisms to address violations of rights in the context of land-based investment?
- Are the roles and responsibilities of institutions involved in designing and implementing the frameworks applicable to land-based investment transparent, clear, and coordinated? Are there overlapping mandates?
- Are stakeholders appropriately involved during the implementation of relevant institutions' mandates? Are the selection criteria that govern stakeholder participation fair and transparent?
- Do the relevant institutions have the requisite authority and resources to perform their roles and responsibilities?
- Is there a mechanism to ensure clear communication among relevant institutions at all levels of government?

Source: Jull 2016

## B. Creating the Enabling Environment-the Implementation Phase

Once the preparation phase is complete, governments can proceed to the implementation phase. It involves three primary activities: (1) creating a strategy to address the gaps and shortcomings of the existing legal and institutional frameworks identified in the preparation phase; (2) amending existing or developing new instruments and reforming the institutional framework based on the comparative analysis performed in the preparation phase; and (3) designing a mechanism to monitor progress (FAO 2020a).



Figure 7: Steps in the Implementation Phase

### 1. Creating the strategy

The strategy for reform can be thought of as a kind of roadmap as it should lay out the necessary changes and the order in which they should be made. This prioritization should reflect the final output of the

preparation phase. It should include clear reporting requirements identifying the officials who are responsible for the reports, a timetable and details of planned financial expenditures.

Note that the strategy also should address how reforms will be implemented. This includes not only modifying the legal and institutional frameworks as necessary but also actually putting the new frameworks into action once they have been established. Effective implementation may require significant increases in human resource and institutional capacity and financial resources. The best legal and institutional frameworks are worth little if they are poorly implemented. Thus, it is important to have sufficient financial resources and provide necessary training in advance of implementation (FAO 2020a; Cotula et al, 2016).

## 2. Amending existing or developing new legal instruments and the institutional framework

Modifying the legal and institutional frameworks is a big task. It requires amending existing instruments or developing new ones based on the comparative analysis performed in the preparation phase. In addition, it entails carrying out the plan for institutional reform, including clearly defining the roles and responsibilities of government at all levels to facilitate internal coordination and predictable execution of the investment-related responsibilities of those in government (CFS-RAI paragraph 36).

Implementing reform should be guided by a recognition that the key to creating an effective enabling environment is having “coherence, consistency and predictability among policies, laws and regulations...” (CFS-RAI paragraph 36). This can be achieved by considering the wider policy and legal framework in which the reforms will fit, with the aim of avoiding inconsistencies and unnecessary duplication. Accordingly, it is usually not a good idea simply to “import” policies or laws from other countries as local contexts and existing legal frameworks always will differ (Cotula et al., 2016).

### Box 9: The Role of Incentives in the Enabling Environment

- “Responsible agricultural and food systems investment is primarily determined by the enabling environment, not investment incentives. Governments seeking to encourage more investment should first focus on improving the enabling environment.
- Incentives tend to be more effective when they are identified as the best mechanism to overcome a particular barrier to investment that an investor is facing, for example, to overcome specific market failures.
- Incentives should be designed to support the outcomes encouraged by the CFS RAI, particularly to empower small-scale producers, especially young agri-entrepreneurs and women.
- Incentives should not disproportionately benefit large-scale foreign investors to the detriment of other investors or other public goods towards which funds could be directed.
- Regional coordination and governance should be pursued to curb a “race to the bottom” in offering incentives.
- Incentives may work best when offered as part of a package and/or when coupled with other measures, such as regulatory reform or disincentives for undesirable behaviour.
- Attaching a condition or conditions to the granting of an incentive can help guarantee that the government’s goal(s) for providing the incentive are met; this includes behavioural goals that would improve the sustainability outcomes of the investment.”

*Source: FAO/CCSI 2021 at 38*

Governments should avoid relying too heavily on the role that investment incentives play in the enabling environment. Research shows that the quantity and quality of investment is determined primarily by the strength of the overall enabling environment and not the availability of incentives (FAO/CCSI 2021). (See Box 9)

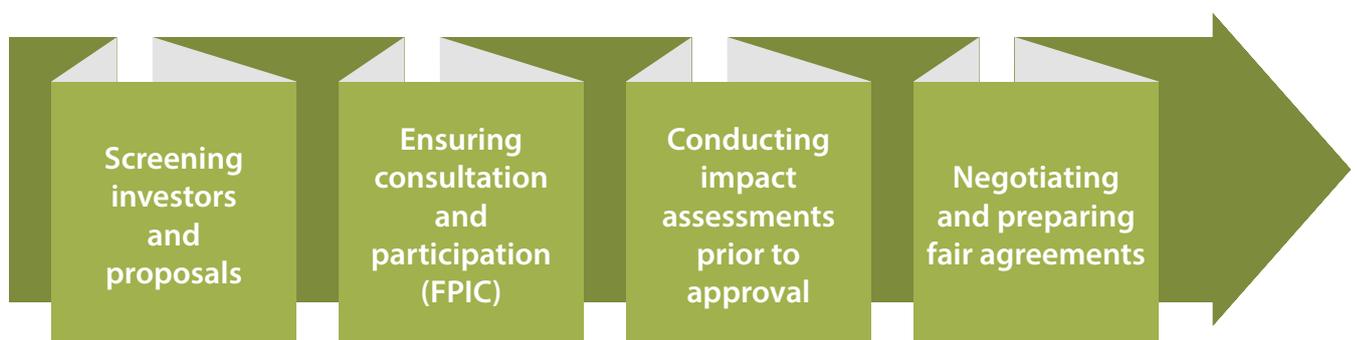
Another key to effective implementation of legal and institutional reforms is clarity. Using clear language is important as lack of clarity can lead to excessive discretion on the part of officials charged with administering the laws. Indeed, clear language helps those officials and the public more easily understand their responsibilities (FAO 2020a).

### 3. Designing monitoring mechanisms

Mechanisms for monitoring the implementation of all aspects of this phase should be established and put into effect. Monitoring by a multi-stakeholder group, as discussed previously, can help government authorities assess the revised legal and institutional framework and make changes and redefine roles where necessary. This promotes accountability and effective operationalization of the plan for legal and institutional reform. (See part VI for a discussion of monitoring particular investments.)

## IV. A Responsible Investment Assessment Process

An important component of the enabling environment is an investment assessment process (IAP) aimed at promoting, facilitating and monitoring investments. It is through such a process that government exercises its responsibilities in relation to individual investments by both foreign and domestic investors. The aim is to create and implement a clear and transparent process that promotes investment that adheres to responsible investment principles and standards (FAO 2015).



