COMMUNITIES AND INVESTOR CONTRACTS



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Introduction:

Deciding whether or not to allow investments on community lands is one of the most important decisions a community can make. Good investments can lead to real community development and prosperity. However, bad investments may result in economic exploitation, increased human rights abuses, polluted local waters and soils, blocked travel or access routes to natural resources, and may even result in communities losing their lands completely.

PART ONE: INTRODUCTION

PART ONE OF THE GUIDE INCLUDES THE FOLLOWING:

- Introduction
- How to use the Guide
- Most common external threats to community land
- Overview of Kenya's Community Land Act (CLA)

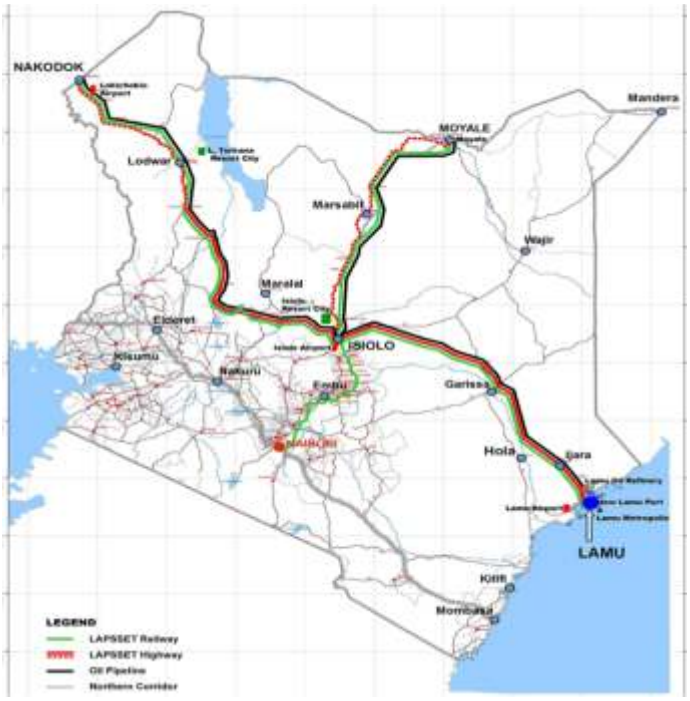
Land is an essential resource for communities in Kenya - it is a source of their livelihoods and an important part of their identity. Over the years there has been an increase in demand for land and natural resources. This has led to communities losing their land lawfully and unlawfully to individuals, private companies/investors, and the government. Some examples include:

Lamu Port-South Sudan-Ethiopia Transport Corridor Project (LAPSSET) - has led to the acquisition of huge tracts of community land even by individuals who acquired the land for speculative purposes.[1] The project will involve the construction of ports, pipelines, roads and railways.

The construction of the Standard Gauge Railway (SGR) led to people being forcefully displaced from their land and the government did not necessarily take their land use into consideration[2] when resettling them. The SGR project is being done by the governments of Kenya, Uganda and Rwanda. It started in Kenya as a flagship project under Kenya's development agenda – Vision 2030. The railway line begins at the Mombasa port and runs to Kigali through Kampala, with a branch line to Juba.[3] This has led to loss of land for the communities, and their access to water has also been undermined since the project consumes large quantities of water from Tana River.

These are just a few examples of cases of the many instances when communities have lost their land for mega projects either through direct engagement with the investors, or as a result of government interventions (compulsory acquisition of land).

It is evident from these examples that land in Kenya is in high demand. With weak governance structures in the past and lack of legal recognition/ownership of their land, community land was frequently improperly acquired by the government or sold to investors for projects. However, with the enactment of the Community Land Act, communities are becoming more aware of their rights in regards to their land and natural resources. Communities are working towards ensuring that their land is never again improperly acquired.



Map showing the scope of the LAPSSET Project within Kenya

WHY IS IT IMPORTANT FOR COMMUNITIES TO UNDERSTAND THEIR RIGHTS WHEN NEGOTIATING WITH INVESTORS?

- They will get better contract terms that will be beneficial to all people in the community.
- They will ensure that their rights are protected before, during and after all engagements with investors.
- They will be empowered to reject 'bad' offers.



Above: A photo of a Standard Gauge Railway train while in transit Photo credit Kenya Railways Corporation)KRC)

1 Abdirizak Arale Nunow, 'The Displacement and Dispossession of the Aweer (Boni) Community: The Kenya Government dilemma on the new Port of Lamu' (International Conference on Global Land Grabbing II, New York, October 2012).

2 Daniel Wesangula, 'Proposal to construct Standard Gauge Railway though Nairobi National Park rejected' Standard Digital 16 September 2016.

3 Douglas Kauda, 'Against all odds: Mega-Railway Project becomes a Reality' (2014) 1 Uchukuzi Magazine 6.

THIS GUIDE WILL HELP COMMUNITIES UNDERSTAND THE FOLLOWING:

- What are contracts, and the different types of contracts that communities need to know?
- Why are contracts important?
- Who should be involved in the drafting of contracts?
- How should contracts look like and what are the key elements?

This guide will help communities understand the process of voluntary acquisition of their land – either through absolute ownership or leasehold. Community members will understand what they need to look out for and how to always ensure that in all their engagements – they protect their interests and rights. Each section will have a series of questions that the community members can consider when negotiating with third parties.

Weak governance structures and a lack of legal recognition/ registration of community land caused the same to be frequently and improperly acquired by the government or sold to investors for projects. However, with the enactment of the Community Land Act, communities are becoming more aware of their rights in regard to their land and natural resources and are working towards ensuring their land rights are protected.

HOW TO USE THIS GUIDE

This guide has been developed to support communities and paralegals as they enter into and negotiate contracts with people and parties outside of the community that are interesting in acquiring land. It includes information about the following types of contracts - contracts between communities and investors, conservation contracts, and contracts between different communities. With the help of this guide, communities will understand the legal framework governing such contracts, key terms that they should look out for, who should be involved in the drafting and negotiating process, and the rights and obligations of the parties involved.

Whether registered or even before they receive titles, it is important that communities negotiate for good deals or full compensation. The guide will also share insights on how to renegotiate unfair provisions in contracts already in existence.

MOST COMMON EXTERNAL THREATS TO COMMUNITY LAND

Community land and natural resources have always faced external threats. Without titles that prove their ownership, it has been difficult for communities to fight for their rights, and for those rights to be acknowledged. Some of these external threats include: extraction of natural resources from community land and compulsory acquisition of community land for mega projects. The common external threats that communities face can be categorized into two broad categories: government and private actors.

The common external threats that communities face can be categorized into two broad categories:

External threats imposed by the Government	External threats imposed through private investments and conservancies
(Note: communities need to know that most government projects are also sponsored by private investors – therefore they should also carry out their due diligence. This means carrying out a detailed background analysis of the project (who is sponsoring it, how long it is for, how the community will benefit). Compulsory acquisition of the land as the name suggests is not a voluntary process and therefore the process is different from contracts between communities and investors.)	In as much as these tend to be voluntary – they also pose threats to communities and their land. This guide will help communities understand what measures they can take to protect themselves from such external treats. Further, this guide will elaborate the key procedures that need to be followed in acquisition of community land voluntarily through private investors for projects. The guide will also look into conservations as a land use in community land, and advise communities on what they need to look out for. In addition, the guide will focus on who is involved at which stage and their specific roles throughout the process. The aim of this is to ensure that communities understand the different processes once they are registered, and even before they receive the titles to help them negotiate for better terms and adequate compensation.

