

LEGEND Analytical Paper 2

Addressing 'legacy' land issues in agribusiness investments

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LEGEND Analytical papers aim to initiate and stimulate debate, research and analysis on and current issues in global land governance, by drawing together and assess understanding and evidence on questions of emerging relevance and making recommendations for policy, development programming and stakeholder practice.

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List of acronyms

CAO	IFC Compliance Advisor/Ombudsman	OECD	Organisation for Economic Co-operation and Development
DFI	Development Finance Institution	RSB	Roundtable on Sustainable Biomaterials
DFID	Department for International Development	TFT	The Forest Trust
FAO	Food and Agriculture Organization of the UN	UK	United Kingdom
FPIC	Free, Prior and Informed Consent	UN	United Nations
IFC	International Finance Corporation	UNDRIP	UN Declaration on the Rights of Indigenous Peoples
ILO	International Labour Organization	US	United States
LEGEND	Land: Enhancing Governance for Economic Development	USAID	US Agency for International Development
NCP	National Contact Point for the OECD Guidelines for Multinational Enterprises	VGGT	Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security
NGO	Non-governmental Organisation		
NHRCT	National Human Rights Commission of Thailand		

Executive summary

Legacy land issues: what they are and why they matter

A recent wave of large-scale land deals for plantation agriculture in low- and middle-income countries has fostered lively debates about development pathways and policy options to promote agricultural development in such countries. It has also fostered widespread demand for practical guidance on how to tackle the difficult issues involved in developing investments that respond to both local aspirations and commercial concerns.

In this context, much public debate has focused on agribusiness projects that involve the acquisition of land to establish new plantations. However, many companies acquire existing plantations, or land that has already formed the object of earlier transactions, clearances or allocations for large-scale farming operations. This may involve the acquisition of a plantation established by a parastatal agency, for example, or the partial or full takeover of the activities of another commercial operator.

These approaches can present operational and reputational advantages, not least because in recent years the acquisition of farmland to establish new plantations has triggered widespread concerns and sustained campaigning about ‘land grabbing’. But in taking over an existing operation, a company may also inherit ‘legacy’ land issues that its predecessors left unaddressed.

There is no universally accepted definition of legacy land issues. In this Analytical Paper, legacy land issues are those rooted in events that occurred before a company took over the agribusiness venture. This may include issues linked to the conduct of the previous project proponent, or to the context in which the original land acquisition took place. Complex histories and unclear roles and responsibilities often mean legacy disputes are among the most difficult land issues an agribusiness company will have to deal with.

It is impossible to quantify the prevalence of legacy land issues in agribusiness investments worldwide, mainly because of limited data. But recent trends suggest legacy land issues are likely to become increasingly relevant, because the takeover of pre-existing operations appears to account for a significant share of recent land deal making in low- and middle-income countries.

The paper and its main findings

This Analytical Paper explores legacy land issues as they affect agribusiness investments in low- and middle-income countries. It develops a framework for understanding and addressing legacy land issues in agribusiness investments – exploring what these issues are, how they can be identified and what measures can be taken to address them. The paper draws on interviews with experts from different backgrounds, analysis of relevant international instruments and case studies of practical experience of tackling legacy land issues.

The findings indicate that dealing with legacy land issues may be needed to address continuing adverse livelihood impacts and perceived injustices; it makes business sense, even if it is done covertly and without formal acknowledgment of liabilities for historical wrongs; and depending on the circumstances, it may respond to national law requirements and to international law and guidance.

Virtually all land has formed the object of some dispute at some point in history. Lack of clear time parameters can undermine legal certainty and the security of land transactions effected in good faith. International instruments provide little or no guidance on how far back in time it is possible or justifiable to go when screening for potential legacy issues. Ultimately, much depends on the circumstances. The extent to which affected people still have a genuine relationship with the land they were dispossessed of emerges as the main criterion for assessing whether a land issue is still ongoing.

Compared with agribusiness investments that involve the establishment of new plantations, legacy land issues present particular challenges. This is because of the interplay of past and present, which can involve ingrained distrust and entrenched, polarised positions; the central place of perceptions, expectations and strongly held beliefs that are intimately connected to the collective sense of justice; and the often unclear roles of multiple actors at different points in time.

At the same time, legacy land issues have largely remained a blind spot in the literature. No international instrument provides comprehensive guidance on how to deal with legacy land issues in agribusiness investments, though some do touch on those issues. For example, the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security (VGGT) call for the recognition of all ‘legitimate’ tenure rights, including rights that may have been dispossessed, while the Guiding Principles on Business

and Human Rights have firmly inscribed legacy issues in the corporate responsibility to respect human rights.

In more operational terms, due diligence exercises can provide an avenue for companies to identify legacy land issues. Interventions to identify legacy land issues at a systemic level are also possible, for example as part of government-led land use planning and investment screening or through public scrutiny of investment processes. Practical approaches to deal with legacy land issues include community engagement and independent or participatory fact-finding or land delimitation, all the way through to land restitution, compensation, benefit-sharing and grievance mechanisms.

Depending on the situation, addressing past wrongs can be an important part of these efforts. In many cases, however, the imperative is to recognise the past but focus on building a better future. There is much that companies, governments, non-governmental organisations (NGOs) and donors can do to make this happen.

Recommendations

Agribusiness companies should:

- Develop clear corporate policies on land rights, including legacy land issues, and including clear commitments to ensure all operations adhere to the VGGT.
- Establish comprehensive strategies to deal with any legacy land issues, based on solid baselines against which solutions can be developed, on effective community consultation and engagement with external stakeholders and, where relevant, on the retrospective application of free, prior and informed consent (FPIC).
- Rethink land tenure due diligence processes to investigate land issues not only from a legal and commercial perspective but also through 1) effective community engagement; 2) thorough review of any social impact assessment and of compliance with its recommendations; and 3) data collection on the history of the land acquisition, the context in which it occurred, any consultations conducted and compensation paid and any latent or actual land disputes.
- Recognise that this enhanced land tenure due diligence requires time, targeted efforts, specialised expertise in social and land tenure issues and early involvement of corporate units responsible for social and environmental performance.
- Establish dialogue with affected people, communicating clearly that a new management is now involved, and implementing community consultation and ‘retrospective’ FPIC as a basis for negotiated solutions to legacy land disputes.
- Depending on the context, implement appropriate combinations of independent or participatory fact-finding or land mapping and delimitation, land restitution, compensation, benefit-sharing and/or other approaches to address legacy land issues.
- Establish grievance mechanisms that comply with the effectiveness criteria identified by the Guiding Principles on Business and Human Rights, and engage with dispute settlement or third-party grievance mechanism processes initiated by affected people or by NGOs supporting them.
- Ensure transparency in all dealings with government and affected people to build trust and ensure expectations align with realistic business prospects.
- Establish and resource units with expertise in handling land rights issues, including a devoted local land officer for substantial projects, and source land tenure specialists to design and implement interventions.
- Provide in-house training on land rights, including legacy land issues, to ensure all relevant personnel including those dealing with corporate transactions are aware of and apply corporate policies on land rights and the VGGT.

Lenders, end investors and buyers should:

- Develop clear corporate policies on land rights, covering legacy land issues, and including clear commitments to ensure clients, investees and suppliers adhere to the VGGT.
- Establish follow-up mechanisms to ensure full compliance with corporate policies and applicable standards.
- Install land rights issues, including legacy issues, in due diligence processes in the context of lending or investment decisions, or when establishing supplier relations, including by scrutinising the capacity, commitment and track record of companies.
- Install land rights issues, including legacy issues, in lending or investment agreements, establishing clear requirements that bind companies to action.
- Engage with the agribusiness partner (borrower, investee or supplier) to ensure land rights issues are addressed throughout the investment cycle, knowing that legacy land issues can become apparent long after an investment is initiated, financed or contracted.
- Consider discontinuing business relations as a last resort if there is no realistic prospect that land rights issues can be properly addressed.

Lawyers, consultants and other service providers should:

- Over and beyond national law requirements, consider relevant international guidance and standards, including the VGGT, knowing that, depending on the context, conduct complying with national law could still expose clients to reputational and operational risks.
- Consider the social dimensions of legacy land issues, in addition to their legal and technical aspects, ensure relevant personnel are properly equipped to understand and address those social dimensions and, to this end, resource project teams with expertise in handling land rights issues and where needed provide in-house training on land rights including legacy land issues.

- Rethink land tenure due diligence processes to investigate land issues not only from a legal and technical perspective, but also through articulating to clients the importance of 1) effective community engagement; 2) thorough review of any social impact assessment and of compliance with its recommendations; and 3) data collection on the history of the land acquisition, the context in which it occurred, any consultations conducted and compensation paid and any latent or actual land disputes.
- Ensure services provided to design and implement measures addressing legacy land issues reflect international best practice, including in light of international guidance and standards, and document and disseminate lessons learned whenever possible and consistently with any confidentiality requirements.

Governments should:

- Establish arrangements to monitor legacy land issues and integrate consideration of legacy issues in land use planning and relevant land governance processes.
- Where appropriate, identify and focus efforts on geographic areas presenting significant potential to generate legacy land disputes, for instance linked to a history of conflict or displacement or to a high concentration of agribusiness operations.
- Adopt and implement legislation and establish institutions and processes to deal with any historical land issues, including land restitution programmes where appropriate.
- Ensure overarching land governance frameworks help prevent or minimise legacy land issues (e.g. through more accurate, reliable and transparent land administration systems, and clear rules on prescriptive acquisition where relevant) and include effective and accessible mechanisms (e.g. courts, specialised institutions) to deal with legacy land disputes when they arise.
- With regard to individual operations, ensure legacy land issues are included in impact assessment processes, screen for legacy land issues when considering reallocating land from failed agribusiness projects, ensure affected people have access to legal and other assistance and capacity support, facilitate dialogue between company and affected people based on FPIC where relevant and ensure compliance with any terms agreed between company and affected people.

NGOs should:

- Mainstream consideration of legacy issues in land rights programming, including both advocacy and operational activities, in order to identify and raise those issues where needed and to help develop possible ways forward.
- Where there is demand for it, support people affected by legacy land issues, including in the context of FPIC

and more generally in negotiations with companies and government authorities. This may include legal empowerment work, support to community-based organisations, land mapping or technical advice in areas such as law, inclusive business or economic valuation.

- Where appropriate, act as mediators or facilitators to support dialogue among companies, government and affected people, and/or establish partnerships with government and the private sector to develop solutions to legacy land issues.
- Provide third-party monitoring of compliance with any commitments that agribusiness companies or government authorities may have entered into.

Researchers should:

- Undertake field studies to document diverse types of legacy land issues, including more broadly defined legacy issues that this paper could not cover, and practical approaches to address those issues – what works where, under what conditions and with what potential for replication and upscaling.
- In addition to conventional research dissemination methods, feed findings into policy and practice and facilitate international lesson-sharing to inform more granular international guidance, more adapted national policies and more effective interventions by governments, development agencies, NGOs and the private sector.

Donors should:

- Provide technical and financial support to enable governments, NGOs and researchers to implement the recommendations above. This may include, for example, supporting government to improve land records and undertake historical analysis of land transactions and supporting NGOs to accompany villagers in their dealings with government and agribusiness. Interventions should focus on priority geographic areas targeted for agribusiness investments or otherwise presenting high potential for legacy land disputes.
- Ensure legacy land issues are duly considered in the international normative work they support, including initiatives to develop or test international guidance and standards, while also ensuring proper coordination of efforts and consistency of messaging, and joining forces whenever possible.
- In the context of private sector development programming, conduct thorough due diligence on potential private sector partners, including to screen for capacity to tackle land issues in a legacy context; screen for legacy land issues in geographic sites targeted for private sector development interventions; and share lessons from experience through the appropriate channels, including the Global Donor Working Group on Land.