*Figure 8: The Investment Assessment Process*

While IAPs vary widely by country and type of investment, in most cases they should include four essential stages: (1) screening prospective investors and proposed projects through due diligence practices; (2) ensuring consultation and participation of all potentially affected stakeholders; (3) conducting impact as-

assessments prior to deciding whether to approve the project; and (4) preparing contracts and agreements for assessment by the relevant authorities and parties to the agreements (see Figure 5)<sup>3</sup>.

## A. Screening prospective investors through due diligence practices

This activity involves 3 main activities (FAO 2015):

1. **Registration of intent with the relevant government authority.** It is important to register foreign and domestic investors to create a full picture of potential investors in all sectors, regions and timeframes. At a minimum, the investor should provide basic information on the ownership, financial and operational capacity and at least a general description of the nature and extent of the investment it wishes to explore. Government cannot oversee investments they are unaware of.
2. **Conducting due diligence on the investor.** Due diligence processes are conducted by many of the government actors engaged in an investment process. It is an important responsibility of government entities, such as investment promotion agencies, charged with attracting and regulating land-based investments. The objective is to learn as much as possible about a potential investor before entering into an agreement (see Box 10) (WB 2017 Note 6; UNIDROIT/IFAD 2021).

### Box 10: Screening Questions for the Investor

In most cases, the institution charged with screening the investor will want to know the following:

- Whether the investor company has demonstrated a commitment to sustainable development and to operating investments in compliance with applicable laws and standards of responsible business conduct.
- Whether the company has the necessary experience and expertise to undertake the type of project they are proposing.
- How the company would finance this project and whether they can demonstrate adequate resources.
- Does the investor have contingency plans if they have insufficient capital to fund the investment, if their financial projections are optimistic, or if they run into unexpected financial or operational challenges?
- Details about who owns and manages the investor company so that the corporate structure is transparent and traceable.
- The investor company's reputation or track record with respect to ongoing or past investments, especially with investments in your country and region. E.g., what is the track record with human rights and tenure rights violations?

*Sources: FAO 2015; WB 2017 Notes 6 and 7; CCSI/FAO 2022*

<sup>3</sup> Some might consider monitoring the investment to be part of the assessment process, but monitoring occurs after the investment has been approved and is being implemented. The government's role in monitoring is discussed later in part VI of this manual.

Information about the investor can be obtained from a variety of sources. Those conducting the analysis can (1) seek information directly from the investor; (2) search the internet; (3) contact counterparts in other countries; and (4) work with organizations like the World Association of Investment Promotion Agencies<sup>4</sup> (Kroll 2020).

- 3. Screening the proposed investment.** This inquiry should seek all relevant information about the potential project, including the size, location, proposed business activities and, overall, to what extent does it align with the country's development objectives (FAO 2015). Much of this information will come from the investor in the form of feasibility studies or business plans (WB 2017 Note 7; UNIDROIT/IFAD 2021). (See Box 11 for a list of information the responsible institution should seek about the proposed investment.)

#### Box 11: Key Information to Obtain when Screening the Investment Proposal

- Details about the business model and plan with a view to ascertaining whether what is proposed is feasible and likely to yield the anticipated and desired outcomes.
- Is the proposed business model inclusive? If not, have alternatives, such as joint ventures or outgrower schemes been explored?
- How does the investor plan to consult with affected rights-holders and comply with FPIC?
- What are the likely environmental and socio-economic impacts of the project, particularly for local communities?
- Whether the proposed project is designed and would be implemented to integrate climate change considerations.
- The expected contribution to safe and healthy agriculture and food systems, food security, and nutrition.
- The expected contribution to gender equality and economically empowering women and youth.
- How the investor plans to monitor and evaluate the project during its implementation and close it after the project has concluded.
- The expected contribution to national development objectives and (more generally) to poverty eradication and sustainable development.
- Whether the proposed site is suitable for the proposed project, considering potential impacts on legitimate tenure rights holders.
- What types of training and employment opportunities would the project bring?

*Sources: FAO 2015; WB 2017 Notes 6 and 7; CCSI/FAO 2022*

Note that screening investors and proposed projects is likely to occur periodically over time as the proposed investment is developed and more information becomes available.

<sup>4</sup> World Association of Investment Promotion Agencies (<https://waipa.org/>).

## B. Ensuring consultation and participation of all potentially affected stakeholders

If, based on the results of screening and due diligence the responsible government agency makes a preliminary determination that the investor and the proposed project may be beneficial and could be ultimately approved, the agency may connect the prospective investor to other appropriate government authorities, technical experts and communities that may be interested in hosting the investment. (In some cases, the investor already may have identified a proposed site.) As detailed below, in most cases the investor and the community should carry out a participatory land mapping process during this phase so that all affected stakeholders and their land rights and uses are known to all. This should be the beginning of the consultation process.

As explained in the Overview, the VGGT stipulate active free, effective, meaningful and informed participation and consultation. Investments affecting the land of indigenous peoples should not proceed without their free, prior and informed consent (FPIC). International best practices advise investors to obtain FPIC in all land-based investments (FAO 2015; FAO 2016; CCSI 2020; Landesa 2021). (See Box 12.)

### Box 12: Free, Prior and Informed Consent (FPIC)

Derived from international law, this principle states that any investment affecting the land or resources of indigenous peoples should not proceed without the free, prior and informed consent (FPIC) of those affected by the proposed project or investment. It gives indigenous communities a veto – the right to say no – to a project being implemented in their territory. This power may extend over the lifetime of the project if the nature or scope of the investment changes over time. The four elements can be summarized as follows:

**Free.** Those deciding whether to consent to a project should do so without coercion, intimidation or manipulation.

**Prior.** Consent must be sought well before any authorization or the beginning of project activities. The timetable must allow sufficient time for culturally appropriate consultation and for completion of local decision-making processes.

**Informed.** People receive all relevant information about the project. The information provided must be objective, accurate and presented in a manner or form that is understandable to those receiving it.

**Consent.** The people have agreed to the activity that will take place on their land. The right to consent includes the right to say no to the project or to offer to consent only under certain conditions.

