

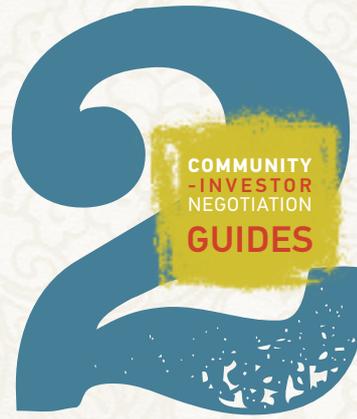
NEGOTIATING CONTRACTS WITH INVESTORS

COMMUNITY
-INVESTOR
NEGOTIATION
GUIDES

GUIDE 2 For community members and advocates interacting with potential investors



NEGOTIATING CONTRACTS WITH INVESTORS



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INTRODUCTION

WHAT IS THE PURPOSE OF THESE GUIDES?

An investor may approach a community seeking land and natural resources at any time. These guides provide recommendations for how advocates and community leaders can best support communities to prepare for and, if they so wish, engage in empowered contract negotiations with investors seeking to use community lands and natural resources for their businesses.

Guide 1 explains how communities can prepare for interactions with potential investors, including making decisions about whether or not to negotiate. It can be used to help a community: (a) prepare *before* an investor arrives and (b) decide whether or not to enter into discussions or negotiations with an investor that has arrived. Guide 1 should be used *before* any negotiations start.

If a community decides to negotiate with a potential investor, this guide (**Guide 2**) describes issues that can be included in a community–investor contract. It also explains what language should be avoided in the contract. It is designed to help communities negotiate a contract with an investor that is clear, fair, and equitable.

WHO ARE THESE GUIDES FOR?

These guides have two main audiences:

- ➔ Lawyers, paralegals, advocates, *animateurs*, and other professionals who help communities with legal issues related to the management and protection of their lands, natural resources, and human rights (individuals that these guides refer to as “**advocates**”); and
- ➔ Community leaders and community members seeking information to support their interactions with potential investors and who are working together with lawyers, paralegals, and other advocates. **However, communities should not use this guide in place of legal assistance.**

While these groups are the intended audience of these guides, **advocates and leaders should never negotiate and make investment-related decisions on their own.** Instead, they must ensure the meaningful participation—in every investment-related decision—by all community members, including women, youth, people with different livelihood strategies, and members of marginalized or minority groups.

WHY ARE THESE GUIDES NEEDED?

Deciding whether or not to allow an investor to use community lands and natural resources is one of the most important decisions a community can make. If an investment project is carried out in a respectful and inclusive way, it may help community members to achieve their goals. Those goals may include creating jobs and local economic opportunities. But investments come with risks. The investment projects may make the land that community members need for farming and other livelihood activities unavailable for some time. They may pollute local rivers, lakes, air, and soils. They may block access to sacred areas or water sources. They may even violate community members’ human rights. In some cases, investments may result in communities completely losing their lands.

It may be possible to reduce the risks related to investments if communities know their rights; understand the advantages, disadvantages, and the risks of investments; and are supported by advocates who help community members protect their interests. Preparing communities to engage with potential investors from a place of empowerment can improve contract negotiations and make it more likely that investments contribute to the community’s thriving, healthy future. An empowered community can demand that investors respect community interests, conserve the local environment, and support the community’s development, all on the community’s own terms.

These guides do not provide legal advice and they do not cover all the important legal issues. If the community decides to negotiate with an investor, it is best to have an independent lawyer look at a contract before the community signs it.

CONTEXT OF THESE GUIDES

Today, around the world, there is more and more competition for increasingly scarce lands and natural resources. In this context, community members should be prepared to interact with potential investors seeking community lands and natural resources. These investors may be local or national elites, government officials, or international investors. They may ask for a few hectares, or thousands of hectares. There are three main “moments” that communities may face in this context, each of which requires different skills and knowledge:

1. **Before an investor comes**, communities should make sure that their lands and natural resources are secure and protected, as well as governed by strong local land management rules and structures. Without secure land rights, communities may not be able to protect their lands from outside investors and as a result they will be in a weaker bargaining position when investors arrive. Participatory, accountable community land governance can help ensure that any future community–investor contracts benefit not only local leaders and elites but also women, youth, poorer families, and members of minority or marginalized groups.
2. **Around the time that a potential investor first visits a community seeking its lands and resources**, the investor may also be asking the government for permission to operate its business project. In many countries, investors must apply for and receive environmental licenses, business permits, and other types of authorizations from the government. These state approval processes can create opportunities for the community to influence the conditions that the government puts on the investment. For example, the community can ask the government to require strong environmental protections in any permits it issues to the investor.

In situations where the government (instead of the community) has the legal right to give the community’s lands to an investor, the community can urge the government to reject any investment that would harm the community’s interests. **Government**

approval and permitting processes can be important advocacy opportunities for people who do not have ownership rights to the land that the investor wants but whose lives and livelihoods will be affected by the investor’s project (for example, pastoralists, herders, and hunter-gatherers with historical use and access rights to the land).

In addition, when the government gives investors the right to use community lands through contracts between the government and the investor, **community members can try to influence the government–investor contract negotiations**. For example, community members can share their interests and concerns with the government before and during negotiations, and they should ask to send representatives to participate in the government–investor negotiations. Also, even in situations where the government has the legal right to give community lands to an investor, **the community should still try to negotiate its own contract directly with any potential investor** to ensure that the community benefits from—and is not harmed by—the investment.

3. **After an investor has been given the right to use the community’s lands and has begun project operations**, community members should monitor the investment and its impacts on the community. They should also monitor whether or not the investor is obeying the terms of the contract and national laws. When problems arise, community members can bring their concerns either directly to the investor and/or through government complaints processes and grievance mechanisms. If the investor refuses to address the problem(s), community members can seek help from government offices or local courts and put pressure on the investor through advocacy campaigns.

These three “moments” are all important opportunities for communities seeking to protect their interests. Communities should also work with advocates to **strengthen national legal protections for community land and natural resources rights**, both in general and in the context of investment. Improved laws and policies can better protect the community’s rights over the long term.

INTRODUCTION

/ CONTINUED

NATIONAL LAW IS IMPORTANT

Every country has its own particular laws about investments and community land rights. Advocates helping or representing communities must carefully research relevant national laws and apply those laws alongside this guide. Relevant national laws include laws that apply to contracts, investments, land rights, Indigenous peoples' rights, environmental protection, and specific types of projects.

A community can always withdraw from negotiations if it is not happy with what is being offered. However, **national law will often determine whether or not a community has the legal power to stop an investor's project from proceeding.**

Whether and how the community's land rights are protected under national law may affect what the community can negotiate with an investor. For example, communities whose rights to their lands are protected by national law will have stronger bargaining positions than communities whose customary land rights are not formally protected by national law. Communities also have different ways of managing collective and individual use of their lands. Some communities possess and manage land collectively (communal land); in other communities, families own their own separate plots of land, but customary or national law might say that community leaders can play a role in negotiations with investors. Different decision-making processes may therefore be needed for when land is communal and for when land is possessed by specific families. While this guide can be used by most communities that are approached by an investor seeking to use community lands, some parts of the guide may be more or less useful depending on a community's specific situation.



Review national laws. Because this guide is meant to be used around the world, the suggestions provided may not apply to every community's situation. In some countries, most or all land belongs to the government, and the laws may or may not recognize customary rights to land. In these countries, laws about how land is accessed and used may affect the contracts that communities can make with investors, as well as the rights and protections that communities enjoy. The laws of different countries may also affect rental payments, environmental impact assessments, land management, contracts, and commercial leases of land. Seek the advice of legal and technical experts to understand the existing obligations of companies and the rights of communities, and to make sure that the contract complies with national laws.

HOW THIS GUIDE IS ORGANIZED

This guide (Guide 2) describes what a contract is and discusses different types of contracts that communities and investors might sign. It also explains how to make sure the contract is worded clearly, so that everyone has the same understanding of the agreements that are being made.

The rest of this guide focuses on what may be included in a contract and provides suggestions and reminders on what communities should include in any contract they sign. The order of the sections in this guide follows the order in which many contracts are written. In order to help communities decide what to

seek to include in a contract, each section includes a list of questions that community members can discuss as they prepare for and participate in negotiations. While the listed questions do not cover every issue that should be considered, they can be used as the starting point for community discussions.

This guide focuses on how to negotiate legally enforceable contracts (agreements that create obligations and that can be enforced by a court). However, this guide may also be helpful in the negotiation of agreements that are not legally enforceable.

IMPORTANT! ABOUT THE EXAMPLE LEGAL CLAUSES AND TEXT BOXES IN THIS GUIDE:

EXAMPLE

This guide includes **examples of contract clauses**. Many of these clauses are contained in real contracts between communities and companies (with some language changed for clarity and privacy). **These examples are *not* suggested as clauses to be put into future negotiated contracts.** They are provided only to give a sense of existing practice and possibilities. Every community should draft its own contractual language to best suit its situation and interests.

CAUTION!

This guide also includes **“red-flag” clauses**. “Red flag” means that the words or phrases used (and similar words) should be **avoided**. This is because the language may create challenges, cause tensions and mistrust, or go against community interests. These red-flag clauses are taken from real contracts (again, some language has been changed for clarity). The specific words or phrases that should be avoided are in **red text**.

At the end of most sections there are these **tips**:

GET LEGAL ADVICE

GET TECHNICAL ADVICE

A **“Get legal advice”** box: This lists some of the questions that the community might need to ask a lawyer about. Sometimes there is also a **“Get technical advice”** box: This lists questions that the community might need to discuss with a business expert, accountant, impact assessment professional, environmental or social scientist, or another type of expert.

DISCUSS WITH THE COMMUNITY

A **“Discuss with the community”** box: These questions can be used to help the community start to discuss different issues that will be important when negotiating the contract. These are only some of the questions that need to be considered; for each issue, there will likely be other important questions that the community should discuss.

CHECK THE CONTRACT!

A box labeled **“Check the contract!”** Each community’s circumstances are different; these are just *some* of the issues the community should check after the contract has been drafted but before it has been signed. If the draft contract does not adequately address these and other issues, the community should make sure that the next version of the draft contract does.

GLOSSARY OF TERMS

Annual profits or losses: How much money a company makes or loses, after the company has paid its expenses, over the period of a year. The details may be provided in a financial statement.

Breach of contract: When a party to a contract fails to fulfill its obligations under the contract.

Clause: A section or paragraph in a contract.

Community: A group of individuals, families, and households who collectively live within or have strong historical ties to a specific territory with definable boundaries and who are governed by a shared set of either state or customary governance structures.

Company: An entity that engages in business. This guide deals with companies and investors that carry out natural resource projects—particularly agricultural or forestry projects—but it may be also be relevant in the case of companies that carry out mining projects. The terms “Company” and “Investor” are used interchangeably throughout the guide. See also the definition for “Investor.”

Comply: For the purpose of this guide, to do what a party is required to do by the contract. When a party does not comply with its obligations under the contract, it is in “**breach of the contract.**”

Contract: When two or more parties (people, communities, or organizations) promise to do something in exchange for a valuable benefit, this can form a contract, which is “**legally binding.**” Parties that enter into a contract have rights and obligations under the contract. Typically, the steps or process that must be followed in order for a contract to be valid are described in a country’s laws. Valid contracts will create “**enforceable legal rights.**”

Contract area: The area of land that the contract covers. Business activities may take place on this land.

Dispute resolution: The process that parties who have a disagreement use to try to resolve the disagreement. This could include, for example,

going to court or participating in a mediation or arbitration. Specific dispute resolution processes may be described in and required by a contract.

Enforceable legal rights: Rights that are recognized and protected by the law. In some places, enforceable legal rights explicitly include customary rights that arise out of customary law. Enforceable legal rights can also be created through a contract. All parties to the contract must respect these legal rights. If a party to the contract does not respect these rights, it can be ordered to do so by a court.

Environmental and social impact assessment (ESIA): A study that identifies serious environmental and social impacts that a project will likely have. The ESIA is usually presented as a report that must be approved by the government.

Environmental management plan: A document that sets out how the company will address the risks identified in the environmental impact assessment.

Grievance mechanism: A process for individual community members to communicate and seek remedies for complaints or grievances they have regarding the project’s negative impacts or the conduct of the company or its employees.

Human rights impact assessment: A study that analyzes the potential or actual human rights impacts of a project and provides recommendations to respond to those impacts.

Infrastructure: Physical structures and systems necessary for a business, city, or village to operate, such as buildings, roads, water piping or wells, communications towers, and electrical systems. Social infrastructure refers to structures and systems used for social services, such as schools and health clinics.

Investment activities: Activities that are carried out for an investment project with the intention of making a profit.

Investment project: A project undertaken by a company or investor with the intention of making a profit.

Investor: A person or entity that puts money into businesses or investment projects. This guide deals with investors that carry out natural resource projects—particularly agricultural or forestry projects—but may also be relevant in the case of investors that carry out mining projects. The terms “Company” and “Investor” are used interchangeably throughout the guide. See also the definition for “**Company**.”

Lease: A contract in which one party transfers land or property to another party, or the use of that land and property, for a specific period of time, usually in return for periodic payments called “rent.”

Legal obligation: For the purpose of this guide, something that a person, community, or organization is legally required to do. A legal obligation can be created by law or by contract. If a party does not comply with its legal obligations under a contract, it has breached the contract.

Legally binding: Recognized by law and enforceable in a court of law. Valid contracts are legally binding, and they create legally binding obligations for parties.

License: Permission, generally provided by the government, to carry out a specific activity. Very similar to “**Permit**.”

Material breach: When a party fails to perform a major obligation under a contract.

Monitoring: To regularly check how a project is operating and its positive and negative effects. This can be done to see if the company is complying with the law or with a community-investor contract. Monitoring can include different types of research, including testing water or soil for pollution, interviewing community members about their experiences, or checking company paperwork to make sure the company is complying with certain obligations, such as sharing revenue. Monitoring can be done by the government, the community, the company, or other actors.

Negotiation: A negotiation involves two or more people or parties who come together with the goal of reaching an agreement. Each side presents

what they want, which is discussed until a compromise is reached.

Ombudsman: A public official appointed to receive and investigate complaints. In some countries, an ombudsman may receive complaints from affected community members about the negative effects of an investment project.

Party: A person, community, or organization that enters into a contract with other persons or organizations.

Permit: Permission, generally provided by the government, to carry out a specific activity. Very similar to “**License**.”

Profit-sharing: For the purposes of this guide, an arrangement in which the community receives a direct share of a company’s profits from the project. Profits are the money the company earns from the project minus how much the company has spent on the project.

Remedy: A measure to correct or compensate for a legal wrong. Remedy can also describe correcting or compensating for a problem or harm.

Royalty: For the purpose of this guide, a royalty is a payment given to the community that is based on the amount of goods produced by the company’s project. The payment may be a percentage of the value of the goods produced (for example, 10% of the value of goods produced), or it may be a payment for every unit of good produced (for example, \$10 per ton of good produced).

Social impact assessment: A study that analyzes the potential and/or actual social impacts of a project, and that recommends measures to respond to those impacts.

Subsidiary: A company that is owned and controlled (in part or in full) by another company. For instance, a multinational company may establish and register a subsidiary company in the country where a project will take place, so that the subsidiary company can assume all rights and responsibilities relating to the project.

Term: The period of time during which a contract is operative (in effect). Sometimes this is called the “duration” of the contract.

a.

WHAT IS A CONTRACT?

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WHAT IS A CONTRACT?

A contract is a legal agreement in which one person, company, or community promises to provide another person, company, or community something in exchange for a payment or other kind of benefit. Each side to the contract is called a “party.” If formed according to national contract laws, this agreement is **enforceable** in a court of law. Contracts are generally written down and signed by all parties.

A contract creates legal rights and obligations for all parties to that contract. If one party does not do what it promised to do under the contract, the other party has the right to insist that the promise is fulfilled. A lawyer or paralegal may help the other party encourage the first party to make good on its promise. If the promise is still not fulfilled, the other party usually can go to court to ask for a “remedy.” One type of remedy for a broken contract is “compensation” (such as money) for any losses or damages caused. Another type of remedy is a court order demanding that the party breaking the contract stop what it is doing and/or fulfill its promises. This is discussed in section 18 below.

To be legally enforceable, the contract must explain **what each party promises to do**. In some countries, the law requires that for the contract to be enforceable, one party must give “something of value” in exchange for a promise by the other party. For example, if a community promises to provide land to the company but asks for nothing in exchange, this could affect whether the contract is legally enforceable.

Each party’s promises and commitments can be included in different sections of the contract. The contract may describe what the community will allow the company to do on the community’s land, including a description of the project (see section 3) and project-related infrastructure (see section 7). It will also describe what the company promises to give the community in exchange for using its lands and resources (see section 8). If the contract does not discuss these issues, then there might be a risk that the contract does not have an exchange of promises by both parties and, therefore, might not be legally enforceable. Involving a competent lawyer from within the country where the community is will help to make sure that the contract is enforceable.

TYPES OF CONTRACTS

There are many types of contracts that a community and a company may sign. This guide focuses on two types of contracts: benefit-sharing contracts and leases.

- ➔ **Benefit-sharing contract.** A benefit-sharing contract is a contract between a company and a community that sets out what the company agrees to provide to the community (for example, money, a school, a clinic, a road, jobs, etc.), in exchange for use of the community’s lands and resources, and/or in exchange for the community’s support for the company’s planned investment. Benefit-sharing contracts may also be called “Community Development Agreements,” “Social Agreements,” “Compensation Agreements,” or another name. If made in accordance with local contract laws, these types of agreements may be enforceable contracts.
- ➔ **Lease.** A lease sets out that an individual, family, or community will allow a company to occupy and use the individual, family, or community’s lands and natural resources for a set period of time in exchange for payment and potentially other benefits (such as the benefits typically provided through benefit-sharing contracts). Leases generally restrict the individual, family, or community’s ability to regularly access or enter the land until the lease ends. A lease may also be called a “Land Access Agreement,” an “Authorization to Access Private Property,” or another name. If made in accordance with local laws, leases are generally enforceable contracts.

Contracts between communities and companies do not always fall neatly into these categories. For example, a contract may look and function like both a benefit-sharing contract and a lease.

There are also other kinds of written agreements that communities and investors might sign together, including:

- **Memorandum of Understanding (MoU).** An MoU usually explains a shared understanding of a certain set of circumstances and sets out basic rules for how the parties will interact and what they will try to do. Although this guide includes topics that may be relevant to MoUs, MoUs are generally not considered to be contracts, and so they are not covered by this guide. It is worth noting, however, that if an MoU is made in accordance with domestic contract law, it is likely that the MoU would be considered a contract. This is because if an agreement fulfills local legal requirements regarding what forms a contract, it does not matter what the agreement is called. A local lawyer can help to determine whether an agreement is a legally binding contract or not in accordance with local laws.
- **Contract of sale.** Land sales, and the contracts that accompany land sales, are not covered by this guide. This guide recommends that communities never sell their lands. Rather, communities should

instead lease or otherwise allow an investor to access the land for fixed periods to ensure that the land will remain under the community's control and management in the future.

Communities or community members may also enter into other kinds of contracts with agricultural companies or other investors. These include contracts for certain types of "inclusive business models" such as **contract farming** or **outgrower schemes**.¹ Communities may also enter into other inclusive arrangements that give them even more rights or benefits, such as **joint ventures** or other arrangements for significant profit sharing. These contracts are often very different and require a detailed analysis of economic factors that affect what participating community members will be paid. While these kinds of contracts are not covered by this guide, **communities should strongly consider whether there are other ways of partnering with investors that would lead to more benefits than are typically gained through a lease or benefit-sharing contract**.² In considering other forms of partnership, legal advice is particularly important to help communities navigate the advantages and disadvantages of different kinds of contracts.



Communities with ownership rights over their land should never sell their lands.

A lease (even a long-term lease) is *always* better than a full land sale. When a community leases land, the land remains community property, and it will go back to the community at the end of the lease. In contrast, a land sale is final; community members may never regain the land that has been sold. Most importantly, leases offer the community flexibility to change or renegotiate the terms of the lease over time. While leasing land offers benefits over selling the land, remember that a very long-term lease of 50 years or more may have similar impacts on a community as a land sale.

Even when communities do not have ownership rights, they should avoid any contracts with investors that would require them to give up their permanent use rights or customary claims to the land. It is better to negotiate lease contracts so that the community will regain access and use of its land in the future.

¹ These models are explained in Vermeulen and Cotula (2010), "Making the most of agricultural investment: A survey of business models that provide opportunities for smallholders," <http://pubs.iied.org/12566IIED/>.

² For more guidance, we recommend that communities seek legal and technical assistance. The following guidance may also be useful:

- UNIDROIT/FAO/IFAD Legal Guide on Contract Farming (2015), www.unidroit.org/studies/contract-farming.
- IISD/FAO/IFAD Model Agreement for Responsible Contract Farming: With Commentary (2018), www.iisd.org/project/model-agreement-responsible-contract-farming
- CGIAR LINK methodology: A Participatory Guide to Business Models that Link Smallholders to Markets (2012), <https://bit.ly/2H55Cd0>.

THE SPECIFIC WORDS USED IN A CONTRACT

The exact words used in a contract are very important.

Different words can strengthen or weaken a company's or a community's obligations and rights, and can affect how enforceable the contract is in practice. When negotiating and drafting the terms of the contract, communities should follow these basic tips:

- ➔ **Use simple language.** Simple language helps ensure that community members understand what they are agreeing to. It also can ensure that the community and the company have the same understanding of what is in the contract. If technical language is used, it should be defined. If the company's lawyers want to use very complicated language in the contract, the community can insist that the contract's language be simplified before they sign.
- ➔ **Be specific and detailed.** A clause that only says "The company must provide a school" does not include important information such as what sort of school must be provided, how large it must be, the kinds of building materials that will be used, who will pay for teachers and operational costs, or when the company will provide the school. Communities must make sure that important details are included so that the community can hold the company to its promises.
- ➔ **Be careful about words like "may" and "endeavor."** Words and phrases such as "may," "to the extent possible," or "endeavor to" do not create an obligation or a legally binding duty to act; they only say what could potentially be done. On the other hand, words such as "must" and "shall" usually mean that the party signing the contract has a legal obligation to perform the action.