OVERVIEW OF THE COMMUNITY LAND ACT

Due to the challenges experienced in managing communally owned lands under the old laws, the legal status of all community lands in Kenya changed with the passage of the Constitution of 2010 and the Community Land Act of 2016. These are now the two main laws related to community land in Kenya. The Community Land Act of 2016 repealed both the Trust Lands Act and the Land (Group Representatives) Act. Therefore, all communities living in Group Ranches are legally required to transition to community land and all communities living on Trust Lands must be registered according to the Act.

The Community Land Act requires communities to complete a number of tasks in order to register their land with the government. These tasks are:

1. Drafting and adopting by-laws (locally created rules for land governance and management) for how the community wants to make decisions and use and manage its community land (CLA, Section 15.4.e).

2. Forming a Community Assembly, creating a Community Register that includes all community members, and registering the community as a legal entity. (CLA, Section 15.1).

3. Electing a Community Land Management Committee (7, 11, 13 or 15 members) that includes men, women, and representatives from all villages within the community land (CLA, Section 15.3).

4. Describing their land to create evidence of the community's claims and resolving land boundary conflicts (CLA, Section 39.2).

5. Completing and submitting paperwork and fees to the relevant government offices.

6. Following up on land registration applications to make sure they are processed in a timely manner.

The process of transitioning to community land and registering community land is a community driven process. Therefore, communities need to understand their rights and know how to protect themselves from internal and external interference. Section 36 of the Act clearly stipulates that all investments related to community land shall be made after a free, open, and consultative process. Communities should be empowered enough to negotiate in a manner that ensures that their interests are protected.

According to section 36 (1) of the Community Land Act, the agreement shall include the following:

- An environmental, social, cultural and economic impact assessment.
- Stakeholder consultations and involvement of the community.
- Continuous monitoring and evaluation of the impact of the investment to the community;
- Payment of compensation and royalties.
- Requirement to re-habilitate the land upon completion or abandonment of the project.
- Measures to be put in place to mitigate any negative effects of the investment.
- Capacity building of the community and transfer technology to the community
- Any other matters necessary for determining how local communities will benefit from investments in their land.

When two or more parties (people, communities, or organizati ons) 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. " These are rights that are recognized and protected by the law. They can also be created through a contract when each party agrees to fulfil certain obligations. 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.

PART TWO

PART TWO OF THE GUIDE INCLUDES THE FOLLOWING:

- What is a contract?
- Various types of contracts (investment contracts, conservation contracts, contracts between communities)
- Principles that should guide community members when entering

WHAT IS A CONTRACT?

A contract is a legally binding agreement between two or more parties. Parties usually enter into contracts for a specific purpose, and once the purpose has been completed, the contract comes to an end. However, there are certain obligations that can be fulfilled even after the contract phase is completed such as contracts that require confidentiality from the parties involved after their expiry. Communities need to understand terms of every contract they are party to, and know their rights, responsibilities, duties, and obligations as stated in the contract.

This guide focuses on the following contracts:

- Investment contracts
- Conservation contracts
- Contract between communities

WHAT IS AN INVESTMENT CONTRACT?

An investment contract is an agreement between an investor and another party e.g a host government, public institution, community or private persons entered into for the purpose of regulating a specific investment project. In most cases, the investor usually enters into a contract with the host government - and the host government acquires a community's land for the project, and compensates them for their land. For example, in 2014 the National Land Commission spearheaded the compensation of landownersand fishermen in Lamu County ahead of LAPSSET for loss of their land and fishing grounds. However, communities need to understand the nature of investment contracts so as to be able to negotiate and enter into contracts directly with private investors.

> "An agreement relating to investment in community land shall only be made between the investor and the community" (Section 36.2 CLA).

Types of Investment Contracts between communities and companies:

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. In Kenya, these agreements are compulsory where an investor wishes to undertake mining activities or land based carbon offset projects.

A lease.

A lease sets out that a community will allow a company to occupy and use the community's lands and natural resources e.g. for mining or tourism, for a set period of time in exchange for payment and potentially other benefits (similar to those typically provided through benefit-sharing contracts). Leases generally restrict the community's ability to regularly access or enter the land until the lease ends. If made in accordance with local laws, leases are enforceable contracts. In Kenya, guidelines on land leases are contained in the Land Act (Cap 280. Community by-laws may also dictate the leasing conditions for an investor.

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. MoUs are generally not considered to be contracts. However, 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. The language used in most MoUs closely resembles that in contracts and communities need to ensure that they are agreeable to the obligations spelt out. A lawyer can help to determine whether an agreement is a legally binding contract or not in accordance with local laws.

WHY ARE INVESTMENT CONTRACTS IMPORTANT?

Investment contracts are important as they define the scope (including costs and benefits of the parties involved), terms of the investment, and also help the parties involved understand their duties and responsibilities.

When parties are drafting the contract, the party (usually the investor) tasked with drafting the initial contract will focus on their interests and ensure that they are protected. Therefore, it is important for the other party (usually the community) to be well informed of their interests, and the implication of the other party's interests on the subject matter of the contract. In such cases communities need to look at the contract critically and align their interests with the terms of the contracts, and ensure that none of their rights are infringed upon. This means that communities have to ensure that they look at all phases of the contract - before signing the contract, after the contract has been signed, and after the term of the contract has expired - and have a full understanding of their rights, obligations, duties, and responsibilities throughout these different phases.

Before signing the contract

- Understand the following about the investor (due diligence):
  - Name and nature of business
  - Area of operation and how long they have been in existence
  - Other possible investments in Kenya – and if any relates to the investment project in the community
  - Is the company registered in Kenya, are they allowed to carry out their work in Kenya
- Offer in comparison to current value of the land
- Duration of the contract (especially for a lease)
- Payment plan
- When and how can the contract be terminated

During contact negotiation

- Ensure that the lawyer (if the community has agreed to engage one) consults the community at every stage of the negotiation process
- Understand each term of the contract and ask for clarification if need be
- Advocate for the best interest of the community

After the contract has been signed

- Adherence to the terms of the contract by both the community and the investor
- Is payment being made as per the payment plan
- For a lease: is there a provision for extension of lease (How is this determined)
- What is the process and when should the investor apply for extension of lease
- When and how can the contract be terminated

Communities should always push to have a signed copy of the agreement for their reference, and to ensure that the terms of the contract are been adhere to as agreed. In addition, they should always question the other party whenever they feel like certain terms are been violated.

After the term of the contract has expired (especially a lease)

9 Resumption of absolute ownership to the community – is it automatic?
9 Adherence to the terms of the contract by both the community and the investor

Investment contracts also describe the type of ownership that the investors will have over their land - absolute or partial (lease) ownership. For example, if the community sells the land to the investor and the investor is issued with a certificate of title then that means they own that parcel of land absolutely, but if the investor and the community enter into a lease agreement - then the investor has partial (lease) ownership limited to the time period of the contract, and once that time lapses that parcel of land automatically reverts back to the community.