1. Introduction

1.1 Legacy land issues: what they are and why they matter

A recent wave of large-scale land deals for plantation agriculture in low- and middle-income countries has fostered lively debates about development pathways and policy options to promote agricultural development in such countries. It has also fostered widespread demand for practical guidance on how to tackle the difficult issues involved in developing investments that respond to both local aspirations and commercial concerns.

In this context, much public debate has focused on agribusiness projects that involve the acquisition of land to establish new plantations. However, many companies acquire existing plantations, or land that has already formed the object of earlier transactions, clearances or allocations for large-scale farming operations. This may involve the acquisition of a plantation established by a parastatal agency, for example, or the partial or full takeover of the activities of another commercial operator.

These approaches can present operational and reputational advantages, not least because in recent years the acquisition of farmland to establish new plantations has triggered widespread concerns and sustained campaigning about ‘land grabbing’. But in taking over an existing operation, a company may also inherit ‘legacy’ land disputes that its predecessors left unaddressed.

These land disputes may have deep historical roots, possibly dating back to colonialism, and they may originate from dispossessions that initially bore no direct connection to agribusiness – for example evictions that occurred in the context of an armed conflict. Subsequent transactions may have brought the land into the hands of an agribusiness venture without resolving the underlying historical disputes.

In other cases, the land dispute may have originated in more recent times and presents closer connections to agribusiness developments. Examples include disputes stemming from perceived inadequacies of the local consultations conducted in the latest wave of large-scale land deals for agribusiness investments in low- and middle-income countries.

In many societies, land provides the basis for local livelihoods, social identity and spiritual value. It can raise emotive issues. Therefore, the passage of time alone is often not enough to heal perceived wrongs in land acquisition. Pre-existing land disputes can influence local perceptions about historical injustices, and, ultimately, an agribusiness venture’s ‘social licence to operate’. Complex histories and unclear roles and responsibilities often mean legacy disputes are among the most difficult land issues an agribusiness company may have to deal with.

It is impossible to quantify the prevalence of legacy land issues in agribusiness investments worldwide, mainly because of limited or inaccessible data. But recent trends suggest they are likely to become increasingly relevant, because the takeover of pre-existing operations appears to account for a significant share of recent land deal making in low- and middle-income countries.

Indeed, many agribusiness ventures established through the recent wave of large-scale land deals have failed or are significantly delayed,¹ and governments are likely to seek to reallocate this land to new operators. Other ventures have sold their projects after acquiring the land and establishing the farming operations owing to changed economic circumstances, or in line with the original business plan. As new companies take over existing operations, legacy land issues are likely to become an increasingly common challenge in agribusiness investment processes.

Legacy land issues have largely remained a blind spot in the literature, though there is growing recognition that it is important to address them (e.g. CDC, 2016; Comité technique ‘Foncier et Développement’, 2014; Indufor, 2016; Interlaken Group, 2015a, 2015b; World Bank, 2016). No international instrument provides comprehensive guidance on how to deal with legacy land issues in agribusiness investments, though some instruments do touch on them.

For example, the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security (VGGT) call for the recognition of all ‘legitimate’ tenure rights, including rights that may have been dispossessed, while the Guiding Principles on Business and Human Rights have

¹ The Land Matrix database of large-scale land deals reported a ‘significant increase’ in failed deals, and only a relatively small share of the land acquired is reported to have been put under cultivation (Land Matrix, 2014a, 2014b). The reliability of this database is not without limitations, but the Land Matrix remains the most comprehensive global effort to track the recent wave of large-scale land deals.

Box 1: 'Legacy' land issues defined

There is no universally accepted definition of legacy land issues. In a broad sense, legacy is often taken to encompass any issues stemming from events that took place in the distant past, or events that occurred in more recent times but before a company acquired the land or operation or before some other important intervening change.

Defined in such broad terms, the concept of legacy could apply to any longstanding businesses – for example where a company adopts new social responsibility policies or makes new commitments to implement international standards, and holds land acquired long before under contested circumstances.

A broad notion of legacy would also apply to the acquisition of land to establish new plantations. In these cases, the government may have cleared the land of occupants to make it available for the agribusiness venture before the investor could influence events.

This Analytical Paper adopts a narrower definition of legacy, focusing on situations where a company takes over an existing farming operation, in full (e.g. through a full-fledged corporate takeover or the acquisition of a specific operation) or in part (e.g. through entering into a joint venture partnership). In this narrower conception, legacy land issues are those that stem, at least in part, from land acquisitions the current operator was not involved in negotiating. This may include land issues directly linked to the conduct of the previous project proponent, but also contextual land issues not properly addressed by government or previous project proponent(s).

This narrower notion involves a considerable degree of positionality, meaning it depends partly on the perspective taken. While the agribusiness company that acquires the venture may see a land problem inherited from the previous operator as a legacy issue, the previous operator now exiting the venture is more likely to view the same issue in terms of 'social closure'. Indigenous peoples, small-scale farmers, pastoralists or forest-dwellers claiming the land are likely to experience the situation as a continuation, in a different form, of the pre-existing land struggle.

However, transfers of business ownership can both affect and be affected by a wider range of actors beyond the new operating company. Therefore, beyond the important elements of positionality, legacy land issues tend to involve situations shared by diverse actors and linked to a new phase of the business venture. This Analytical Paper explores the role different actors can play in preventing, identifying and addressing legacy land issues.

firmly inscribed legacy issues in the corporate responsibility to respect human rights.

1.2 Focus, methods and limitations

This Analytical Paper explores legacy land issues as they affect agribusiness investments in low- and middle-income countries, particularly in Africa but also in Latin America and Asia. It was prepared as part of the 'Land: Enhancing Governance for Economic Development' (LEGEND) programme, supported by the UK Department for International Development (DFID).

The paper sheds light on the nature of legacy land issues and provides pointers on possible ways to address them. Given the limited publicly available literature, it aims primarily to develop a framework for understanding and addressing legacy land issues. As more evidence on these issues comes to light, such a framework could then be validated or revisited, and in any case further developed.

As discussed, 'legacy' is often taken to encompass any issues stemming from historical events, but this paper adopts a narrower definition that focuses on situations where a company takes over an existing farming operation, in full or in part (see Box 1). While recognising that this narrower focus covers only a small part of potentially relevant legacy land issues, the broader view would encompass too wide a range of situations and lose clarity of focus for the purposes of a short analytical paper. More

research on the wider range of legacy land issues would be a desirable follow-on step.

The paper considers both legal and social dimensions of legacy land issues. The legal dimensions are important, because irregularities in the 'chain of title' can undermine a company's legal claim to the land. Also, international human rights law provides important pointers on how to deal with legacy land issues. But legacy issues present broader social dimensions as well: disputes may exist even if the transaction has complied with the law, and perceptions of justice and legitimacy can affect a company's 'social licence to operate'. As we discuss, effective community engagement is a key part of dealing with any legacy land issues.

The paper draws on three main strands of desk-based research:

- Semi-structured (primarily phone) interviews with some 20 experts from government, industry, non-governmental organisations (NGOs), donor agencies, researchers, law firms and consultancies. These were conducted under conditions of anonymity. They provided much insight on the nature of legacy land issues and the real-life challenges involved in dealing with them.
- Analysis of international instruments that provide pointers on how to tackle legacy land issues. Few provisions deal with legacy land issues explicitly. Most are framed in more general terms and would apply to legacy among other issues (e.g. guidance on grievance mechanisms).

- Analysis of eight case studies of agribusiness investments in Africa, Latin America and Asia. This draws primarily on a review of the literature and available legal documentation (e.g. court cases). Based on the date of the latest acquisition, most case studies are relatively recent (post-2000), though in several cases the original land acquisition dates back a long time. In a couple of cases, the latest transaction dates back to the 1990s. The case studies concern agribusiness operations in the following countries: Cameroon, Colombia, Democratic Republic of Congo, Indonesia (two cases), Liberia, Malawi and Paraguay.

The research was designed as an initial step towards understanding legacy land issues and presents important limitations. The selection of interviewees for the semi-structured interviews owed much to personal connections and cannot be claimed to have resulted in a representative group of stakeholders. But the diversity of the perspectives provided and the interviewees' wealth of collective experience meant the interviews contributed important insights to the research.

The review of international instruments aimed to identify key pointers, rather than developing comprehensive comparative analysis. Several documents would be relevant, but the research focused on four instruments: 1) the VGGT, which is the most comprehensive global instrument dealing with land governance, and which (while not legally binding) enjoys high-level political backing; 2) the Guiding Principles on Business and Human Rights, examined against the background of wider international human rights law and jurisprudence; 3) the Performance Standards of the International Finance Corporation (IFC), which is a commonly referred to set of standards of good business practice; and 4) the Principles and Criteria of the Roundtable on Sustainable Biomaterials (RSB), as an example of a standard developed by a multi-stakeholder certification body that explicitly addresses legacy land issues.²

These four instruments are quite diverse. The VGGT are voluntary and most of their provisions are addressed to states, though some provisions are explicitly addressed to private sector entities (e.g. paragraphs 3.2 and 12.12). On the other hand, the IFC Performance Standards are to be complied with by operating companies, and compliance may be legally required under loan contracts. Operating companies would need to comply with the RSB standard as a condition for certification. The Guiding Principles on Business and Human Rights are an authoritative instrument reflecting a worldwide consensus on

international best practice. Some provisions of the Guiding Principles and the VGGT reflect binding international law.

The case studies are considered experiences that provide insights on the nature of legacy land issues and possible measures to address them. They are not presented as illustration of best practice. Research on the case studies faced particularly far-reaching challenges. As discussed, the literature is very limited. In addition, 'legacy' is not a commonly used term, and most of the available literature discusses legacy land issues in indirect ways (i.e. in the context of research focused primarily on other issues). This situation makes it difficult to systematically review the literature through the use of rigorous search protocols.

Therefore, the case studies were selected on the basis of preliminary intelligence gathering (broad-based internet searches, information from the interviews) and of broadly formulated case study selection criteria (geographic spread, diversity of crops and of legacy issues). For each case study, systematic internet searches were then conducted according to a basic search protocol typically involving use of relevant company names.

The case studies vary greatly in terms of breadth of sources and depth of information. Some case studies involve heavily contested facts, and without conducting fieldwork it is impossible to go beyond acknowledging the different perspectives. Citation of the sources should help readers situate the perspective from which data or analysis originates. The case studies are presented in anonymised form to focus the attention on the practical and policy implications rather than the particular circumstances of specific agribusiness operations.

1.3 Outline of the paper

The remainder of the paper is structured in four sections. Section 2 makes the case for taking legacy land issues seriously, drawing on international instruments, the expert interviews and practical experience from the case studies. It also elaborates further on the nature of legacy land issues, combining conceptual insights with lessons from the case studies.

Section 3 discusses ways to identify legacy land issues. It does this from the perspective of the individual company, focusing primarily on due diligence. It also discusses identifying legacy issues at a systemic level, exploring the role of government and NGOs. The analysis draws primarily on the case studies and the expert interviews, though it refers also to some pointers from international instruments.