CAUTION !

RED-FLAG CLAUSES

"**To the extent possible**, all farmland will be left to continue to exist as it was prior to the Company's palm oil project. However, due to the terrain and topography of the land **it may not be possible to completely avoid overlapping** with existing farmland."

! Avoid this language, because it would allow the company to use existing community farmland even though it sounds like the company will not. The company could argue that it is allowed to use the farmland by pointing to this clause and saying that it is not "possible" to avoid overlapping with the community's farmland.

"The company commits to **endeavor to assist** in providing and supporting the primary and secondary education of school-going infants/pupils/students residing in the locality of the land under commercial development within the land."

! Avoid this language, because the phrase "endeavor to assist" is not clear. "Endeavor to" does not mean the company must do something—it just means the company has to **try** to do something. The meaning of "assist" is also not explained, which makes the company's obligation even less clear.

THE ROLE OF DEFINITIONS IN A CONTRACT

A contract often includes a definitions section that explains the meaning of key words used in the contract. This is important, as definitions make it easier for everyone to have the same understanding of what a certain word means. Definitions can also be used by a judge who is asked to interpret the contract in court.

Community members should make sure that they understand and agree with how key words are defined and used in the contract. Examples of the types of words that might be defined in a contract include: lease, project, tenure, remedy, damage, arbitration, community, community members, and leaders. Such words should be defined simply and clearly, according to how they are normally used.

The first letter of any defined word should be capitalized every time it is used to make it clear that the word has a specific and agreed-upon meaning. For instance, the contract should refer to “the Project” rather than “the project.”

Definitions should be very specific to the project and context. Examples of specific definitions written for a particular project and context include:

- ➔ **Affected Community:** “A community comprising less than a statutory district (including chiefdoms, clans, townships, towns, villages, and all human settlements) whose interests are likely to be affected by Operations carried out.”
- ➔ **Agricultural Products:** “Rubber Products and any other products derived or obtained as the result of agricultural or farming activities, including plants, trees, fruit, timber, wood, and food crops whether cultivated or not, as well as any other products derived as a result of the processing of any of the above.”

CAUTION!

RED-FLAG CLAUSE

“This contract is ruled by and interpreted in conformation with **French law**. The Arbitration Tribunal consists of an arbiter designated by the court of the International Chamber of Commerce, and the **language of arbitration will be in English.**”

WHAT LANGUAGE SHOULD THE CONTRACT BE IN?

The choice of language used for the contract is important, as community members must be able to understand what the contract says.

The community and the company should decide together which language to write the contract in. While the company may wish to use the national language or English, **community members should never sign a document that they do not fully understand.** Community members may want to insist that the contract is written in *both* the national language and their local language. If some community members are illiterate, the contract should also be read aloud to them by a trusted literate community member or advocate to make sure that all community members understand what it says.

If two versions in different languages are made, **a lawyer, trusted community member, or advocate who is fluent in both languages should check the versions to make sure that they are exactly the same** and that no detail has been lost in translation. The contract should also clearly say which of the two versions is the official, binding version. Community members should review both the national language version and the local language version before they sign them.

Be careful of contracts that switch languages by requiring use of one language for some interactions and use of a different language if a dispute arises and must be resolved. The contract language and the language in which any dispute will be settled should be the same language, or they should both be languages understood by the community.

! *Avoid this type of clause if the community and its advocates do not speak and read both languages, as the clause requires that they be able to speak and read both in order to understand the French law and to advocate on the community's behalf during an English-language arbitration.*

b

WHAT SHOULD GO IN A CONTRACT?

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1.

PARTIES TO THE CONTRACT

The first section of the contract should clearly describe the “parties” who are signing the contract. This is important: once the contract is signed, each party will take on the rights and obligations described in the contract.

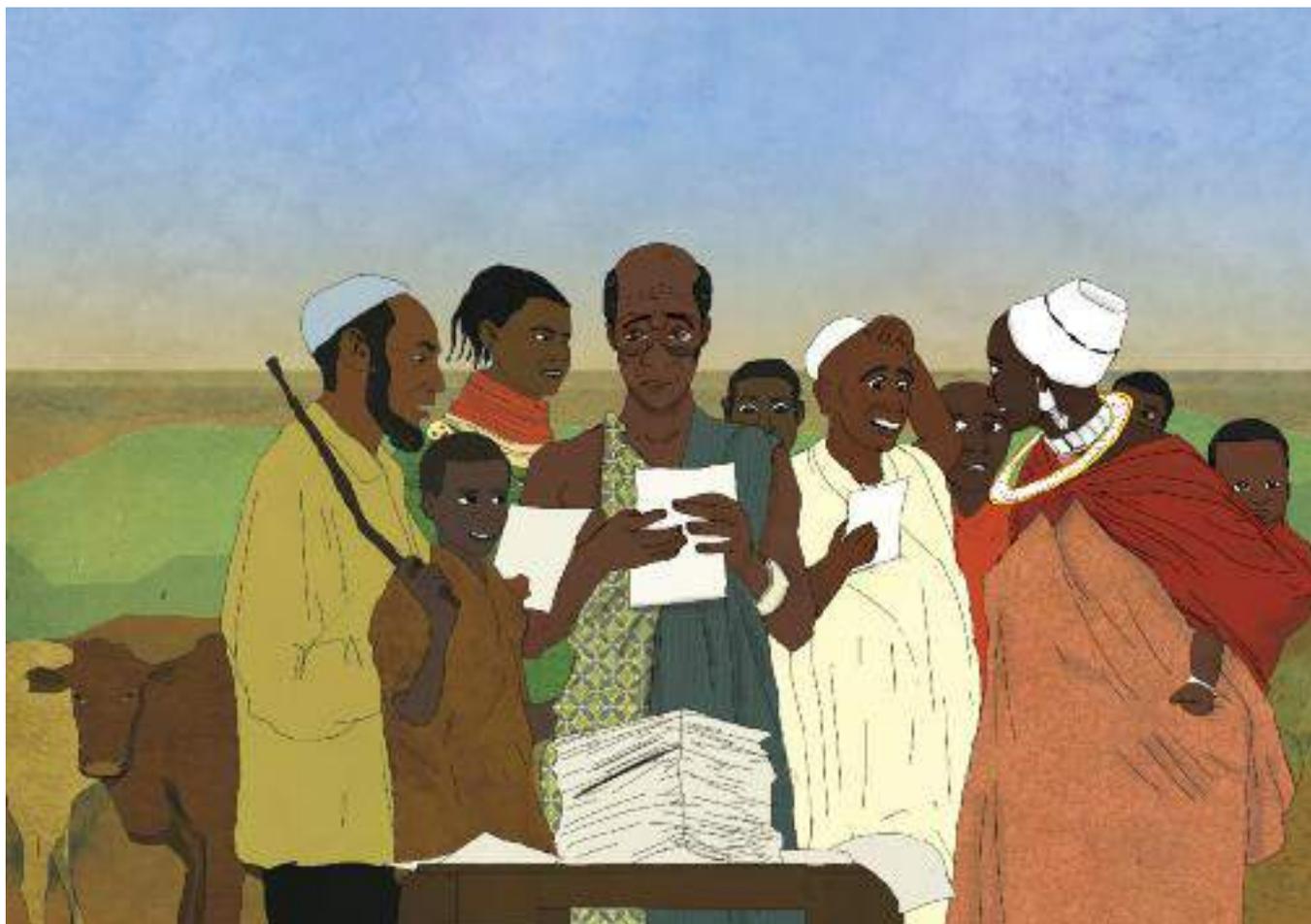
If the contract is between a company and a community as a whole, the contract should **use the community’s full name, not any one leader’s name. Do not sign contracts that use a leader’s name in place of the name of the community**, as this may give one leader the right to make decisions on his or her own, or to keep certain benefits for himself or herself. In some countries, the community might need to establish a “legally recognized entity,” such as an association or a community corporation, to be able to be a party to a contract. In that case, a legally recognized entity should be established before any contract is signed, or else the contract might not be enforceable. If for some reason the community’s full name cannot be listed as a party, and leaders or other specific people must be the only community members listed as parties, make sure the contract states that these people are “*acting on behalf of the community.*” The contract should clearly state that the community as a whole has the right and power to make all major decisions.

If a family or a group of families is leasing land, the contract should include all family members as parties to the lease so that each family member is able to enforce the lease if necessary. If possible, it is best to list the names of every adult man and woman in the family. If there are too many family members to list, the family may choose people from within the family to represent the interests of all family members, including women and children.

The contract should **include the following information about a company: the full name of the company, where it is incorporated, its registration number, and its registered address.** This information can help to identify the company that is legally responsible under the contract. The registered address may be where any “notice” should be sent to (see more on Notice in section 17). Some investors have an international “parent” company and a local subsidiary company, and the local subsidiary company will usually be the party to the contract. In this situation, the community can seek extra protection by having the parent company sign a separate “guarantee contract.” In the guarantee contract, the parent company guarantees that if the local subsidiary does not fulfill its obligations under the contract, the parent company will fulfill those obligations. The guarantee contract can help to protect the community if the local subsidiary company goes bankrupt or abandons the project without doing and paying for everything it agreed to in the contract. The guarantee contract can be attached to the community–investor contract as a separate annex.

EXAMPLE

For example, the guarantee contract can require the parent company to guarantee “*the due and punctual fulfillment of the local subsidiary’s obligations under the contract the local subsidiary signed with the community.*”



Put the community's name, not the name of a specific leader, as a party to the contract. This helps make sure that *all* community members have the right to make decisions about the investment project.



Does the community need to establish an association, community corporation, or other kind of legally recognized entity to have the legal right to enter into a contract?

- Who is the contract between?
- Are the full names of all the parties included in the contract and correctly spelled?
- Has the name of the company been checked and confirmed as the correct legal name?
- Is the name of the community listed as a party, or is only the name of the chief/leader listed?
- Does the contract include contact information and other identifying details, such as addresses and, for companies, registration numbers?



2.

INTENTION TO BE LEGALLY BOUND BY THE PROMISES IN THE CONTRACT

This is the part of the contract that shows that the parties intend to be legally bound by the promises they made in the contract. This is important, as otherwise the contract might not be enforceable.

The contract should clearly show that the community and the company want to be legally required to do the things they promise to do. While an intention to be bound can often be inferred from a contract that clearly explains each party's obligations, the parties can also include a clause that says that they want to be legally bound by the contract.

EXAMPLE

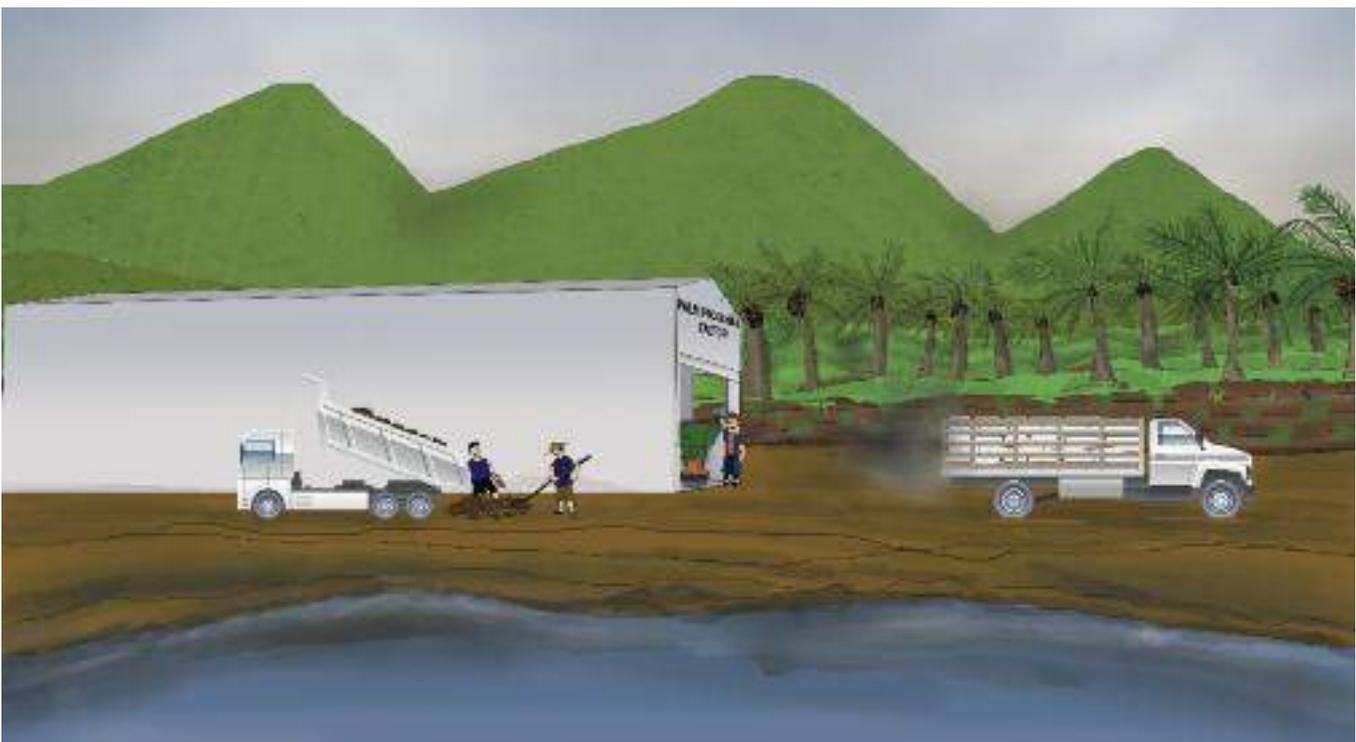
One example of a clause that the contract can include to show an intention to be legally bound is: ***"This contract is intended to be legally binding on the parties."***

CAUTION!

RED-FLAG CLAUSE

"This agreement ***does not create any legally enforceable rights*** to the benefit of either party. All disputes or grievances of any kind arising out of or related to this agreement shall be settled through mediation as described in this agreement. ***The parties hereby renounce their rights to enter into any form of litigation or arbitration on any disputes or grievances arising out of this Agreement.***"

! Avoid this language, because one party might use it to argue that the parties did not intend for the contract to be legally enforceable. Also, it is almost ***never*** advisable to renounce the community's right to go to court to litigate and enforce the promises in the agreement.



DESCRIPTION OF THE PROJECT

This is the part of the contract where the company must clearly and fully describe what it plans to do. This description must include enough information for the community to understand how the company intends to use the land and all natural resources located on that land.

The project description should be detailed and specific. If the company later tries to use the land for a different activity from what was agreed to, the community can point to the project description in the contract as a reason that the company should stop that activity. Often, the contract will explain which activities are allowed and then say that the company cannot do anything that is different from those activities unless it receives permission from the community.

Make sure that the contract has all the necessary details: what will the company be harvesting, making, or producing? How will the company use the land to make its product?

EXAMPLE

One example of a project description is: *“The Company agrees not to use the land other than for the uses described below: The plantation, cultivation, harvesting of sugarcane, and supporting agricultural activities that relate to the preparation, fertilization, and irrigation of soil. If the Company wants to use the land for other purposes not listed in this clause, the Company must first seek and receive the consent of the Community.”*

Avoid very broad descriptions that allow the company to use the land for activities that were not agreed on.

Make sure that there is no language that allows the company to use the land for “any purpose” or “any other purpose,” because this language will allow the investor to change activities without receiving the community’s permission.

CAUTION!

RED-FLAG CLAUSES

“The Company promises not to use the land otherwise than for the **business purposes** of the Company **or for any other purpose.**”

! Avoid this broad language, because it allows the company to use the land however it wishes, including for purposes that it has not discussed with the community or that are not mentioned in the contract.

“During the duration of the contract, **if a new activity is started** or initiated by the Company, the terms of **this contract shall apply to such activity.**”

! Avoid this language, because it may allow the company to start a new activity that was not agreed to, without first receiving the community’s approval.

“The land holders undertake to give the peaceful authorization, allotment, and possession to the Company to use land for the cultivation of rice, corn, maize, wheat, pulses, **fruits, vegetables, and other crops.**”

! Avoid this language, because it allows the company to use the land to grow **any** crop. The company might want flexibility, but the community should only agree if it understands and accepts that different crops will affect the land, soil, and water in different ways.

CHECK THE CONTRACT!



- ⇒ Does the description of the company’s project clearly explain what specific projects and activities the company will carry out on the land?
- ⇒ Does the description limit the company’s project to a very specific set of activities? Or does it allow the company to begin other activities that the community has not agreed to without the community’s permission?

4.

DURATION OF THE CONTRACT AND POTENTIAL FOR RENEWAL

This is the part of the contract where the community agrees to the length of time that the company can use its land and that explains if the community will consider renewing the contract with the company after the contract ends. This is important, as the duration affects how long the community will be unable to access and use its lands.

The contract should **clearly state the beginning date and end date of the contract**. Community members should think carefully about **how long they want the company to use the land**, as this may affect the type of project that they are willing to accept. Understanding the type of crops to be grown, as well as the resources needed to grow those crops, is important. Some crops require longer periods of time on the land. For example, crops like rubber or palm oil take time to grow and harvest, and the investor will need the land for a longer period of time. Similarly, an investor planning to grow crops that are planted once but can be harvested repeatedly may be unwilling to sign a short-term contract. If an investor plans to build a processing facility, the investor will likely want to use the land for even longer to make sure that such a big investment will be profitable. If the investor requests a 50-year lease, are the community members ready to sign away their grandchildren's rights to use the land?

Not all projects require a very long duration, but companies may try to ask for the longest length of time possible. If a long duration is not strictly needed for the project, **it may be best for the community to seek a short duration**. A short duration, such as five years, allows a community to assess its relationship with the company regularly, for example after five years. If the community and the company are happy with the arrangement, they may agree to renew the contract, or they may enter into a new contract with newly negotiated terms. Shorter contract durations can help

communities change the contract terms at the end of each contract, in order to address changing economic conditions or community needs. However, asking for a short duration may make it harder to negotiate longer-term benefits, such as physical infrastructure.

If the company requests a contract duration that is longer than 10 years, community members should discuss whether such a long duration is in their best interests. If it is not, they can come back with a counteroffer of a duration they feel more comfortable with.

The contract should also set out whether or not it can be renewed. Clearly noting if and how a contract can be renewed can give the community more control over how long the investor will operate on its lands. For leases, it is best to avoid allowing the contract to renew automatically without the community's consent at the time of renewal. In general, it is best for communities to require that certain key terms be renegotiated before the contract is renewed, such as the amount of rental payments, the community benefits, and any other aspects of the relationship that may be of particular concern to the community. A contract that allows all terms to be negotiated on renewal gives the community more flexibility to adapt future contracts to its specific needs, but it may make renewal negotiations more time-consuming and increase the need for outside legal or technical support during renewal negotiations.

EXAMPLE

For example, a contract might say: *"The duration of this contract is 5 years, from 7 May 2019 to 6 May 2024. If the community consents, the contract may be renewed at the end of this term for another 5-year term, on terms to be negotiated between the parties."*

If the contract sets out a process for the contract to be **renewed**, it should:

- State that even if the company wants to continue its operations and renew the contract, **the community has the right to decide whether or not the company may continue to operate on the community's lands.**
- State that **if the community decides that the company can stay, then a new contract must be negotiated.**
- State that **any negotiations for a new contract must include community participation, information sharing about the company's plans, and community consent.** The community can then adjust the terms of any new contract to take into account changes, such as inflation (see section 8), changes in the value of the land and natural resources, and changing community needs. The community can also address other issues that arose during the course of the original contract.

EXAMPLE

For example, the contract could say: ***"If the Company and/or the Community wants to renew or extend this contract, the proposal to renew will be discussed in a public community meeting, where the community will decide by majority vote whether to enter into a negotiation process. Before or during that meeting, the Company must provide updated financial information about the Company and the Project, an updated business plan, as well as updated versions of all other information that had been provided to the Community during the negotiation of this contract. During the negotiations for renewal, the Community will use the same decision-making process that it used during the negotiation of this contract. Even if the Community decides to enter into a negotiation process for renewal, the Community retains the right to withhold its consent for a renewal."***

GET LEGAL ADVICE

In some countries, the law limits contract duration or restricts whether or how many times a lease may be renewed. Does national law limit the maximum or minimum duration for this type of contract, or does it limit the number of times the contract can be renewed?

DISCUSS WITH THE COMMUNITY

- How long does the community want to let the company use their land?
- Does the community want to allow for the possibility of renewing the contract so that the company could stay after the end of the contract term?

CHECK THE CONTRACT!

- Is the duration of the contract described, along with the specific start and end dates of the contract?
- If the community wants the possibility of renewing the contract, will all of the terms be completely open for negotiation, or will only certain issues be open for negotiation?

5.

DESCRIPTION AND DEMARCATION OF THE LAND AREA REQUIRED

This is the part of the contract that describes exactly what land the company may use for its business and explains how the company will physically mark the land. Specifically describing the land, and requiring that the company physically mark it, is important for helping to reduce potential disputes about the company's use of the land.



The contract should state the exact area of land that the company may use and include a clear map of that area.

The contract should state the precise area and the total number of acres or hectares of land that the community has agreed to allow the company to use. This may be described as the “Contract Area” or “Project Area.” When deciding the precise area that the company may use, the community must make sure that these decisions respect the wishes of both male and female community members and the different ways that land and resources are used. People who pursue different livelihoods (such as hunters, fisherfolk, pastoralists,

and farmers) use land and natural resources differently, and so they may have different ideas about what lands are critical to their households' survival. The community must also consult with any community members that have rights over the land that the investor wishes to use, or rights over areas of land that touch or overlap with that land. For example, if a family has rights to a specific piece of land that the investor wants to use, the community can only provide that land to the company if that family agrees.

Limit the size of the area provided to the company to only what is necessary for the proposed project. Investors often ask for areas of land far larger than they need. Rather than providing a huge area of land for the investment from the beginning, the community should try to include clauses that require the company to fully use a smaller area of land before it is allowed to expand its operations. The company might ask to include an “option” clause in the contract that gives it the right to lease or use specific additional land in the future. The community should only agree to an option clause if it includes a condition that the community must consent to the grant of additional land.