Scenario on investment

Anchor Limited, is an international company that is aggressively expanding its investment portfolio and wants to venture into the hospitality industry. The company directors have approached the chief of Nkare Nyiro community, which has registered its community land, to elaborate on its plans to set up a luxury resort that tailors to high end international tourists. The proposed hotel will require that certain conditions are met. This includes having an expansive view of the landscape for the tourists with no houses or livestock within their view, a constant supply of fresh water and firewood, building materials such as stones and rocks, and the use of cultural resources of the Nkare Nyiro community such as its name as well as some community artefacts to improve the hotel brand as one that appreciates local culture. The company promises to ensure that the community will benefit out of this investment. Given this scenario and the provisions of the CLA, what are some of the questions that should be answered at each step of contract negotiations? (Refer to the step-by-step guidelines at the end of this guide.) How will Anchor Ltd ensure that it complies with the rules and regulations governing investments in community land during negotiations (Refer to the CLA and the section on FPIC).

CONSERVATION CONTRACTS

The Wildlife Conservation and Management Act (Cap 376) defines a wildlife conservancy as land set aside by an individual landowner, body corporate, group of owners or a community for purposes of wildlife conservation.

WHAT IS A CONSERVATION CONTRACT?

A conservation contract is an agreement between a community and another party (government, civil society organization, individual, or group) responsible for funding of a conservation project.

Section 29 (1) (c) of the Community Land Act stipulates that a registered community may reserve a community conservation area for that very purpose. This therefore guarantees that conservancies owned by communities and that are within the boundaries of registered **community land are a type of land use, and not a form of land ownership.** This distinction is very important for communities so that as they enter into conservation contracts - they must ensure that they benefit directly.

As established by the Kenya Wildlife Conservancies Association, there are three types of conservancies:

- **Community conservancies:** These are conservancies that are established and managed by communities on their community land. The community directly benefits from the conservancy and they use the proceeds to sustain their livelihoods. For example, Melako community conservancy that is in Marsabit County. The conservancy has helped the community develop themselves by improving their livelihoods and promoting good rangeland conservation. Similar to Melako community conservancy, communities must have a board that they elect for the management of the conservancy on their behalf. The communities are responsible for holding funds and sharing them among themselves - and ensuring that the funds contribute to their development.

  Communities may also choose to enter into contracts/ partnerships with other parties to enable them run the conservancy better. These should be done carefully and not take away their power to manage their land.

- **Private conservancies:** These are conservancies that are run and managed by private individuals. In community land, such a conservancy is held under leasehold - as conservancies are not a form of land ownership but a type of land use. In these types of conservancies, the owners of the conservancy decide how the proceeds received from the conservancy are used. They make all decisions regarding the conservancy. It is essential for communities to be empowered so as to negotiate for better terms with such conservancies so as to ensure that they benefit. The, for example, Ol Pejeta conservancy in Laikipia County is a private conservancy that was a working cattle ranch and was bought by a conservation organization in the United Kingdom, with additional support from a private organization, and is run by Ol Pejeta Ranching Limited.

  Communities need to negotiate for terms that benefit the community as a whole - and for sustainability of their livelihood systems. This will ensure that there is full transparency on the income generated and that they don't lose access to key natural resources such as pasture and water.

- **Group conservancies:** This is a conservancy created by the pooling of land by private landowners who share a common border for the purpose of wildlife conservation eg Mara Nabosho Conservancy. They are run and managed in the same way as private conservancies - but given that it is a group this means that their negotiating power is higher and their resources are vast.

Communities need to answer the following questions when setting apart land for conservancies:

- Who is going to manage the conservancy?
- What will be the core business of the conservancy/what is the purpose of the conservancy?
- For private and group conservancies - How is the conservancy registered/how it will be registered (legal capacity)
- How will the community collect and use the funds they collect from the conservancy?
- For private conservancies - how will the community benefit from such a conservancy?
- What kind of title will be issued to a private conservancy, and how will that affect the rights of the community?

WHY ARE CONSERVATION CONTRACTS IMPORTANT (ESPECIALLY PRIVATELY OWNED AND MANAGED CONSERVANCY WITHIN COMMUNITY LAND)?

These contracts are important because they help communities understand the constraints posed on their natural resources, and agree on action that they need to take to protect these natural resources. Like the investment contracts, the conservation agreements also describe in detail the duties and responsibilities of the parties involved at all the phases of the contract.

Conservation agreements also ensure that communities adequately use their natural resources - and they must include this in the conservation agreements. For example, Maasailand Preservation Trust and Mbirikani (former) Group Ranch entered into a conservation agreement to "help keep lions and other predators safe as Mbirikani is one of the contiguous Maasai-owned grazing areas, which together form a natural corridor essential to the ecological integrity of four surrounding parks".

The agreement had a huge impact on the community, such as the community experiencing a decrease in the killing of lions - "the funds protects lions outside of the parks by providing a model of conservation of critical, unprotected area, complete with roaming prides of lions, wild herbivores, and people".[4] In such a case, the community benefited from the fund as they had what was needed to ensure that the lions were protected, in this way the community's interests were protected.

Scenario(Roleplay for training sessions)

In Tuala Community, an investor approached the Chairman of the CLMC with a proposal to lease 4,000 ha of land for the purpose of establishing a private conservancy. The investor is in a hurry to start his investment which will result in ksh. 1 million per year for the community. He indicates to the chairman that any delays will make him move to other communities who are ready and willing to lease the land. The chairman allocates one week for community engagement and to negotiate with the investor in the spirit of informed and inclusive decision-making. Based on your understanding, what are the steps to be taken before a community can get into such an investment?

CONTRACTS BETWEEN DIFFERENT COMMUNITIES

Communities should also have contracts between themselves especially with regards to land use and access. This is crucial in defining the terms and conditions of the rights that can be exercised by the other community. In addition, the contract should also describe what happens in cases where the other community contravenes the contract.

Access and user rights means that communities (such as pastoral communities) allow other communities to access and use a section of their land over a given period of time. For communities such rights need to be properly defined and there also needs to be a provision for what happens when these rights are infringed upon. Such agreements do not have to be in writing – and for communities these could be oral agreements between the members of the Community Land Management Committees (CLMC).

4 Ibid.

5 the authorization to represent an investor in transactions/engagements with the community

WHO SHOULD BE INVOLVED IN DRAFTING CONTRACTS?

Community members are the key stakeholders in the drafting and negotiating process. As stated in Section 15 (4) of the Community Land Act, the Community Land Management Committee (CLMC) members are responsible for the management and administration of community land on behalf of all community members.

Members of the CLMC should therefore be the first point of contact for contracts, and they should then proceed to engage the community through the Community Assembly - for their feedback on the contract(s) and the way forward.

Given the technical language used in such contracts, community members may also agree to engage a lawyer or a Civil Society Organization (CSO) that they work with. This will ensure that community members negotiate for terms that protect their interests, and do not end up signing a contract that will affect their land and natural resources.

In addition, if there is any other party that has a role to play in the contract, they should also be involved in the drafting and negotiating process - to ensure that their rights are protected and that their role is clearly articulated. For example, an investor that will be using a proxy[5] - communities should ensure that if there is a Power of Attorney in such a case, it is registered and clearly describes what the proxy can do on behalf of the investor.

WHAT SHOULD COMMUNITY MEMBERS LOOK OUT FOR AS THEY GET INTO CONTRACTS?

- **Insist that the contract should be in writing**

In Kenya, both oral and written contracts are recognized by the law. However, under the Law of Contract Act, contracts that affect an interest in land must be in writing, signed and witnessed. Every term that the parties agree to should be put in writing, this is to ensure that there is always a reference point. Communities should therefore insist on having all contracts, and all terms of the contracts put in writing.