*Source: FAO 2014*

While government officials may or may not be directly involved in all communications between communities and investors, government should require that consultations between investors and communities begin in the very earliest stages of the investment process and continue throughout the project lifecycle and monitor investor compliance (CCSI 2020). The following are best practices that government should mandate on the part of the investor:

- Agree with the community on a consultation process for working towards seeking FPIC. This should identify the specific current and future activities where consent should be sought. The process should always be based on good faith negotiation free of coercion, intimidation or manipulation.
- Develop and implement a stakeholder consultation plan tailored to the risks, impacts and development stage of the operations and to the characteristics and interests of affected communities. The plan should incorporate the consultation process referenced above.
- Begin consultations as early as possible during project planning and well before activities for which consent should be sought are commenced or are authorized.
- Consult and agree on what constitutes appropriate consent for each stakeholder group in accordance with their governance institutions, customary laws and practices with each group participating through their own freely chosen representatives and institutions.
- Include appropriate measures to allow effective participation of disadvantaged and marginalized groups (e.g., women, youth, and those who are landless, disabled or elderly). Such measures may include separate meetings for each group.
- Recognize the process of seeking FPIC does not entail a one-off discussion. Rather, there should be continuous dialogue throughout the investment and implementation cycle.
- Provide all information relating to the activity to the community in a manner that is timely, objective, accurate and understandable to them. Consultations should be conducted in the local language and in keeping with the community's cultural norms.
- Ensure that the parties document in writing all commitments and agreements that have been reached and share them with the entire affected community in a form and language they can understand and in a timely manner (Deng 2012; FAO 2015; WB 2017 Note 15; Landesa 2021b).

The government also should follow these practices where it is more directly involved in the investment as the party acquiring the land (see Part V) (Deng 2012; FAO 2015; WB 2017 Notes 11 and 12; CCSI 2020). See Box 13 for an example of successful community-investor consultations in Mozambique and how Liberia has integrated FPIC into its new land law.

### Box 13: Consultations in Mozambique and FPIC in Liberia

"In Mozambique, following NGO-led consultations at community level, forest investor Portucel suspended planting pending negotiations with households and community organisations on terms of participation and provision of land. The company also adjusted business plans to incorporate out-grower and contract farming arrangements providing access to designated areas of land or operating as out-growers. To increase the likelihood that eventual negotiations would be fair and open, local [NGOs] ... ORAM and Terra Firma provided legal, business and negotiation training to support 16 community associations to engage with the company."

*Source: Quan and Seigneret 2019 at 10*

"Liberia recently passed the Land Rights Act of 2018, which recognizes and protects the customary land rights of millions of Liberians. The government collaborated with civil society organizations and other local partners to develop the Act, which includes a requirement to obtain any community's FPIC for future "interferences" with customary land."

*Source: CCSI 2020 at 5*

**Participatory mapping of tenure rights.** Government officials also should require the investor (normally at the investor's expense) to undertake participatory mapping of tenure rights as part of the consultation process. This combines modern mapping methods with participation of local inhabitants who possess expert knowledge of their environment. The maps should show who currently occupies, owns, and uses the land, as well as boundaries, sources of water and other natural resources, burial sites and other locations important to the community (USAID 2015). (See Box 14). The results of the participatory mapping activity can be compared with existing official land data to present an accurate and comprehensive picture of all land rights in the area.

#### Box 14: Important Content for a Participatory Land Map

- The outside boundaries of each village or community and information about the neighbors;
- Any overlapping claims including protected areas or wildlife/conservation zones, watersheds, government forests, forest or mining concessions;
- The proposed project boundary;
- Current ownership of the land (including common areas);
- Current occupancy and/or use of the land (this is often different from ownership);
- Whether land is being leased or otherwise allocated to third parties;
- Natural boundaries, such as rivers;
- Location of common natural resources (e.g., hunting areas, forests, rivers, pastures);
- What uses the land is most suitable for (this may require more sophisticated equipment and the use of experts);
- Current land-related disputes (both between and within communities);
- Man-made improvements (e.g., roads, bridges, irrigation systems);
- Sacred, historic, or spiritual sites;
- Livestock corridors or other areas used by transhumant groups; and
- Any other private sector operations in the area or areas directly contiguous (consider also activities upstream that may affect water availability in the project site).

*Source: USAID 2015 at 33-34*

This is necessary because, in many settings, official land records do not reflect customary land rights and those records that do exist may not be fully up to date. Mapping is important for several other reasons: (1) it helps to determine who should be involved in consultations, negotiations and decision-making regarding the project; (2) it will help to ensure that all legitimate tenure rights are recognized and respected; (3) it provides critical information for the assessment of potential impacts of the investment on tenure rights, food security and the environment; and (4) the map will help inform design of the project (USAID 2015; New Alliance 2015). For an example of participatory land mapping see Boxes 15 and 16.