EXAMPLE

For example, the contract could say, *“The Community grants to the Company an exclusive right to an option (“Option”) to lease additional land in the [community land area], as described in this Agreement. The Company may exercise the Option at any time during the Term of this Agreement or any extensions thereto. The Company will notify the Lessor in writing of its desire to exercise the Option at least [number] of months in advance of its intent to use and occupy the additional land. The exercise of the Option is conditioned on mutual agreement of terms and conditions by the Parties.”*

Alternatively, if the company insists that it needs more land and does not want to have to ask again, the community could consider providing a larger area of land to the investor under a “phased development” plan. Under this plan, the contract would say which pieces of the land will be developed and when, the amount of development that must occur on one piece of land before the company can start developing a new piece of land, and the community’s rights to use any land that is not developed until the project expands operations according to the plan.

To make sure the land provided to the investor is understood, the contract should contain a map, a detailed description, and the Global Positioning System (GPS) coordinates of the exact area of land the investor will use. If the contract only includes a map of the area, community members should carefully check that the map is of the exact land that the community agreed to allow the investor to use.

CAUTION!

RED-FLAG CLAUSE

“Whereas the Community owns a property with an area of 250,000 hectares and **the Company plans to develop a total area of 179,999** hectares in accordance with State’s forestry development policies.”

! *Avoid this type of clause, because it does not say which exact piece of land will be used by the company. The only time that this type of language might be acceptable is in an MoU, provided that the parties will, before the project begins, negotiate a contract with specific terms that describes the land that the company can use. Also, this is an extremely large amount of land!*

The contract should require the company to set out clear physical markers on the land’s boundaries. These markers, which should be noticeable physical objects such as numbered pillars, must match the description of the land used in the contract.

CHECK THE CONTRACT!

This part of the contract could also describe the process that will be used to check if the company is operating within the land provided and what will happen if the company uses land *outside* of the agreed boundaries. Contracts often have a separate section that addresses failure to comply with obligations (see section 18 below). Either in that separate section or this section on demarcation, the contract should include a description of the specific steps the company and the community will take to make sure that the company is not using more land than was agreed to, as well as the consequences if it is discovered that the company is using more of the community’s land without asking. This description can also include how frequently the community will check that the company has remained within the agreed boundaries.

EXAMPLE

One example of such language is this: *“Once a year, the Community and a representative of the Company will enter the Project Area and check the limits against the map in the contract. If the Company’s activities have expanded to include land outside the area agreed to in this Contract, the Company will pay compensation to the Community for the excess land used, which will be calculated based on the acreage in use in excess of the Project Area for a full contract year. In addition, the Community and the Company will agree whether the Company shall return to the agreed boundaries of the Project Area, or whether the Contract will be amended to change the boundaries.”*

- Does the contract state the exact location and amount of land the community is allowing the company to use? Are a reliable map and GPS coordinates attached?
- What will happen if the company tries to use more land than is agreed to in the contract?
- If the contract sets out a “phased development” plan, does it state the specific start and end dates of each phase of the project?

6.

PARTIES' RIGHTS IN AND NEAR THE PROJECT AREA

This is the part of the contract that says what rights the community and the company each have over the land and resources, including what the community and the company can and cannot do on that land and with those resources, for the duration of the contract. This is important, as the community can seek to keep some rights to use and access the land, and it can also restrict what the company is allowed to do on the land to make sure the company's activities do not harm the community.

The contract should give clear details about **what the company can do, including what rules it must follow when it does each activity**. Specifically, the contract should clearly set out the following:

- **What changes the company is allowed to make to the natural landscape.**
- **What natural resources on the land the company may use**—such as any water, soil, stones, and wood.
- **Whether the company must pay for the use of those resources.** If so, how will the use of those resources be measured? Are there limits on the amount of the resource that the company can use? How much will the company pay for the use, and how frequently will the payments be made?
- Whether the company's use of resources on the land is limited to its own use, or **if the company can sell those resources or allow others onto the land to use the resources**. For example, if the company cuts down trees to clear the land, can it sell those trees? Can it allow others to come onto the land to take and sell those trees? If so, does the community have the first opportunity (a "right of first refusal") to agree to do this work for the company?
- **Any rules the company must follow when it uses the land and natural resources.** For example, the contract may state that the company can only use water in the contract area after it: (1) conducts an environmental impact assessment of the project's planned water use; (2) puts in place safety procedures to ensure that the company does not pollute the water or use so much water that the community does not have enough water for drinking and livelihood activities; and (3) pays the community a fee for use of the local water sources. Also, if the community does not want the project to operate at certain times or on certain days, it should include details about which days of the week and times of the day the company is allowed to operate.

EXAMPLE

One example of how the community can charge the company for resources is: *"If the Company requests to buy a reasonable amount of firewood from the Community, the Community will sell the wood to the Company at the rate of \$ [amount] per bundle of firewood, provided it has enough excess firewood to meet the Company's request. Apart from wood that it buys from the Community, the Company must not take, burn, or otherwise procure any wood from the Project Area."*

The contract should also explain **what the company is not allowed to do**. For example, there may be a "no go" area within the project area or elsewhere in the community where the company is not permitted. The contract can expressly prohibit specific activities, such as cutting down trees or affecting important environmental, economic, or cultural areas. The community may want to prohibit the company from using certain natural resources that are not related to its project. For example, if the company's business is growing sugarcane, the community may want to prohibit the company from harvesting firewood from the project area. Or, if the community holds rights to resources that are in the ground, the community may want to prohibit the company from exploiting any minerals that may be found in the project area.

The contract should state **what the community is allowed to do in the project area**, including the rights of way and water rights the community wants to keep. The contract can specify that community members can access certain places or resources or do certain activities within the project area, and that the company must not block that access or those activities. Examples of places or resources communities may wish to access include: paths; sites that are accessed seasonally, such as paths for livestock like cows and goats; burial grounds and other culturally important sites; sites where important medicinal herbs are harvested; water sources, such as wells, rivers or streams; and forests, for collecting firewood or other materials. Examples of activities that the community may wish to be able to do in the project area may include: harvesting tree nuts or fruits; hunting or fishing; and doing agricultural activities on land that is not being used by the company.

The contract should also be clear about **whether or not the company can ever restrict what the community is allowed to do in the project area**. For example, the company should never be able to restrict access to burial grounds, sacred sites, or water sources, but it might need to place restrictions on hunting to ensure the safety of its employees. If the community has the right to do agricultural activities on unused project land, then the contract should also explain how much time the company must give the community to move off the land when the company wants to start using the land. For example, the contract could say that the company must notify the community in writing at least one year in advance of when it wants to use the land.

The contract should **not give the company total control over lands and natural resources that the community needs for its members' survival and well-being**. If the community depends on natural resources, like water or forest products, that are located on the land provided to the company, then the community should insist on remaining in control of and being able to access those resources. When the community is making decisions about what rights of use and access should be protected under the contract, it is important to consider the opinions of both women and men, as women and men often use natural resources differently.



RED-FLAG CLAUSE

“The Company shall be entitled to **exclusive possession over** all that forms part of the land, including **villages, rivers, forests, and all other natural resources**.”

! *Avoid this language, because it may mean that community members are not allowed to access any part of the land, even villages (where people may live), rivers (which community members may rely on for water), or forests (which community members may rely on for food, medicine, or other purposes).*

Make sure that the contract does not require the community to take action to support the project's success, or make the community responsible for things that may be outside of its control. Do not allow anything in the contract that is not realistic or that community members are not willing or able to do.



RED-FLAG CLAUSE

“**The Community undertakes to ensure that the land will be free from any nature of nuisance and legal or other hassles**.”

! *Avoid this language, because it could make the community legally responsible for “any nature of nuisance... or other hassles,” even those nuisances and hassles that the community cannot control or prevent.*



- ➔ What activities should the company be allowed to do on the land? What activities will hurt the community and should be prohibited?
- ➔ What rights to access and use the land in the project area must the community preserve to ensure the well-being of community members, including women, men, and youth?



- ➔ Does the contract state that within the contract area, the community is allowed to access certain paths, resources, and places, and is allowed to carry out certain activities?
- ➔ Does the contract clearly describe any environmentally sensitive or culturally important areas of land within the project area that the company must not disturb?



- ➔ What rights to access, control, and manage local land and natural resources, including water, does the community have under law?
- ➔ Under national law, what rights does the investor have to use natural resources on the land it leases?

7.

DESCRIPTION OF PLANNED PROJECT INFRASTRUCTURE

This is where the contract says what project-related infrastructure the company is allowed to build on the land, and where. This can be important for the community, as infrastructure can disrupt the community, for example by causing noise or air pollution or by blocking paths traditionally used by the community.

The contract should provide specific details about any infrastructure that the company will build in order to carry out the project, such as buildings, processing facilities, roads, irrigation channels, phone towers, or other infrastructure. This is different from any infrastructure the company builds for the benefit of the community, which is discussed in section 8 below. These details should include where the infrastructure will be built. Including these details in the contract will help make sure that the community is aware of, and not opposed to, the company's planned infrastructure development.

The community also may wish to include in the contract the types of infrastructure that require the community's input or approval, as well as the processes that should be used to get that input and approval.

EXAMPLE

For example, the contract could say: ***"The Company must consult with, and obtain the consent of, the Community before it constructs or installs any road, vehicle track, fences, gates, structure, or building (whether temporary or permanent) in the Project Area. The Company may not construct or install such infrastructure without the Community's consent."***

The community may want the contract to require that the investor give community members the right to use certain infrastructure, such as electrical lines or pipe-borne water installed for its operations.

EXAMPLE

For example, the contract could say: ***"Community members have the right to use [amount] megawatts per month of the electricity flowing through the electrical lines that the Company has built to bring electricity to the Project."***

The company may wish to share the community's existing infrastructure, such as any existing wells or roads. The community can require the company to pay for the use of that infrastructure. If the infrastructure costs money to use, such as a water pump that requires fuel to operate, the community can also require the company to pay for those costs, such as the cost of any fuel needed to operate the water pump.

EXAMPLE

For example, the contract could say: ***"The Company can access water from the Community's wells in accordance with the clause on water use below. Each time the Company accesses water from one of the Community's wells, the Company must give the Community enough fuel to replace the fuel used when the Company used the well. The Company must also pay for and arrange for the servicing of the water pump attached to any Community well it uses every three months, or sooner if the pump fails."***

- ➔ Does the contract describe all of the infrastructure that the investor will ever build? If not, does the contract require the company to obtain the community's consent regarding any infrastructure it proposes to build that is not expressly described in the contract?

CHECK
THE
CONTRACT!
»»»

WHAT THE COMPANY WILL GIVE THE COMMUNITY IN EXCHANGE FOR USING ITS LANDS AND NATURAL RESOURCES

This is the part of the contract that says what the company will give to the community in exchange for the use of its lands and natural resources. This is important, as these payments and benefits may be the main reason that the community is negotiating a contract with the company.

This section will explain the following different types of things the community can demand from the company:

- ➔ Regular monthly or yearly rental payments or fees for using the community's lands and natural resources;
- ➔ Royalties or other payments based on profits or gross revenue;
- ➔ Infrastructure developed for the community, such as wells;
- ➔ Jobs, skills training, and scholarships; and
- ➔ Support for the local economy by buying goods and services from local people.



The company is planning to profit well from this investment. By requiring that the company share its profits with the community, the community can also prosper and benefit.

The community may want to begin negotiations by asking for more than one of these things. For example, it is reasonable for a community to ask for both rental payments and support for the existing local economy, or to ask for royalties, fees, and job creation. Community members should decide together what their ideal “package” of payments and benefits would look like, and then be prepared to negotiate with the investor until everyone agrees on a package that both parties are satisfied with.

Rental payments, fees, royalties, or other specific and consistent, recurring payments may be paid into a community development fund or bank account controlled by community members. This fund or account can then be used to pay for local development projects that benefit the community as a whole. Such a fund should be controlled by representatives from different parts of the community, including women, the elderly, and youth. It should have clear rules for how the money is to be spent. The representatives should be accountable to the whole community, and decisions on how the money should be spent should be taken by the community as a whole. The community may want to decide in advance, based on its “future vision” (see Guide 1, section 3) or Community Development Plan, how the money will be spent.

When the land is owned communally, payments to individual families can be complicated. But in some cases, a community will sign a contract with a company for use of lands that are individually owned by specific families. If that is the case, the rental or other payments will generally be owed to the individual households. If funds are paid directly to individual households, care should be taken to ensure that female household members can also access, and benefit from, the funds.

Any negotiated payments or benefits should be clearly defined in the contract.

CHECK
THE
CONTRACT!

- Does the contract state the date and frequency (every week, every month, every year, etc.) that the company must pay rents, royalties, or fees?
- How will the payments be made? To whom?

A COMMUNITY BANK ACCOUNT

If rent, royalties, or a share of the company's profits is being paid to the community as a whole, the community may want to set up a community-owned bank account. A community bank account will help ensure that there is an official paper record of every activity involving the money, such as the amount that is put into the account and how much is taken out of the account and by whom.

The community should vote and decide on which five or more trusted community members can together access the account as a group. **It is important that no one member of the community is able to access the account on his or her own**, as this creates opportunities for corruption and theft. This group should include women, youth, and elders. The group can be responsible for managing how the money is used and reporting to the community on the amount of money in the account.



Before deciding on what to ask for, check: (1) whether the company has signed any contracts with the government that require giving benefits to the community and (2) whether the company is already required under national law to provide certain benefits to the community. You should ask for payments or benefits that the company is not already required to provide to the community. Do not sign a contract that gives a company the rights to use community land or resources in return for payments or benefits that the company is already required to provide to the community under national law or a contract with the government. For example, if the company offers to provide a school in exchange for use of your land, but it has already promised in a different contract with the government that it will provide your community with a school, it is not necessary for your community to sign a contract with the company to receive the school.

RENTAL PAYMENTS AND FEES

This is the part of the contract where the company commits to pay the community money in exchange for using community lands and resources. When negotiating how much rental payments should be, each party argues for what it thinks is a fair rental price, and then the parties come to a compromise that everyone is comfortable with.

National laws may affect whether or not a company **must** pay rent to community members, or whether renting land is allowed at all. Where national laws do not explicitly require that companies pay rent to communities for the use of their land, community members should still negotiate for recurring rental payments. In countries where communities can require companies to pay rent and where the government has set a recommended rental rate, **communities should feel free to ask for more than what the government has suggested.** The community's land, for example, may have more fertile soil, or access to important rivers or springs, or larger trees than those found in other areas of the country.



A serious **red flag** to watch for is **when companies try to pay less than what the government has recommended as a rental rate.** Communities should check whether the government has recommended a rental rate and should not agree to a lower rent. This is particularly important when rent is the main form of payment that the company will provide in exchange for using the land.

Calculating a fair rental payment

Trusted experts or local leaders may help the community consider important factors when deciding how much rent to ask the company to pay each month or year. Rent for agricultural or forested land is usually calculated by hectare and paid once a year.

Before beginning negotiations with the company, the community may want to formally assess the value of the land that the company will use. Communities should think about how much value their households get from the land each month or year. Remember that an annual payment must be divided by 12 to understand what the monthly payment would be: for example, if the annual

payment is \$12 per hectare, that means the company is only going to be paying \$1 per hectare each month. Carefully consider how much value community members get from one hectare each month before negotiating a rental payment. (See Guide 1, section 4 for a valuation exercise that communities can use to better understand the value they receive from their lands and resources.)

There are different ways to calculate the land's value, including:

- ➔ For the community: what is the economic, cultural, and social value of the land?
- ➔ For the company: how much profit does the company predict that it will make from the project?
- ➔ On the local land market: How much do people pay to rent land in the area? What is the market rental rate in the country?

THINK
BIG!

The company is planning to make money from this investment, and it would not be beginning this work if it does not see profits coming in the future. The community should therefore think carefully about what to ask for, even if such things will cost a lot of money or take a lot of time.

Inflation

Consider including protections against "inflation" in the contract. Inflation is when prices increase and the same amount of money purchases less than it did before. For example, inflation can mean that the costs of basic foods like rice, flour, or corn increase over time. When this happens, households have to spend more money to survive. If inflation happens, as time passes, the same rental payment will have less actual value for the community. This can be a problem if a community signs a long-term contract with a rental payment that is the same each year and never increases. For example, if the community signs a 50-year lease with a \$100 rental payment, and over 30 years the national currency loses half its value because of inflation, then after 30 years, the rental payment of \$100 will only really have \$50 of "purchasing power."

8.

To help make sure that the value of the rental payments to the community stays the same in terms of what that money can buy, and to make sure that the community continues to receive a fair rental payment, **the contract could require that annual rental payments be assessed and increased to cover annual inflation rates.**

EXAMPLE

For example, a contract might say: *“The annual rent shall be increased every year through the lifespan of the lease to cover for inflation; the amount of increase shall be the official rate of inflation most recently published by the [national statistics agency, central bank, or other relevant publisher of inflation rates] at the time of the increase.”*

Alternatively, the contract could tie increases in rental payments to any increases in the market price for certain staple food items.

EXAMPLE

For example, the contract might say, *“At the time of signing, the monthly rental payment per hectare is equal to the average annual cost of 200 kilos of rice in the national market. Each year, the annual rent per hectare will increase if needed to be equivalent to at least the average cost of 200 kilos of rice on the national market in the previous year.”*

Payment schedule

The contract should **include a clear payment schedule that says exactly when and how the company must pay the rent to the community.** The payment schedule might be once a month, once every three months, twice a year, or once a year. **The contract should also say how the company will pay the community**—for example, by depositing the rental payments into the community’s bank account according to the schedule. The contract can also require the company to provide the community with proof of each payment by the company, such as a receipt or bank statement.

EXAMPLE

For example, a contract could say: *“The Company shall make a monthly payment to the Community of [amount] USD per hectare within the Project Area, regardless of whether the Company actively uses all land within the Project Area during that month. This monthly payment amount shall be increased by 5% every 12 months. The monthly payment shall be paid in full on the first day of each month throughout the duration of this Contract. The payment will be deposited into the Community’s bank account, as described in Annex [X], and the Company will provide proof of payment to the Community within 5 days of deposit.”*

GET LEGAL ADVICE

- Are there any national laws or policies setting out how much money or rent companies must pay to communities?

- What payments will the community require the company to make for use of the community’s land, water, and natural resources? How will the community decide what is a fair payment?
- When and how often will the payments be made?
- How will the payments be made? Where and to whom?

DISCUSS WITH THE COMMUNITY

PROFIT SHARING, REVENUE SHARING, OR ROYALTIES

Profit sharing, revenue sharing, and royalties are three different types of financial payments a company can make to a community. In some contracts, a company may promise to pay the community a percentage of the company's profits or revenues from the project, or instead promise to pay a fee based on how much the project produces. These payments can be instead of, or in addition to, rental payments. When the project is profitable, these payments can be an important source of income for the community; however, when the project is unsuccessful, it may be a bad deal for the community. Also, a company may have many ways to "hide" profits, revenue, or production numbers, making it hard for a community to understand how much it should be paid.

- ➔ Under a **profit-sharing arrangement, the community receives a share of the company's profits from the project (profits are how much money the company earns from the project minus how much money it has spent on the project)**. Profit sharing creates the potential for the community to earn more money from the investment than it would make just from rental payments, but it is hard to know how much profit the company will make. Some projects may never be profitable, or may take a long time to become profitable. Also, if the company hides its profits from the community, the community will not receive its fair share of the profits. Communities that want a profit-sharing arrangement should get legal advice and make sure that they are able to closely monitor the company's financial performance.
- ➔ Under a **revenue-sharing arrangement, the community receives a share of all money that the company receives from the project without considering any money the company has spent or lost during the project**. For example, if the company will be growing crops on community lands, the company could pay the community a percentage of the money from the sales of those crops. If the company will also be carrying out activities that add value to a product, like processing agricultural crops (for instance, grinding cassava to make cassava flour), the company could pay the community a percentage of the money earned from these activities. As with profit sharing, communities that want to receive a share of the company's revenue should get legal advice and be able to monitor the company's financial performance.

EXAMPLE

An example of a revenue-sharing clause is: *"In addition to the annual rent payment described above, the Company shall also provide an annual payment to the Community in the amount of 5% of Gross Revenues (the total proceeds and compensation received by the Company, whether from cash or credit) from the sales of agricultural crops and products grown or produced in the Project Area."*

- ➔ A community can also ask to receive a royalty. **A royalty is a payment that is based on the amount of goods produced by the company's project.** For example, a company might promise to pay the community 10% of the value of all of the crops the company produces on the community's land, or the company might promise that it will pay a certain amount of money to the community for every ton of crops it produces. The contract should tie the value of the goods to an objective standard, such as the price of the good on the international market. For instance, if the company is operating a rubber plantation, the value of the rubber produced could be tied to the most recent price for rubber published by the Singapore Commodity Exchange or the Malaysian Rubber Board.

If profit sharing, revenue sharing, or royalties are included in the contract, the contract should include:

- ➔ Details about the **community's share of the profit or revenue (such as the percentages to be paid to the community), or the specific royalties that it will receive (such as the amount of money for every ton of product produced)**, as well as the method for calculating the amount the community will be owed.
- ➔ A payment schedule that says **exactly when and how the company must pay the community**.
- ➔ A clear description of the **information and financial records that the company will provide**. This can include information about what the company has produced; its profits, costs, and revenues; and how the company will calculate the payments owed to the community. The company can also be required to provide proof of each payment it makes to the community (such as a receipt or bank statement). The contract should say how often the company must share information with the community (at a minimum, each time a payment is made). The

contract should also say how this information will be shared. For instance, the company could be required to share the information at a meeting open to the entire community, with women, men, elders, youth and members of minority groups present and able to ask questions.

GET LEGAL
ADVICE

GET TECHNICAL
ADVICE

→ If the community wants to negotiate a profit-sharing, revenue-sharing, or royalty arrangement, then the community should immediately seek legal, financial, and technical advice, including from a business expert or accountant. These arrangements can be difficult to get right: for example, if the contract has a profit-sharing arrangement but the company doesn't make any profits, then the community will not receive any money through the profit-sharing arrangement.