In Kenya, both oral and written contracts are recognized by the law. However, it is advised that contracts should be in writing. Every term that the parties agree to should be put in writing, this is to ensure that there is always a reference point. Communities should therefore insist on having all contracts, and all terms of the contracts put in writing.

- **Read and understand the contract**

This is essential for community members - to read and understand every provision in the contract, and in case anything is not clear they should ask for clarification. A contract is legally binding, therefore, community members should only sign contracts that they are comfortable with and that protect their interests.

- **Confirm that the terms in the contract reflect what was negotiated**

Before the contract is drafted and signed, the parties involved negotiate the terms - communities should therefore ensure that the contract reflects what they negotiate. This is important especially if the contract has not been drafted by the community - the community should ensure that all key terms negotiated are clearly stated in the contract as was negotiated.

- **Who is the investor/what do they do – a brief analysis of their other contracts**

As part of their background check, the community should carry out due diligence and find out who the investor is, and what they do. The purpose of this is to have an understanding of the investor before the community signs the contract - especially for investors that already have ongoing or complete projects with other communities. This way the community will be able to understand the extent of the investor's work and how they treat communities that they engage with.

The communities should be able to answer the following questions as they carry out the research on the investor:

- Who is the investor?
- What is the investor's core business?
- Does the investor have any projects in Kenya? If yes, what kind of projects do they have? Is there any information on how the investors have handled/handling contracts with other communities? In terms of enforcing their rights, honoring payments, and sticking to the terms of the contract.
- Does the investor have any case in court? If yes, what is the subject matter of the case?
- How will the rights of the community be affected during the contract period?

Communities need to know the time period as stipulated in the contract and if this will affect their rights and interests in any way. For example, if the contract is for a period of one year - how will this affect other communities that have an agreement with the community over exercising their grazing rights.
In cases of absolute ownership, communities must understand that they will not be able to exercise any of their rights over the parcel of land bought by the investor. Therefore, communities need to be certain about the parcel of land they are selling or leasing to the investor.

- **How to determine adequate compensation – know the value of their land**

This is quite important for communities so that they ensure that they are not taken advantage of in any contract. The process of land valuation is quite tasking especially when the government is the one valuing the land. In situations where communities have extra funds they can hire a private valuer to help them calculate the value of their land. In addition, they

can also advocate in including a private valuer as part of the negotiation process to calculate the market value of the land, before the parties settle on a price.

- **Engage a lawyer/CSO when in doubt**

Contracts can be technical, in such cases communities should engage a lawyer or CSO that they work closely with - this will ensure that their interests are protected. The person/ organization engaged should be able to read and explain the contract to the community, and clarify any issues that the community may have. For investors who choose to engage communities directly, they are more likely to use their lawyers - therefore, in such cases communities should also engage their lawyer to negotiate on their behalf.

If communities agree to engage a lawyer or CSO they should ensure that they also participate in the process - for example, through the members of the CLMC, who can represent the community in the process. Before communities engage the lawyer or the CSO they should list down their priorities and what their representatives can commit to directly. This will ensure that the community's interests are well articulated and represented.

A community may opt to sign a Memorandum of Understanding (MoU) between itself and the CSO hence giving the CSO the authority to act as a supporting partner when negotiating contracts, for example, through offering technical and legal advice.

PRINCIPLES THAT SHOULD GUIDE COMMUNITY MEMBERS WHEN ENTERING INTO CONTRACTS WITH INVESTORS:

Due diligence

This is important for the community – due diligence is a targeted form of investigation of the investor. The purpose is to help the community confirm the details of the investor (as provided by them), identify potential risks and problems that may arise during the contractual relationship, and establish whether the community wants to enter into a contract with the investor or not.

A few questions that the community should try answer as they carry out due diligence:

- Is the investor (if a company) operating its business in Kenya legally?
- What is the nature of business done by the investor? Is the contract with the community part of their day to day investments?
- Are there any other projects been funded by the investor? What information can be accessed about these projects?
- Is the law firm/advocate representing the investor certified to do so?
- Apart from the law firm/advocate, who else will be negotiating with the community on behalf of the investor?
- Is the investor in any form of partnership with the government? What information can be accessed about their partnership?
- Apart from the money that the community will receive, what other benefits will they receive from the investment?
- If the investor is an international investor – what laws will govern the contract?

Transparency and accountability

The members of the CLMC should be transparent and accountable to the community assembly at every stage of the process. As stipulated in the CLA, such decisions must be made by at least two-thirds of the community assembly. All notices that shall be sent to the community announcing a meeting to discuss the contract – should include details of what will be discussed so that community members come prepared.

The members of the CLMC should not at any time commit to anything without an informed consent from the community assembly, by at least two-thirds of the community members. Therefore, the chairperson of the CLMC should make this clear to the investors at the very beginning of the process. In addition, anyone else who is brought on board by the community such as a lawyer will not commit to anything on behalf of the community.

The contract should be clear and informative

Most contracts are complex and that is why there is need for communities to engage third parties to help them understand the contract in totality. Communities should insist that everything that they agree on should be in writing, and all terms of the contract should be clear. Any section that is not clear should be sent back to the investor for their interpretation.
The contract should have all the information that is agreed upon by the parties, and any other information that is agreed upon even after they sign the contract should be included as an addendum.



Photo Credit: Indigenous Movement for Peace Advancement and Conflict Transformation (IMPACT)

Conformity with By-laws:

The Community must ensure that the investment terms are not in breach of their by-laws. That's why the community needs to have strong and clear by-laws from the outset. These will be used to protect them and their natural resources from exploitation.

Current and Future Land Use:

Are there currently any areas of the community land that are used for public purposes (schools, hospitals, government offices, shrines, etc.)? Are there any areas that the community would like to designate for public purposes in the future? Are there any areas that the community would like to designate for other purposes? How often will you review decisions about how land has been allocated? How will decisions be made about allocating land for specific purposes in the future in case the community land is yet to be registered?

Take your time

The community should not be in a rush to sign the contract – they should only do so when they are satisfied with the terms of the contract. If they work with a lawyer, they should ensure that every provision is explained to them in a manner that they understand. Any time limits should also be expressly stated – for example, how long does the community have to accept or reject the offer.

Free, Prior, and Informed Consent (FPIC)[6]

The community should be able to make their own collective decisions with regards to the investment and the contract. All information given to them should be understood by them, and their final decision respected by the investor. No decision shall be made by the CLMC without the express consent of the Community Assembly.

FPIC seeks to ensure that communities have the ability to make their own informed choices with regards to their land and natural resources. It further ensures that "during decision making processes, indigenous peoples are not coerced or intimidated; that their consent is sought and freely given prior to the authorization or start of any activities; that they have full information about the scope and impacts of any proposed developments, and that ultimately their choices to give or withhold consent are respected".

The representatives of the community need to be careful to ensure that FPIC is appreciated and exercised by the community at large – through constant consultation and sharing all the information they receive to the community. For FPIC to work during the contract process there needs to be complete disclosure of information so as to ensure that all decisions made by the community, are made based on facts. This applies to the investor – it is expected that they also disclose all information that communities will need with regards to the contract.

As stated above FPIC also means that communities can withhold consent – and this should be respected. Communities should not feel like they have to consent to every investment opportunity and as such they should be empowered enough to make their own decisions and protect their interests.