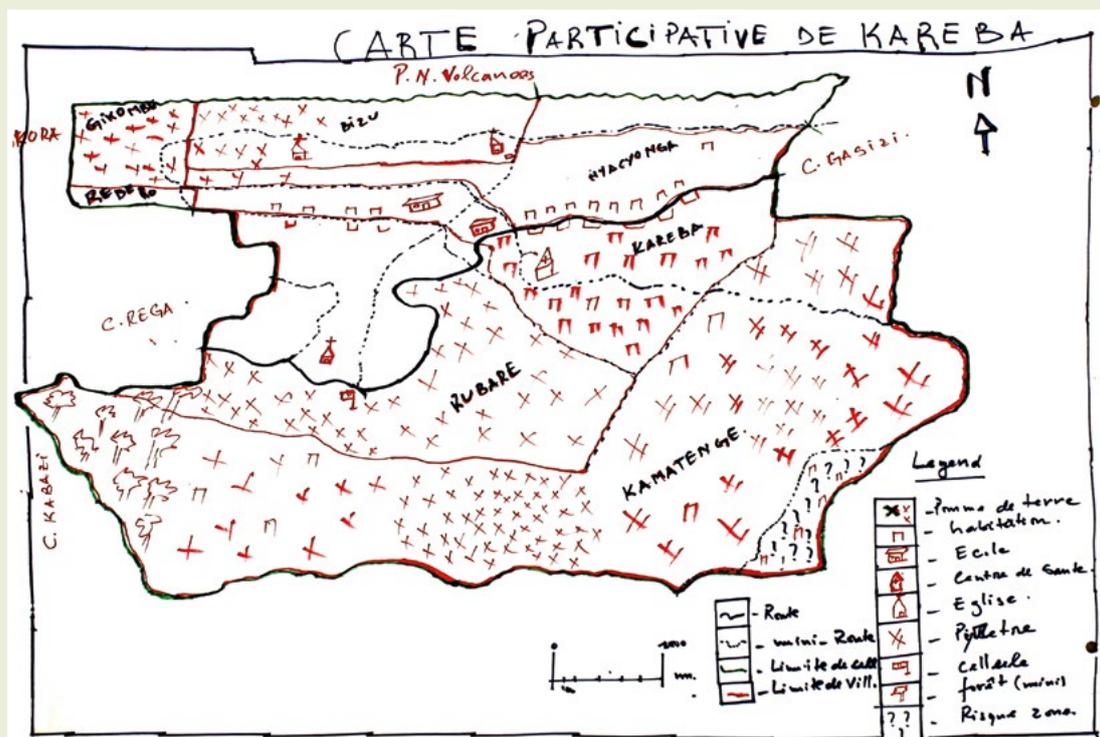


### Box 15: Participatory Land Mapping in Mozambique

The NGO ORAM collaborated with a company called Portucel in Mozambique to map the land-holdings of 20 communities, and to issue certificates to the owners of over 10,000 household land parcels. This mapping process enabled the communities, households and individuals to identify land that could be released for investment and to negotiate securely with the company.

Source: Quan and Seigneret 2019 at 8

### Box 16: Example of a Participatory Land Map

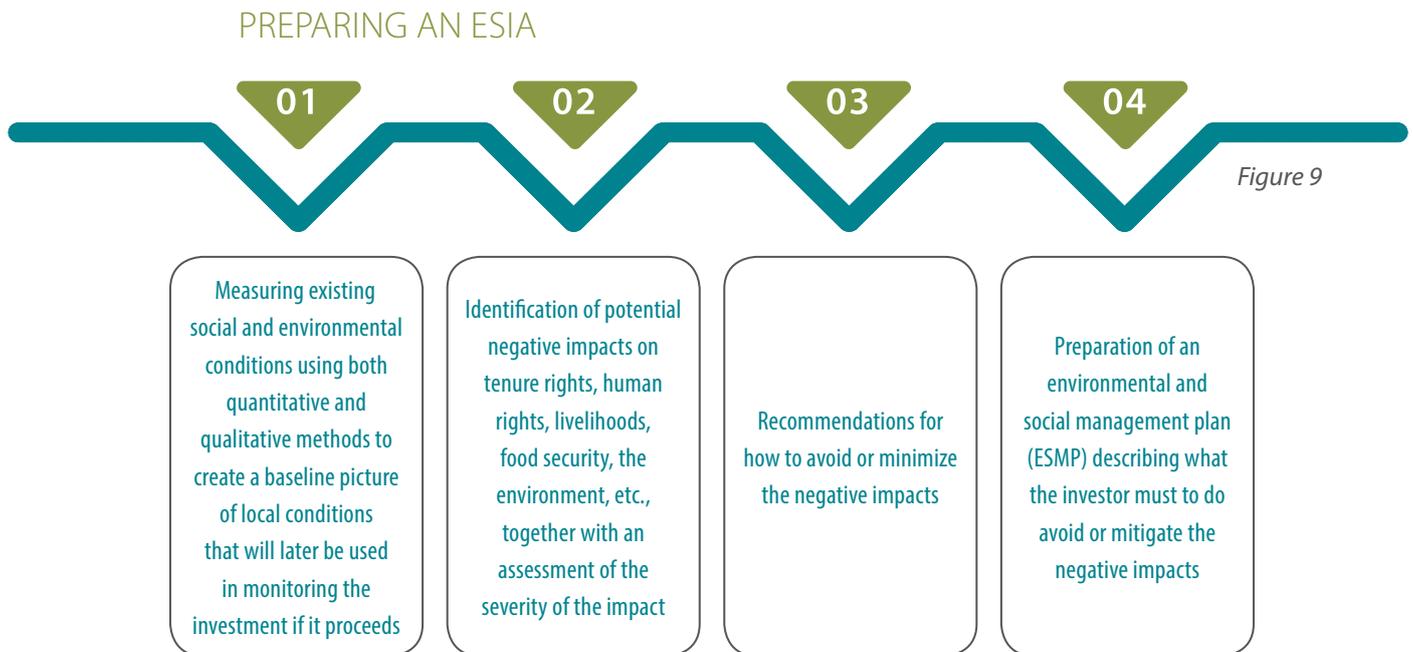


Source: CIFOR 2014 (<https://www.flickr.com/photos/cifor/35721106972>)

## C. Conducting impact assessments prior to deciding whether to approve the project

The VGGT and CFS-RAI advise investors to conduct environmental and social impact assessments (ESIAs) to help them to avoid negative impacts on the community and the environment. ESIs are a tool for assessing project proposals and can also be used to negotiate changes in proposals, including the development of mitigation strategies, or even cancellation of projects. Most governments require them, at least for larger investment projects. However, in many cases the ESIs do not effectively consider non-environmental issues, such as tenure rights, food security, etc. This is a significant shortcoming and governments should take action to ensure that all important potential impacts are assessed (FAO 2016; WB 2017 Note 14).

There are four steps in preparing an ESIA: (1) measuring existing social and environmental conditions using both quantitative and qualitative methods to create a baseline picture of local conditions that will later be used in monitoring the investment if it proceeds; (2) identification of potential negative impacts on tenure rights, human rights, livelihoods, food security, the environment, etc., together with an assessment of the severity of the impact; (3) recommendations for how to avoid or minimize the negative impacts; and (4) preparation of an environmental and social management plan (ESMP) describing what the investor must do to avoid or mitigate the negative impacts (CCSI/Namati; OECD/FAO 2016; Landesa 2021).



As ESIA usually are required by law, government officials should be in a position to require the following from the investor in relation to the ESIA:

- The ESIA must be conducted before any final decisions are made and before any agreement is signed.
- Retain an independent, well-qualified firm to conduct the analysis.
- Require the firm to invite and allow representatives of the community to provide information for the ESIA and otherwise be meaningfully involved. Community members can help the assessment team to identify potential impacts and ways to eliminate or minimize harm through measures the community will find beneficial and culturally appropriate.
- Give the community the opportunity to provide input into the content of the final report and the ESMP (Deng 2012; FAO 2016; WB 2017 Note 14; Landesa 2021b).

After the ESIA is completed, the responsible government institution evaluates results and determines whether it complies with law and responsible investment principles (ideally enshrined in law or regulation). If not, the project must be modified or abandoned. If the ESIA is satisfactory, the agency will assess and decide whether to approve the ESMP (See Box 17). Compliance with the assessment's recommendations on how to prevent and mitigate risks and improve the overall impacts of the investment must be a condition for approval of the project.