DISCUSS
WITH THE
COMMUNITY

- How will you know how much profit a company is making, how much revenue it is earning, or how many goods it is producing?
- What information must the company provide so that the community can make sure that it is receiving the money it is owed? How will you check the information provided by the company? Is there anyone who will be able to help you with this?
- How will you calculate the amount of royalties or the percentage of the profits or revenues that you will receive?

INFRASTRUCTURE DEVELOPMENT AND OTHER PROJECTS

This is the part of the contract where the company may commit to building infrastructure or undertaking other projects that help the community prosper and develop. When a company comes into a community and asks to use its land and natural resources, it is normal for the community to ask the company to contribute to the community's development through these types of projects *in addition* to paying money to the community. For example, the company could provide support for new wells, roads, electricity, a school, a town meeting hall, a health clinic, or cell phone towers.

Before the negotiations start, the community as a whole should agree on what kind of infrastructure or other projects it will ask the company to provide (see Guide 1, section 6.d.). In addition to asking the company to pay for or provide specific buildings or services for the community, the community can also ask for permission to use infrastructure or services that the company will develop inside the project area for the company's own use. For example, if the company plans to bring in water, electricity, and internet for its own operations, the community can ask to use those services.

Involve the government. When a company and a community agree that the company will develop specific infrastructure or other projects, they should invite the government to be involved in the planning and operating of the project. There should be close coordination with the local government office in charge of development to ensure that any project fits into the area's local development plan and broader long-term goals.

For any infrastructure or other project that the company agrees to provide to the community, the contract should have a detailed description of what the company will provide and how it will cooperate with the local government. For example, the contract should clearly address:

- How will the government support the project (both in the development phase and over the long term)?
- What will be the timeline for construction? When will construction begin? When must the infrastructure be completed and ready for the community to use?

- Details such as: what size will the buildings be? How deep will the wells be? How long will the electrical lines be? Etc.
- What quality of materials will be used? For example, will the company use high-quality cement and a metal roof, or local wood and thatch?
- Who will build the infrastructure? Will the company pay community members, an outside company, or company employees to do the construction?
- Where will it be built? The location should be decided in consultation with community members. It should be in a suitable area that is accessible to all community members.
- Who will provide regular maintenance or upkeep? Will the government, company, or the community be responsible for regular maintenance, such as replacing a roof that has rusted, fixing solar panels that stop working, or repairing a broken pump for a well?

Make sure the contract requires the company to do everything that is necessary for the community to actually use and benefit from the infrastructure or projects provided. For example, if the company builds a health clinic but does not provide beds, a paid nurse, or enough money to cover the costs, then the community may not receive the benefit it expected; the health clinic will be simply an empty, unstaffed building. Similarly, if the company builds a school but does not pay for teachers, desks, books, paper, and pencils, then how will local children learn?



- What basic physical structures, social services, or facilities does the community need for its development and future prosperity?



RED-FLAG CLAUSE

“The Company promises *to reasonably assist* in providing and supporting the primary and secondary education of the *direct dependents of the Company’s employees in the manner the Company deems fit.*”

! Avoid clauses that give the company control over deciding what benefits it will provide. This clause only requires the company to “reasonably assist” in providing educational benefits, and the company may have a different opinion than the community about what “reasonably assist” means. The clause also allows the company to decide how it will assist in providing educational support, even if the community or employees do not think that support is useful or adequate. (In this example, the educational support is also only provided to workers’ dependents, not to other children in the community. This is not necessarily wrong or right, but it would mean that the community is giving up land and resources partly for a benefit that only some people will enjoy.)



- Does the contract include all the details of how, when, and where the projects to be provided by the company will be built?
- Does the contract clearly state the timeline or date by when these things must be provided or built?
- Does the contract specify who will provide necessary resources and materials, as well as who will maintain (or pay for the maintenance costs for) any buildings or infrastructure to be built?
- Does the contract say who will own any infrastructure that is developed?

EMPLOYMENT CREATION, TRAINING, AND SCHOLARSHIPS

Hiring employees from the local community

This is the part of the contract that can require the company to create jobs for community members. Guaranteeing employment for some community members can be important, as otherwise jobs might be taken by people coming from outside of the community.

The contract should clearly:

- ➔ **State the approximate number of jobs the company will create.**
- ➔ **Guarantee an approximate number of jobs to be provided to local community members and/or state what percentage of the total number of jobs created by the project will go to local community members.** If the contract is not specific, the company may promise to bring jobs to a community but instead hire workers from outside the community. The company might ask that the requirement to hire local community members only apply if local applicants have the required skills or experience for the jobs advertised. The community should think about

whether this is a valid request and whether its members would have the skills or experience necessary to do the jobs created by the project.

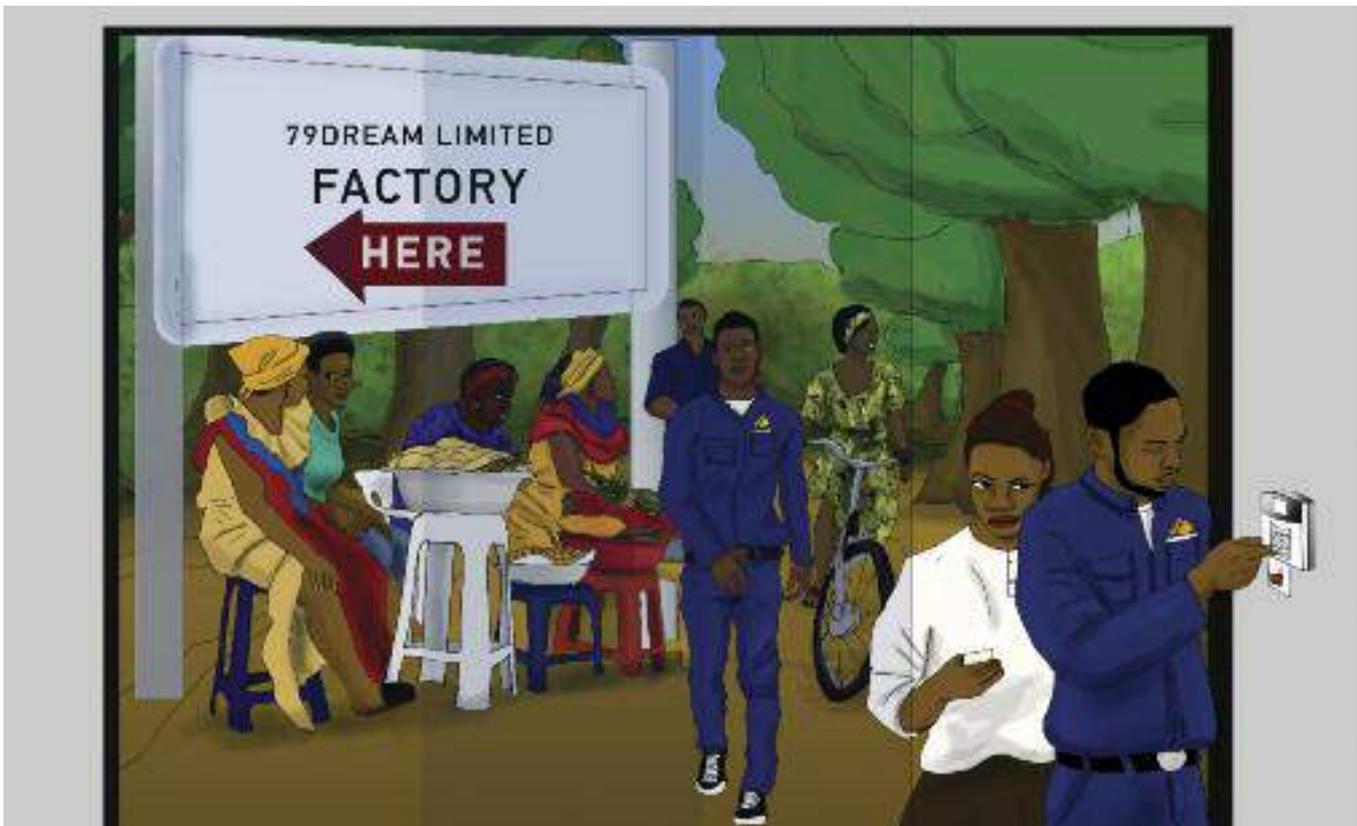
- ➔ **Define who is a “local” community member for the purpose of allocating jobs.** This can include a process to confirm which applicants are local community members. The contract can also give first preference to the most affected community members or those who have directly lost land to the investment.



RED-FLAG CLAUSE

The Company covenants to have the **sole discretion** to appoint such persons as it shall deem necessary to carry out its agricultural and ancillary projects, **in accordance with its own selection and recruitment procedure.**”

! *If employment opportunities are important to the community, avoid this language, because it gives no employment preference to community members. Instead, the company can hire whomever it wants.*



Make sure the contract says the number of jobs that will be awarded to community members.

EXAMPLE

An example of a clause that does specify the percentage of jobs going to local community members might be: *“In no case will the Company hire non-nationals for unskilled labor positions, and hiring preference will be given to qualified and competent men and women from the local Community. Subject to the availability of qualified and capable applicants who meet the Company’s reasonable requirements, the Company shall cause Community members to hold at least 10% percent of management and supervisory positions within 5 years of the contract being signed, and at least 30% percent of management and supervisory positions and 100% of unskilled positions within 10 years of the contract being signed. These requirements apply to full-time, part-time, and casual positions. The company also must make sure that 50% of all positions held by Community members are held by female Community members.”*

CAUTION!

RED-FLAG CLAUSE

“The Company must employ *local persons in preference to expatriates* applying for the same vacancy provided that any such local persons hold the required qualifications, experience, and know-how.”

! If employment opportunities for community members are important, avoid this language, because it suggests that the company views anyone from the country as a “local person.” This means that no jobs are reserved for community members.

EXAMPLE

An example of a clause that defines the local community might be: *“a community that has been identified in the environmental and social impact assessment required under the country’s Environmental Protection Act as having the potential to be significantly negatively or positively affected by the project’s operations.”*

An example of a clause that defines who is a member of the community might be: *“Members of the community include: (a) a person who hails from the community; (b) a person whose father or mother hails from the community; (c) a person who has resided in the community for at least 3 years before the signing of this contract; or (d) a person who is married to someone who falls within (a) or (b) above.”*

The contract should say what **types of jobs should be made available to community members** and how many community members will be hired for each type of job. The contract should:

- ➔ Define the different levels of “skilled” jobs (like management positions or office jobs) and “unskilled” jobs (like many of the jobs that involve physical labor to be performed in the contract area).
- ➔ State how many different kinds of skilled and unskilled jobs will be reserved for local community members. The contract should include a percentage or “quota” of community members who must fill each kind of job. If the company wants a certain level of skill or experience for managerial positions, the contract can require the company to provide a set number of training programs and other opportunities to help community members gain the skills they need to be competitive candidates for those types of positions.
- ➔ State how many positions will be full-time or part-time.
- ➔ State which jobs are permanent/ongoing positions, and which are temporary or seasonal.
- ➔ Specify that a certain percentage of local community workers must be women, youth, people with disabilities, or other groups that are qualified but may find it hard to access work opportunities in the local job market.

Finally, the contract should say **what happens if the company fails to do what it promised to do about local employment.** For example, if the contract requires the company to create 500 jobs for local community members by Year 2, but the company only creates 50 jobs by then, the contract might require that the company pay the community a penalty equal to the salary of each local job it failed to create, and/or provide an additional benefit to the community, such as training programs or scholarships.

GET LEGAL ADVICE

- Do national laws require that the company comply with specific employment requirements and provide certain benefits to employees?

Offering trainings and scholarships

The community can also ask the company to provide job training assistance and other kinds of educational or skills-building opportunities to community members to help them qualify for jobs or start their own businesses. The contract could require the company to:

- Provide high school or university scholarships to a certain number of community youth each year;
- Train a specified number of community members to have the skills to hold certain positions within the company, including management-level positions; and
- Fund trainings that teach community members skills that will help them qualify for employment with the company or in the job market generally. Such trainings can include skills such as reading, writing, financial accounting, and money management, as well as other workplace skills.

Promoting safe and fair work conditions for employees

If community members are going to work for the company, the contract can include protections the company must provide to its employees, including referencing applicable national employment laws that protect workers' rights, health, and safety. The community can ask the company to attach a template of the company's basic employment terms to the contract. The community may also wish to include in the contract:

- How often, and how, company employees will be paid their salary;
- How much workers will be paid, including if the company will follow minimum wage requirements;
- If, and how, the company will provide health care and other employment benefits;
- Whether the company will provide compensation for employees who lose their jobs or are terminated through no fault of their own;
- That workers have the right to form and join trade unions; and
- Whether the company will provide childcare and other benefits for the children of employees.

GET LEGAL ADVICE

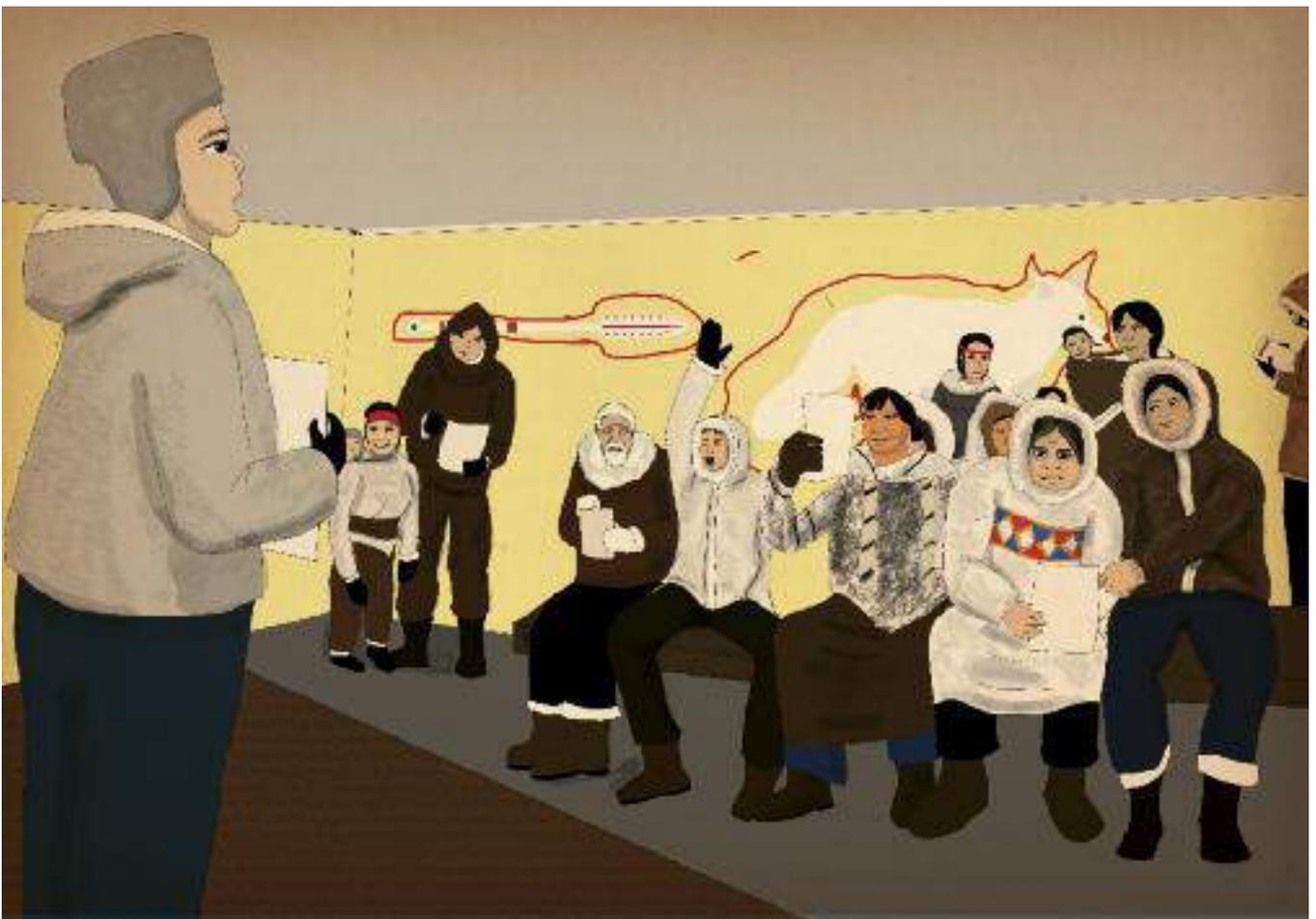
- What national employment laws must companies follow? What protections exist in national or international laws that ensure workers' health, safety, sanitation, and payment?
- What good employment practices should be listed in the contract?

BUYING GOODS AND SERVICES FROM LOCAL PRODUCERS

Community members may also want to ask the company to commit to buying some of the goods and services that it needs from local businesses or community members. Such an arrangement can help stimulate the local economy by creating new economic opportunities for community members who do not work for the company. For example, if the company will provide lunch to its employees, the contract could say that the company will use a community-based catering company or that it will buy the food for those lunches from community farmers and merchants at a fair market price.

- What jobs will the company create that must be filled by local community members?
- What percentage of skilled and unskilled jobs must be filled by community members?
- Is there a requirement that the salaries for employees who are local community members should be similar to other employees of the company?
- What trainings or scholarships will the company provide to the community?
- What percentage of goods and services will the company buy from local businesses?

CHECK
THE
CONTRACT!



For any promised benefits, make sure that the contract is specific, detailed, and gives clear timelines by which the company must provide the benefit.

9.

IMPACT ASSESSMENTS AND COMPENSATION FOR KNOWN OR EXPECTED DAMAGES

This is the part of the contract that explains how the environmental, social, and human rights impacts of the project have been assessed (or will be assessed before the project starts). This part of the contract also requires the company to fulfill the assessment's recommendations on how to address any of the project's foreseeable negative impacts. This is important for making sure that there is a plan to avoid or minimize the project's potential negative impacts.

A company's project *will* affect the local environment and the community. For example, it may reduce the availability of water and other resources that the community depends on for survival. Or it may negatively affect the harmony and social relations within the community. National laws usually require companies or governments to carry out studies to understand these negative impacts and then take action to prevent them. These studies are called "impact assessments" and can take many months to complete.



The contract should clearly say what the company must do to avoid or reduce negative impacts on the environment.

Different types of assessments can be done. “Environmental Impact Assessments” look at potential impacts on the environment and on health, such as those arising from pollution from the project. “Social Impact Assessments” look at potential impacts on the community, such as whether community members will lose livelihoods. “Human Rights Impact Assessments” look at potential impacts on human rights, such as whether community members’ rights to education or to food are at risk of being violated. Sometimes different types of impact assessments can be combined into one study; for instance, many companies conduct an Environmental and Social Impact Assessment (“ESIA”).

The person(s) carrying out the impact assessment should consult closely with the community, so that the community members can: (i) say what issues they think the assessment should look at and (ii) share their perspectives regarding social and environmental issues. This is important, as community members often know a lot about sensitive areas and also know what is important to their livelihoods and traditions.

Impact assessments provide the community with valuable information about a project’s potential risks and impacts on their lands, plant and animal species, natural resources, health, and way of life.

Any impact assessment should be accompanied by a list of actions that the company must take—or ways that it should revise its project plans—to reduce or avoid negative impacts on the environment and the community. This is usually called an **Environmental and Social Management Plan** (“ESMP”).

Understanding the findings and recommendations of the impact assessment and management plan can help community members make an informed decision about whether to allow an investor to use their lands. If the community does allow the investor to use their lands, the contract should require the investor to comply with the management plan, which may reduce the harm caused by the investment.

An **Environmental and Social Impact Assessment** (“ESIA”) is a study that identifies the serious environmental and social impacts that a project might cause. An ESIA can help the government and other stakeholders decide whether the investor should be allowed to carry out the project. The ESIA is usually presented as a report that must be read and approved by the government before giving the investor an environmental license. If the investor is allowed to pursue the project, the ESIA can provide a plan for what the investor must do to reduce and avoid negative impacts.

The ESIA process should include the following steps:

1. An ESIA starts by measuring existing environmental and social conditions (including water quality, soil quality, and the health of community members) to create a **baseline “snapshot”** of the local environment and social conditions. Any changes to the environment, human health, or social conditions that the project causes in the future can be measured against that baseline.

2. The ESIA then **identifies potential impacts** on the environment, human health, and/or social conditions. This includes noting whether those impacts are acceptable, should be made less harmful, or should be avoided completely.
3. The ESIA makes **recommendations for how to minimize or avoid different negative impacts**. This can include recommendations for changing the ways in which the company should carry out the project, so that it produces fewer negative impacts.
4. ESIA’s should be accompanied by an **Environmental and Social Management Plan** that explains actions that the investor must take to avoid or reduce any negative environmental and social impacts identified in the ESIA.

ESIA’s should be conducted by a third-party firm, not by the company itself.

Impact assessments and the resulting management plans should have been completed and reviewed by the community *before* the community and company begin negotiations. This part of the contract should:

- Confirm that impact assessments were developed in consultation with the community and carried out by a knowledgeable and independent third-party evaluator;
- Confirm that the results of the impact assessment were shared with the community;
- Require the company to follow each recommendation in the impact assessment and management plan; and
- State how the company will compensate the community for any negative impacts if the community allows the company to proceed with the project. The contract should explain how compensation of money and/or other goods will be calculated, and how and when the compensation will be provided.

However, **sometimes community–investor contract negotiations begin before the assessments have been undertaken.** When this happens, the contract should say:

- **That the impact assessment must be carried out before the project starts. The contract should say that the project cannot begin** until the community reviews the impact assessment and accepts: (1) the measures that will be taken to avoid or reduce expected or possible negative impacts and (2) the amount of money and/or other goods the investor will pay to compensate the community for unavoidable negative impacts. The community and the company may decide to make this a “condition precedent”—something that must be fulfilled before the contract comes into force.
- **Who will carry out the impact assessment.** All impact assessments should be done by an independent expert or institution that is *not affiliated with the company*.
- **That the impact assessment will incorporate community members’ perspectives.** Public participation should be built into the impact assessment process. The contract should explicitly

require that community members will be interviewed and consulted. Consultations with the community will make sure that the impact assessments consider and incorporate community members’ perspectives and traditional knowledge.