Section 4 examines measures to address legacy land issues once they have been identified. The repertoire ranges from land restitution to community development funds,

2 For the sake of transparency, it is important to disclose that the lead author of this Analytical Paper provided input into the development of the RSB Guidelines for Land Rights, cited in this paper, and participated in consultations leading to the development of the Guiding Principles on Business and Human Rights. The first two authors also contributed to various initiatives to implement the VGGT, including some of the tools cited in this paper (Comité technique 'Foncier et Développement', 2014; FAO, 2016).

through to independent or participatory fact-finding or land delimitation. Effective community engagement emerges as the key theme. The section draws primarily on international instruments and on the case studies.

Section 5 summarises key findings and outlines recommendations for companies, lenders, end investors,

buyers, governments, NGOs, donors, lawyers, consultants and researchers. It also discusses possible next steps for the LEGEND programme. The recommendations flow from the analysis developed in Sections 2–4 but also benefited from the expert interviews.

2. Taking legacy land issues seriously

2.1 Why address legacy land issues

There are three main reasons why companies, governments and NGOs should take legacy land issues seriously. First, dealing with legacy can help address perceived injustices and their continuing livelihood and socioeconomic impacts. Indeed, land issues originating in the recent or distant past can have ongoing impacts, such as when people who have lost land are still experiencing adverse effects or grieving the loss of land that has important spiritual or cultural value.

While the new private sector operator may have played no role in the events that originally triggered the land dispute, it may have either benefited or be perceived to have benefited from them. Government conduct may have triggered or exacerbated the dispute, and in any case legacy issues may constitute a key area for public action by governments concerned about livelihoods and the collective sense of justice. There is a strong moral case for addressing legacy land issues.

Second, and from a private sector perspective, there is a robust business case for taking legacy land issues seriously. They are an important element of the ‘land tenure risk’ any company investing in land should consider (de Leon et al., 2013; TMP Systems, 2015). Lack of data makes it impossible to estimate the costs they can create for businesses. But it is clear that failure to address such issues can have substantial reverberations for agribusiness ventures, including legal risks (e.g. disputes over legal title,

lawsuits), operational risks (e.g. encroachment on company land, outright land occupations, sabotage) and reputational risks (adverse local to global campaigning) (Box 2).

Conversely, by tackling legacy land issues, companies can strengthen their social licence to operate. This would include situations where, for reasons of opportunity, companies prefer not to be seen to formally accept responsibility for historical wrongs, but work ‘behind the scenes’ to address the substantive concerns at stake (interview with company official, 3 February 2016). Interventions may involve collaboration with the government, which has ultimate responsibility for land governance in its jurisdiction.

Third, there may be legal grounds for tackling legacy issues. In acquiring another company, depending on the legal structure of the deal and the terms of the contract, an enterprise would take over its assets, but it could also take over its liabilities. In addition, in some countries legislators have passed laws providing for land restitution to redress historical land dispossession.

For example, Colombia’s Victims and Land Restitution Law of 2011 was adopted in the context of the country’s peace process, whereas South Africa’s Land Restitution Act of 1994, as amended, aims to deal with the legacy of apartheid. This type of legislation may force companies to deal with land issues that predated their operations; depending on the law, companies can take steps to adapt to the new legal context, but ultimately they must comply.

Box 2: How legacy land issues can adversely affect an investment

The case studies provide examples of how legacy land issues can adversely affect a business. In a sugarcane venture in Malawi, villagers encroached on the concession, leading to a court case and ultimately a negotiated solution with the current plantation operator (Bledsoe et al., 2015).

In Liberia, land disputes linked to an oil palm and rubber plantation led the current management to commission an independent assessment and implement recommendations including enhanced community engagement (TFT, 2013). In Cameroon, a dispute relating to a privatised oil palm plantation resulted in use of transnational grievance mechanisms and a negotiated solution (French NCP, 2013).

In Colombia, a land dispute rooted in the country’s history of conflict and displacement resulted in court litigation between oil palm companies and small-scale farmers, and a foreign buyer ultimately discontinued the business relationship (The Body Shop, 2010). In one oil palm venture in Indonesia, villagers affected by legacy land issues reportedly disrupted land delimitation conducted by the investor (Firdaus et al., 2013); in another, they were accused of stealing oil palm fruit from the plantation (Colchester et al., 2011).

Box 3: Why look at legacy land issues? Insights from human rights jurisprudence

In a case study from Paraguay, an indigenous community sought restitution of its ancestral land. The land began to be acquired by British businessmen in the 19th century, and over time was gradually divided up and transferred to private ranchers. After lengthy national litigation in the 1990s, the case reached the Inter-American Court of Human Rights. The court found the indigenous community still held a collective right to property over land of which it had ‘unwillingly’ lost possession, and was entitled to land restitution (*Sawhoyamaya Indigenous Community v. Paraguay*, paragraph 128). This finding was cited with approval in subsequent human rights jurisprudence, including in Africa (*Centre for Minority Rights Development and Minority Rights Group International v. Kenya*, paragraph 209).

While operational standards are often silent on legacy land issues, international law and guidance provide clear pointers on the need to identify and address such issues. For example, international human rights jurisprudence has clarified that historical dispossession of ancestral lands does not necessarily extinguish customary land claims.

It has also clarified that the collective human right to property of indigenous and local communities can continue to exist after they have lost physical possession of their land, and even after a business has subsequently acquired that land (see Box 3). Some national human rights institutions have held that a company could be liable for grievances even if it was not directly involved with the contested land acquisition, if it directly benefited from it (NHRCT, 2015).

In addition, several international ‘soft law’ instruments deal with legacy land issues either directly or indirectly. While IFC Performance Standard 5 provides no specific guidance, legacy issues are indirectly referred to in the accompanying IFC Guidance Note. Legacy land issues also feature in the VGGT, in the Guiding Principles on Business and Human Rights and most explicitly in the RSB Principles and Criteria (Table 1).

Several ‘derivative’ guides developed to operationalise international instruments also address legacy land issues, including the guides developed by the Comité technique ‘Foncier et Développement’ (2014) and the Interlaken Group (2015a), and the analytical framework developed by the New Alliance for Food Security and Nutrition (2015). Additionally, CDC (2016) has just released new guidance on legacy land issues.

To sum up, dealing with legacy land issues may be needed to address continuing adverse livelihood impacts and perceived injustices; it makes business sense, even if it is done covertly and without formal acknowledgment of liabilities for historical wrongs; and depending on the circumstances, it may respond to national law requirements and to international law and guidance.

2.2 Anatomy of legacy land issues

A good understanding of legacy issues is crucial for taking effective action. In delimiting the parameters of this paper, Section 1 identified some key features of legacy land issues. This section elaborates further on some of those.

Legality and legitimacy, perceptions and reality

The relationship between legality and legitimacy, and between perceptions and reality, is key to understanding legacy land issues. In some of the case studies reviewed, villagers or NGOs claimed that irregularities vitiated the original acquisition (e.g. Colchester et al., 2011). But even where it is recognised that the original land acquisition complied with applicable law, its legitimacy may still be contested.

This may owe to a perceived lack of adequate consultation or compensation, or be because the acquisition occurred in a socio-political context that did not allow people to voice their concerns and aspirations freely. How people *perceive* the events surrounding the original land acquisition and subsequent developments matters a great deal in framing legacy land issues, irrespective of how the events actually unfolded (interview with company official, 13 November 2015). Perceptions can change over time.

The important role of perceptions is a recurring feature of land issues in agribusiness investments. But legacy situations compound this dimension, because reliable records of historical events may not be available. These insights have direct practical implications. For example, the important role of perceptions compounds the case for a company to address legacy land issues irrespective of who may have been legally responsible for the historical conduct.

Also, in conducting land tenure due diligence, the company would need to consider both legal and social aspects if it is to identify legacy issues effectively. Transactions that appear unproblematic based on the legal paperwork and official accounts alone could still belie significant tensions that can be identified only through sustained investment in community engagement.

Changes of law intervening after the original land acquisition can increase complexity. Conduct that may have been lawful when the land was first acquired may no longer be legally acceptable. While in principle legality should be assessed against the rules applicable at the relevant time, intervening legal changes can affect expectations and perceptions.

Table 1: Should legacy land issues be addressed? What international instruments say

Guiding Principles on Business and Human Rights	<p>As part of the broader corporate responsibility to respect human rights, Principle 17 calls on business enterprises to identify, prevent and mitigate not only the human rights impacts an enterprise may cause or contribute to but also other impacts directly linked to the enterprise's business relationships. The Commentary to this Principle clarifies that 'human rights risks [i.e. the business enterprise's potential adverse human rights impacts] ... may be inherited through mergers or acquisitions'.</p>
VGGT	<p>The VGGT do not explicitly mention legacy land issues. However, several VGGT provisions are directly relevant to those issues.</p> <p>The Guidelines use a broad concept of 'legitimate tenure rights', including 'rights not currently protected by law' (paragraphs 4.4, 5.3 and 7.1). In other words, the concept of legitimate tenure rights encompasses social perceptions of legitimacy, which, as we will discuss, are an important part of legacy land issues.</p> <p>The VGGT call on states to consider, where appropriate, 'providing restitution for the loss of legitimate tenure rights to land' (paragraph 14.1). So rights to land that claimants may have been dispossessed of in the past can still be deemed legitimate and deserving of public intervention.</p> <p>The Guidelines explicitly tie legitimate tenure rights to the corporate responsibility to respect human rights, integrating key concepts from the Guiding Principles on Business and Human Rights (paragraph 3.2). The latter explicitly refer to legacy issues.</p> <p>The VGGT refer to compliance with international obligations, for example in relation to indigenous peoples. As discussed (Box 3), these obligations extend to land that indigenous peoples unwillingly lost possession of.</p> <p>Provisions calling on investors and investments to respect legitimate tenure rights (e.g. paragraphs 12.4 and 12.12) should be interpreted in light of this broad conception of legitimate tenure rights.</p>
IFC Performance Standards	<p>Performance Standard 1 provides guidance for situations where the government clears the land of occupants to make land available to the agribusiness venture. It calls on the company to identify the risks, the entities involved and opportunities to collaborate with those entities to help achieve IFC-compliant environmental and social outcomes (paragraph 2).</p> <p>Performance Standard 5 states that, '[w]here land acquisition and resettlement are the responsibility of the government, the client will collaborate with the responsible government agency, to the extent permitted by the agency, to achieve outcomes that are consistent with this Performance Standard. In addition, where government capacity is limited, the client will play an active role during resettlement planning, implementation, and monitoring [...] (paragraph 30).</p> <p>On the other hand, IFC Performance Standards do not provide guidance on legacy land issues as defined in this paper (i.e. linked to subsequent transfers of project ownership). However, the Guidance Note accompanying Performance Standard 5 refers to 'special attention' being required 'if project-related land acquisition occurs in an area with widespread land disputes or in a post-conflict country/region/area from which people were expelled (or chose to leave) due to conflict, and where the ownership of land is not clear at the moment of acquisition' (paragraph GN7).</p> <p>In these contexts, the Guidance Note states that clients should apply the Guiding Principles on Business and Human Rights. They should also identify and consult with individuals and communities as part of their assessment of legal, social and reputational risks surrounding land acquisition (paragraphs GN7 and GN9).</p> <p>Establishing whether the previous project proponent complied with IFC standards may be a key part of due diligence exercises.</p>
RSB Principles and Criteria	<p>Principle 12 reads: 'Biofuel operations shall respect land rights and land use rights.' Minimum requirements under Criterion 12a.1 clarify: 'Land under legitimate dispute shall not be used for biofuel operations until any legitimate disputes have been settled through Free, Prior and Informed Consent and negotiated agreements with affected land users.'</p> <p>The RSB Guidelines for Land Rights define a 'legitimate dispute' as 'any dispute in which an affected individual, incorporated body or group asserts that their rights, interests or negotiated agreements have been violated either previously or by the operator or a state agency that has permitted the operation' (p. 25).</p> <p>The RSB Guidelines for Land Rights explicitly refer to legacy issues. They state that '[i]t is imperative that operators acquiring lands, especially in high risk areas, check out the history of land deals for the parcels or areas on offer to make sure that the lands they are being offered are legitimate and not encumbered with disputes' (p. 10). The Guidelines require free, prior and informed consent and provide for its retrospective application to legacy land issues (pp. 20-21).</p>

Box 4: Political change and legacy land claims

In Indonesia, the Suharto regime awarded many palm oil concessions. The democratic transition in the late 1990s opened new spaces for citizens to speak out. In recent years, contestation of new and longstanding concessions has increased, amid concerns about deforestation and carbon emissions from forest fires to clear land for oil palm cultivation. In this context, an oil palm concession faced opposition, leading to confrontation and negotiation between villagers and the new management (Colchester et al., 2011).