### Box 17: Content for Environmental and Social Management Plans (ESMPs)

“An ESMP needs to be placed within the environmental and social context identified in the ESIA, and each ESMP is case specific. Although not all topics listed are always relevant to all ESMPs, a proper ESMP should consider the following, at a minimum:

1. Assessment and management of environmental and social risks and impacts
2. Labor and working conditions—decent work and gender
3. Resource use efficiency
4. Pollution prevention and management
5. Community health and safety
6. Biodiversity, ecosystems and habitat conservation, and sustainable management of living natural resources
7. Indigenous peoples and traditional local communities
8. Cultural heritage
9. Land acquisition, restrictions on land use, and involuntary resettlement
10. Land rights, resettlement, and displacement
11. Financial intermediaries’ need for reports on compliance
12. Stakeholder engagement and information disclosure”

*Source: WB 2017 Note 14 at 2*

## D. Preparing fair contracts and agreements for approval by the relevant authorities and parties to the agreements

If the investor, the community and other stakeholders (in many cases, the government) reach general agreement through the consultations process that a project may be acceptable, the parties can enter into negotiations that, if successful, will lead to a final written agreement. The goal of the negotiations should be to reach an agreement on the various rights and obligations of the parties, how they will communicate and give notice to each other, mechanisms for monitoring compliance and how to handle complaints and resolve disputes (UNIDROIT/IFAD 2021).

It may be advisable for the community and the investor to enter into a memorandum of understanding (MOU) to guide the negotiations. The government may or may not be a party depending on whether it owns the land and/or will be asked to provide investment incentives. In any case, officials may facilitate development of the MOU. The MOU should state, among other things, that: the parties intend to negotiate in good faith in an attempt to reach an agreement; how the parties will consult, be inclusive and determine whether consent has been given; and other terms that will govern the negotiations (Landesa 2021a). See Box 18 for other content that could be found in an MOU.

### Box 18: Content of a Memorandum of Understanding

- Detailed description and timeline of the proposed negotiation, consultation and drafting process
- List of key stakeholders who will be included, along with their roles, rights and responsibilities
- Description of any professional, financial or legal support that the company will provide to the community during the contracting process
- Shared objectives between the company and community
- Description of the role of government authorities, if any, in the negotiation, consultation and drafting process
- Description of the engagement and consultation process that the company will undertake with the community and individual women and men land holders and users (preferably as documented in a stakeholder consultation plan)
- Clearly defined process for dispute resolution

*Source: Landesa 2021a at 44*

In some countries, especially those where the government is the legal owner of the land, the community may lack the legal authority to sell or lease their land to an investor. (Or the government may have acquired privately-held land through expropriation.) One such country is Ethiopia, where the Ethiopian Constitution<sup>5</sup> clearly states that land is owned by the state and farmers and citizens have the right to use but cannot transfer their land. In such cases, the land lease contract may be between the government and the investor but the community, especially legitimate tenure rights holders whose land will be affected, must be included in negotiations<sup>6</sup>. That is, while the government, entity or person with formal rights to the land may sign the agreement to transfer land rights, negotiations related to the development of the project should include a range of people in the affected community, such as traditional leaders, a representative group of all land users in the village, and vulnerable groups, such as women, youth, elderly, indigenous people, ethnic minorities, and pastoralists<sup>7</sup>. Where the government has the legal authority to transfer rights to land, the MOU can require the investor to obtain FPIC from the community related to any transfer of land (Landesa 2021b; UNIDROIT/IFAD 2021).

Regardless of the specific context and as explained above, government should ensure that negotiations between the investor and the community are transparent and consistent with the principles of effective consultation and FPIC. The investor should negotiate with whomever the community designates to represent it and all participants should have legal representation. Ultimately, the investor must take the necessary steps to confirm that the terms of the final agreement are truly acceptable to the affected community, including women, youth and other sub-groups (New Alliance 2015; USAID 2015; UNIDROIT/IFAD 2021; Landesa 2021; Landesa 2021a).

The final agreement may be contained in a single comprehensive government approval or agreement document or, in some settings it may consist of many individual contracts or other documents<sup>8</sup>. Whatever documentary form the final agreement takes, a number of important topics should be covered by one

<sup>5</sup> Ethiopian Constitution, Proclamation No. 456/2005 and Proclamation No. 1161/2019.

<sup>6</sup> See the BVVG Model Lease Contract for an example of a lease that was developed for Ethiopia.

<sup>7</sup> The community can be an actual party to other agreements, such as a Community Development Agreement or a stakeholder consultation plan.

<sup>8</sup> Investors also are likely to be required to obtain or produce various other documents, licenses and permits to operate legally in the country.

or more contracts. Depending on the circumstances, the final agreement or collection of agreements may cover (FAO 2015; FAO 2016):

- Land lease or sale (describing the parties, the project and specific land area, compensation and duration)
- Payment for transfer or loss of tenure rights (if not covered by the lease or sale document)
- Community Development Agreement describing benefits the investor will provide to the community (see Box 2 in the Overview)
- Stakeholder consultation plan
- Partnerships with local suppliers
- Monitoring plan
- Dispute resolution and grievance mechanisms

An important element for negotiation and the agreement is equitable compensation for land rights that are transferred to the investor. When an investor acquires rights to land owned by the government it still must provide fair and adequate compensation to the affected community if their rights or livelihoods are affected. National law may establish a compensation amount, but government should require responsible investors to pay an amount commensurate with international standards, even if that amount exceeds the national standard. Valuations of land should be fair, and compensation paid promptly. (See Part V for a discussion of compensation by government in the context of expropriation-which always should be used as a last resort-and a brief overview of valuation techniques.) Frequently, compensation paid only in the form of cash will be inadequate. In such cases government should require investors to provide alternative land and other non-cash compensation. Compensation also should include payments for resettlement and new housing (if necessary) environmental and social harm and other losses. While there is no “one size fits all” formula for compensation, in all cases those being compensated should be better off or at least no worse off than they were before the investment (USAID 2015; FAO 2016).

Government officials can encourage investors to consider collaborative business models that create partnerships with communities that benefits the company and community alike. See Box 19 for an example of such an approach<sup>9</sup>.

It is essential to keep in mind that the responsible government officials should review the terms and conditions with the affected community and confirm that they have given their FPIC before final agreements are signed. If not, the project should not proceed.