- **What the impact assessments will cover.** The contract can describe what factors the impact assessments will assess (for example: impacts on biodiversity, water quality, soil quality, air quality, social conditions, community members’ health, etc.).
- **That the company must share the findings and full report with the community at a well-publicized public meeting at a convenient time and place, open to all community members.** The contract might require that the investor translate the assessments’ findings into the community’s native language, provide easy-to-understand explanations of the assessments’ findings, and/or organize public meetings where the scientists or other experts who conducted the assessment will explain the findings to community members.
- **That the company must share with the community the terms and conditions of any environmental license issued by the government.** This will help the community understand the steps that the company must take in order to keep its environmental license.

EXAMPLE

Example clause: *“The Company must commission an environmental and social impact assessment, to be carried out by a qualified independent expert. The environmental and social impact assessment must be shared with the Community, and the Company may not start any development in the Project Area until the Community accepts the results of the assessment, the proposed measures that the Company will take to avoid or reduce negative impacts, and the amount of compensation offered for any negative impacts that cannot be avoided. The Community retains the right to reject the project if it is not satisfied with the assessment, measures, or compensation described above.”*

GET TECHNICAL ADVICE

Once an impact assessment has been done, community members should review the reports with a trusted impact assessment professional or environmental or social scientist and ask:

- Are the proposed solutions enough to ensure that the community's environment and social fabric will not be severely negatively affected?
- What kinds of changes to the company's project plan are necessary to ensure the least damage?
- What specific actions should the company take to avoid or reduce negative impacts to the local environment?

GET LEGAL ADVICE

- Is the company required to carry out any impact assessments under national law? Has the company already done the required assessments? Must the assessment and any accompanying impact management plans be approved by a relevant government agency? If so, has the government agency already given its approval?
- Does the planned impact assessment comply with national law?
- How much compensation is fair for certain impacts, and how should the compensation process be structured?

CHECK THE CONTRACT!

- What should be included in the contract to make sure that the company follows through with its plan to reduce the harm of environmental risks identified in the impact assessment?
- Are the proposed solutions enough to ensure that the community's environment and social fabric will not be severely negatively affected?
- How much compensation would the community accept for negative impacts that it cannot avoid?

- Is the company required to follow each recommendation in the impact assessment and management plan?
- If impact assessments have not yet been completed, is the company required to carry out an impact assessment before the project starts? Does the community have the right to reject the project after it reviews the assessment if it is not satisfied with the measures that the company will take to avoid or reduce negative impacts, or with the compensation the company offers for any negative impacts that cannot be avoided?

DISCUSS WITH THE COMMUNITY

PROTECTIONS AGAINST ENVIRONMENTAL DAMAGE AND HARM TO HUMAN HEALTH

(DURING THE INVESTMENT PROJECT)

This is the part of the contract that sets out how the company must protect the environment—including the community land, forests, plants and animals, water, and air—as well as community members’ health. This is important, as the community will continue to rely on the environment long after the project has finished. The environmental protections in the contract should be designed to fill any gaps in the company’s obligations to protect the environment under national laws, environmental licenses, and the Environmental and Social Management Plan (“ESMP”).

To protect community members’ health and the environment, the contract should:

- **Include general protections against pollution and environmental damage.** The contract should set out requirements such as rules that cover what the company must do to avoid or minimize air pollution (for example, due to dust or smoke); water pollution; soil pollution (for example, from the use of chemicals); noise pollution (for example, from machinery or trucks); light pollution (for example, from using bright lights at night); harm to plant and animal species; and damage to historically and culturally important parts of the environment. The contract should also include environmental protections that protect the health of community members. These general protections should be included in addition to requiring the company to carry out all the mitigation measures included in the ESIA and/or ESMP.



RED-FLAG CLAUSE

“The company covenants to use **reasonable endeavors** to ensure that the agricultural project is run in an **environmentally friendly manner**.”

*! Avoid clauses that have unclear requirements for environmental safeguards. The use of the words “reasonable endeavors” means that the company does not commit to running the project in an environmentally friendly manner, but rather commits to **trying** to ensure that the project is run in an environmentally friendly manner. Also, it is not clear what “reasonable” or “environmentally friendly manner” means, as there is no standard definition for either term.*

- **Require that the company must comply with national laws regarding environmental protection.** The company must obey national laws and regulations that protect the environment, even if they are not referenced in the contract. Including the company’s responsibility to follow these laws in the contract can help show that the community is aware of its rights and of the company’s legal obligations, and that the community intends to monitor the company’s compliance with the law. The contract could also say that if the company violates any laws, the violation counts as a breach of the contract.



The contract should require the company to actively protect the environment and community members' health and clean up any pollution or environmental damage that the project causes.

EXAMPLE

For example, the contract might say: *“The Company will adhere to the Environmental Protection and Management Law, the New Forestry Reform Law, and any other law or regulations of the country in which the Project is located, the regulations of the Environmental Protection Agency, the Forestry Development Authority, and the principles of the Roundtable on Sustainable Palm Oil (RSPO).”*

Or, the contract might say: *“The Company must ensure that it has all the necessary permits, licenses, or permissions required for the conduct of the Project, such as, but not limited to, water use permits under the Water Act and licenses under the Forest Act to remove any living tree, bush or shrub growing within 100 meters of a river, stream or watercourse.”*

- ➔ **Include the community’s own traditional or customary rules that protect the environment.** Communities may add additional local rules that protect their health and environment. These may be *more* protective than national laws. These may include community bylaws, protocols, and written or unwritten customary and indigenous rules on environmental protection. It is especially important for communities to add their own rules in countries

where national laws do not provide strong environmental protections. For example, the community might consider including protections to particular types of plants or animals, or resources that are important to the community such as water, certain wild foods, or medicinal herbs.

EXAMPLE

For example, the contract might say: *“The Company must not disturb any bush, plant, or other vegetation, or construct or erect any temporary or permanent structure, on or within 100 meters of the natural spring, shown on the map appended to this Contract.”*

- ➔ **Set out a process for community members to speak to the company whenever they have concerns about the company’s impacts on the environment and/or human health.** The contract can also state that if the community sees signs of environmental damage, the company must attend a meeting with the community and government officials from the national environmental protection agency to discuss the impacts and agree on a solution. If the contract includes this, it should also explain what the company’s responsibility is to address any concerns that are raised.

- ➔ **Require the company to establish an environmental redress fund at the beginning of the project.** The contract should require the company to pay money into the fund each year. This money can then be used to repair any serious environmental damage the company causes, as well as to clean up the project area more generally after the project ends (see section 22 below). Having an environmental redress fund protects against the situation where a company causes serious environmental damage but disappears, declares bankruptcy, or refuses to fix it. The contract should have strict rules on when this fund can be accessed and what the fund’s money can be spent on. An environmental redress fund may be complicated to set up, however, and the community should seek legal and technical advice on the best way to do this. For some projects, such as mining projects, it is possible that the government has already required the company to do something similar.
- ➔ **Describe what the company must do if it damages the environment or harms the health of community members.** The contract should require the company to restore what it has damaged to the same or better level than before the damage and to pay compensation to those directly and indirectly affected by the damage. The contract can also say that community members should be able to participate in deciding what the remedy should be.



- ➔ What rules must investors follow under national environmental law?
- ➔ Can the contract incorporate existing national environmental law protections, so that if the company breaches one of those laws, it is also in breach of the contract?
- ➔ What “best practice” procedures, targets, or standards should be included in the contract?³
- ➔ How can community rules about the environment be written in a way that outsiders can understand? Should the community consult an expert knowledgeable in environmental law to help them with this?
- ➔ Does the law already require the company to set up an environmental fund or to otherwise set aside money that will be used if environmental damage occurs? If so, would the funds cover the types of environmental damage that the community is most concerned about?



- ➔ What traditional or local rules does the community have that conserve and protect the local environment? Which of these rules should you require the company to follow while it operates on the community’s land?

- ➔ Does the contract clearly state that the company will be entirely responsible for any breaches of environmental laws on the property, including fines and other penalties?
- ➔ Does the contract state that the company’s liability (legal responsibility) for any breaches of environmental protections will continue after termination of the contract?



³ For example, international guidelines, principles, and treaties that the government may have committed to include The African Development Bank’s Integrated Safeguards Systems (ISS); The African Development Bank’s Integrated Safeguards Policy (ISP); The African Development Bank’s Agriculture and Rural Development Policy (ARDP); The African Development Bank’s Integrated Water Resources Management Policy (IWRMP); The African Development Bank’s Integrated Environmental and Social Impact Assessment Guidelines; The Convention on Biological Diversity; The Ramsar Convention (1971); The Convention on Migratory Species of Wildlife; and The United Nations Framework Convention on Climate Change (UNFCCC) of 1992.

PROTECTIONS AGAINST SOCIAL DAMAGE BY THE COMPANY, INCLUDING RULES FOR THE CONDUCT OF COMPANY EMPLOYEES

This is where the contract explains the protections and rules against potential negative social impacts that may result from the company's business, or the actions of the company's security guards or other employees. This is important, as the increased presence of outside employees, if not managed properly, can affect the community's social fabric. Protections against negative social impacts can include prohibiting actions that are illegal, but also other behaviors that can hurt individual community members or affect the community's harmony.

To protect the social fabric of the community, the contract should:

» **Incorporate community rules that regulate**

outsiders' behavior in the community and protect against social harms. If the community has such rules (written or oral), they can be attached to the contract so the company will be aware that it must follow them. The community's rules may be about minimizing the company's impacts on sacred sites or cultural practices, about how the company's employees must act while within the community, or about any other requirements that the community feels are necessary to protect their way of life. While some of the actions that the community wishes to prevent may not be illegal under national law, the community can still place restrictions on the company and its employees as part of its own social rules.



The contract can prohibit the company and its employees from acting in ways that harm the community's culture and society.

EXAMPLE

For example, the contract might say: *“The Company will require its workers to sign contracts that they will not drink alcohol within the Community, or have sexual relations outside of marriage with community members. The Company will take steps to discipline any workers who violate the contract he or she signed.”*

Or, the contract might say: *“The Company agrees to design its operations to minimize effects on traditional practices such as taboo day, sacred sites, taboo animals/plants, medicinal plant sites, traditional hunting grounds, and non-timber forest product sites. The Company agrees that operations are timed to minimize disruption to subsistence agricultural activities.”*

- **Include rules that ensure that community members may continue to practice their traditional livelihoods** outside the project area without being harassed by company staff. For example, if community members need to use the main road to carry harvested agricultural produce to a market, and the company also plans to frequently use the main road, the parties can include rules in the contract to make sure that all users can safely share the road.
- **Include any other rules necessary to make sure that the company respects and does not hurt community members or the community’s social life.** These might include rules to make sure that the company’s security guards do not use force against community members, or that women and girls can safely collect water from water points. The contract could also include road safety rules to protect community members from vehicles traveling to or from the project area, and procedures to protect community members being injured by other safety hazards linked to company practices or infrastructure. To make sure that the community’s social life remains calm, the community might request that the living area for the company’s outside employees be located far from the community’s own housing and living areas.

GET
LEGAL
ADVICE

- How can the community’s rules be included in the contract to protect the community’s social fabric from being negatively affected by the company’s business?
- Are there any penalties that the company should have to pay for certain types of social harms? How can the penalties be strong enough so that the company will choose to avoid causing harm and will not think it is easier to simply harm the community’s social fabric and pay later?

DISCUSS
WITH THE
COMMUNITY

- What social and cultural rules must the company and its employees follow?
- How must the company and its employees behave to make sure they do not disrupt or harm the community’s social and cultural way of life?
- What should happen if the company and its employees break the rules?

- Does the contract list explicit rules that the company and its employees must follow to protect against social damage?
- Does it explain what will happen if the company and its employees break the rules?

CHECK
THE
CONTRACT!

PROVIDING INFORMATION, INCLUDING COMPANY RECORDS, DURING THE COURSE OF INVESTMENT

This is the part of the contract that explains what information the company must share with the community, at what time, and through what processes. This is important: if the contract is vague about what information the company must provide to the community and how often it must do so, the community might not receive important information it needs to understand how the project might affect it. This part of the contract also explains when the community can access the company's accounting books, financial records, and other relevant documents. Accessing those books and records is especially important if the company has agreed to pay the community a percentage of its profits or revenues (see section 8 above).

CAUTION!

RED-FLAG CLAUSE

"The parties will ***maintain lines of communication*** throughout the lifecycle of the operations regarding ***any issues in implementing*** the Contract."

! *Avoid language that is unclear about information provision. This clause requires the parties to "maintain lines of communication" but does not state what that means, how often the company must report to the community, or in what form the company must communicate important information. This clause also requires communication about "any issues in implementing the contract" but does not explain what this phrase covers.*

To ensure that relevant information is shared in a timely and accessible manner, the contract should clearly state:

- ➔ **The information the company has already provided to the community, or must provide to the community, before the contract comes into force.** If the information has not already been provided at the time of negotiations, then the contract can make sharing this information a "condition precedent"—something that must be fulfilled before a contract comes into force and the contractual obligations become binding on both parties. This will delay the contract's start date ("effective date") to sometime after the contract has been signed. The information that the community likely would want *before the contract comes into force* includes:
 - ➔ **A feasibility study** that describes the project, the company's business model, and the resources needed for the project to succeed, including an analysis of the project's financial viability (its ability to succeed and make a profit for the company);
 - ➔ **The company's business plan**, the project's expected annual profits, and the expected timeline for profits. If the company is required to submit a business plan to the government, the company should be required to give the same document to the community;
 - ➔ **Impact assessments and management plans** (see section 9 above); and
 - ➔ **Copies of any government-issued documents relevant to the project**, such as permits or licenses.

→ **The information the company must report on or give to the community throughout the duration of the contract.** Depending on the project, this may include:

- Annual revenues and annual profits or losses (the contract may also require that the company’s accountant confirm the accuracy of this information);
- Copies of government-issued documents relevant to the project received by the company after the contract is negotiated;
- Information about the ownership of the company, if it is sold or acquired during the investment project;
- Information relevant to environmental impacts, such as the names of any hazardous chemicals used, including how much chemical fertilizer, insecticide, or herbicide has been used in a certain time period; the total volume of water the company has used in a certain time period, including surface water, ground water, and wastewater from nearby operations of another company; and direct or indirect impacts on local biodiversity; and
- Reports regarding the company’s compliance with the contract or with any plans developed to address the findings of impact assessments.

→ **A schedule or timeline** that states the dates that the company must give the agreed documents and information to the community. The community may ask for the documents and information to be shared once a year or every six months.

→ **The language and format the information and documents should be in**, so that the community can understand the information. If original documents will be in a language that community members cannot understand, the contract should require the company to translate the information into a local language that the community can read and understand it.

EXAMPLE

For example, after describing what must be reported on, the contract might state: *“The Company must submit the reports in both [the country’s official language] and in [the language or dialect used by the community].”*

→ **How the information will be presented to the community.** The contract can require that the company share information with the community and all relevant people with an interest in the project at a large meeting, to which all community members are invited.

EXAMPLE

For example, the contract could say: *“The Company has shared its business plan with the Community (annexed to this contract). Once a year, the Company will give to the Community reports of annual profits or losses and any updates to its business plan. The Company will also give the Community copies of any government documents related to the investment, such as permits, licenses, registration documents, and cadastral records, as soon as those documents are issued. When it is time to give this information to the Community, the Company will bring this information to the community meeting hall and organize a meeting with the Community to discuss the information and answer questions.”*

CAUTION!

RED-FLAG CLAUSE

“The Company will generate **periodic performance reports** for the Communities with an **evaluation of its compliance with the intentions of this Contract**. The Company will take **any efforts it deems necessary** to correct any deficiencies found in the performance of work guided by this Contract.”

! Avoid clauses that are vague about the company’s obligations to report to the community or that have vague timeframes. This clause does not say how often the company must report; it just mentions “periodic” reports. This clause also does not say what specific information the company must give to communities. Finally, the clause allows the company, rather than the communities, to decide what measures it should take to fix problems in the company’s performance.

EXAMPLE

Example clause: *“The Company will generate performance reports for the Community every 6 months, with an evaluation of its compliance with the Contract. These reports will include actual performance for each metric described in the appendix of this Contract. Appended to these reports, the Company will provide copies of relevant documents that evidence the reports. The Company will provide and explain this information in a meeting to which all Community members are invited, which will be held at a place accessible to all members of the Community.”*

Metrics that can be included in an appended list include those relating to the payment of rents, royalties, and fees; the provision or funding of any social infrastructure or services; the employment of local community members; any environmental damage caused and measures taken to address it; and any negative social impacts caused and measures taken to address them.

To make sure that the community can look at the company’s records as needed (which is especially important when the contract provides for profit- or revenue-sharing), the contract should:

- ➔ **State exactly what records the community will be able to look at.** For example, records might include the company’s accounting books and financial records.
- ➔ **Specify when and where the community can look at these records.** Can the community review these records at any time? Does the community need to provide advance notice that they want to see the records, such as three business days? Where will these records and documents be kept? If that location is difficult for community members to travel to, is the company required to help community members travel to where the information is kept?
- ➔ **Explain who from the community can look at these records.** The contract can require that the company share certain records only with an elected committee or with any community member who would like to see them.

GET LEGAL ADVICE

GET TECHNICAL ADVICE

- ➔ Are there any specific national laws or regulations that govern how companies must report on their operations to local communities?
- ➔ What exact information should the company be required to share with the community so that the community can hold the company to its obligations under the contract?
- ➔ Which company documents or records are needed for the community to be able to check if the company is paying the correct amount to the community under a profit-sharing or revenue-sharing scheme?

DISCUSS WITH THE COMMUNITY

- ➔ What information would the community like the company to provide so that it can have a good understanding of how the investment is progressing, and whether or not the company is doing what it promised to do in the contract?
- ➔ When does the community want to receive the information? Every six months?
- ➔ What would be the most easily understandable, convenient way for the company to share information with the community? Where would be most convenient for community members to receive and review company information?

- ➔ What must the company report on, and when? Which specific documents must be shared? What language will they be in?
- ➔ Does the contract describe how the community can look at information, who can look at it, and when they can look at it?
- ➔ Are there any confidentiality restrictions on how the community can use the information received from the company?

CHECK THE CONTRACT!

13.

ASSIGNMENT OF RIGHTS

This is the part of the contract that explains what will happen if the original company carrying out the project sells, transfers, or otherwise gives its rights in the contract to a new company. In this situation, the new company would replace the original company and be allowed to use the land in the same way that the original company had agreed with the community. The contract should set out how the new company, which may do things differently, must relate to the community.

The contract should make sure that before the original company “assigns its rights” to the new company, the community is informed and is part of the discussions. The contract should:

- **State that the original company must consult the community and obtain its consent before the original company is allowed to assign its rights to a new company.**
- **Require the original company to provide information about the new company to the community,** including, for example, its environmental and human rights record and its financial records.
- **Require that the new company agrees to be bound by the original contract.**

CAUTION!

RED-FLAG CLAUSE

“In the event of the Company’s liquidation or acquisition by another company and/or entity during the continuation of this Lease, **the Company’s interest shall continue and or devolve** on its successor or assign as the case may be.”

! Avoid clauses that allow a company’s rights under the contract to be taken by a different company without first checking with the community. This clause does not require the company to consult the community or obtain its consent before assigning rights, which means that the community has no control over who may be operating the project in the future.

EXAMPLE

Example clause: *“The Company must not assign or transfer its obligations or rights under this Contract to any other person or entity (the “assignee”) without the prior written consent of the Community. Before seeking the Community’s consent, the Company must provide all pertinent information about the proposed assignee, including how any other projects operated by the proposed assignee have negatively affected other local communities and how the proposed assignee acted to respond to or rectify any such negative effects. Once the Company’s interest in the Contract has been assigned or transferred, the assignee will be bound by this Contract and must meet with the Community to acknowledge that it is committed to the existing Contract.”*



Make sure that the contract requires the company to meaningfully consult with, and obtain the consent of, the community before the company sells or assigns its investment to another company.

GET LEGAL ADVICE

- ➔ What does national law say about the community's rights when a company "assigns it rights" to another company?
- ➔ When the government (rather than the community) technically granted the land or resources to the company, will a benefit-sharing contract between the community and the original company be automatically assigned to the new company, even if the new company is not interested in complying with it?
- ➔ Can the contract be drafted to ensure that any company obligations will continue so long as the project continues (for example, requiring that the original company fulfill its obligations up until the new company begins to fulfill them)?
- ➔ What legal power does a community have to require its consent in an assignments clause, or to refuse the new company?

CHECK THE CONTRACT!

- ➔ What rights does the community have if the company sells its business or otherwise tries to transfer its rights under the contract to another company?
- ➔ Will a new company be bound by the promises that the original company made in the contract?

14.