Historical roots and ongoing developments

Legacy land issues are rooted in history but are not static. Their manifestation can evolve with changing actors and circumstances. Experiences from Liberia and the Democratic Republic of Congo indicate that the acquisition, further development and/or expansion of an existing operation can itself reignite latent disputes. This is particularly true where the pre-existing operation was abandoned or had stalled, neighbouring communities had occupied unused concession land and/or the arrival of a new company creates new pressures or expectations (GreenCons, 2010; interview with NGO official, 24 November 2015).

Also, after the folding of an agribusiness venture that had been operating under a state-issued concession on public land, villagers claiming historical land rights may expect the land to be returned to them.³ An elder affected by an oil palm plantation in Liberia was cited as saying, '[w]hen [the previous project proponent] left, instead of turning the farm over to us as owners of the land, the Government voted to turn the farm over to [the new project proponent] without consulting us' (Green Advocates and FPP, 2012: 19). Depending on the context, gaps may exist between legal provisions empowering government agencies to reallocate the land and social perceptions of legitimacy. As a result, the award of a new concession can exacerbate land issues, rather than the new operator company just 'inheriting' pre-existing issues.

In addition, changing contexts may influence the nature and intensity of legacy land issues. These can include political transitions from authoritarian rule to democracy, which can bring to the fore land disputes that previously could not be discussed openly (Box 4). Changed demographic pressures and lack of alternative livelihood opportunities can also affect legacy land issues: where population growth increases competition for land, and where livelihood options outside agriculture are limited, youths may struggle to access the land they need to establish a new family. In turn, this can foster resentment towards agribusiness ventures seen to have taken the best land in the area (interview with land tenure experts, 6 November 2015).

The case of a sugarcane venture in Malawi illustrates how changing contexts and intergenerational issues can come into play. The current operator took over the project from a company that had established the plantations back in the 1960s and 1970s, when the country was under authoritarian rule. In recent years, the project has faced some simmering resentment and open land disputes, including a court case initiated by the company against villagers whom the company claimed had encroached on its land.

While the elders may remember the negotiations that occurred decades ago, youths now struggling to access increasingly scarce land may be more inclined to challenge a deal they were not consulted about (interview with land tenure experts, 6 November 2015). This example illustrates that legacy situations can involve complex intra-community issues, in addition to issues affecting 'external' relationships with companies and with the government.

Besides demographic growth, the award of other agribusiness or extractive industry concessions, or the establishment of natural parks, may exacerbate the squeeze on local landholdings. In Cameroon, growing pressures on land from other sources have compounded disputes about an oil palm plantation dating back to the 1960s (according to Gerber, 2008).

To sum up, legacy land issues may have deep historical roots, but present developments often shape the nature and intensity of any disputes. Again, these insights have practical implications, because – depending on the context – action to address the current drivers of resentment or contestation can be an important element of strategies for dealing with legacy land issues. Also, effective baselines are important to disentangle genuine legacy issues from 'new' land claims emerging in the context of changing demographics and resource pressures.

Diverse contexts, issues and claims: towards a typology of legacy situations

Legacy land issues are extremely diverse, reflecting the different contexts in which the issues arose and unfolded, the diverse actors, relations and claims at different points in time and ultimately the diverse options available to address those issues.

3 USAID (2015) notes that what to do when an agribusiness investment comes to a close depends on the circumstances, including contractual provisions, but '[t]o the greatest extent possible, it is preferable to return land rights to local women and men rather than allowing the land rights to revert to the state' (p. 53). See also Cordes et al. (2016).

In some of the case studies, legacy land issues were linked to conduct attributable to the previous project proponent or its business partners. In others, they were rooted in the wider historical circumstances prevailing at the time of the original land acquisition, or even further back in time. Legacy situations associated with armed conflict and mass displacement can raise particularly difficult land issues (interview with international consultant, 14 October 2015).

In addition, the transaction may be part of a full-scale corporate merger or acquisition involving the takeover of a whole business and its multiple operations in different countries. Alternatively, it may be confined to the acquisition of a specific operation, and virtually all the case studies concerned this latter scenario. Full-scale corporate takeovers raise more difficult challenges in identifying the legacy land issues that may be at stake in the company's diverse farming operations.

In addition, legacy land issues present different features depending on whether the company acquires the plantation through a direct transaction with the previous project proponent (e.g. in the Colombia example; Vargas et al., 2010) or through a reallocation by the government of land previously leased to another agribusiness venture (in several other case studies).

In the former case, the deal may be a purely private transaction, leaving less room for the government to intervene (interview with development agency officials, 16 February 2016). However, where the land is held under a state-issued concession, contractual clauses can condition to government approval direct or indirect transfers between private parties. In some cases, the farm has formed the object of several transactions since its first establishment, creating additional challenges in tracing legacy issues.

Legacy land issues may directly affect a company's own operations, or land used by suppliers or outgrowers (for an example from Malawi, see Zamchiya and Gausi, 2015). Other land issues that are only indirectly linked to the company's operations may include, for example, disputes about the distribution and use of any land rental fees paid by the company's predecessor(s). These more indirect legacy land issues can be more difficult to address, because

the company may have limited control (interview with researcher, 1 December 2015).

Besides pre-existing land disputes, a company can also inherit progressive commitments the previous project developer may have offered to promote local support. This situation can result in legacy issues of a different kind, for example where the acquiring company has more conservative social responsibility policies, or operates in a more difficult environment, for example because of significantly lower commodity prices. Issues linked to the new company not taking forwards solutions explored by the previous project proponent emerged in one case study from Indonesia (Colchester et al., 2011).

Finally, legacy situations can vary significantly according to the diverse demands villagers and NGOs advance. In some of the case studies, demands were framed in terms of land restitution or reallocation. Examples include cases from Colombia (GRAIN et al., 2014) and Paraguay (*Sawhoyamaxa Indigenous Community v. Paraguay*). In other cases, demands involved more specific issues, such as compliance with promises made by the predecessor company (e.g. in a case study from the Democratic Republic of Congo; interview with NGO official, 24 November 2015). Diverse demands ranging from land restitution to specific improvements can coexist in the same business venture.

Table 2 summarises these classifications. Reflecting the complexities that can characterise real-life situations, the table frames the typology in terms of gradations along a spectrum, rather than 'either/or' parameters.

2.3 Roles, responsibilities and timeframes

Roles and responsibilities

Legacy land issues raise important questions about the role of different actors. Companies may feel it is not their role to remedy a country's historical wrongs. Yet, as discussed, there is a strong moral, business and (depending on the context) legal case for companies to address legacy land issues, whether explicitly or implicitly. This may include action by the agribusiness company operating the project,

Table 2: Wide-ranging legacy land issues: towards a typology

Origins of legacy land issues:	From the conduct of the previous project proponent to the historical context of the original land acquisition
Nature of the transaction (I):	From the takeover of a specific operation to a full-blown corporate merger or acquisition
Nature of the transaction (II):	From a transaction between private parties to land reallocation by the state
Relationship with the agribusiness company:	From issues affecting a company's own operations to issues affecting land used by suppliers or outgrowers
Nature of the issues:	From inheritance of land disputes to inheritance of 'progressive' commitments the new operator may be unable or unwilling to honour
Nature of the demands:	From demands for land restitution to calls for improvements in the terms of the operation

but also action by its business partners – for example lenders, end investors and buyers.

Indeed, there is much that lenders, end investors and buyers can do to push for higher standards and provide support for compliance. In at least one case (from Colombia), a buyer discontinued the supply arrangement as a result of unresolved legacy land issues (The Body Shop, 2010).

In several case studies, the company appears to have been left to deal with legacy land issues on its own. Yet governments are ultimately responsible for land governance within their jurisdiction. They have a duty to protect human rights from business interference, as reflected in the Guiding Principles on Business and Human Rights (Principle 1). Government conduct may have contributed to the legacy land dispute (interview with NGO official, 18 February 2016).

Also, governments may resist resolving legacy disputes out of concerns about setting a precedent. Local resentment created by legacy situations may be directed at the government, which allocated the land, more than the company that acquired it (interview with land tenure experts, 6 November 2015). On the other hand, governments can make a difference through enabling legislation or on-the-ground interventions, possibly including brokering dialogue between companies and affected people (interview with government official, 12 February 2016).

NGOs have been working on legacy land issues in the case study ventures reviewed primarily by putting the issue on the agenda and supporting affected people. Some of the literature that most explicitly addresses legacy land issues involves NGO reports. In at least three case studies (from the Democratic Republic of Congo, Indonesia and Liberia), NGOs provided technical or other support to local groups in relation to legacy land issues.

Donors have been supporting government or NGO action, and in some cases their private sector financing arms have been directly confronted with legacy land issues. Yet donors may also have historical ‘baggage’ in the country, particularly where legacy land issues are rooted in the colonial era. This context can create complexities and sensitivities that interventions involving the establishment of new operations are less likely to face.

Historical injustices and good faith transactions: How far back in time is it possible or justifiable to look?

A recurring question in dealing with legacy situations is how far back in time it is possible or justifiable to go when

screening for potential legacy issues. Virtually all land has formed the object of some dispute at some point in history. Lack of clear time parameters can undermine legal certainty and the security of land transactions effected in good faith.

Depending on applicable law, certain claims arising from legacy land issues might be extinguished because they are legally time-barred. Also, in some countries, legal norms protect good faith possession. One emblematic example is the concept of prescriptive acquisition (*usucapio*), which applies particularly in jurisdictions derived from Roman law. Based on this concept, long-term, good faith, uninterrupted and uncontested possession would heal irregularities in the original land acquisition, and confer land ownership on the possessor.

However, prescriptive acquisition would not apply where a company accesses land as a long-term concessionaire or lessee, rather than acting as a private owner (a common requirement for prescriptive acquisition). In addition, human rights recognised in the national constitution or international treaties would override the application of property law concepts such as prescriptive acquisition.

Beyond the legal dimensions, perceptions of legitimacy matter a great deal in historical disputes. Some interviewees remarked that, in the eyes of people with a strong cultural, social and spiritual connection to the land, even events that happened decades before can still be deemed relevant to the present situation (interview with legal professionals, 2 February 2016).