#### **Box 19: Revenue Sharing in Tanzania**

“After securing collective land rights for pastoralists and hunter-gatherer groups and developing 15 village land use plans in the Lake Eyasi basin in northern Tanzania, the VSF-B pilot developed a landscape-wide tourism development plan and code of conduct. The project also established a tourism revenue-sharing arrangement with district government and community-based organisations (CBOs) for each indigenous social group in order to safeguard their interests. Project partners and local actors are to establish a multi-stakeholder platform that will involve tourism operators, local government and conservation authorities to manage implementation in an inclusive way.”  
(Note: this is a project by VSF-Belgium (VSF-B), UCRT & Dorobo Safaris Ltd.)

*Source: Quan and Seigneret 2019 at 13*

<sup>9</sup> See BWG Model Contract on Outgrower Schemes for an example of a contract developed for use in Ethiopia.

## V. Providing Government Land to Investors

As discussed above, in some cases government provides land directly to investors. Government should abide by responsible investment principles when obtaining the land just as it would require a private investor to do so. This means respecting legitimate tenure rights, engaging in meaningful consultations with the affected community and rights holders and otherwise acting as a responsible investor.

For purposes of this discussion the land that a government leases or sells to investors can be separated into two categories. The first is land the government has in some way acquired relatively recently from local individuals or communities. Such transactions may be completed through compulsory acquisition or other processes by which land rights held by private parties become publicly-owned. The second involves land that has been fully owned or controlled by government for some time. Even in the latter circumstances, however, unless the land in question is entirely vacant and unused throughout the year, individuals and local communities are likely to be affected by any transaction with private investors.

In the first case, the government can obtain rights to the land in a consensual transaction with the local rights holders upon payment of fair compensation, a process sometimes referred to as “willing buyer, willing seller.” Or the government can obtain the land without the consent of those who have rights to it also upon payment of fair compensation. The VGGT state that governments should only use this expropriation power when it is for a public purpose based on a law that clearly defines what is and is not a “public purpose.” Evidence gathered over many years indicates that it is best to avoid expropriation as involuntarily displacing communities usually has significant negative impacts on affected people and leads to long-running conflicts. Done poorly, it can leave people homeless and destroy the social fabric of communities. This can create significant and very costly opposition to investments on the land. Thus, governments should use this power only as a very last resort (FAO 2015).

Even in the second scenario, government or the investor still may need to provide fair compensation if the transaction with an investor causes the displacement of current users of the land as such users may have legitimate, albeit informal tenure rights under the VGGT. In both scenarios governments should be guided by the following principles in section 18 of the VGGT:

- States ensure appropriate systems are used for the fair and timely valuation of tenure rights and that these systems promote social, economic, environmental and sustainable development objectives.
- As well as economic value, valuation systems take into account social, cultural, religious, spiritual and environmental values where applicable.
- Valuation standards are developed that are consistent with international standards and that are publicized so valuers and other stakeholders are aware of them.
- Valuations of tenure rights and valuation information and methods are transparent, publicized and accessible (FAO 2017)<sup>10</sup>.

Determining an accurate valuation of land to be used in large-scale agricultural investments is critically important in achieving equitable compensation to the land right holder whether by the community or the government. Internationally, the prevailing approach is to set compensation based on the “fair mar-

<sup>10</sup> See the BVVG “Guidelines for the Procedure of Land Identification and Verification for Commercial Agricultural Investments” for detailed guidance on how to identify land for investment in Ethiopia in a way that respects local land users and is likely to be commercially viable.

ket value” or “market value” for the land. Fair market value is often defined as the price at which a willing seller would sell, and a willing buyer would buy.

In the land expropriation context, the law usually requires the government to pay “just compensation” or “fair compensation” for the property taken and “fair market value” or “market value” is used to decide whether the compensation is just or fair. However, international standards often may require more in that they insist that those whose land is taken should be at least as well off after expropriation as before (see Box 20).

### Box 20: Compensation in the Context of Expropriation

When assessing fair compensation, the aim is to place the affected party in a position after expropriation that is no better or worse than before. Valuations are integral to this aim and the following general guidelines can be stated:

- Independent and impartial valuers should be appointed to value expropriated tenure rights and any reduction in the value of land affected by expropriation.
- The valuation process should be participatory and minimize conflict and stress on affected parties.
- If an affected party wishes to appoint a valuer to value affected tenure rights, the cost should be borne by the expropriating authority.
- The process should provide for resolution of disputes over value and the valuation process.
- If the acquiring authority is empowered by a specific law, the valuation date should be set by law, not by the acquiring authority.
- Valuers should ensure that compensation is fairly and expediently agreed, and:
  - provide, if possible, an early indication of the amount of compensation likely to be awarded;
  - base estimates of market value on openly agreed transaction prices where possible; and
  - take non-market value into consideration.

*Source: FAO 2017 at 33-34*

There are several approaches for determining fair market value, a detailed discussion of which is beyond the scope of this manual. It is important to note, however, that in countries with less developed land markets a lack of price transparency may require a wider variety of land valuation methods. These other methods include auctions, valuation based on the cost of replacing a comparable plot of land or the improvements upon such land, valuation based on the present or expected tax revenue generated from the land and value based on set levels that are prescribed by statute or regulation (Vhugen, et al, 2014)<sup>11</sup>.

In all cases, governments should resist the temptation to sell or lease land to investors for substantially less than market value or to substantially reduce or even eliminate land-related taxes. Doing so places the government in a “race to the bottom” where it competes with other countries to make land available at unreasonably low prices. In addition, lease rates can be linked to the extent to which the investors use the

<sup>11</sup> See BVVG publication “Initial Valuation Concept for Compensation Purpose” for a discussion of valuation approach options in the Ethiopian context.