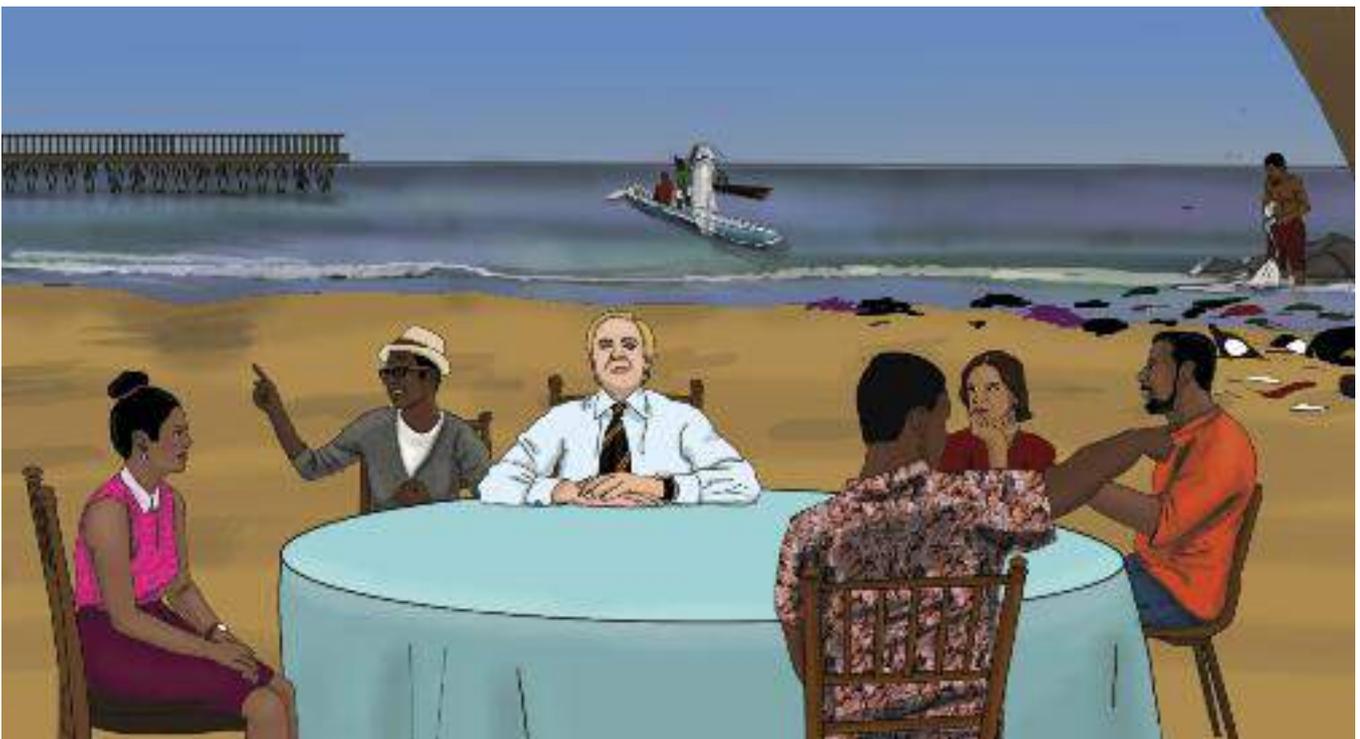
REVIEW, RENEGOTIATION, AND AMENDMENT OF THE CONTRACT

This is the part of the contract that talks about how the community and the company can change what the contract says before it ends, if they both agree. This will be helpful if the community later wants to change the contract because of new circumstances that will affect how the contract operates.

For contracts that will last for a long time, it can be useful to include an automatic option for **periodic review** of the contract after a certain time period, such as every five years. This gives the community and the company an opportunity every five years to consider if parts of the contract should be changed to address changes in circumstances that were not expected when the contract was originally signed. A periodic review can provide a good opportunity for either side to request a renegotiation of certain clauses in the contract.

EXAMPLE

Example clause: *“There will be a periodic review once every 5 years for the duration of the Contract. The purpose of the review is to have good-faith discussions to consider any modifications that may be necessary or desirable in light of any substantial changes in circumstances or experience gained during that period. The Company and Community agree to be open to discussing any matter that may help to maximize the Project’s positive impacts and minimize its undesirable impacts for the Community, including, but not limited to, increasing the compensation the Company will pay to the Community.”*



Include in the contract a process of periodic review to make sure that the contract terms are still fair and beneficial to all parties.

If the community wishes to leave open the possibility of updating the contract, then the contract should:

- **Give both the community and the company the right to request renegotiation at any time**, or whenever there is a change in economic, social, or environmental circumstances that will significantly affect the community or the company.
- **Set out a process for renegotiating and amending the contract for big changes.** This process may be a shorter version of the same process used to negotiate the original contract.
 - The contract should require that when big changes to the contract are requested, the renegotiation process will happen *with the whole community's participation*, in the local language, at a place that is easily accessible to all, and in the presence of lawyers, paralegals, or others who can advise the community and advocate for its interests.
 - The contract should require the company to use the same process that was used when first negotiating the contract, if the company wants to make changes that would affect the community's rights or benefits. Or if the company wants to make big changes to the project, then the contract can require a new impact assessment to assess how the changes will affect the local environment and the community.
- **Set out a process for renegotiating and amending the contract for small changes.** The contract should clearly state a process of approval or denial for small changes to the company's project or the contract (such as changes to the company's operating hours that would mean that trucks drive through the community very early in the morning or late at night). The contract could state that such small decisions can be made by the community's elected land governance body on the community's behalf, or by another representative and trusted body. *Be careful to define what counts as a small change, as some changes may seem small but have big impacts.*
- **State whether there will be an independent moderator.** The community should consider whether it would want an independent moderator at the periodic review or during renegotiations, and, if so, how such a person would be chosen.
- **State that any changes ("amendments") to the contract must be made in writing**, agreed to by both parties and signed by the parties' representatives.

The community should be very careful to not renegotiate or amend the contract in ways that may harm the community's interests. If there are very specific rights or obligations in the original contract that the community wants to make sure will remain in any renegotiated contract, the community could seek to add a clause into the contract to make sure that any renegotiation will not result in a weakening of those rights or obligations.

EXAMPLE

For example, the community could try to include a clause that says: *"If the Contract is renegotiated, the renegotiated contract will not result in reduced benefits or rents being paid to the Community." Remember, however, that the community can always decide during renegotiations what it is or is not willing to give up, and reducing any possibilities in advance may leave the community with fewer bargaining options.*

GET LEGAL ADVICE

- Do national laws say anything about how or when a contract may be changed?

DISCUSS WITH THE COMMUNITY

- If the contract needs to be changed, what will be the process for agreeing on changes?
- What kinds of changes will the community consider to be "big" changes? What changes will be considered to be "small" changes?
- If the company requests a small change to its operations or to the contract, who from the community will be allowed to give approval on the community's behalf?

CHECK THE CONTRACT!

- Does the contract include an automatic option for periodic review (for example, every five years)?
- Does the contract say that the community can request a review of the contract? Is the company required to meet with the community to discuss the request?
- Is there a timeline for any review process?

15.

MONITORING FOR COMPLIANCE

This is the part of the contract that talks about how the community and the company will check whether everyone is doing all of the things that they promised to do in the contract. This includes checking if the company is staying within the project area's boundaries, complying with its promises to protect against environmental and social damage, and supplying the promised payments and benefits set out in the contract.

This part of the contract should:

- **Explain that the community has the right to monitor the project and the company's activities**, which includes the right to request important information and the right to periodically

access the project area to collect information and observe any on-the-ground impacts of the project.

EXAMPLE

For example, the contract could say: *“Upon receipt of two week’s prior written notice, the Company agrees to permit two community-appointed representatives of the Community to enter upon the land for formal inspection once a year, during the day time and to thereafter give notice in writing to the Company of all defects then and there found.”*

The contract should say that community members have the right to monitor whether the company is fulfilling all of its obligations under the contract.



- **State what will be monitored.** The contract can explain that the community will monitor the company's compliance with the contract. It can also list specific issues that will be monitored, such as:
 - Whether the company has made all payments and provided all benefits it promised to in the contract;
 - Whether the company has complied with all plans to address the findings of the impact assessments, including if it has taken the actions in the environmental and social management plan that were designed to reduce environmental damage and social harms. The contract may also explain what specific environmental impacts will be monitored, such as any impacts on water quality, air quality, soil contamination, density of local fish and wildlife, or other indicators, such as the health of community members;
 - Whether the company has carried out the agreed business activities;
 - Whether the company's activities have resulted in negative social impacts that the contract aims to prevent.
- **Explain how the monitoring will be done.** For example, when monitoring environmental impacts, will certain scientific tests be used? Where will analyses be conducted? And by whom? Will community members' traditional knowledge and history be considered when analyzing impacts on the environment and the community's social fabric? Will community members have access to healthcare so that their health can be monitored?
 - The data in the Environmental Impact Assessment can provide *baseline measurements* that can be compared against later measurements of local environmental conditions made *after* the project starts.
- **Describe when the monitoring will occur.** The contract can include a timeline for when the monitoring will be done, or explain how frequently certain issues will be monitored and how frequently the community can access the project area for monitoring purposes.
- **Set out who will do each type of monitoring.** Some monitoring might be the responsibility of the community, the company, or a trusted organization or professional. Monitoring should not be done only by company representatives. The contract could also require regular meetings where the company and the community sit down and go through each of the company's obligations one by one to make sure that it is complying with the contract.
- **Clearly state that the company will pay for any costs associated with monitoring.**
- **Describe how the results of the monitoring will be shared with the wider community.** Will there be one meeting every year? Or a meeting every time monitoring takes place? What language will the meeting take place in? Where will the meetings be held, and who may attend?

EXAMPLE

Example clause: *"In addition to the Company's obligations for environmental and social impact monitoring contained in the Environmental Impact Assessment and Environmental Management Plan, the Company and the Community will work together to develop and implement a participatory monitoring program, in which the Company and the Community will jointly monitor the project's environmental and social impacts. The Community shall select at least three Community members to participate in the participatory monitoring program each year. The Company must assist in capacity-building by providing training for participating Community members so that they can understand the processes and be able to draw objective conclusions."*

EXAMPLE

Example clause: *“Monitoring and evaluation of environmental impacts will be implemented together by representatives of the Community and the Company once a month. Community representatives participating in this monitoring and evaluation shall have freedom of movement within the Project Area. Monitoring and evaluation of environmental impacts will also be implemented by an independent team, chosen through mutual agreement by both parties, and paid for by the Company. This independent monitoring and evaluation will take place at least once every 6 months.”*

- **Explain what will happen if the company does not allow the community to monitor its activities and/or to monitor the related impacts on the land and environment.** The contract should explain what will happen if the company does not allow the community to properly monitor the project as described in the contract. This would qualify as a breach of the contract, which would entitle the community to a remedy, as discussed in section 18, below. If the company continues to not allow the community to monitor the project, this refusal could eventually be grounds for contract termination, which is discussed in section 19 below.
- **State whether the company will also monitor anything under the contract.** The contract might state, for example, that the company will:
 - Monitor its operations to make sure it stays within the boundaries of the project area.
 - Monitor all company infrastructure located in the community and the project area to ensure that it is operating appropriately.
 - Regularly monitor the project’s environmental impacts, including the amount of any hazardous chemicals used, the amount of water used, and any direct or indirect impacts on local biodiversity.
 - More generally, monitor whether the company is complying with the contract, the ESMP, and all applicable laws and regulations.
 - Monitor whether the community is meeting its obligations under the contract.

GET TECHNICAL ADVICE

- How can environmental impacts be monitored? What have other companies in the region been required to monitor?
- What is a “safe” amount of each specific chemical or pollutant that the company proposes to use or create? What is a dangerous amount? What are legally allowable amounts of chemicals or pollutants in the community’s air, water, and soil?
- What are the specific risks to health that the project may cause and that community members should look out for? How can these be managed, given the health care services that the community has access to?

GET LEGAL ADVICE

- What obligations does the government have to help make sure that the company is not illegally polluting the environment?

DISCUSS WITH THE COMMUNITY

- How will the community check whether the company is following the terms of the contract and the agreed rules?
- How should the community communicate concerns about negative impacts to the company? And how soon must the company respond?
- Do community members want to be involved in monitoring social or environmental impacts? If so, how would the community decide which community members would do this? What training would they need?

CHECK THE CONTRACT!

- Does the community have the right to enter the land in order to monitor the company’s activities? How frequently can it do this?
- Who will monitor the investment’s impacts on the environment? How will this be done? Who will pay for this?

TABLE: RIGHTS AND RESPONSIBILITIES AROUND MONITORING

The contract should specify the rights and responsibilities of each party around monitoring. The following table can be used to support contract negotiations about what will be monitored—when, how, and by whom—so that the community is aware of: (1) what its rights are; and (2) what the company must do. While the government will often not be a party to the contract, it is important that the community knows what the government’s roles and responsibilities are; these are included in the final column of the table.

Issue	Community	Company	Government
Boundaries of the project area	<p><i>The contract should ensure the community’s right to:</i></p> <ul style="list-style-type: none"> ➔ Monitor that all company operations take place within the agreed project area. ➔ Access the boundaries of the project area to make sure that the company is not using land outside of the project area. ➔ Access any information, including maps or GPS coordinates, held by the government or the company about the exact boundaries of the project area. 	<p><i>The contract should state the company’s responsibility to:</i></p> <ul style="list-style-type: none"> ➔ Monitor its operations to make sure it stays within the project area. ➔ Provide the community with information, including maps and GPS coordinates, about the exact boundaries of the project area. ➔ Inform the community if it wishes to expand its operations beyond the permitted project area, which would require a renegotiation of the contract. ➔ Notify the community if the company’s operations go beyond the boundaries of the agreed project area without justification, and explain what the company will do to fix this breach. 	<p><i>The government should:</i></p> <ul style="list-style-type: none"> ➔ Monitor the company’s operations to make sure the project stays within the agreed project area. ➔ Provide the community with information, including maps and GPS coordinates, about the exact boundaries of the project area. ➔ Create a clear process that community members can use to raise any complaints or grievances concerning company use of land outside of the project area.
Payments to the community	<ul style="list-style-type: none"> ➔ Access documents, such as bank deposit receipts, that prove the company paid any rent or other payments owed to the community (especially if payments are made into a community bank account). ➔ Access information from the company regarding the information used to calculate any rent increases based on inflation. This could include inflation rates, food prices, or relevant market prices used. ➔ Access company information such as financial and other documents regarding how the company calculated payments for profit sharing, revenue sharing, or royalties. This could include the company’s quarterly or annual revenues and costs and the annual amount or value of the goods or commodities produced. ➔ Access information about the total amount of payments made to the community. 	<ul style="list-style-type: none"> ➔ Give the community documents, such as bank deposit receipts, that prove the company paid rent or other payments owed to the community soon after each payment is made (especially if payments are made into a community bank account). ➔ Give the community information used to calculate any rent increases based on inflation. This could include inflation rates, food prices, or relevant market prices used. ➔ Give the community information, including financial and other documents, regarding how the company calculated payment amounts for profit sharing, revenue sharing, or royalties. This could include the company’s quarterly or annual revenues and costs, and the annual amount or value of the goods or commodities produced. ➔ Inform the community of the total amount of financial payments made to the community. 	<ul style="list-style-type: none"> ➔ Monitor the contract to make sure that the company pays the community as agreed. ➔ Monitor the company’s payments to ensure that, consistent with inflation, any rents satisfy at least the minimum value set by the government where applicable. ➔ Monitor for misuse of the funds paid to the community.



TABLE: RIGHTS AND RESPONSIBILITIES AROUND MONITORING - CONTINUED

Issue	Community	Company	Government
Infrastructure development	<p><i>The contract should ensure the community's right to:</i></p> <ul style="list-style-type: none"> → Monitor whether there are any defects or safety problems with infrastructure the company has built or paid for, including by safely accessing relevant construction sites. → Access information on the development and progress of infrastructure projects that the company agreed to build and maintain. → Access information about the current status of any local infrastructure development being built for the community. 	<p><i>The contract should state the company's responsibility to:</i></p> <ul style="list-style-type: none"> → Monitor that all company infrastructure located in the community is operating appropriately, and report to the community if there are any problems. → Regularly inform the community about the progress of construction of any local infrastructure development being built for the community. 	<p><i>The government should:</i></p> <ul style="list-style-type: none"> → Inspect infrastructure plans and any infrastructure built to ensure compliance with national standards and coherence with local development policies. → Monitor the contract to make sure that the company provides infrastructure benefits to the community as agreed.

Local employment, training, scholarships, and local goods and services	<ul style="list-style-type: none"> → Access information about local employment creation, training, scholarships, and opportunities for community members to provide goods and services to the company, such as contracts or "tenders" (if these opportunities are included in the contract). This information should include the number of community members receiving jobs, training, scholarships, and contracts or tenders; specific information about those opportunities (for example, are the jobs full-time or part-time, short-term or ongoing? How long do trainings last and what topics are covered? What institutions are the scholarships for? What is the value of specific contracts or tenders awarded to community members?); and how individual community members are selected for each opportunity. 	<ul style="list-style-type: none"> → Give the community information about local employment creation, training, scholarships, and opportunities to provide goods and services to the company, such as contracts or "tenders" (if these opportunities are included in the contract). This should include the number of community members receiving jobs, training, scholarships, and contracts or tenders; specific information about those opportunities (Are the jobs full-time or part-time, short-term or ongoing? How long do trainings last and what topics are covered? What institutions are the scholarships for? What is the value of specific contracts or tenders awarded to community members?); and how individual community members are selected for each opportunity. 	<ul style="list-style-type: none"> → Monitor company compliance with labor laws (including concerning wages, rights to collective bargaining, social security benefits, health insurance, and maternity leave). → Monitor for the acceptance of bribes by community leaders in exchange for preferential treatment concerning how local employment, training, scholarships, or contracts for the provision of goods and services to the company are allocated. → Monitor the contract to make sure that the company provides all agreed benefits regarding local employment, training, scholarships, and opportunities to provide local goods and services.
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TABLE: RIGHTS AND RESPONSIBILITIES AROUND MONITORING - CONTINUED

Issue	Community	Company	Government
<p>Environmental impacts</p>	<p><i>The contract should ensure the community's right to:</i></p> <ul style="list-style-type: none"> → Look at the impact assessment findings, report, and any associated management plan conducted for the project. → Regularly access all information related to the impacts of the company's project on the environment and human health. → Monitor the company's operations to make sure it is following the agreed Environmental and Social Management Plan (ESMP). → Use indigenous and traditional knowledge when monitoring and assessing any impacts of the company's project on the environment and human health. → Speak to the company whenever the community has concerns about the impacts of the company's project on the environment and human health. → Access the project area to conduct a formal inspection (including to collect information and observe any on-the-ground impacts of the project) after following appropriate notice requirements. 	<p><i>The contract should state the company's responsibility to:</i></p> <ul style="list-style-type: none"> → Share the impact assessment findings, report, and any associated management plan with the community in an accessible form. This may include translating the documents into the community's native language, providing plain-language explanations of assessment findings, and organizing and publicizing public meetings where the practitioners who conducted the assessment will explain the findings to community members. → Regularly monitor, and provide the community with information relevant to, environmental impacts, such as the names and amount of any hazardous chemicals used, the amount of water used, and direct or indirect impacts on local biodiversity, as well as its compliance with the contract and the ESMP. → Provide any new information it has on new negative environmental impacts that occur in the course of its business operations, and what remedial measures it has taken to address these impacts. → Allow the community to access the project area to conduct a formal inspection (including to collect information and observe any on-the-ground impacts of the project) after following appropriate notice requirements. 	<p><i>The government should:</i></p> <ul style="list-style-type: none"> → Provide the community with copies of any environmental or other relevant permits, impact assessments, or ESMPs relating to the project, and support the community to understand that information. → Monitor all environmental impacts of the company's operations to make sure that they do not violate national environmental laws.

TABLE: RIGHTS AND RESPONSIBILITIES AROUND MONITORING - CONTINUED

Issue	Community	Company	Government
Social impacts	<p><i>The contract should ensure the community's right to:</i></p> <ul style="list-style-type: none"> → Access the project area to conduct a formal inspection (including to collect information and observe any on-the-ground impacts of the project) after following appropriate notice requirements. → Access information regarding any injuries, assaults, or deaths of community members that occur in or near the project area within a reasonably short amount of time of the company learning of such events. → Access information regarding the impacts on the community of the company's operations using standard development metrics, to provide a full picture of its positive or negative impacts on the social fabric of the community. 	<p><i>The contract should state the company's responsibility to:</i></p> <ul style="list-style-type: none"> → Allow the community to access the project area to conduct a formal inspection (including to collect information and observe any on-the-ground impacts of the project) after it follows appropriate notice requirements. → Provide information regarding any injuries, assaults, or deaths of community members that occur in or near the project area within a reasonably short amount of time of the company learning of such events. → Disclose information regarding the impacts of its operations on the community using standard development metrics, to provide a full picture of its positive or negative impacts on the social fabric of the community. 	<p><i>The government should:</i></p> <ul style="list-style-type: none"> → Monitor, investigate, and respond to any dangerous or illegal behavior by company employees, including behavior that puts community members at risk.
Operations	<ul style="list-style-type: none"> → Access information regarding the company's operations, including any changes to the planned operations and any new permits it receives. → Periodically visit the project area to conduct a formal inspection of operations after following appropriate notice requirements. 	<ul style="list-style-type: none"> → Provide the community with relevant information, in an accessible form, about its operations, including any changes to the planned operations and any new permits it receives. This should be done according to an agreed timeline, and additional information should be provided when the community requests it. → Allow the community to access the project area to conduct a formal inspection of operations after following appropriate notice requirements. 	<ul style="list-style-type: none"> → Monitor and inspect company operations to ensure compliance with national laws and any work requirements set out in investor–state contracts.

GOVERNING LAW

This is the part of the contract that says which country's laws apply to the contract. This is important because the contract may be interpreted differently depending on which country's laws are used.

The contract should clearly state which country's laws will be used when interpreting the contract, as well as the rights and obligations created by the contract. It is often best to use the laws of the country where the

EXAMPLE

For example, the contract could say: ***"This Contract and the rights, obligations and duties of the parties under this Contract are governed by, and shall be interpreted in accordance with, the laws and regulations of [name of country]."***

project is happening, as it will be easier for the community to find advocates who understand their country's laws.

Some investors may prefer to have the contract governed by their home state law because they are more familiar with that law. Communities generally should not agree to this, as it may be difficult for them to find a local advocate who is familiar with the home state law, and courts in the community's country may not be willing to apply the law of another country.

GET
LEGAL
ADVICE

→ Which country's laws should apply to the contract?



It is often best for the contract to be governed by the laws of the country where the project is happening.

17.

NOTICE

This is the part of the contract that sets out how the community and the company agree to officially communicate with each other. It states when the parties must notify each other about concerns or certain events before further action can be taken. This is important, as formal notice can be a first step before terminating the contract and can help to encourage the company to comply with its legally binding obligations (including the promises it made in the contract).