International instruments provide little or no guidance on these issues. In envisaging the possibility of land restitution to remedy the dispossession of legitimate tenure rights, the VGGT provide no pointers on appropriate cut-off dates or on the relevance, if any, of prescriptive acquisition (VGGT section 14).

Ultimately, it is impossible to discuss timeframes in abstract terms. Much depends on the circumstances. The case studies provide examples of disputes with distant historical roots – in one case from Paraguay, dating back to dispossession that occurred in the 19th century. The extent to which affected people still have a genuine relationship with the land they were dispossessed of emerges as the main criterion for assessing whether a land issue is still ongoing (*Sawhoyamaxa Indigenous Community v. Paraguay*, paragraphs 118, 121 and 131–4).

3. Identifying legacy land issues

This section explores ways to identify legacy land issues at both company and systemic levels. The company-level discussion focuses on due diligence. Systemic identification highlights the role governments and NGOs can play in detecting legacy land issues, including before they escalate into actual disputes.

3.1 At company level: due diligence

Due diligence involves investigating an individual or a company ahead of a business transaction in order to confirm relevant material facts and identify potential risks and liabilities. The scope of a due diligence process varies depending on the nature of the business targeted as well as that of the business transaction.

In agribusiness investments, due diligence may be carried out by the company that takes over the venture, or by a lender or end investor when considering whether to provide financing to the agribusiness. Buyers also conduct due diligence on their prospective suppliers. Lawyers or consultants are often commissioned to conduct this work.

Due diligence in agribusiness investments is likely to include scrutiny of the land rights the company being acquired holds. Conventionally, this land tenure due diligence is often framed in narrow legal and commercial terms. It often aims to establish whether earlier transactions complied with applicable law, and whether as a result the company holds secure land rights opposable to third parties and capable of being transferred to the acquiring company.

A review of applicable law and of project-specific legal documentation is a key part of this process, including lease agreements, land titles and entries in the land register. Failure to conduct proper land tenure due diligence can expose companies to contestation of the legality of their title. In some of the case studies, NGOs alleged irregularities in the original acquisition to argue that subsequent transactions were vitiated (e.g. Colchester et al., 2011, writing about an oil palm operation in Indonesia).

It was impossible to obtain information about the due diligence processes conducted at the time of the latest acquisition for the case studies reviewed. In most cases, however, there is nothing to suggest any due diligence conducted did pick up on the latent legacy land issues that would subsequently become apparent.

Talking about a sugarcane venture that changed hands in the late 1990s and that faced land disputes after the transaction, a company official said that, while she had no specific information about the due diligence conducted at the time, she expected that ‘nothing “dubious” came out of it as all the lease documents were in order’ (interview with company official, 13 November 2015).

It is clear that, while conventional due diligence exercises confined to legal paperwork can shed light on the legality of the acquisition and the legal robustness of the chain of title, they can fail to identify important land issues grounded in local perceptions of social legitimacy. Narrowly focused due diligence exercises may shed little light on applicable customary land rights, on historical grievances linked to the circumstances of the original land acquisition, on contestation *vis-à-vis* community representatives who may have signed deals in the past or on simmering tensions at the local level.

For these reasons, several interviewees highlighted the importance of complementing conventional approaches to land tenure due diligence with historical investigation, fieldwork and effective community engagement. This enhanced approach would involve collecting information on the history of the land acquisition, the context in which it occurred (e.g. political space for dissent; any evidence of harassment, intimidation or violence), any consultations conducted and compensation paid and any latent or actual land disputes. The emergence of ‘red flag’ issues could trigger more in-depth historical and field research, especially for complex projects involving sizeable landholdings and contested facts.

Some interviewees emphasised the need to mobilise specialised expertise in social and environmental issues (interview with company official, 3 February 2016), and some lawyers conducting due diligence for large-scale investments do complement conventional legal due diligence with field visits by social and environmental experts (interview with legal professionals, 2 February 2016).

This ‘enhanced’ due diligence bears some resemblance to social impact assessment exercises. These assessments provide an important mechanism in their own right for identifying pre-existing land issues at project inception stage. However, a change in project ownership would not necessarily trigger a legal requirement for a new impact assessment – unless the new venture involves, for example,

Box 5: Due diligence in the Guiding Principles on Business and Human Rights

Principle 15: In order to meet their responsibility to respect human rights, business enterprises should have in place ‘[...] (b) A human rights due diligence process to identify, prevent, mitigate and account for how they address their impacts on human rights [...]’.

Principle 17: ‘In order to identify, prevent, mitigate and account for how they address their adverse human rights impacts, business enterprises should carry out human rights due diligence. [...] Human rights due diligence: (a) Should cover adverse human rights impacts that the business enterprise may cause or contribute to through its own activities, or which may be directly linked to its operations, products or services by its business relationships [...]’.

Commentary to Principle 17: ‘[...] Human rights due diligence should be initiated as early as possible in the development of a new activity or relationship, given that human rights risks can be increased or mitigated already at the stage of structuring contracts or other agreements, and may be inherited through mergers or acquisitions. [...] Questions of complicity may arise when a business enterprise contributes to, or is seen as contributing to, adverse human rights impacts caused by other parties. Complicity has both non-legal and legal meanings. As a non-legal matter, business enterprises may be perceived as being “complicit” in the acts of another party where, for example, they are seen to benefit from an abuse committed by that party’ (our emphasis).

Principle 18: ‘In order to gauge human rights risks, business enterprises should identify and assess any actual or potential adverse human rights impacts with which they may be involved either through their own activities or as a result of their business relationships. This process should: (a) Draw on internal and/or independent external human rights expertise; (b) Involve meaningful consultation with potentially affected groups and other relevant stakeholders, as appropriate to the size of the business enterprise and the nature and context of the operation.’

Box 6: Due diligence in certification standards

The RSB Principles and Criteria state: ‘Existing land rights and land use rights, both formal and informal, shall be assessed, documented, and established. The right to use land for biofuel operations shall be established only when these rights are determined’ (Principle 12, Criterion 12.a). Relevant ‘minimum requirements’ read: ‘Where the screening exercise of the RSB impact assessment process reveals a negative impact to existing land rights and land use rights by biofuel operations, the Participating Operator shall conduct a Land Rights Assessment [...]. Land under legitimate dispute shall not be used for biofuel operations until any legitimate disputes have been settled through Free, Prior and Informed Consent and negotiated agreements with affected land users.’

As discussed, the RSB Guidelines for Land Rights state that ‘it is imperative that operators acquiring lands, especially in high risk areas, check out the history of land deals for the parcels or areas on offer to make sure that the lands they are being offered are legitimate and not encumbered with disputes’ (p. 10).

expansion or modification of the pre-existing one. But the new management could conduct a new independent impact assessment even if this is not legally required, and in at least one case study pressure from development finance institutions (DFIs) led the current operator to carry out an environmental and social assessment of its oil palm operations (Digby Wells, 2015).

While due diligence is conducted purely for the company’s benefit and usually remains internal documentation, impact assessments could (should) lead to public documentation and typically involve other actors too, including government approval and possibly requirements for public hearings and local consultation. These requirements may provide enhanced opportunities to identify relevant land issues (for guidance on legacy issues in social impact assessments, see Vanclay et al., 2015).

Therefore, close scrutiny of prior impact assessment documentation, including any sections on land issues, is an important part of land tenure due diligence exercises, as

is scrutiny of compliance with measures identified in the impact assessment or related management plans (interview with legal professionals, 2 February 2016).

International guidance has helped broaden out the traditional scope of due diligence processes. The Guiding Principles on Business and Human Rights place ‘human rights due diligence’ at the centre of the corporate responsibility to respect human rights (Principles 15 and 17). The human rights due diligence provides a mechanism for companies to identify actual or potential human rights impacts, including any related to land and including on the basis of effective community consultation (see Box 5).

Implicitly referencing concepts from the Guiding Principles, IFC Performance Standard 1 states that ‘due diligence against these Performance Standards will enable [the company] to address many relevant human rights issues in its project’ (paragraph 3). The RSB standard also contains references to due diligence, in some cases with explicit links to legacy land issues (see Box 6).

While the VGGT do not offer detailed guidance on due diligence processes, they provide an important benchmark for conducting land tenure due diligence. They call for recognition, respect and protection of all ‘legitimate tenure rights’. These are taken to include not only rights backed by national legislation but also those perceived to be socially legitimate even if they are ‘not currently protected by law’ (paragraphs 4.4, 5.3 and 7.1).

This broad concept of legitimate tenure rights is likely to encompass a wider range of tenure rights than is often considered in conventional due diligence exercises. It strengthens the case for an enhanced approach to due diligence that goes beyond purely legal dimensions. Particular attention is needed when taking over projects initiated before the VGGT were formally endorsed in 2012, as social impact assessments and due diligence exercises may have fallen short of the benchmark established by the VGGT.

Some documentation provides more specific guidance on how to conduct enhanced land tenure due diligence, including documents drawn up to operationalise the international instruments mentioned above – particularly the VGGT. Overall, these documents compound the case for in-depth land tenure analysis and expertise, going well beyond legalistic approaches to due diligence. Examples include Comité technique ‘Foncier et Développement’ (2014), FAO (2016), Interlaken Group (2015a) and New Alliance for Food Security and Nutrition (2015).

In practice, identifying historical land issues can be difficult. These issues may be sensitive and not easily spoken about at the local level. Identifying them requires time, resources and dedication, not least because it implies a degree of trust that is often difficult to build – particularly where historical disputes have entrenched mistrust in relations between company, government and different local groups (interview with company official, 12 November 2015). Ensuring proper resourcing, sourcing the necessary specialised skills and factoring adequate time in due diligence processes all emerge as key imperatives (see also CDC, 2016).

3.2 At systemic level: identifying situations likely to create legacy land issues

The discussion thus far has focused on a tool to identify legacy land issues from the perspective of the acquiring company. However, legacy land situations also present systemic dimensions, and they can affect different actors too. Addressing these issues can require interventions by multiple actors. Systemic interventions could decrease the likelihood that the takeover of one or more operations will trigger or reignite land disputes. This raises the need for tools to enable actors other than the company to identify, in systemic terms, situations that can create legacy land issues, and possible measures to address them.

For example, a history of armed conflict and mass displacement followed by widespread, contested land transactions can increase the likelihood of legacy land disputes throughout the national territory or in specific parts of it (see Box 7 on Colombia). A case study involving claims for land restitution in Paraguay’s Chaco region is but one of several land disputes rooted in claims of historical land dispossession in that part of the country (Slack, 1995). The existence of abandoned colonial plantations, coupled with renewed business interest in acquiring those plantations, can also create a breeding ground for legacy land issues (a recurring issue in Liberia, for instance).

Finally, land deals in the recent wave of agribusiness investments have sometimes been concentrated in particular parts of a country, driven by concerns about soil quality, perceived land abundance, water access, government policy or infrastructure considerations (e.g. Cotula and Oya, 2014). This trend can also lead to the geographic concentration of agribusiness takeovers, and therefore of potential legacy land issues.