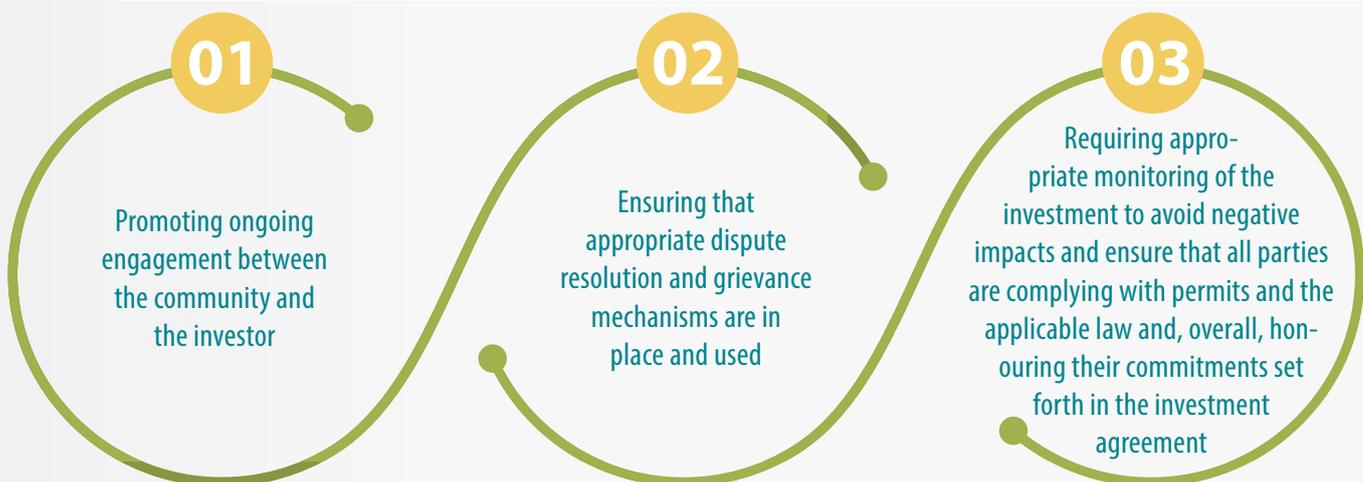
land as specified in the business plan with higher rates levied if the extent of use is less than in the plan. For responsible investors, an especially low price for land rarely will be a significant factor in deciding whether to invest as other factors will be far more important. Indeed, an offer of a very low lease rate or sales price may signal to the company that the government is not interested in establishing an enabling environment that promotes responsible investment.

## VI. Implementing and Monitoring the Investment and Project Closure

Even the best investment assessment process and overall enabling environment can be undermined during implementation of an investment. Disputes and misunderstandings may arise, and external conditions (market prices, environmental conditions, etc.) may change. Government officials should attempt to stay involved to help the parties proceed in a way that is mutually beneficial. Doing so involves: (1) promoting ongoing engagement between the community and the investor; (2) ensuring that appropriate dispute resolution and grievance mechanisms are in place and used; and (3) requiring appropriate monitoring of the investment to avoid negative impacts and ensure that all parties are complying with permits and the applicable law and, overall, honouring their commitments set forth in the investment agreement (FAO 2015).

Involvement of Government officials that helps the parties proceed in a way that is mutually beneficial

Figure 10



**Promoting ongoing engagement.** If the investor and the community agreed to a consultation plan, the government's role can be as simple as requiring the parties to comply with it. Absent such a plan, government can encourage the business to maintain consistent communication with the community and other stakeholders through mutually agreeable and culturally acceptable channels of communication. In these meetings the investor can share information about the operation of the project and field questions that allow the community to understand what is happening and whether it is consistent with their expectations (Landesa 2021b).



### Box 21: Government-Investor Collaboration on a Grievance Mechanism in Laos

“In Laos, the government is responsible for the settlement of land-related grievances that cannot be resolved at village administrative level. In addressing its land dispute, OBL [the investor] worked with the provincial government to establish a new “Provincial Compensation Evaluation Committee” (Provincial decree No. 1089/ 2012). This Committee was a redesign of the Provincial Grievance Committee, to address challenges identified during its operation. The Committee was established as part of OBL implementing a new approach to grievance resolution, allowing the company to play a greater role in resolving the dispute, gaining direct community-company contact, and thereby ensuring the grievance resolution process continued moving forward, as it had become protracted. The Committee comprised provincial and district officials and Outspan representatives whose duties were to work with village authorities to collect detailed data on the areas of land impacted by the investment, evaluate the amount of compensation due and explain to affected families the compensation process.”

*Source: MRLG 2016 at 16*

Note that Lao law also sets forth a mechanism for resolving investor-community disputes that involve compensation and resettlement in Prime Minister’s Decree #84, Article 19 (2016):

“The committee for compensation and resettlement is made up of:

1. The provincial, city committee for compensation and resettlement, which is appointed by the government with the proposition of the Minister of Natural Resources and Environment when the project owner completes a draft report on environmental, social and natural impacts as well as the plan for the environmental, social and natural management, follow-up and examination, is made up of the provincial governor, the related city mayor as president; the provincial vice-governor, a city vice-mayor as vice-president; the district chiefs, chiefs of relevant departments, representative(s) of the project owner and representatives of the mass organizations as members.

In case of a development project that does not have significant environmental, social and natural impacts, the Ministry of Natural Resources and Environment considers that this committee need not be set up. In many cases, if the development project involves many provinces and the provinces have many projects (to supervise), the Ministry of Natural Resources and Environment will be assigned to coordinate with the related provinces in considering setting up such a committee;

2. A management unit of compensation and resettlement appointed by the provincial, city committee for compensation and resettlement with the proposition of the provincial, city Department of Natural Resources and Environment, is made up of representatives of the related provincial city authorities/departments and mass organizations.

3. An operation unit for the compensation and resettlement appointed by the provincial, city committee for compensation and resettlement with the proposition of the district, municipal offices of Natural Resources and Environment, is made up of representatives of the related district, municipal authorities/departments and chiefs of the related villages.

For the projects that no provincial, city committee for the compensation and resettlement is set up, the provincial governor will make a direct appointment of the committee.”

**Dispute and grievance resolution mechanisms.** As noted above, the investment agreement should contain provisions for timely, affordable and effective means of resolving disputes. In many cases such disputes can be dealt with through a variety of government-led dispute-resolution channels at the national, regional or local level (FAO 2015; CFS-RAI Principle 9; WB 2017 Note 19).

In addition, government can encourage or even require investors to establish grievance mechanisms that entail a set of procedures for resolving grievances related to the project that may not require resort to lengthier judicial process. (See Box 21.) Through such mechanisms communities and investors can resolve complaints before they escalate into serious conflict and government officials may be able to act as facilitators or mediators. As with all other terms, any such provision must be freely agreed to by the affected community and jointly managed by the community and the investor. Any mechanism should be culturally appropriate, accessible and lead to equitable decisions (Deng 2012).

**Monitoring.** To avoid costly conflicts and otherwise facilitate smooth operation of the project, the government, the community and the investor should also agree to a monitoring plan as part of the final agreement. Monitoring is a way to determine whether parties to land-based investment contracts are complying with their obligations. It also enables parties to assess the impacts, both positive and negative, of these investments on national development priorities, affected communities and individuals (USAID 2015; FAO 2016).