There are many reasons that the community or the company might need to give notice to the other party:

- The community or the company may be required to give notice to the other party if there is:
 - A conflict or dispute (discussed in section 20 below);
 - A breach of contract and—if the breach is by the other party—a demand that the other party fix the breach (discussed in section 18 below);
 - A wish to terminate the contract (discussed in section 19 below); or
 - An unexpected “force majeure” event that affects a party’s ability to do what it promised to do in the contract (discussed in section 21 below).
- The company may be required to give notice to the community when:
 - It plans to begin to develop parts of the land currently being used by the community (discussed in section 6 above); or
 - It wishes to exercise an option to use and occupy additional land (discussed in section 5 above).
- The community may be required to give notice to the company before community representatives intend to visit the company’s offices to look at company books or records, or to access the project area for a formal inspection (discussed in section 12 above).

This section of the contract does not describe all of the situations when notice must be given. Those situations should be described in other parts of the contract. For example, if notice must be given in order to terminate a contract, then the termination section of the contract should explain the notice requirement and should include how many days, weeks, or months in advance the notice is required. **The Notice section should simply describe the process that the community and the company have agreed to use to officially communicate with each other** to make sure that both parties receive important information in a timely manner. If notice is given in the way described in the Notice section of the contract, the other party cannot claim that it did not receive the information that was communicated.

This section of the contract should state:

- **Whether the notice can be spoken or must be in writing.** The community and company may agree to give each other notice in writing, or verbally at community meetings with a minimum number of community members present, or in accordance with the community’s traditional methods. If the notice must be in written form, the contract should say which language it should be in.
- **The place where any written notice will be delivered.** Information for the company could be delivered to the company’s office near the project area. Information for the community could be delivered at a central community meeting area.
- **How the information will be delivered.** For example, by mail (if available) or by hand (if feasible).
- **Who it should be delivered to.** Will certain community members be chosen by the community to receive the notice? Which company managers or employees should receive the notice?

→ When the information will be “deemed” (officially considered) to have been received. This can be important if the community is giving notice of a breach by the company and wishes to rely on that notice as part of the process to terminate the contract. If the information is sent by mail, it would usually be deemed to have been delivered at the time the information is sent. If the information is delivered by hand, it would usually be the time at which the information is hand-delivered.

The community members should consider how they usually give and receive information, as well as the most effective and accessible way to give information to and receive information from the company. This will help prevent breakdowns in the procedures set up by the contract. For example, if literacy levels are low in a particular community, and mail is not available, then it would be impractical for the community to agree to give notice in writing to be delivered by mail. Similarly, if a community is located far from the capital city where the company’s office is headquartered, it would be impractical for the community to agree to hand-deliver notice at the company’s headquarters.

EXAMPLE

If practical, a contract could say: **“Any Notice required to be given by this Contract shall be in writing and must be given by delivering the information by hand to the relevant address specified below.**

[Company address]
[Community address]

Copies of Notice should be sent to [names and addresses].

Either Party may give Notice to the other Party to change the address to which Notice must be delivered or to change the person(s) designated to receive Notices or copies of Notices. Any Notice given as set out here shall be deemed to have been given and received at the time of delivery if delivered by hand.”

Or a contract may say: **“The parties agree that traditional methods of notice as applicable and allowed by the traditional laws and Chiefdom laws shall be valid Notice under this Contract.”**

In this case, the contract should also specify what those traditional methods are.

Or a contract may say: **“The Company agrees to give the Community Notice in writing in [relevant local language]. Notice is to be posted in prominent areas in the Community [with detail of exactly where those locations are].”**



→ How does the community want to give and receive formal notice under the contract?



All official community-investor communications should be in a language that community members can read and understand, and written information should be delivered to the community at a convenient, local place.

REMEDIES: WHAT HAPPENS IF THE COMPANY BREACHES THE CONTRACT?

This is where the contract explains what will happen if the company does not do everything it says it will, and therefore breaks the agreements in the contract. (This is called “breaching the contract.”) If the company breaches the contract, the community will be entitled to a “remedy”—the company must either fix the breach or compensate the community for problems caused by its breach of the contract. This is important, as remedies can help the community avoid suffering losses as a result of a company’s breach. The risk of having to pay for some remedies may also make companies more likely not to breach the contract.

The contract should set out clear penalties and consequences if the investor breaches the contract in a way that harms the community.

In general, there are two types of breach:

1. **Very serious breaches** by the company that go to the “heart” of the contract and justify termination of the contract. These are discussed in section 19 below.
2. **Other breaches** by the company that are less fundamental to the contract. These are sometimes called breaches of “warranties” or “immaterial breaches.” For example, if a contract with a company that will grow rice on the land has a clause requiring the company to pay for any firewood that it gathers and the company fails to do this, this is probably not a very serious breach of the contract. For these types of breaches, the remedy will often be compensation.



For any breach by the company, there should usually be a requirement that the company **notify** the community of the breach soon after it realizes that it has breached the agreement (see more on Notice in section 17 above). For example, the contract should require the company to notify the community if it discovers it has polluted a water well that the community uses. The contract can also set out a process for the community to provide notice to the company that the company has breached the agreement, if the community is aware of the breach and wants a remedy. When the community provides notice, it should give the company a period of time to correct its actions and stop breaching the contract. A notice period can increase the chances that the company will fix its mistake, allowing the contract to continue.

For both types of breaches, the contract should give the community the **right to demand a meeting with the company to discuss the breach**. The contract should also state that if the community wants to have legal support available at any meeting to discuss the company's breach of the contract, that the company must cover the cost of the community's legal support.

When a company breaches the contract, the contract should require the company to fix the breach and put the community back in the position it would have been in if the company had not breached the contract. Different types of remedies can be set out in the contract. These might include:

- Paying money or giving other things to the community as **compensation** for the damage caused by the breach. Exactly what should be paid or given is calculated *after* the damage is caused.
- Payment of an agreed amount of money (**liquidated damages**) for specific breaches of the contract. This is calculated and agreed on *before* the damage is caused, when the contract is being negotiated. For liquidated damages to be available, they must be included in the contract as a possible remedy. The contract should state what set amount of money the company will have to pay for certain breaches. The payment amount must be roughly the same as the amount the community would lose due to the breach. Before deciding to include a liquidated damages clause, the community should carefully think about whether a liquidated damages clause would encourage the company to simply breach the contract and then pay the amount of liquidated damages owed.

As discussed in section 19, the community may also be able to **terminate** the contract if the company's breach of the contract is very serious. Other remedies may also be available if the company breaches the contract. These do not need to be included in the contract, as courts can order these remedies under national law. These include:

- **A court order that compels the company do** what it promised to do and comply with the contract.
- **A court order (known as an injunction) that requires the company do something or stop doing something**, to protect the community's interests under the contract.

If the community is worried that the company will break certain promises, the contract can say what the remedy should be for breaking those promises. For example, if the breach involves the company's failure to pay the community for something, then the contract can set out that the company will have to pay interest for each day it is late in paying the community.

EXAMPLE

For instance, the contract could say: *"If the Company fails to pay rent to the Community for a period of 14 days or more after the rent becomes due, the Company will also be required to pay interest at 10% from the day the payment was due until the Community receives full payment of the rent and accrued interest."*

Otherwise, a court (or other dispute resolution process agreed on by the parties) can decide what remedy is appropriate.

18.

The contract may also include a “catch-all” clause to talk about remedies for all other breaches.

EXAMPLE

For example, the contract might first describe very serious breaches (as discussed above) and then say: *“If the Company breaches any other clause in this Contract, the Community shall give notice to the Company in accordance with the Notice clause, requiring the Company to remedy its breach and perform its obligations within 30 days from receiving the Notice. The Company should also contact the Community’s representatives to discuss how it will compensate the Community for any loss or damage caused by the breach. If the Company fails to remedy the breach and perform its obligation within the 30 days, the Community can notify the Company that it is still in breach of the contract and demand a meeting, which the Company must attend, and which must take place within 30 days of the request. If the Community and the Company do not reach an agreement on how the problem will be rectified within 60 days of the notice being given, then either party may invoke the dispute resolution procedure mentioned in this contract. If the Company refuses to meet with the Community or participate in the dispute resolution procedure for a period of 90 days from the first time the Community notified the Company about the breach, then the Community may terminate the contract by written notice. The land will then immediately revert to the control and domain of the Community, and the Company must stop operating and leave. With the exception of fair wear and tear, the Company will be responsible for any damage caused to the Community’s land.”*

The company might want to include a clause that creates consequences **if the community breaches its obligations** under the contract. Examples of community obligations might include a requirement that the community does not physically block the company, its employees, or its suppliers from accessing the project area, or a requirement that the community must not object to any applications by the company for permits needed to carry out the project. The community should be very cautious about including clauses in the contract that create consequences for the community if it breaches its obligations. If the community agrees to include those clauses, any remedies for a breach by the community should be reasonable. **Remedies that would require the community to pay large amounts of money to the company, or to forfeit any long-term rights to the land, should never be included.**

GET LEGAL ADVICE

- What kinds of actions or effects would count as a very serious breach of the contract, and what would count as other non-serious breaches?
- What is a reasonable notice period for very serious and other non-serious breaches?
- Are “liquidated damages” clauses enforceable according to national law? If so, what amounts are realistic and likely to be enforceable under domestic law?

DISCUSS WITH THE COMMUNITY

- Who will be in charge of notifying the company if it is in breach of the contract?
- If the community receives compensation for a breach of the contract, who will manage this money?

ENDING THE CONTRACT (TERMINATION)

This is where the contract explains when a party may end (“terminate”) the contract. This includes terminating the contract before the end date because of a very serious breach, or allowing the contract to conclude under normal circumstances at the end of the contract’s duration. This part of contract should also explain any ongoing rights or obligations that the parties will have after termination. Being able to terminate the contract early because of a very serious breach is important: it can put pressure on the company to do what it has promised to do, pay, or provide, and it gives the community a way to protect its interests if the company continues to seriously breach the contract. Knowing when and how a contract will end is also important so that community members can continue to plan for the future uses of their lands and resources.

EARLY TERMINATION BECAUSE OF VERY SERIOUS BREACH OR FAILURE TO PERFORM

Not all breaches of the contract are very serious. However, some breaches may be so serious that they go to the “heart” of the contract. These very serious breaches may give either party the right to terminate the contract before the end date. These breaches are sometimes called breaches of “conditions,” breaches of “essential terms,” or “material breaches.” A community may be able to terminate the contract if the company commits this type of breach, if the community has given notice to the company and the company has failed to fix the problem. (See more on Notice in section 17 above.)

The contract should say **what counts as a very serious breach** that could give the community the right to terminate the contract. Termination is a very serious action that can have big consequences for both parties, so it should only be reserved for the most serious breaches. To help establish why the breach is regarded as very serious, the contract should explain *why* the community wanted to enter into the contract.

Examples of very serious breaches that could be included in the contract as reasons for termination might include:

- ➔ **Nonpayment of rent.** If the community enters into the contract because it wanted to receive rental payments, then nonpayment may be a very serious breach.

EXAMPLE

For example, the contract might say: *“One of the fundamental reasons that the Community decided to enter into this Contract with the Company was to receive rental payments that could be used to advance the sustainable development of the Community. Failure to provide the rental payments described in this Contract will be grounds for termination.”*

- ➔ **Failure to develop.** If the community enters into the contract because it expects the company to develop the land as described in the business plan and in the contract, then the company’s failure to do so may be a big problem for the community, as the company may be using valuable land and resources even though the community did not receive the benefits it expected.
- ➔ **Extensive damage to the environment or a sacred site.** If one of the community’s main goals of having a contract is to make sure that the company protects the local environment or important cultural or sacred sites, and if there are related protections explicitly included in the contract, then the company’s breach of those protections (such as causing significant water pollution or damaging a sacred site) may be a very serious breach.

- ➔ **Breach of protections against social damage.** Certain illegal conduct or other behavior by the company or its employees that severely hurts individual community members or deeply affects the community's harmony could be a very serious breach.
- ➔ **Other reasons.** Termination might be appropriate if the company is no longer able to carry out operations or comply with the contract—for example, if the company stops operations for more than a year, abandons the project, can no longer pay all the money it owes (becomes “insolvent”), or files for bankruptcy.

The contract can then explain the process for dealing with the company's very serious breach of the contract. The contract should give the company an opportunity to fix the breach (sometimes called an “opportunity to cure”) and keep the contract alive. For example, the contract could establish a process for responding to a very serious breach by the company that includes the following steps:

- ➔ **Provide notice.** The community must tell the company that the breach is happening and require the company to fix the problem within a specified number of days.
- ➔ **Demand a meeting.** The contract can also require specific company representatives to attend a meeting with the community to talk about the very serious breach and decide together how to fix it.
- ➔ **Give the company a chance to fix the breach.** If the company does not fix the breach, then the community can either: (a) begin a dispute resolution process (see section 20 below) or (b) give the company notice that it will terminate the contract if the company doesn't fix the breach within a further period of time.
- ➔ **Terminate the contract.** If the company has still not fixed the breach by the end of the time period, despite being given multiple opportunities to fix it, then the community can terminate the contract.

If the community has notified the company that the breach has occurred and has given the company a chance to fix the problem, and if the company has not fixed the problem, then it is more likely that a court will approve the community's decision to terminate the contract.

EXAMPLE

For example, the contract might say: *“If the Company fails to pay its monthly rent to the Community for a period of 15 days, the Community shall give notice to the Company, and the Company shall promptly pay the rent. If the Company continues to not pay its monthly rent to the Community for an additional period of 30 days or more after the Community gives notice according to the Contract, the Community may terminate the Contract for the Company's failure to perform by providing written notice to the Company. All land and related improvements to the land will immediately revert to the control and domain of the Community, and the Company must stop operating and leave.”*

It is important to note that **terminating the contract early has different effects**, depending on the nature of the community's land rights.

- ➔ If the community has leased the land to a company, then termination of the contract would mean that the community would evict the company and stop the project.
- ➔ If the company needed to get permission from the government (rather than the community) to use the land, then the community cannot stop the project by terminating the contract. Even if the company entered into the contract with the community to maintain good relations, the community's termination of the contract will only stop the arrangements between the company and the community. If the company still has the government's permission to use the land, then the company may still be able to continue the project.

TERMINATION AT THE END OF THE CONTRACT TERM

The contract should say that it will end (terminate) at the **end of the contract's term or duration**. The contract's duration and whether or not the contract can be renewed will usually be discussed earlier in the contract (see section 4 above).

The contract should state whether either party will continue to have obligations after the contract's termination. This helps ensure that the company will do everything it promised to do after the project ends but before it leaves the area, such as repairing the land. The contract should also make clear that the parties will continue to be legally responsible (liable) for any breach of the contract, even after the contract's end date. This means that if the company did not pay all rent that it owed to the community, and the community only discovered this after the contract's end date, the company would still be legally responsible for paying the community all the rent it owed for its use of land.

EXAMPLE

For example, the contract might say: ***"This Agreement will automatically terminate upon expiry of the Term. Upon termination, no party is released from liability for any material breach of its obligations under this Agreement that occurred prior to such termination. Further, the rights and obligations of the parties in this contract concerning rent payments, environmental reclamation, safe maintenance and return of land, reasonable disposal of assets, and resolution of disputes shall survive any termination or expiration of this Agreement until all such provisions have been fully performed and all payments owed the Community are paid in full."***

PROHIBITIONS ON TERMINATION

Caution! In some circumstances, the company might ask for the contract to include a complete **prohibition on termination**. This would mean that neither the community nor the company could ever terminate the contract, even when the other party has very seriously breached the contract. **This prohibition on termination is not recommended.** Sometimes the community's right to terminate is a tool that can encourage the company to be on good behavior. A community's power to terminate a contract can make the company more likely to follow the contract and respond to community complaints in good faith. If a contract has a prohibition on termination, then the company may be able to do whatever it wants without facing any consequences.

CAUTION!

RED-FLAG CLAUSE

"No party is entitled to terminate this contract **for any reason, including by reason of any breach** or repudiation of this Contract by any other party."

! Avoid clauses that do not allow early termination by the community for a valid reason. The right to terminate may help encourage the company to behave properly and can also help a community end its relationship with a company that is acting in bad faith.

A contractual clause that prohibits termination may not be valid in some countries. In some civil law countries, parties to a contract can terminate the contract at any time, as long as they give enough advance notice of their intention to terminate. The exact amount of time needed for adequate notice may vary depending on the contract's duration and the type of the activities covered by the contract. In this case, the right to early termination cannot be removed by inserting a clause in a contract.

TERMINATION WITHOUT CAUSE

The company may also want the right to terminate the contract at any time for any reason, even if the community did not do anything wrong (**termination “without cause”**). The community should think carefully about what might happen if the company could terminate the contract at any time. For example, the community would receive its lands back, but the land might not be usable for certain activities, and the community would also lose the benefits it had negotiated. If the community decides to allow the company to terminate without cause, the contract should require that the company must provide specific benefits to the community for a period of time after termination, and the company’s obligations to restore the land should remain in place.

GET LEGAL ADVICE

- Should the contract say which promises are so serious that if they are breached the community can terminate the contract? Is this likely to be enforceable under national law?
- If the community validly terminates the contract, would this stop the investment project, or could the investor still legally continue their operations?
- If the company proposes a complete prohibition on early termination, is this enforceable under domestic law?

DISCUSS WITH THE COMMUNITY

- What are the most important things the community hopes to get out of the contract? Are these so important that the community would prefer to terminate the contract if the company fails to provide them?
- Would the community be happy to have a clause that allows either party to terminate the contract early?



If the company breaches the contract in a very serious way that harms the community, the contract should allow the community to terminate the contract.

DISPUTE RESOLUTION PROCESSES AND GRIEVANCE MECHANISMS

This is the part of the contract that explains how disagreements (disputes) between the community and the company will be resolved (dispute resolution processes). It may also describe a grievance mechanism for resolving grievances raised by either the community as a whole or by individual community members about the project or the company's actions. Dispute resolution processes and grievance mechanisms are important because they provide procedures to resolve and address disputes and grievances, which can help maintain peaceful relations between the community and the company.

DISPUTE RESOLUTION

The contract should state **clear procedures for how the community and the company will resolve any disputes** relating to the contract. There are different ways to resolve a dispute, including:

- **Informal discussions:** The community and company meet, discuss the dispute, and come to an agreement about how to resolve it.
- **Traditional dispute resolution process:** The community and the company use the community's traditional or customary way of resolving disputes with outsiders (if one exists).
- **Mediation:** An independent, trained mediator helps the community and the company discuss the dispute and come to an agreement about how to resolve it. The mediator has no power to "decide" how the dispute should be resolved.
- **Arbitration:** An independent, trained arbitrator decides how the dispute will be resolved. This takes place in a formal meeting (an arbitration). It is similar to a court hearing, but the dispute is decided by the arbitrator, who the parties choose and who at least one of the parties pays for, instead of a judge, who is a public official. The community and the company usually must follow the arbitrator's decision.

- **Court hearing:** The community and company go to a public court to have the dispute resolved by a judge. The community and the company must follow the judge's decision.

The contract should set out various **stages of a dispute resolution process**:

- **Starting a dispute resolution process: notice.** The contract should require the community to notify the company of the dispute. If the dispute relates to a breach of the contract, the notice can require the company to fix the breach within a set number of days.
- **Meeting.** The contract should encourage the parties to resolve disputes by themselves by discussing the dispute in a calm and collaborative manner. The contract should say that a meeting must occur within a certain number of days of the community or the company requesting a meeting. It should explain whether the entire community should be notified of the meeting and explain which other people who have an interest in the project, if any, should be invited to attend.

EXAMPLE

For example, the contract could say: *"An aggrieved party will, within 20 business days of a dispute arising, give Notice to the party with which it has the dispute, setting out details of the dispute and any other matter that may be relevant to the resolution of the dispute. Within 5 business days of the date of the Notice, both parties will use reasonable endeavors to meet and resolve the dispute within a further period of 10 business days. If a dispute is not resolved during this time, then either party can proceed to the formal dispute resolution, as described in this Contract."*

- **Traditional dispute resolution.** If the community has a traditional dispute resolution process, this process can be included as one of the steps of dispute resolution in the contract.

EXAMPLE

For example, the contract could say: *“The parties can agree, on a case by case basis, to use the Community’s customary dispute resolution process, as described in the Annex, as a first step to explore and potentially resolve any disagreements relating to this Contract.”*

- **Mediation.** If the community and the company still cannot resolve the dispute after the first stages, then they can appoint an external person to act as a mediator to try to help the parties come to a resolution. The mediator could be a lawyer trained as a mediator, an appropriate government actor, or another person who is trusted by both sides.
- **Other formal dispute resolution.** If the parties are still unable to resolve the dispute after the mediation, then they can use a more formal

dispute resolution procedure, such as going to court or arbitration. In formal dispute resolution procedures, there is usually an impartial person, like a judge or an arbitrator, who will decide on how the dispute will be resolved and whose decision becomes binding on both parties.

- **Enforcement.** If the community and company agree on how to resolve the dispute and record the agreement in writing, they should also think about how the agreement will be enforced. This might include setting milestones or deadlines for remedies or establishing new monitoring procedures.

The contract should also set out important details about how the dispute resolution process will operate, including:

- **What rules will be used** for mediation and formal dispute resolution. The customary rules of the community could be used, but only if they can apply to disputes with outsiders and there are no national laws that must apply. If the company does not agree to use the community’s customary rules, it will usually be best to use the national laws of the country where the community is located.



The contract should set out clear dispute resolution and grievance mechanisms that make it easy and safe for community members to report their concerns about the investment or the company.