Based on publicly available information, the case studies provide few or no examples of the interventions governments and NGOs can undertake to identify legacy land issues in systemic terms. However, land use planning exercises at different levels of government could provide an avenue, focusing on those parts of the country that

Box 7: Conflict and displacement in Colombia

In Colombia, a land dispute between an agribusiness consortium and an association of local residents highlights the complexities that may be involved in legacy land issues. The dispute is part of a wider, contested transition from traditional to commercial farming methods, in a ‘complex milieu’ characterised by a history of armed conflict and mass displacement, by widespread lack of clarity about land ownership and by weak local government institutions (Vargas et al., 2010).

The dispute has its roots in land reform interventions dating back to the 1970s, followed by subsequent private land transactions that shifted ownership of the land to commercial farmers. At different stages over a 20-year period, the venture experienced disruption caused by militia groups, land occupations and evictions, new applications for land redistribution and high-profile international campaigning (Vargas et al., 2010). Both parties to the dispute have resorted to various types of court actions, including proceedings before Colombia’s Constitutional Court (Decision T-267/11 of 2011).

present higher potential for legacy land disputes. Equipping land management and investment promotion authorities with the skills and tools to screen for legacy land issues at investment approval stage is another possible strategy.

A wide array of mechanisms with wider potential application, such as parliamentary inquiries, could be used to identify systemic land issues linked to developments

in parts of the country. NGOs could establish 'land observatories' to monitor developments at national level or in priority geographic areas. They could also deploy field-level 'land rights monitors' in relevant parts of the country, in line with similar approaches implemented by NGOs to track evolving land tenure issues in non-legacy investment contexts (e.g. Twesigye, 2015).

4. Tackling legacy land issues

This section reviews experience with addressing legacy land issues. It discusses pointers provided by international law and guidance and also draws lessons from the case studies. The approaches reviewed range from community engagement and independent fact-finding through to land restitution, compensation, benefit-sharing and grievance mechanisms. The list is not exhaustive, and real-life experiences may combine multiple approaches. These approaches are commonly used to address land grievances in general (Cordes et al., 2016), and present important specificities when applied to legacy situations.

Quality is paramount in measures to address legacy land issues. For example, ‘participatory’ approaches depend significantly on who participates, at what stage, how and with what results. The desk-based nature of the research, the limited literature and the often-contested facts made it impossible for this study to assess quality in the case studies reviewed. And, in line with the overall approach followed in the paper, the case studies are discussed not as illustration of best practice but as experiences from which lessons can be drawn.

4.1 Community engagement and free, prior and informed consent

Given the broad conception of ‘legitimate tenure rights’ that encompasses social legitimacy, and the important ways in which perceptions of legitimacy can shape legacy land issues, effective community engagement is the foundation of any effort to address legacy issues. This consideration emerges from relevant international guidance and from several case studies. As discussed, international instruments rarely mention legacy land issues in explicit ways. But virtually all of them call for some form of community engagement, providing guidance that would be relevant to legacy situations.

Building on international treaties and declarations (particularly International Labour Organization (ILO)

Convention 169 and the UN Declaration on the Rights of Indigenous Peoples (UNDRIP)), international human rights jurisprudence at both global⁴ and regional⁵ levels has established free, prior and informed consent (FPIC) as an essential condition for protecting the human rights of indigenous and tribal peoples. Human rights law also emphasises the importance of consultation in large-scale development projects, including in situations not affecting indigenous peoples.⁶

All the international instruments reviewed call for community engagement, consultation and in some cases FPIC. That said, international instruments present considerable diversity, for example in relation to the specifics of FPIC requirements. In line with international human rights law, the VGGT and the IFC Performance Standards call for FPIC where indigenous peoples are affected, and for meaningful consultation in other cases. Both instruments provide guidance on how to conduct consultation exercises (see Table 3).

On the other hand, the RSB Principles and Criteria extend FPIC to all situations, including projects not affecting indigenous peoples (see Table 3). This latter approach is in line with other international instruments, such as Resolution 224 of the African Commission on Human and Peoples’ Rights (2012). As a result, specific consultation and FPIC requirements vary depending on the standards identified as being applicable to a specific operation, for example based on financing or certification arrangements.

Consultation and FPIC also feature prominently in guides derived from one or more of the above instruments. In seeking to operationalise the VGGT, for example, the Analytical Framework of the New Alliance for Food Security and Nutrition (2015) features several questions about identifying relevant stakeholders, conducting inclusive consultations, securing support for the project by ‘affected persons and the community at large’ and obtaining FPIC of indigenous peoples. The framework also identifies lack of support and lack of FPIC as ‘red

4 E.g. *Ángela Poma Poma v. Peru*, paragraph 7.6; International Committee on the Elimination of Racial Discrimination (1997), paragraph 5.

5 E.g. *Saramaka People v. Suriname*, paragraph 134; *Centre for Minority Rights Development and Minority Rights Group on behalf of Endorois Welfare Council v. Kenya*, paragraph 291.

6 E.g. the Basic Principles and Guidelines on Development-based Evictions and Displacement, UN Doc. A/HRC/4/18, paragraphs 38-39; and Large-Scale Land Acquisitions and Leases: A Set of Minimum Principles and Measures to Address the Human Rights Challenge, 28 December 2009, UN Doc. A/HRC/13/33/Add.2, Principle 2.

Table 3: Community engagement, consultation and FPIC

Guiding Principles on Business and Human Rights	As part of the process to identify human rights impacts, business enterprises should carry out meaningful consultation with potentially affected groups and other relevant stakeholders (Principle 18(b)).
VGGT	The VGGT call on states to secure the FPIC of indigenous peoples before approving proposed investments (paragraphs 9.9 and 12.7). They also call on states to consult holders of legitimate tenure rights, ensuring their ‘active, free, effective, meaningful and informed participation’ (paragraph 3B.6). A VGGT technical guide outlines how to implement the VGGT provisions on FPIC (FAO, 2014).
IFC Performance Standards	The IFC Performance Standards require stakeholder engagement including the consultation and participation of affected communities, and FPIC in specified circumstances involving indigenous peoples (Performance Standards No. 1, paragraphs 25, and 30-32; No. 5, paragraph 10; and No. 7, paragraphs 9-11).
RSB Principles and Criteria	Criterion 2.b reads: ‘Free, Prior & Informed Consent (FPIC) shall form the basis for the process to be followed during all stakeholder consultation, which shall be gender sensitive and result in consensus- driven negotiated agreements.’ Criterion 12.b reads: ‘Free, Prior, and Informed Consent shall form the basis for all negotiated agreements for any compensation, acquisition, or voluntary relinquishment of rights by land users or owners for biofuel operations.’

lines’ that would require the project not to proceed (New Alliance for Food Security and Nutrition, 2015, section II).

International guidance on consultation and FPIC tends to be framed in relation to new investments. The very notion of ‘prior’ consent implies the process occurs before a project is approved. The takeover of an existing operation differs considerably compared with a pre-investment situation. The agribusiness plantation may have been a reality on the ground for decades, inevitably affecting options for moving forward. People who lost land may have long moved elsewhere, they may have died and in any case they may be difficult to identify and contact.

At the same time, effective community engagement is the most effective way both to identify legacy issues and to develop consensual solutions. There is thus a strong case for retrospectively applying guidance on consultation and FPIC to legacy situations, and some international standards explicitly state this. The RSB Guidelines for Land Rights provide the clearest example. It is worth citing relevant text from these Guidelines:

‘Full respect for the right to FPIC, by definition, depends on rights-holders being allowed to make decisions ‘prior’ to the imposition of measures that may affect their rights. Yet operators will face numerous situations where such impositions have already occurred, either before they got involved at all, or before they were involved in the RSB or because laws and regulations forbid project developers approaching communities before initial permits have been obtained, or because of regrettable mistakes. [...]. All such impositions may have led to violations of people’s rights. [...] The RSB will not certify operations that are subject to legitimate disputes and this applies to inherited disputes [...]. Experience shows that retrospective application of FPIC [...] can be an effective means of remedy. The RSB requires such an approach’ (RSB Guidelines for Land Rights, pp. 20-21).

Applying FPIC on a retrospective basis is likely to raise difficult issues requiring careful thinking through. Questions include, for example, at what stage of the new contracting process retrospective FPIC should be applied, and what would happen to the existing operation should the FPIC process result in a negative outcome.

Experience from several case studies confirms the central place of community engagement in efforts to address legacy land issues. A sugarcane venture in Malawi provides a relevant example. The government originally granted land leases for two estates in the 1960s and 1970s. The current operator took over the estates in the late 1990s (Bledsoe et al., 2015). The example relates to one of the two estates. In recent years, there has been simmering resentment, amid growing land scarcity.

According to company sources, over time villagers encroached on company land that was not being used for agricultural production. Villagers and management had different views on whether the land formed part of the original land leases. The company saw it as being part of their lease; villagers argued it had been granted to the company’s predecessor under a separate, temporary arrangement that had now come to an end (interview with land tenure experts, 6 November 2015).

After occupations blocked the company’s access to the estate, the company took the dispute to court (Bledsoe et al., 2015: 30–1). Company sources suggest the company largely won the case, though it was impossible for this research to access the court judgement. While the judgement would have clarified legal rights and obligations, it did not resolve the issue on the ground, as villagers remained on the land (interview with company official, 13 November 2015).

The company pursued dialogue with the villagers. The resulting negotiated agreement formalised the existing situation, as the company subleased the land to the occupants. The agreement also established limits on further buildings and encroachments, specified that the land must be used for

community benefit and required villagers and the company to collaborate to protect surrounding natural resources (interview with company official, 13 November 2015).

Effective community engagement can involve important roles for government and NGOs. Officials may see themselves as potential ‘brokers’ of negotiations between companies and affected people (interview with government official, 12 February 2016). However, absence of government was notable in the community engagement processes in several case studies, and it was explicitly picked up in relation to a case study from Liberia (Panel of Experts on Liberia, 2011, citing company sources).

In several of the case studies, NGO advocacy helped inscribe land issues on the agenda, ultimately triggering community engagement. NGOs have also provided legal and other assistance to villagers. The VGGT explicitly mentions the need to consider ‘existing power imbalances between different parties’ in consultation exercises (paragraph 3B.6). They also refer to legal aid and assistance (e.g. paragraphs 6.6 and 7.4).

4.2 Independent or participatory fact-finding or land mapping and delimitation

Legacy land issues often involve contested facts and different perceptions of historical events. Creating a shared understanding can be an important element of strategies to address legacy land issues - because the acknowledgment of past events can itself help heal any injustices that may have occurred. All accounts, data, analysis and maps accepted by all parties provide a more solid basis for dialogue and ways forward.

This issue has received limited attention in international guidance, though most instruments refer to the need to systematically identify affected tenure rights (e.g. VGGT paragraph 12.10 and RSB Criterion 12.a; see also New Alliance for Food Security and Nutrition, 2015, section II). However, the issue has featured prominently in international human rights jurisprudence, where court declarations that authoritatively ascertain contested events constitute a form of redress in their own right (often referred to as ‘satisfaction’).

The issue also features prominently in the case studies reviewed. Approaches vary considerably in relation to both the objects of inquiry (e.g. historical events, existing boundaries) and its forms (e.g. independent third-party assessments, participatory fact-finding). While much hinges on the relationship between company and affected people, the experiences reviewed also involved important roles for credible third parties (commodity-based bodies, NGOs and entities straddling for- and non-profit worlds), for providers of land tenure expertise and for central and local government bodies.

At one end of the spectrum, companies have asked third parties to conduct independent technical assessments that they are prepared to accept as a basis for moving

forwards. In one case study from Liberia, a concession originally granted by government in 1954 changed hands several times until the early 2000s, when the project was suspended for security reasons and was subsequently taken over by the state. In 2009, the government signed a new concession with a foreign investor (Lomax et al., 2013).