In this case therefore, information necessary for FPIC should include the following:

6 Ward, Tara, 'The Right to Free,Prior, and Informed Consent: Indigenous Peoples' Participation rights within International Law,'Northwestern Journal of International Human Rights, Vol. 10, Issue 2, Article 2, 2011http://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1125&context=njihr

- The type of investment-what they want to do on the land
- The size of land the investor wants from the community
- The possible impact of the investor on the environment and the lives of the people
- Length of the investment
- Possible players in the investment beneficiary ownership and
- Community's full participation

PRINCIPLES OF EFFECTIVE PARTICIPATION

- Publicity in good time before a decision is made
- Full information about how to make input or contribute
- Adequate information about the decision and how it is to be made
- No pressure or undue influence on the community
- The parties should take each other's input into account
- The parties should give feedback
- Ensuring that processes are appropriate to the group(s) sought to be involved, including youth and women
- Good faith: A climate of trust, collaboration and mutual respect; everyone involved has a duty to act in good faith, being prohibited from bias and anti-democratic conduct
- Flexibility: Taking into account the circumstances and particular characteristics of the community involved, including unforeseen circumstances.
- Reasonable time: To allow institutions and organizations representing communities or groups within the community to meet, reflect and make concrete proposals.
- Absence of coercion or conditioning
- Timely information: All information necessary for people to express their point of view, being properly informed on the subject of consultation, from the start of the consultation process and properly in advance.

Some questions to be considered by communities when addressing external threats that they are facing or are likely to face:

- How is our community land being exploited?
- What are the exact threats that we are facing? Do we know who/what is causing them?
- How have we tried to address these threats?
- How secure is our land from these external threats?
- How can we make our land secure from these external threats?
- Do these threats threaten our livelihood?
- Are we profiting/just losing from any of these threats?
- How does the Community Land Act protect us from external threats?

PART THREE

PART THREE OF THE GUIDE INCLUDES THE FOLLOWING:

- Key elements and terms in a contract
- Who should be involved in the drafting of contracts
- What should community members look out for as they get into contracts

KEY ELEMENTS AND TERMS IN A CONTRACT

Offer

This is an invitation to enter into a contract - made by one party to the other. An offer can be expressed orally or in writing. Communities should be keen in listening to the terms of the offer made to them and ensure that even if it is made orally, they put it in writing and send it to the other party for confirmation. It is the first step in validating a contract and therefore it needs to be clear.

Example of what a written offer for a contract should include:

- Purpose of the contract
- Parties to the contract
- Consideration for subject matter of the contract
- Duration of the contract

Acceptance

Once an offer has been made, the other party can accept or reject the offer. If the community rejects an initial offer, they can make a counter-offer (this is basically another offer that is made to the original party that made the initial offer). Therefore, if the community is not pleased with the terms of the original offer but still want to work with the party that made the offer, they can proceed to make a counter offer.

If the community agrees to the terms of the offer then they can proceed to accept it - orally or in writing. The community then is bound to the terms of the offer and their contractual obligations will be derived from the terms that they accept.

Investment contracts would typically lead to more complex terms and these would be reduced to a written agreement that comes into force upon execution/signing by both parties.

Example of a counter offer in contracts:

In response to the offer sent to the community, we raise the following counter offer – for the sale or lease of our land:

A total sum of Kshs. xxxxxx for 50 acres of land to be paid as follows: 50% of the said amount to be paid upon signing of the contract, and the balance of 50% to be paid within 90 days after signing of the contract.

Example of a written acceptance for a contract (should include brief reiteration of the offer and clear acceptance of the terms of the offer)

In response to your offer the community expressly accepts to the amount as offered and the payment plan. In addition, we also accept that sale of our land to you will mean total and absolute ownership of the said land, but within the agreed terms.

Finally, the contract shall be deemed as properly accepted when parties sign the contract and the first payment is made - any amendments to the contract must be in writing and approved by both you and ourselves.

Parties

The parties to the contract must be clear for purposes of signing the contract and also to know who can be held liable in case any issue arises.If the contract is between a company and a community as a whole, the contract should use the community's full name, not any 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, especially if the land is not officially registered as community land. If for some reason the community's full name cannot be listed as a party, and leaders/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. Communities should also decide on which member(s) of the CLMC will sign the contract on their behalf. For investors who have a proxy, they also need to be clear on who will sign the contract - which can also be included in the Power of Attorney. Communities should have an opportunity to peruse the Memorandum and Articles of Association of the company in order to know which and how many Directors are needed to sign such contracts.

Example of clause on parties:

This contract is between the following parties xxxxxxxxxxxx a company incorporated under the Companies Act of Kenya, having its registered office in xxxxxxxxxxxx (hereinafter referred to as 'Investor') acting through its duly appointed representative xxxxxxxxxxx (hereinafter referred to as 'Investor Representative') who was appointed as such through the Power of Attorney dated xx/xx/xxxx and registered on xx/xx/xxxx
And

xxxxxxxxxxxx community registered as such under the Community Land Act, located in xxxxxxxxxxx acting through their duly elected Community Land Management Committee members (hereinafter referred to as 'CLMC') having being elected on xx/xx/xxxx

Capacity

Parties to a contract must have capacity to enter into the contract and perform their contractual obligations. Capacity refers to legal standing to enter into a contract. This means that if they are individuals, they should be adults (18 years of age and above) and should be of sound mind (mentally stable). In addition, for international investors or local companies, they must also have the licence to conduct business in Kenya. Any party that lacks capacity to enter into a contract at the time of signing will automatically invalidate the contract. For registered communities, the capacity to enter into contracts will be determined by the CLA which gives guidelines under section 15 (land disposition decisions) and 36(contracts with investors) on the quorum for decision making by the community assembly. The bylaws can give more elaborate steps for engaging investors to ensure that the community is not coerced. FPIC guidelines are also applicable when investments relate to carbon markets or mining. Sometimes an Environmental or Social Impact Assessment (EIA) is required by law. This is to ensure that communities can make informed decisions especially where community land has not been registered.

Example of clause on capacity:

As agreed between the parties, all parties to the contract had the capacity to enter into the contract at the time of signing of the contract. And that there was no duress exercised against any party to agree to the terms of the contract and append their signature.

According to the Laws of Kenya and within the context of this agreement, capacity means:

- Each party was above the age of 18 at the time of signing the contract
- Each party was of sound mind (mentally stable) at the time of signing the contract

Intention to be legally bound

The parties must intend to be legally bound, and this means that in case any party defaults or does not perform their obligation as provided for in the contract - legal action can be taken against them. In addition, this also means that the subject matter of the contract must be legal and the contract must be in line with the provisions of Kenyan law. In cases where international law is relied upon - this must be done in accordance with Article 2 (5) and (6) of the Constitution of Kenya. This part is important, as otherwise the contract might not be enforceable. The contract should clearly show that the community and the company intend 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 of a "Red-Flag"/ Bad 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."

Example of clause on intention to be legally bound:
By signing of this agreement parties acknowledge and agree that they are legally bound by the terms of this contract. In case of any issue arising from the contract, the parties shall be bound by the Laws of Kenya in seeking redress.

Consideration/compensation

The consideration that the community will receive must be clearly stated, and if not satisfied (based on the market value of the land), the community should be able to negotiate for better payment. The consideration clause should also be clear on how the money will be paid and when it will be paid. If the payment is to be done in instalments, the clause should include the dates on which the instalments will be paid.

Example of clause on consideration:

Payment shall be made as follows:

The first installment (50%) of the total value of the subject matter of the contract Kshs. xxxxxx shall be deposited directly into the following account belonging to the community Account details on or before the date of signing of the contract.