Broadly speaking, monitoring involves collecting a set of qualitative and quantitative indicators<sup>12</sup> to establish a baseline and then periodically collecting data on the same indicators for comparison with the baseline. It is essential to monitor and review investments throughout their lifecycle (FAO 2015; FAO 2016; Landesa 2021b). See Box 22 for a list of what should be monitored, depending on the particular circumstances<sup>13</sup>.

#### Box 22: What Should Be Monitored?

- Compliance with the contractual obligations of all parties, such as:
  - Payments made to the community, individuals or the government pursuant to a land lease.
  - Infrastructure, jobs and other benefits provided to the community based on a CDA.
  - Compliance with a stakeholder consultation plan.
- Impacts on the community, both positive and negative.
- Operational safety and health of the project.
- The extent to which the project leads to disputes and grievances.
- The investor's adherence to investment incentive performance requirements.

Monitoring should be carried out in a participatory manner and monitoring methods and indicators should be meaningful to the community. This means, for example, that those who gather information for the monitoring program have affected individuals present so that they can provide useful information and also so that the community can better understand the activities of the business. It also means that

<sup>12</sup> As noted above, the baseline data often will be collected in the ESIA.

<sup>13</sup> See, also "BVVG Monitoring Scheme for Monitoring Large Agricultural Investments in Ethiopia."

the investor and the community should form and utilize a monitoring committee to provide data and keep the community informed of the impacts of the investment (Deng 2012; Landesa 2021a).

The monitoring plan should describe what will be monitored, and the methods that will be used to collect data, how often data will be collected and by whom. It should set forth mechanisms for community participation, as well as the agreed upon institutional and funding arrangements. The plan should incorporate obligations set forth in the various contracts that govern the investment, such as leases, CDAs and ESMPs (Deng 2012).

### Box 23: Government-Mandated Monitoring in Laos

“Lao People’s Democratic Republic’s 2016 Investment Promotion Law article 72 requires investors to allocate budgets for investment monitoring and evaluation. The Environmental Impact Assessment Decree also requires investment project developers to design an environmental management and monitoring plan to be incorporated into a report on environmental impact assessment (art. 13). In instances of resettlement, the Decree on Compensation and Resettlement Management in Development Projects also determines the monitoring and examination of plans for compensation, resettlement and rehabilitation of affected peoples (art. 26).”

*Source: Jansen and Andrade Correa 2021 at 32*

Government officials should ensure that the investor is complying with the agreed monitoring plan and avoiding or curing any negative impacts. This should be pursuant to its required regulatory activities related to environmental harm, labor laws, etc. In some countries, the government may play a more active role in monitoring (WB 2017 Note 9) (see Box 23).

**Project Closure.** It is important not to ignore what happens at the end of the project. Investments may last 5 years or 50 years or more, including potentially lengthy extensions. They might start small and expand over time. Moreover, as land-based investments in agriculture and forestry are risky and do not always succeed the project may terminate before the time specified in the agreement.

For these and other reasons, government officials should see to it that the investment agreement contains several important terms applicable to the end of the project. These include: (1) Who has ownership or use rights to the land at the end of the project? Does it revert back to the original tenure rights holder, which could be an individual, family, community or the government? (2) Is the investor required to repair or otherwise restore the land to its original condition so that the community can resume use of it? (3) Who becomes the owner of buildings and other infrastructure established by the investor? Is it the community or the government? These and other questions should be addressed in the investment agreement and addressed when the project ends (UNIDROIT/IFAD 2021; CSI/Namati).

## VII. Conclusion

It is possible or even likely that investment in land in developing countries may increase based on world events such as climate change or the war in Ukraine which has resulted in another spike in world prices for grains and other staple foods. This may result in new opportunities for developing country governments and their citizens but as addressed in this guide, also potential risks. This means that governments are likely to play an even more essential role in ensuring that such investments are implemented responsibly. They can do so by creating a suitable enabling environment and then implementing it through an investment assessment process that are consistent with the guidance contained in this manual. The ultimate result can be a “win-win” outcome where investments are both financially successful and socially sustainable (see the Key Points in Box 24).

### Box 24: SUMMARY OF KEY POINTS

- Governments in the countries where investments are made (host governments) play a critical role in ensuring that land-based investments implemented in their jurisdictions are responsible and contribute to sustainable development.
- Governments play three primary roles in promoting responsible land-based investments:
  1. Creating the enabling environment for responsible investments
  2. Applying that enabling environment to attract, facilitate and monitor investments through a transparent and effective investment assessment process.
  3. Identifying and acquiring land to transfer to investors.
- Creating the enabling environment involves two phases:
  1. **The preparation phase.** The activities involved in this first phase can be grouped into five sets of activities: (1) identification of the country’s main concerns, priorities and principles related to land-based investments; (2) carrying out a stakeholder mapping analysis that identifies all of the relevant stakeholders in the country and their needs related to land-based investments; (3) identification and classification of relevant policies, laws and incentives; (4) identification of the relevant components of the institutional framework (including roles and responsibilities); and (5) comparing the existing legal and institutional frameworks with the responsible investment principles to identify gaps and necessary changes.
  2. **The Implementation Phase.** This involves three primary activities: (1) creating a strategy to address the gaps and shortcomings of the existing legal and institutional frameworks identified in the preparation phase; (2) amending existing or developing new instruments and reforming the institutional framework based on the comparative analysis performed in the preparation phase; and (3) designing a mechanism to monitor progress.

- An important component of the enabling environment is an investment assessment process (IAP) aimed at promoting, facilitating and monitoring investments. It is through such a process that government exercises its responsibilities in relation to individual investments by both foreign and domestic investors. The aim is to create and implement a clear and transparent process that promotes investment that adheres to responsible investment principles and standards. It has four basic stages: (1) screening prospective investors and proposed projects through due diligence practices; (2) ensuring consultation and participation of all potentially affected stakeholders; (3) conducting impact assessments prior to deciding whether to approve the project; and (4) preparing contracts and agreements for assessment by the relevant authorities and parties to the agreements.
- In some cases government provides land directly to investors. Government should abide by responsible investment principles when obtaining the land just as it would require a private investor to do so. This means respecting legitimate tenure rights, engaging in meaningful consultations with the affected community and rights holders and otherwise acting as a responsible investor.
- Government also has an important role in overseeing investment implementation. Doing so involves: (1) promoting ongoing engagement between the community and the investor; (2) ensuring that appropriate dispute resolution and grievance mechanisms are in place and used; and (3) requiring appropriate monitoring of the investment to avoid negative impacts and ensure that all parties are complying with permits and the applicable law and, overall, honouring their commitments set forth in the investment agreement.



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