Villagers claimed the original concession was awarded with inadequate consultation (Lomax, 2012). The Panel of Experts on Liberia (2011) established by the UN Security Council noted that ‘land disputes stemming from a lack of community consultation have long plagued many of the rubber plantations, and have flared up, in particular in connection with the new expansions of the [case study plantation]’ (paragraph 217). Given this situation, the new operator asked an independent organisation, The Forest Trust (TFT), to assess the extent to which the company followed FPIC when entering the area. The report noted gaps in the initial process and made operational recommendations (TFT, 2013).

At the other end of the spectrum are approaches that involve participatory establishment of data, maps or boundaries. Participatory land mapping and delimitation can be particularly relevant for example where legacy issues concern the boundaries of the historical land concession or of subsequent expansions, or where it is necessary to identify key community resources (e.g. wetlands, grazing lands, forests), the tenure rights applicable to those and ensuing limitations on business activities in those areas.

For example, participatory boundary retracements were conducted in one of the estates belonging to a sugarcane venture in Malawi. The retracements aimed to clarify the boundaries of the original land concession. The boundaries of this estate formed the object of contestation in the 1980s. When the current management took over, new development works reignited the dispute (Kiezebrink et al., 2015). In 2014, the company initiated a participatory boundary retracement to deal with the issue.

A government surveyor, a representative of the district commissioner, traditional authorities, a community-based committee and a land tenure expert conducted this exercise. It also involved local elders who remembered where the original boundaries were (interview with company official, 13 November 2015). However, the critical literature suggests some villagers still feel the boundaries of the concession are not completely clear (Kiezebrink et al., 2015).

4.3 Land restitution

Community engagement and independent or participatory fact-finding can pave the way to operational solutions for addressing legacy land issues. Land restitution, in whole or in part, can be an effective remedy to deal with land grievances (Cordes et al., 2016). It has emerged both at normative level and from the case studies.

Land can have special social, cultural or spiritual value, potentially making it irreplaceable in the eyes of indigenous or local communities. There is extensive international human rights jurisprudence on the restitution of ancestral lands to indigenous and tribal peoples, particularly cases decided by the Inter-American Court of Human Rights.

A case study from Paraguay, discussed in Box 1, provides one example. In a 2006 judgment, the Inter-American Court of Human Rights ordered the government of Paraguay to return land to an indigenous community within a specified period of time (*Sawhoyamaxa Indigenous Community v. Paraguay*, paragraphs 210 and 248(6)). In 2014, the Paraguayan parliament adopted a law providing for land expropriation (Law 5194 of 12 June 2014). The case highlights that, under international law, the government may have a legal obligation to return the land.

At the same time, legacy situations can raise difficult issues. The current operator may have acquired the land in good faith, unaware of historical claims and latent land disputes possibly dating back decades. Restitution may not always be possible or appropriate, for example if the land has been substantially altered or damaged (Cordes et al., 2016).

Restitution could also expose a government to claims under international treaties protecting investment (Cotula, 2015; Cordes et al., 2016), and it may be difficult to establish who to return the land to. As Section 2.3 discussed, operational guidance on how to deal with these issues is limited, though international instruments clearly inscribe restitution among the possible remedies to deal with land conflict (Table 4).

In the case studies reviewed, the issue of land restitution or reallocation has primarily come up in the context of contentious legal proceedings (e.g. concerning cases from Colombia and Paraguay). However, some case studies also illustrate partial forms of restitution of *use* rights. In a case from Malawi, discussed above, the company retained title but subleased part of the land to the villagers occupying it.

4.4 Compensation and benefit-sharing

Claims that the original land acquisition involved inadequate compensation, or compensation paid to the wrong people, are a recurring theme in legacy land disputes. Therefore, mechanisms to ensure affected people receive adequate compensation and participate in the economic benefits the agribusiness venture generates can be an important part of strategies to address legacy land issues.

Conceptually, compensation and benefit-sharing are clearly distinct: compensation is a one-off exercise to replace the value of an asset lost, whereas benefit-sharing can be an ongoing process and is not limited to the value of lost assets. In real-life situations, the two elements are often interlinked. International human rights courts have considered equitable benefit-sharing to be closely related to the rights to property and to payment of compensation.⁷ In pragmatic terms, long-term benefit-sharing can be more effective in restoring livelihoods than one-off compensation. Lack of benefit-sharing can compound adverse impacts on livelihoods, which may require higher levels of compensation.

Table 4: Land restitution in international instruments

Guiding Principles on Business and Human Rights	The Guiding Principles call on states to provide 'effective' remedies for human rights violations (Principle 25). The Commentary to this Principle clarifies that remedies include restitution. The fact that international human rights courts have ordered the restitution of land to indigenous and tribal peoples compounds the relevance of land restitution in a human rights context.
VGGT	Where appropriate, states should consider providing restitution for the loss of legitimate tenure rights to land (paragraph 14.1). Restitution can be delivered in two possible forms: whenever possible, the original parcels or holdings should be returned to those who suffered the loss; where this is not possible, states should 'provide prompt and just compensation' (paragraph 14.2). Restitution is also identified among the possible remedies for dealing with tenure disputes (paragraph 4.9), and as a mechanism to address tenure issues in conflict or post-conflict situations (paragraph 25.5).
IFC Performance Standards	IFC Performance Standard 7 states: 'Any relocation of Indigenous Peoples will be consistent with the requirements of Performance Standard 5 [on Land Acquisition and Involuntary Resettlement]. Where feasible, the relocated Indigenous Peoples should be able to return to their traditional or customary lands, should the cause of their relocation cease to exist' (paragraph 15).
RSB Principles and Criteria	The RSB Guidelines for Land Rights state: 'All persons and by extension peoples enjoy the right of remedy in the case of violations of their rights by omission or commission, and this includes the right to redress and / or restitution of their lands, territories and resources and other properties and intangible values taken or affected without their consent' (pp. 20-21).

⁷ E.g. *Saramaka People v. Suriname*, paragraphs 138–9.

Table 5: Compensation and benefit-sharing

Guiding Principles on Business and Human Rights	The Guiding Principles refer to financial or non-financial compensation as a remedy for human rights abuses (Commentary to Principle 25).
VGGT	<p>Where restitution is appropriate but impossible, states should provide prompt and just compensation (paragraph 14.2). In addition, states should provide just compensation for expropriations of tenure rights (paragraph 16.1).</p> <p>The VGGT provide detailed guidance on valuation and compensation. For example, compensation may be in cash or in kind (in the form of alternative land), or a combination of both (paragraph 16.3).</p> <p>Several VGGT provisions call for inclusive investment models that ‘support local communities’ and involve partnership with small-scale producers (e.g. paragraphs 12.2, 12.4, 12.6 and 12.9).</p>
IFC Performance Standards	While IFC Performance Standard 5 does not explicitly address legacy land issues, it provides extensive guidance on compensation, requiring compensation for loss of assets at full replacement cost in order to help displaced people ‘improve or restore their standards of living or livelihoods’. ‘Where livelihoods of displaced persons are land-based, or where land is collectively owned, the client will, where feasible, offer the displaced land-based compensation.’ ‘The client will also provide opportunities to displaced communities and persons to derive appropriate development benefits from the project’ (paragraph 9, footnotes omitted).
RSB Principles and Criteria	<p>Criterion 12b.1 reads: ‘No involuntary resettlement shall be allowed for biofuel operations. [...] Where land rights and land use rights are voluntarily relinquished and/or acquired on a willing seller-willing buyer basis, local people shall be fairly, equitably and timely compensated. Compensation for voluntary relinquishment and/or acquisition shall include appropriate balancing measures needed to preserve the ability of the persons concerned to sustain their livelihoods in an autonomous and dignified manner.’</p> <p>The RSB Guidelines for Land Rights clarify: ‘the ‘term “willing buyer/willing seller” refers to freely made transactions in land in which formal and informal rights-holders, including customary rights-holders, accept terms developed through negotiated agreements, for a fixed term or permanently, to rent, share or transfer their lands, and/or suspend or relinquish some or all of their rights, in exchange for shares, benefits, payments and/or compensation through a process which fully recognizes their rights including their right to free, prior and informed consent to the negotiations and eventual deal’ (pp. 24–5).</p>

In legacy situations, the close relationship between compensation and benefit-sharing is compounded by the fact that companies may be reluctant to formally acknowledge liability for historical wrongs. It may also be difficult to identify the people who would be entitled to compensation, or their heirs. For these reasons, companies may prefer to frame interventions in terms of benefit-sharing rather than compensation.

Compensation may be in cash or in kind – that is, in the form of alternative land of comparable quality. Cash compensation can raise issues about land valuation, particularly where land markets are not well established, and about use of significant cash payments if local economies are ill prepared (e.g. because of lack of effective banking networks). Some private sector interviewees also expressed concerns that cash compensation might attract others to move to the area in the hope of receiving payments. Provision of alternative land can raise issues about comparability of location and soil quality, about security of tenure rights to replacement land and about relations with other groups claiming or using that land.

Benefit-sharing arrangements can include community development funds, community–investor partnerships and more inclusive business models that involve local producers as suppliers or partners in the agribusiness venture. These arrangements meet other purposes too. They can be deployed to address conflict linked to unresolved historical disputes, but without going to the roots of the problem. As such, they ultimately provide no guarantee that land disputes will not resurface in future.

All the international instruments reviewed provide at least some guidance on compensation, and some also elaborate on benefit-sharing (see Table 5). In addition, there is extensive international human rights law and jurisprudence on compensation.⁸ There is also jurisprudence on benefit-sharing – namely, court judgements that have deemed benefit-sharing a constituent element of the protection of the collective right to property in the context of natural resource investments.⁹

Issues concerning compensation and benefit-sharing have come up in several case studies, involving different actors and configurations, though publicly available information on the specifics of these schemes is limited.

8 See e.g. ILO Convention 169, articles 15(2) and 16(4), and Committee on Economic, Social and Cultural Rights (1990, paragraph 6; 1991, paragraph 17; and 1997, paragraph 13).

9 E.g. *Saramaka People v. Suriname*, paragraphs 129 and 138–40.

For example, the issue of compensation was discussed in the context of a mediation process linked to an oil palm venture in Cameroon (French NCP, 2013). Measures related to compensation, local employment creation, social infrastructure and the establishment of a ‘cultural endowment fund’ formed the object of recommendations and follow-on action in relation to an oil palm and rubber plantation in Liberia (TFT, 2013).

The government also often has a role in compensation and benefit-sharing schemes. In a case from Paraguay, an international court ordered the government to establish a community development fund for social infrastructure projects, in conjunction with land restitution (*Sawhoyamaya Indigenous Community v. Paraguay*, paragraph 224).

4.5 Remedy and grievance mechanisms

Deeply felt grievances can underpin legacy land issues. Mechanisms for voicing and addressing these grievances are an essential part of any strategy to deal with legacy disputes. These mechanisms can also provide channels for disputes to be brought to the attention of governments or companies before they escalate any further.

The international instruments reviewed call for establishing grievance mechanisms and provide guidance on their features. Most also refer to legal remedies, so that,

while operational-level grievance mechanisms can play an important role, they should not preclude affected people from accessing legal redress where relevant (Table 6).