- **What language(s)** the dispute resolution processes will be in. The mediation should be done in the local language, or with interpretation if done in another language, to ensure that both sides clearly understand what is being discussed. The contract should say that if the dispute goes to a court or arbitration and the courts or arbitration will use a language that the community does not speak, then the company must provide funding for interpreters trusted by the community.
- **Where** the different stages of dispute resolution will take place. If the company is from another country, it may want the dispute resolution process to take place in its own home country, but this will make it harder for the community to attend the proceedings, perhaps even impossible. It is usually better to have at least the first stages of dispute resolution, such as meetings and mediation, take place in or near the community area. Formal dispute resolution processes like court hearings or arbitrations should also occur near the community if it is possible; because they usually will need appropriate facilities or staff, these processes might need to occur in a town or city. If national courts have long backlogs, are too far for community members to reach, or are considered to be corrupt or unreliable, the community may want to use other formal dispute resolution institutions in the country. This can include national ombudsmen or local arbitration. The contract should make clear that the company must provide reasonable expenses for transport to

make sure that the community can participate in all dispute resolution stages.

- **Which people within the company** have the authority to resolve the dispute and must be available to meet with the community when a dispute arises. This can be company representatives that the community regularly deals with and has a good working relationship with. The contract can state the name of the person who must be available. The contract can also explain that if that person stops working for the company, the person who takes over their role must be available. If a dispute arises, having this person involved may help the community express its concerns.



RED-FLAG CLAUSE

“If the Community or the Company violates this contract, the aggrieved party is free to pursue recourse with the Roundtable on Sustainable Palm Oil or **any other grievance or redress mechanism that may be accessible** to the aggrieved party. For the avoidance of doubt, this may include seeking redress **in courts of competent jurisdiction.**”

! Avoid clauses that allow for the company to take the community to court in other countries, which could make it very hard for the community to give its side of the story. This clause leaves open the possibility that the company could bring a case against the community in a court that is far away.

EXAMPLE

Example clause: *“If the Company or the Community does not fully carry out the agreed terms of the contract, the party that is complying with the contract can request a meeting with the other party to raise its concerns. This meeting will involve Community leaders and company managers, and potentially Company owners, among others. Every possible effort should be made at this meeting to resolve the dispute in a way that is acceptable to both parties. If the dispute is not resolved, then the parties will choose someone they both trust (such as a respected government official, opinion leader, or national organization) to mediate the dispute in a local office. Field trips to the Community and the site of the Company’s operations must be made to observe the situation. If the dispute is still not*

resolved, the parties should take the dispute to the national ombudsman’s office, where available, or to the appropriate branch of a national tribunal for arbitration. At every step of the process, if the language of the meetings, tribunal, mediation, or court system is not spoken widely in the Community, then neutral and trusted translators should be paid for by the Company for the Community. If the dispute resolution process finds that the Company has broken the contract, the Company will be made to pay any compensation awarded, provide the promised services, and/or otherwise remedy the breach within a specified time frame not to exceed 120 days. If the Company fails to do this, the Community has the right to terminate the contract and evict the Company from the community’s land.”

GRIEVANCE MECHANISMS OR COMPLAINTS PROCEDURES

In addition to dispute resolution processes for disagreements relating to the contract, the community might want to require the company to establish a grievance mechanism or complaints procedure. This is a mechanism or procedure that the community, individual community members, or employees could use to communicate complaints or grievances about the project's human rights, social, or environmental impacts, or about the company's actions more generally. Grievance mechanisms, if designed and implemented properly, can be easier for community members to use, help resolve disputes more quickly than in national courts, and are generally less expensive than court hearings or arbitrations because lawyers may not always be needed.

If the community wants to require the company to establish a grievance mechanism or complaint procedure, the contract should state:

- ➔ The grievance mechanism's **procedure**. The contract should explain how community members can communicate a grievance or complaint regarding the company and who the grievance or complaint should be given or sent to. It should also explain whether the complaints or grievances must be in writing, what kind of evidence is needed to support them, and whether the company and the community will play a role in investigating the grievance or complaint.
- ➔ Ways to make sure the grievance mechanism is **accessible and effective**. The contract should require the company to assist community members in using the mechanism, through awareness-raising and by having the mechanism available at a place and time that works for community members. The contract should also require the mechanism to operate in a culturally appropriate way. It should establish protections against retaliation for community members who raise grievances or complaints, such as confidential procedures.

- ➔ Requirements for providing information. The contract should require the company to help community members who make grievances or complaints to access any **information or advice** they need to meaningfully use the mechanism. For example, the company should provide regular updates about the progress of a community member's complaint or grievance.

EXAMPLE

Example clause: *"The Company and the Community agree to implement the Grievances and Complaints Standard Operating Procedure (SOP) annexed to this contract. This SOP may be continually improved and amended from time to time. The Company and the Community agree to resolve issues, concerns, grievances, and disputes resulting from the Company's operations or activities that have a negative impact on either party. Reporting of a grievance or complaint by a Community member can be made to either the Company or Community representatives in writing or verbally, and any party who receives a complaint or grievance must report it to the Company's Social Sustainability department or to a Company manager within two days. Each report shall be duly recorded by the Company. After the complaint has been received, the Company, Community representatives, and the complainant will carry out field visits and investigations, as needed to verify the complaint."*

- **Remedies and enforcement procedures.** The contract should explain how decisions or agreements about grievances or complaints will be made and enforced. This can include, for example, a requirement that community representatives be included in a panel that decides on the remedy for a grievance. The contract should also explain that community members using the grievance mechanism still have the right to take their complaint to court.

CAUTION!

RED-FLAG CLAUSE

“The parties **renounce their rights to enter into any form of litigation or arbitration** on any disputes or grievances submitted to and decided on by the grievance mechanism procedure provided for in this agreement.”

! *Avoid clauses that take away the community’s right to take a complaint about the contract or the project to court. This clause removes the community’s right to sue the company about a grievance that the community has made to the company’s grievance mechanism.*

GET
LEGAL
ADVICE

- What does national law say about grievance mechanisms or complaints procedures between companies and private citizens?
- What does national law say about the role of government in community–investor disputes and grievance mechanisms?
- What dispute resolution processes should be included in the contract?

DISCUSS
WITH THE
COMMUNITY

- If the company breaches the contract or if there is a dispute between the company and the community, what processes should be followed to resolve the dispute and to ensure the parties return to following the terms of the contract?
- What should happen if the company does something that is not discussed in the contract but that causes harm to the community as a whole, to a group of community members, or to one community member?
- If the contract establishes a grievance mechanism, is it clear that the community has a choice to either engage with the grievance mechanism or to go directly to court or arbitration with any relevant dispute?

21.

UNEXPECTED EVENT (FORCE MAJEURE)

This is the part of the contract that states what will happen if an unexpected and uncontrollable event makes it impossible for either the community or the company (or both) to continue to follow the contract. This type of event is often called a “force majeure” event. This part of the contract is important because it governs what happens if an unexpected event makes it impossible for the community or the company to perform their obligations under the contract.

This part of the contract should begin by defining what types of events fall into this category of a “force majeure” event. The list usually includes:

- Natural disasters like an earthquake or a tsunami;
- If war breaks out or there is sustained and violent civil unrest;
- If a deadly health epidemic creates a state of emergency; or
- Extreme and sustained weather events, like a severe drought.

EXAMPLE

Example clause: *“The term ‘Force Majeure’ as used in this Contract shall mean wars, acts of war, invasions, acts of public enemies, armed hostilities (whether war is declared or not), terrorist acts, revolutions, riots, acts of God, earthquakes or any other natural disasters, epidemics or public health emergencies, or any similar cause, as long as the cause was not within the reasonable control of the Party invoking its rights under this Section as a result of an event of Force Majeure and as long as the cause could not have been avoided or overcome by such Party through the exercise of reasonable investigation or prudent care.”*

The contract should then:

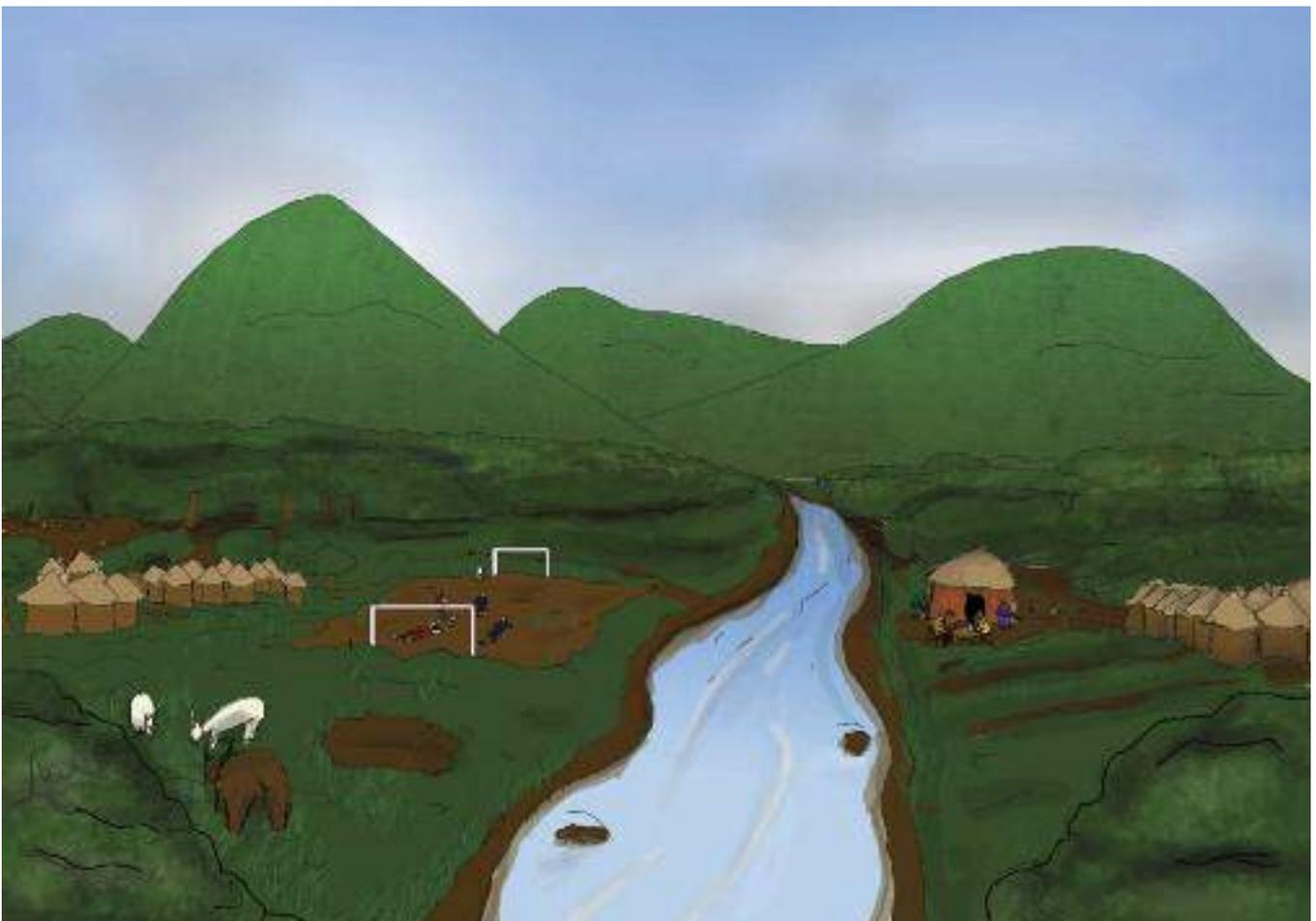
- Set out **what will happen if a force majeure event occurs**. The contract should explain what the community or the company should do if this type of event prevents them from doing what they promised to do in the contract (fulfilling their obligations), and what the effect of the event will be on their obligations and on the contract.
 - For example, the contract can say that if either party is unable to fulfill its obligations because of the uncontrollable event, it must provide written notice to the other party as soon as is practicable. At that time, the party will not be required to fulfill its obligations until the uncontrollable event no longer prevents it from doing so. If the uncontrollable event occurs for a very long period of time, the party may have the right to end the contract after providing written notice to the other party.
- State **which contractual obligations will continue, even if a force majeure event occurs**. For example, the company can still be required to make all payments to the community that it is required to make under the contract, even if the company is unable to operate because of the uncontrollable event.
- State that **if the community or the company terminates the contract before the end of the contract due to force majeure, this does not release the company from its obligations to make any outstanding payments that it owes to the community, to repair and restore the environment, and to return the land to the condition necessary for the community to use it to earn their livelihoods**.

EXAMPLE

Example clause: *“If the Company or Community is not able to continue the contract because of a force majeure event as defined in this Contract, either the Community or the Company may terminate the Contract in accordance with the Contract. If the Company leaves in a hurry, it must, as soon as is safe to do so, follow the procedures set out in the Termination and Disposition of Assets sections of the Contract.”*



- What events should be defined as “force majeure”—uncontrollable events that allow the company or community to delay fulfilling (or in some cases, not fulfill) a contractual obligation, and to potentially terminate the contract if the uncontrollable event continues for a long period of time?
- What process will the community and the company follow to end the contract early if an uncontrollable event occurs?
- What obligations should the company be required to fulfill even if the contract is terminated due to force majeure?



WHAT HAPPENS TO THE LAND AND IMPROVEMENTS AFTER THE CONTRACT ENDS (DISPOSITION OF ASSETS)

This is where the contract explains what will happen to the land and to the assets related to the investment (things of value like buildings and tree crops) when the contract ends. The contract should describe any obligations the company has to clean up or repair the land so that community members can use and access it as they did before the investment project. The contract should also state who can own or use any improvements to the land or assets left on the land.

This part of the contract should say what will happen to the land and improvements to the land once the contract ends and is not renewed. The contract should say:

- **What the company must do to clean up or repair the local environment on the land it used.** This should include a description of what the condition of the land should be when the company leaves (for example, trees should be planted, holes in the ground should be filled, fences should be removed,

etc.). In many cases, it may be best for the contract to require the company to fix the land so that community members can use it as they did before the company came, for activities such as farming, fishing, raising animals, or hunting and gathering. This may include requiring the company to fix any changes to water quality or, if necessary, provide permanent alternative water sources; to fix any contaminated soil from operations or equipment; and to fix soil erosion or degradation.

- If the community thinks that the repair and restoration of the land will cost a lot of money, the community can **include in the contract a requirement that the company set up an environmental redress fund and pay money into the fund each year**, so that the money is available even if the company leaves suddenly (see section 10 above).

The contract should require the company to clean up the land and restore it so that community members can use and access it as they did before the project started.



- ➔ **That the land will revert to the community's control and management.** The contract might say that each community member or family should be able to use and control the parts of the land that they did before the project started. However, some parts of the land may not be as usable after the project ends. The community should have a plan to ensure that some community members or families are not placed in a much worse position than they had been before the contract, and as compared to other community members and families.
- ➔ **What will happen to moveable property,** such as machines, trucks, and unused supplies. Will the company remove these, or will they become the property of the community?
- ➔ **What will happen to non-moveable property like buildings.** This might include, for example, a factory or processing plant built on the land. Will the buildings become the property of the community? Would the community want buildings to remain or prefer to have the power to request that the company remove the buildings? Or will the company renovate or improve the buildings to make them more usable by the community?
- ➔ **What will happen to any permanent tree crops planted by the company.** For example, if the company planted rubber, palm oil, coffee, mangos, tea, or similar crops, will the community own the crops once the company leaves?
- ➔ **What will happen to any infrastructure that the company has brought into the project area,** such as roads, electrical lines, solar panels, and boreholes.

It may not always be possible for the company to return the land to a condition that allows community members to use the land in the same way as they did before the company arrived. For example, if the company leaves behind a processing facility and a lot of permanent tree crops, these may interfere with other ways of using the land. The community should make sure to understand what is likely to happen to the land during the investment project, what the likely long-term impacts will be, what type of restoration will be possible, and what it would prefer to have happen to the land in light of these possibilities. The community can then negotiate and seek to create obligations for the company based on this information.

EXAMPLE

Example clause: *“At the end of the Contract period, the land will return to the Community's control and management, and the Community will own any buildings and other permanent, location-based infrastructure built on the land. The Company will not cut any non-timber trees that it planted or preserved on the land; instead, those trees will become the property of the Community. Any moveable property (machines, trucks, unused supplies, etc.) will remain the property of the Company, although the Company may decide to gift some or all of the moveable property to the Community. If the Company keeps the moveable property or if the Community does not want the offered property, the Company must remove it within two months of the end of the contract. The Company must restore the local environment by filling large holes in the earth, removing garbage, and planting indigenous trees and local plants in consultation with the Community.”*



- ➔ What plans for the land does the community have after the investment project finishes? How will it be decided what happens to the land after the investment has finished?
- ➔ How will the land be re-divided among the families or community members who used it or owned it before the investment?
- ➔ Who decides if assets or improvements should stay on the land or be removed? Who will own or benefit from these improvements?

- ➔ If the community decides that it wants the company to leave at the end of the contract term, what will happen to all of the infrastructure, machines, buildings, and crops left on the land?

CHECK THE CONTRACT!



CONFIDENTIALITY, ENTIRE AGREEMENT CLAUSE, AND SIGNATURES

TRANSPARENCY AND CONFIDENTIALITY

This is the part of the contract that says whether the contract can be shared with anyone or not. This is important, as community members may need to share the contract with legal, scientific, or other technical advisers or other professionals to help protect their interests.

The community should not agree to making the contract confidential. Showing the contract to others can help the community to seek support from technical experts, NGOs, the media, and international advocates. If anything goes wrong related to the company's activities in the community, a confidential contract can restrict community members from talking about the text of the contract or sharing information about the contract and the company's activities. It may also make it harder for the community to speak publicly about the company's breach of the contract.

CAUTION!

RED-FLAG CLAUSE

"The Community and the Company have agreed to keep **all the information and details** as **strictly confidential and they shall not be disclosed to any party** in between or to a third party in any circumstances, as disclosure may directly or indirectly affect the working of the Company."

! Avoid language that prevents community members from sharing the contract or other information relating to the project. This clause applies to "all the information and details," which is very broad. It also prohibits the community from disclosing information "to any party," which might make it hard for the community to get technical support or advice or to share information with media or other allies if needed.

The company may want the contract to be confidential for different reasons. For example, it might not want journalists or NGOs to comment on the fairness of the agreement or to help the community if there is a problem; it might think the terms could hurt its business if they are made public; or it might not want other communities to know what it has agreed to in case that makes it harder for the company to negotiate in the future with those communities about other projects. If the company insists on keeping certain parts of the contract confidential (or the community itself wants to keep parts of the contract secret), the specific information to be kept private should be **put into a separate confidential "annex" that is attached to the contract**. The contract should make clear that only the annex is confidential and that the rest of the contract is free to be published and shared widely. The community should try to **limit the confidential information in the annex as much as possible**.

- Does the contract have a confidentiality clause? If so, will all confidential material be put in a confidential annex, so that the rest of the contract is not confidential?

CHECK
THE
CONTRACT!



“ENTIRE AGREEMENT” CLAUSE

This is the part of the contract that says that the terms set out in the contract are the *only terms agreed between the parties*. This is important, because it formally confirms each party’s rights and obligations. This is usually a standard clause. If a contract is detailed and has all terms agreed upon by the parties, an “entire agreement” clause can help each party understand exactly what it is obliged to do and not do. However, if important promises were made during negotiations but left out of the contract, those promises will not be enforceable. The “entire agreement” clause is a reminder that all promises a community expects a company to fulfill must be included in the contract.

SIGNATURES

This is the part of the contract where the representatives of each party sign the contract with a signature, initials, or fingerprints as evidence that they agree to follow every part of the contract. This is important proof that the community and the company have executed the contract. Until the contract is signed, it has no legal power; after the contract is signed, it is enforceable in a court of law.

Before signing, community members and their advocates must make sure that everything the community wants to be in the contract is in the contract. This is important, as the company may be more willing to agree to the community’s requests when it still wants to secure the community’s signature. Once community representatives have signed the contract, the company may be less motivated to agree to additional requests that the community may ask for.



Community members should discuss the final draft contract with their own trusted lawyer before they decide to sign it.



Community members should show the draft contract to a trusted lawyer before they sign any contract. After reviewing the lawyer's suggested changes, the community should negotiate with the company to make all the changes that the community agrees would best protect its interests.

Do not trust the company's lawyer to be looking out for the community's interests. The community needs its own lawyer to review the contract before community representatives sign it.

Community members must make sure that they understand every line of the contract, do not have any remaining doubts or concerns about the content of the contract, and are ready to do everything they promised to do and to follow all the rules in the contract. A community should *never* sign any contract—or anything in writing—until a lawyer working for the community has reviewed it to make sure that it does not include any legal “tricks” that weaken the community's rights.

The community can ask that the contract be signed in a way that is public, participatory, transparent, and culturally appropriate. For example, the community might ask to:

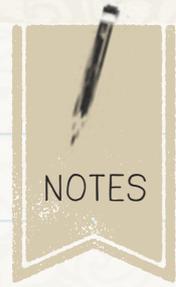
→ **Have a diverse group of community members sign on the community's behalf.** It is best to have representatives of different types of groups in the community sign the contract. This may include local leaders, traditional authorities, women, youth, members of minority groups, elders, and others.

→ **Sign the contract publicly.** It is best to hold a big, public contract-signing meeting that is open to all community members. If it is appropriate, journalists, government representatives, and NGOs could also be invited. The contract should be read aloud by a person trusted by community members, in a language all community members understand. Community members should be given the opportunity to ask questions if something is not clear or if they do not agree with something in the contract. It does not matter if the contract is presented as “final”—there is always more time to negotiate. If possible, record the meeting with video, photographs, and notes about what questions were asked and whether any changes were made before the contract was signed.



ONCE THE CONTRACT IS SIGNED, THERE IS STILL MORE WORK TO BE DONE!

The company will likely make plans to begin the project. The community should start to organize to monitor the company's operations and to make sure the company complies with the contract. The community may also need to begin preparing for how to use the money, infrastructure, or social services that it will receive.



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NEGOTIATING
CONTRACTS
WITH INVESTORS



The Columbia Center on Sustainable Investment is a leading applied research center and forum dedicated to the study, discussion and practice of sustainable international investment.

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Namati is an international organization dedicated to advancing the field of legal empowerment and to strengthening people's capacity to exercise and defend their rights.

namati.org

*"These much-needed guides fill an important gap: only if local communities are **empowered** can they make free, **informed** choices and develop **meaningful** partnerships with government and the private sector."*

- LORENZO COTULA, IIED