The second installment (30%) of the total value of the subject matter of the contract Kshs. xxxxxxxx shall be deposited directly into the following account belonging to the community Account details three months from the date of signing of the contract.

The third and final instalment (20%) of the total value of the subject matter of the contract Kshs. xxxxxxxx shall be deposited directly into the following account belonging to the community Account details six months after the signing of the contract.

1 The general rules of international law shall form part of the law of Kenya.

2 Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution"

Delay or default to make any payment as stated in the contract shall immediately attract an interest of 5% of the instalment amount to be paid and shall increase on a daily basis by an additional 2% until the amount has been paid.

Or

Payment shall be made as follows:
The total amount (100%) of the total value of the subject matter of the contract Kshs. xxxxx shall be deposited directly into the following account belonging to the community Account details on or before the date of signing of the contract.

Delay or default of the payment as stated in the contract shall immediately attract an interest of 5% of the instalment amount to be paid and shall increase on a daily basis by an additional 2% until the amount has been paid.

Duration of the contract

This determines the rights of communities over their land and natural resources during the contract period. Therefore, this need to be clear as once the time lapses then the land reverts back to the community - in cases of a lease.
Not all projects require long durations, but companies may try to push for the longest time possible. If a long duration is not strictly needed for the project before expiry and renewal, it may be best for the community to seek a shorter duration such as three to five years, allowing a community to assess its relationship with the company regularly.. If the community and the company are happy with the arrangement after review, they may agree to renew the contract, or they may enter into a new contract with newly negotiated terms.

Example of clause on duration of the contract:

The contract shall be deemed to be in effect immediately after the parties append their signatures on the agreed date and shall run for a period of xxxxxx years. In case of renewal, parties shall refer to the renewal clause.

Duties and obligations of the parties shall only apply during the contract period unless otherwise agreed upon by the parties in writing.

Scope of the Contract:
Project Description:

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

Geographical Scope

Limit the size of the area provided to the company to only what is necessary for the proposed investment. Investors often ask for areas of land far larger than they need. Rather than providing a huge area of land for the investment at the beginning, the community should try to include clauses that require the company to 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.

Guiding questions

- 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?

Access and Use of Natural Resources by Parties

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 reserve 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/priority (a "right of first refusal") to purchase the trees? + are there 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.

■ Rescission : Cancellation of a contract or rendering it null and void may be an option if there is proof that there was a material error in the contract. Evidence of fraud, mutual errors, lack of legal or mental capacity, duress and undue influence, or one party not fulfilling its obligation can also lead contracts to be declared unenforceable/ voided.

■ Restitution: where the party guilty of unjust enrichment is ordered to pay the other party or ensure that the other party is brought back as nearly as possible to the position they were in before the breach happened

If a contract is unfair or oppressive to one party in a way that suggests abuses during its formation, a court may find it "unconscionable" to mean that it had very unfair terms and refuse to enforce it. A contract is most likely to be found unconscionable if both unfair bargaining and unfair substantive terms are shown, but these are sometimes difficult to prove.

Community members should ensure that the contract also indicates the procedure to be followed in case of breach – and they should be careful to negotiate terms that protect their interests. In addition to the above remedies these include alternative dispute resolution methods (such as mediation, arbitration) and litigation. If the investor refuses to address the problem(s), community members can seek help from government offices and put pressure on the investor through advocacy campaigns.

Example of clause of remedies in contract in cases of breach:

Each of the parties to this contract will be entitled to recover damages and costs in case of breach by the other party. In cases where monetary damages is not adequate to compensate the other party for the breach, the aggrieved party may file a case in court for other remedies such as specific performance - and any other injunctive order to enforce the breach.

Amendment to the contract

Community members should be able to ensure that there is a term in the contract that allows for amendments to be made during implementation of the project. The parties should agree when and how these amendments can be made, and how many times they can be made – so as to ensure that the entire contract is not amended.

Example of clause on amendment of contract

Parties agree that amendments can be made to the contract during the following phases:

- 30 days after signing of the contract
- 3 months into implementation of the contract
- 12 months into implementation of the contract

The party willing to add or remove any term from the contract, will inform the other party in writing and give them 14 days to respond. The amendment will only apply once the parties agree and sign the terms/section added or removed from the contract

Scenario(role play for training sessions)

Dedha community in Isiolo signed an investment in January 2021 with a French investor who is to establish a private high end eco-lodge. The land lease contract indicates that at least 1/3rd of all jobs in the lodge will be reserved for the local communities. In Dec, 2022 the lodge is complete and launched, ready to start business. The French investor however brings all employees from France since the high end guests need specialized handling that is not available in the community. Only 2 people from the community are employed as tour van drivers.

As a community, you have learnt about what is happening. What are some of the remedies the communities can pursue to address their grievances? Discuss and roleplay how you will go about engaging the French investor.

Emerging Issues in Investor Contracts

· Climate change

Climate change refers to long-term shifts in temperatures and weather patterns. Climate change has brought about changes in weather patterns often translated into disasters such as storms, floods and droughts.These questions can be useful in negotiating with a potential investor How will your community cause investors to adhere to environmentally and eco-friendly practices? What will be the process to allow external investors to access your land and natural resources? What sort of investment projects are allowed or disallowed on your community land? How shall your community push the investor to protect the environment?

·Traditional knowledge and Intellectual Property

As investors engage communities, it is important to lay down principles that will govern the protection of the communities' intellectual property rights including traditional knowledge and traditional cultural expressions. According to the **Protection of Traditional Knowledge and Cultural Expressions Act(Cap 218A)**, traditional knowledge includes skills, innovations, practices and learning, embodied in the traditional lifestyle of a community; or contained in the codified knowledge systems passed on from one generation to another including agricultural, environmental or medical knowledge, knowledge associated with genetic resources or other components of biological diversity, and know-how of traditional architecture, construction technologies, designs, marks and indications. Cultural expressions means any forms, whether tangible or intangible, in which traditional culture and knowledge are expressed and include verbal expressions such as stories, names, and symbols; musical expressions including songs and instrumental music; expressions by movement, including dances, and rituals; and tangible expressions such as photographs, paintings, including body-painting, carvings, sculptures and jewelry. The Act requires that a person who uses traditional knowledge or cultural expressions beyond its traditional context shall acknowledge the owner of the knowledge, indicate the source of the knowledge or expression and where possible, the origin of the knowledge or expression, and use such knowledge or expression in a manner that respects the cultural values of the holders. Further, the Act states that the protection of owners and holders of traditional knowledge or cultural expressions shall include the right to fair

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?

Governing law

A contract drafted and signed in Kenya must be governed by the laws of Kenya. This must be clearly stated in the contract as it makes it clear which laws will be used in case of breach of the contract by one or both of the parties.

Example of clause on governing law in the contract:

The contract, all activities relating to contracts, duties and obligations of parties shall be governed by the Laws of Kenya. International laws, treaties and conventions shall only apply in so far as they do not contravene the Laws of Kenya according to Article 2 (5) and (6) of the Constitution of Kenya, 2010.

Termination of the contract

This is essential for the community, as before they sign the contract they must be fully aware of when and how they can terminate the contract. This should be discussed widely by the community, so that in case of breach by the other party, the community knows exactly what they need to do. In addition, the community also needs to keep in mind that they could also breach the contract, and in that case the clause on termination must also protect them from loss of their land.

Example of clause of termination of the contract:

Either party may terminate the contract at any time for just and reasonable cause, upon presentation of a thirty days' notice to the other party in writing.

Upon termination the duties, rights and obligations of the parties shall also come to an end.

Renewal of the contract

The contract should also set out whether or not it can be renewed. 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.

Communities should be able to enter into contracts that they can choose to renew. For contracts that are subject to a leasehold agreement, the community should ensure that there is a provision in the contract that stipulates the time period for which they have to declare an interest to renew, before the leasehold expires. This also applies for the other party to the contract.

When the parties agree to renew the contract, they can choose whether they will be bound by the initial contract, or they will amend the contract.

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, 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.

+ 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?

Example of clause of renewal of contract:

The contract shall be renewed in the following manner:

- If the parties want to renew the contract, they shall do so at least sixty days before expiration of the contract.
- The intention to renew the contract must be in writing.
- The parties shall agree at least 30 days before the expiration of the contract on whether the terms in the contract will be amended or they will only change the duration of the contract to reflect the renewal of the contract.

Once the parties agree to the above, they shall proceed to sign the renewed contract.

Remedies for the parties in case of breach

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 legal complaints processes and grievance mechanisms.

This section should be read together with the section on termination of the contract. Parties must agree on the remedies that will apply in case of breach. In general, remedies aim at returning the aggrieved party to the position they were in at the beginning of the contract or before the breach of the contract.

Examples of remedies include:

■ Award of damages where money is paid to compensate the other party for loss or damage

■ Specific performance where parties are ordered to fulfil/ perform their obligations

and equitable sharing of benefits arising from the commercial or industrial use of their knowledge, to be determined by mutual agreement between the parties. This right might extend to non-monetary benefits, such as contributions to community development, depending on the material needs and cultural preferences expressed by the communities themselves.

Communities may find it necessary to insist that sellers of artifacts and beadwork within a hotel or lodge be, for example, the women from the local community. That way, they may protect their culture from being exploited by outside parties. The use of the community's name to promote an investment should also derive benefits to the community and this can be agreed upon between the community and the investor.

How to support communities in their investor engagements

Tips for community facilitators

1. Teach communities their legal rights.

The Constitution and the CLA are the principal pieces of legislation that protect communities' rights over their land as they insist on inclusivity and participation.

2. Request Environmental, Social and Human Rights Impact Assessments.

Encourage communities to request that potential investors or that the government fund an independent consulting firm or group of experts to undertake an Environmental Impact Assessment (EIA), and a Human Rights or Social Impact Assessment (HRIA or SIA). These will allow communities to assess the potential impacts of the proposed investment so that they can advocate for any changes needed to the investor's plan to reduce negative impacts.

3. Prepare communities to know what to request in exchange for the use of their lands.

Facilitators should support communities to demand rental payments that reflect the value of their lands.

In addition to rental payments, possible benefits to ask for include:

- regular payments such as a fixed share of the annual profits
- clinics, medicines, doctors and nurses
- schools, books and teachers
- electricity to all homes
- new or better roads
- telecommunications and internet provision
- jobs for a specific number of community members
- shares in the company.

Communities should make sure that if they ask for one-off benefits, such as a school or clinic, they also ask for the teachers, doctors, books, electricity and medicines necessary to make these function effectively.

4. Prepare communities to negotiate with investors.

Community members **should not sign any papers** until they have sought the help of a lawyer to understand what the investor is asking them to sign.

Facilitators should ensure communities:

- Ask the investor specific questions about his/her plans and activities.
- Ask for copies of any papers the investor has – eg the business plan, papers from the government etc.
- Make sure community leaders or CLMCs do not approve deals without consulting the community.
- Agree on a negotiation plan within the community. They should decide what is not negotiable, such as keeping waters clean, and what is negotiable, such as what benefits the investor will pay.
- The CLMC or a designated committee can negotiate on the community's behalf – but invite all community members to witness the negotiations.
- Take thorough notes of what is said at all negotiation meetings.

5. Get a good, written contract that can be enforced in a court of law.

Advise the community to:

- work with a lawyer to ensure the final agreement reflects the negotiations and protects the community's interests
- ask for as short a lease term as the investor will agree to (ideally five years) with the option to renew. This prevents the community from being trapped in 50- or 99-year contracts that are not benefiting them.
- ensure the contract clearly describes the way the investor must protect and preserve the environment
- Have the final document scanned and a copy kept with the community's representatives.

Investor Contracts irreducible minimums

Insist that the contract should be in writing and keep a written copy of the contract. Communities can ask their lawyer or a CSO to scan signed original contracts for their safekeeping in addition to the hardcopy. Sometimes contracts can make reference to other documents such as maps which are useful in understanding certain clauses of the contract. These are called annexures and should be attached to the hard copies of the contract. This ensures that the contract can be easily accessed and also acts as a secure permanent record of the original agreement.

Read and understand the contract for sensitive clauses: It is essential for community members to read and understand every provision in the contract, and ask for clarification especially on sensitive clauses such as those touching on duration, access and use of natural resource, concessions, revenue sharing, geographical scope of investment, employment opportunities, renewal, cancellation, dispute resolution, amendment, protection of intellectual property-culture and traditional knowledge, remedies for breach of contract must be adequate.

Confirm that the terms in the contract reflect what was negotiated: Before the contract is drafted and signed, the parties involved negotiate the terms - communities should therefore ensure that the contract reflects what they negotiate. This is important especially if the contract has not been drafted by the community - the community should ensure that all key terms negotiated are clearly stated in the contract as was negotiated. If possible, contracts should include how benefits **to the community will be measurable within specific time frames.**

RENEGOTIATING BAD CONTRACTS

Why would you renegotiate a contract?

Renegotiation is generally triggered for one of two reasons: an imperfect contract or changed circumstances or law. Eg change in capacity of bed nights per acreage, pandemics, The goal of any written contract is to express the parties' full understanding of their deal.

Tips for renegotiation:

1. Co-operation: Don't approach renegotiations with aggression. Doing so typically only engenders resistance and conflict, and the goal here is to preserve your business relationships, if possible. As right as you may be in requesting a change, make sure you're actively working toward a positive result for all parties rather than simply enforcing your rights.

2. Focus on solving problems and creating value: Central to cooperation is a problem-solving mindset. Focus on solving problems and creating value for all parties involved. Remember, the other party needs to have a compelling reason to agree to the adjustments, so if you focus your efforts on solving problems in a way that is worthwhile for investors, communities will get more buy-in from them.

3. Create a clear framework for negotiations: To progress as smoothly as possible, create a clear framework for your negotiations. Set specific rules and procedures, covering areas such as:

- The number of people involved,
- Principles and behaviors to be exhibited during renegotiations,
- A timeline for each stage of the process,
- Rules for when negotiations should be called off,

Upon setting these rules, make sure you stick to them. Your goal is to rework an agreement, not wage war and win at all costs.

4. Carefully evaluate risks and benefits.

When planning for renegotiation, it's important to consider what's at stake. In particular, carefully evaluate the costs of failure. Those may include:

- Expensive and time-consuming litigation (which you may not even win).
- Lost business relationships.

It's worth discussing these costs in order to make sure everyone is on the same page. In addition, make sure you evaluate the potential benefits of renegotiating as well. After all, both parties will want to benefit from the new agreement.

5. Involve everyone with an interest in the agreement.

Include the relevant persons, which would involve the required threshold of the community assembly and the CLMCs.On the other hand, you want to make sure the representatives are likely to help negotiations rather than hurt them. Abrasive attitudes should be avoided.

6. Source for a mediator.

A mediator's role is to facilitate discussion. They'll help you focus on those topics that are most important to the situation while directing your efforts toward creating a positive outcome for everyone involved.

7. Know your alternatives.

Finally, you need to put yourself in a strong negotiating position, which means knowing your alternatives should the deal be called off. By having a list of alternative investors at hand, the investor will have a little more incentive to work out a favorable solution.

8. View contracts as living documents.

Finally, it may help to view your contracts as living documents that need to be updated every so often. By taking this attitude from the outset, you'll make it easier for the investor to accept the need for periodic renegotiation rather than view those efforts as an attack.

General Rules of renegotiation

As mentioned earlier, contracts should be viewed as living documents that may be subject to change whenever there is an urgent need to. Some general guidelines for this are:

General Rules of Renegotiation

As mentioned earlier, contracts should be viewed as living documents that may be subject to change whenever there is an urgent need to. Some general guidelines for this are:

- Keeping to the negotiation framework set out by the clause: The contract should ideally have a set of guidelines that give the next steps whenever a part wishes to have a clause revised. These steps should be followed to allow a smooth renegotiating process
- Respecting the remaining provisions of the contract
- Making a serious effort to reach agreement,
- Paying attention to the interests of the other side
- Maintaining flexibility in the conduct of negotiations,
- Making concrete and reasonable suggestions for adjustment instead of mere general declarations of willingness to adjust
- Avoiding rushed adjustment suggestions
- Giving appropriate reasons for one's own adjustment suggestions
- Obtaining expert advice in difficult and complex consensus proceedings
- Responding promptly to adjustment offers from the other side

CONCLUSION

It is evident that the process of drafting and negotiating contractual terms is involving, and it is in the interest of communities to ensure that they work together to protect their interests at all times. Community members need to work together and in case they need help in negotiating contracts they should make sure they engage a third party who will act in their interest. The contract should only be signed once the community assembly is satisfied with all the terms of the contract. No community should be coerced into signing a contract; the process is voluntary and the community's decision to proceed with the contract or not, is final.

Scenario

The Bigfive Trust, an international organization focussed on setting up conservation and wildlife tourism projects, has approached 6 neighbouring communities individually to set up a wildlife corridor that will allow white Rhinos to safely move around the community without being affected by human wildlife conflict. An eco-lodge will also be set up in each of these communities to attract tourists. White Rhinos are endangered thus armed and highly trained rangers will have to be deployed in these communities to ensure their safety. Every community that agrees to allow the establishment of the Rhino corridor will enter into a Community Development Agreement which will provide that a borehole be dug in each community and a primary school be built. Further details are not given. Each community will also receive a bed-night fee of $3 per tourist from the lodge. The full accommodation rate per tourist however remains undisclosed to the community. This agreement is scheduled to last 30 years and is automatically renewable. Even though some benefits have been seen within the communities, they still think that the Bigfive Trust should compensate them fairly. It is also reported that in other communities rangers have injured community members and confiscated livestock where they were

found encroaching the wildlife corridors.
xplain how these communities can organize and push for fairer contractual terms.

SIMPLE STEP BY STEP GUIDE OF INTERACTIONS BETWEEN THE COMMUNITY AND THE INVESTOR

Step 1: The investor visits the community and expresses their interest in leasing/buying part of the community land for a specific purpose.

The investor is introduced to the CLMC to present their offer and give an overview of the contract. (The CLMC must explain to the investor that they cannot make any decision without consulting the Community Assembly).

Questions the CLMC should ask:

9 Why is the investor interested in our land?

9 What project does the investor intend to carry out on our land?

9 Does the investor want to lease our land? If yes, for how long?

9 Does the investor want to own our land? Does this mean absolute deprivation of our land rights once we sell the land to the investor?

9 How long will the investor give us to negotiate and finalize the contract?

9 Who shall we contact in case we need any clarifications?

Step 2: The CLMC calls for a Community Assembly meeting to discuss the proceedings of their meeting with the investor

Important things that the CLMC should mention to the community:

9 What is the nature of the contract?

9 What is the original offer? What is the current market value of the land?

9 How will the contract/investment affect the rights of the community?

9 Should the community engage someone (such as a lawyer) to help in negotiating the terms of the contract? If yes, how should this person be selected?

Questions that the Community Assembly should ask the CLMC:

9 Who is the investor (background)?

9 Do they have other projects with other communities?

9 On what grounds can the community terminate the contract?

9 How long does the community have to communicate their decision?

Step 3: The Community Assembly discusses a contract and agrees on a way forward

Possible scenario 1 – Accept the original offer

9 Community accepts the offer as presented by the investor

Possible scenario 2 – Set a counter offer

9 Community votes for the investment but decides to set a counter-offer, based on some of the following issues:

- The price offered
- The size of land that the investor wants to acquire/lease
- The terms of the lease – time period, type of investment during the lease, what is the time period to be considered in case of extension/renewal of the lease

Possible scenario 3 – Reject the offer unless some conditions are met

9 Community is not quite interested in the offer, but set some conditions for the investor to meet so as for them to reconsider the offer – such as:

- Investor to lease the land and not absolutely own it
- Community interested in leasing another parcel of land and not the one that the investor is interested in

Possible scenario 4 - Reject the offer in totality

9 Community clearly articulates to the CLMC that they are not interested in the offer.

Step 4: The community through the CLMC communicates their way forward to the investor

9 Based on the above possible scenarios, the CLMC communicates the communities' decision to the investor, and they agree on the way forward. The CLMC can also work with the investor (or their representative) on a timeframe for the drafting and signing of the contract.

Step 5: The investor comes back to the CLMC after discussing the community's feedback

9 Based on the scenarios in step 4, the investor can decide to agree as follows:

- Consider the counter-offer
- Consider the conditions laid down by the community, and communicate what they are willing to compromise
- Agree not to proceed with the investment

Step 6: Negotiation goes on

9 The parties agree to move on with the investment and the contract

9 The parties continue to negotiate – based on the terms that each party wants, is comfortable with, and is willing to compromise

9 Community can negotiate directly or through a lawyer (who must update the community at every point)

Step 7: The parties reach an agreement and the community goes through the contract before signing it

9 The final contract is drafted and sent to the community for review

9 The community should look out for:

- The dates in the contract (this determines when the contract starts and when it ends)
- The terms are as agreed by the parties
- Land use
- The rights of the communities during the contract period
- Ways of terminating the contract
- Applicable laws

Step 8: Community returns a signed copy of the contract

9 Once the community is satisfied with the contents of the contract, they proceed to sign it through their community representatives, and send the signed copy to the investor.



CONCLUSION

It is evident that the process of drafting and negotiating contractual terms is involving, and it is in the interest of communities to ensure that they work together to protect their interests at all times. An offer for an investment opportunity is not binding, and therefore communities need to carefully understand the offer and all other terms of the contract before agreeing to sign the contract.

Community members need to work together and in case they need help in negotiating contracts they should make sure they engage someone who will act in their interest. The third party will need to work closely with members of the community land management committee, who will proceed to update the larger community assembly at every stage.

The contract should only be signed once the community assembly is satisfied with all the terms of the contract. No community should be coerced into signing a contract; the process is voluntary and the community's decision to proceed with the contract or not, is final.

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