The Guiding Principles on Business and Human Rights establish access to remedy as one of their three main pillars, and provide guidance on various types of judicial and non-judicial mechanisms. The VGGT contain several provisions on access to justice and grievance mechanisms. The IFC Performance Standards and the RSB Principles and Criteria both require operators to establish suitable grievance mechanisms (Table 6).

Grievance mechanisms also feature prominently in guides derived from the above instruments. In seeking to operationalise the VGGT, for example, the Analytical Framework of the New Alliance for Food Security and Nutrition (2015) includes several questions about the existence and nature of grievance mechanisms, and requires compliance with the effectiveness criteria developed in the Guiding Principles on Business and Human Rights (section III).

The case studies reviewed illustrate the relevance of legal remedies and grievance mechanisms in legacy situations. Several cases involved national or international litigation (e.g. Colombia, Malawi and Paraguay) or use of grievance mechanisms associated with lenders (e.g. in one case from Indonesia) or with the Guidelines for Multinational Enterprises

Table 6: Remedy and grievance mechanisms

Guiding Principles on Business and Human Rights	Access to remedy is one of the three ‘pillars’ of the Guiding Principles. States must take appropriate steps to ensure access to effective remedy, including through ensuring the effectiveness of judicial mechanisms and through providing effective non-judicial grievance mechanisms (Principles 25–7).
	Business enterprises should establish or participate in effective operational-level grievance mechanisms for individuals and communities who may be adversely impacted (Principle 29).
	Industry, multi-stakeholder and other collaborative initiatives should ensure effective grievance mechanisms are available (Principle 30).
	Principle 31 sets out effectiveness criteria for non-judicial grievance mechanisms.
VGGT	The VGGT contain numerous references to access to justice and legal remedy (e.g. paragraphs 3.1.4, 4.9, 7.3 and 21).
	Specifically in relation to business operations, the VGGT effectively incorporate the Guiding Principles: ‘Business enterprises should provide for and cooperate in non-judicial mechanisms to provide remedy, including effective operational-level grievance mechanisms, where appropriate, where they have caused or contributed to adverse impacts on human rights and legitimate tenure rights’ (paragraph 3.2).
IFC Performance Standards	Performance Standards 1 (paragraph 35) and 5 (paragraph 11) require operators to establish a grievance mechanism.
RSB Principles and Criteria	Criterion 12a.1 reads: ‘Land under legitimate dispute shall not be used for biofuel operations until any legitimate disputes have been settled through Free, Prior and Informed Consent and negotiated agreements with affected land users.’
	The RSB Guidelines for Land Rights deals with respecting FPIC and includes text on grievances that reads: ‘No operation ever develops wholly as expected. To avoid difficulties escalating into disputes and even conflict, there should be readily accessible and previously agreed grievance mechanisms by which representative of both parties can raise their concerns with each other and gain redress. Grievance mechanisms should involve due process whereby concerns are recorded and the details of what actions.’ (p. 19).

administered by the Organisation for Economic Co-operation and Development (OECD; e.g. in a case from Cameroon).

In several cases, use of grievance mechanisms resulted in mediation and ultimately negotiated solutions. In Indonesia, for example, proceedings before the IFC Compliance Advisor/Ombudsman (CAO) paved the way to a mediation process (Box 8). Similarly, proceedings before France's National Contact Point (NCP) responsible for overseeing compliance with the OECD Guidelines for Multinational Enterprises ultimately led to a negotiated solution (French NCP, 2013).

The case studies also provide examples of how a process to deal with legacy land issues can lead to the establishment

of new grievance mechanisms. In a case from Malawi, the establishment of a grievance mechanism forms part of the 'roadmap' the company developed to deal land issues (interview with company official, 13 November 2015). In a case from Liberia, the establishment of grievance procedures followed a third-party independent assessment of land issues commissioned by the company (TFT, 2013). In the Democratic Republic of Congo, a social and environmental action plan adopted by the operator with support from one DFI backer involves the establishment of a new grievance procedure (Digby Wells, 2015).

Box 8: Grievance mechanisms and negotiated outcomes in Indonesia

A dispute concerning an oil palm venture in Indonesia has its roots in events dating back to the 1980s, though planting began in earnest in the 1990s and control of the venture subsequently changed hands several times (Colchester et al., 2011). After the venture was taken over by a foreign investor that received IFC financing, NGOs filed complaints with the IFC CAO (ibid.).

The complaints followed a first complaint filed in 2006 in relation to a different operation belonging to the same agribusiness group. In that case, the IFC CAO facilitated a mediation process that led to a negotiated outcome and a 2013 CAO final monitoring report finding satisfactory implementation (CAO, 2014).

In 2008 and 2011, NGOs filed two CAO complaints, including in relation to the case study project. The CAO arranged for an NGO to facilitate mediation between the parties (Colchester et al., 2011). A first round of meetings produced some early steps around capacity-building for the participants and joint land mapping (CAO, 2016). However, the process was interrupted after the investor sold its stake in the project and the new majority shareholder decided to withdraw from the CAO mediation process (ibid.).

5. Conclusion and recommendations

5.1 Summary of key findings

This Analytical Paper has developed a framework for understanding and addressing legacy land issues in agribusiness investments – exploring what these issues are, how they can be identified and what measures can be taken to address them. The analysis has distilled insights from expert interviews, from applicable international instruments and from case studies of agribusiness investments in Africa, Asia and Latin America.

Overall, the findings highlight ‘the difference between holding a legal right and having a “social license” recognized by local communities’ (Bledsoe et al., 2015: 13). Companies may legally hold rights to a piece of land, based on the original acquisition and the ‘chain of title’ created by subsequent transactions.

However, those rights may not be recognised as legitimate at the local level, given the actual or perceived circumstances of the original land acquisition (Bledsoe et al., 2015). The rights conferred by a land lease may also conflict with other rights to the same land based on customary and/or international human rights law. This situation can expose to contestation not only plantation operators but also their buyers and business partners.

Virtually all land has formed the object of some dispute at some point in history. Lack of clear time parameters can undermine legal certainty and the security of land transactions effected in good faith. International instruments provide little or no guidance on how far back in time it is possible or justifiable to go when screening for potential legacy issues. Ultimately, much depends on the circumstances. The case studies provide examples of disputes having distant historical roots. The extent to which affected people still have a genuine relationship with the land they were dispossessed of emerges as the main criterion for assessing whether a land issue is still ongoing.

Compared with agribusiness investments that involve the establishment of new plantations, legacy land issues present particularly difficult challenges. This is because of the interplay of past and present, which can involve ingrained distrust and entrenched, polarised positions; the central place of perceptions, expectations and strongly held beliefs that are intimately connected to the collective sense

of justice; and the often unclear roles and responsibilities of multiple actors at different points in time.

At the same time, legacy land issues have largely remained a blind spot in the literature and in international guidance. No international instrument provides comprehensive guidance on how to deal with legacy land issues in agribusiness investments, though some do touch on those issues. The IFC Performance Standards provide guidance on situations where the government acquires the land for the project but are largely silent on the legacy land issues corporate takeovers of agribusiness ventures raise. On the other hand, the Guiding Principles on Business and Human Rights apply to legacy issues, and the VGGT contain several provisions that are directly relevant to legacy land issues. The standard developed by the RSB provides the most explicit guidance.

Legacy issues also feature in ‘derivative’ instruments developed to operationalise the VGGT, including the guides developed by the Comité technique ‘Foncier et Développement’ (2014) and the Interlaken Group (2015a), and the Analytical Framework developed by the New Alliance for Food Security and Nutrition (2015). CDC (2016) has just released new guidance on legacy land issues.

Addressing legacy land issues requires acknowledging how the historical context still influences present conditions (Bledsoe et al., 2015). Depending on the situation, addressing past wrongs can be an important part of this effort. In many cases, however, the imperative is to recognise the past but focus on building a better future. There is much that companies, governments, NGOs and donors can do to make this happen.

Due diligence exercises can provide an avenue for companies to identify legacy land issues. Interventions to identify legacy land issues at a systemic level are also possible, as part of government-led land use planning and investment screening or through NGO scrutiny of investment processes. Approaches include community engagement and independent or participatory fact-finding or land delimitation, all the way through to land restitution, compensation, benefit-sharing and grievance mechanisms.

Table 7 summarises measures to identify and address legacy land issues. As the most comprehensive global instrument dealing with land governance issues, including

Table 7: Measures to address legacy land issues

Identifying legacy land issues	Companies: Due diligence Governments: Screening for legacy issues in land use planning and investment approval NGOs: Land observatories and monitoring work
Tackling legacy land issues	Community engagement and FPIC Independent and/or participatory fact-finding Independent and/or participatory land mapping and delimitation Land restitution Compensation (cash or in kind) Benefit-sharing arrangements (e.g. inclusive business, community development funds) Remedy and grievance mechanisms

Note: Table inspired by Indufor (2016).

– at least implicitly – legacy land issues, the VGGT provide a particularly relevant reference point for efforts to deal with legacy land issues.

Below we provide more recommendations. Some are specific to addressing legacy land issues; others involve strengthening land governance approaches in more general terms.

5.2 Recommendations

Agribusiness companies

Legacy land issues can expose companies to significant land tenure risk. It is therefore essential that, in taking over existing operations, companies carefully consider legacy land issues and take action to address any identified. Some measures involve cost implications that can seem challenging, particularly in times of low commodity prices. But the costs of failing to identify and address legacy land issues could be significantly greater – for the business and for affected people. Agribusiness companies should:

- **Develop clear corporate policies on land rights**, including legacy land issues and clear commitments to ensure all operations adhere to the VGGT.
- **Establish comprehensive strategies to deal with any legacy land issues**, based on solid baselines against which solutions can be developed, on effective community consultation and engagement with external stakeholders and, where relevant, on the retrospective application of FPIC.
- **Rethink land tenure due diligence processes** to investigate land issues not only from a legal and commercial perspective but also through 1) effective community engagement; 2) thorough review of any social impact assessment and of compliance with its recommendations; and 3) data collection on the history of the land acquisition, the context in which it occurred, any consultations conducted and compensation paid and any latent or actual land disputes.
- Recognise that this enhanced land tenure due diligence **requires time, targeted efforts, specialised expertise** in social

- and land tenure issues and early involvement of corporate units responsible for social and environmental performance.
- **Establish dialogue with affected people**, communicating clearly that a new management is now involved, and implementing community consultation and where relevant ‘retrospective’ FPIC as a basis for negotiated solutions to legacy land disputes.
- Depending on the context, implement appropriate combinations of **independent or participatory fact-finding or land delimitation, land restitution, compensation, benefit-sharing and/or other approaches** to address legacy land issues.
- **Establish grievance mechanisms** that comply with the effectiveness criteria identified by the Guiding Principles on Business and Human Rights, and engage with dispute settlement or third-party grievance mechanism processes initiated by affected people or by NGOs supporting them.
- **Ensure transparency in all dealings** with government and affected people to build trust and ensure expectations align with realistic business prospects.
- **Establish and resource units with expertise in handling land rights issues**, including a devoted local land officer for substantial projects, and source land tenure specialists to design and implement interventions.
- **Provide in-house training on land rights, including legacy land issues**, to ensure all relevant personnel including those dealing with corporate transactions are aware of and apply corporate policies on land rights and the VGGT.

Lenders, end investors and buyers

Legacy land issues can have reputational and other repercussions not only for the agribusiness company implementing the project but also for their business partners both upstream (lenders, end investors) and downstream (buyers). Business partners – especially those with established brands – should take legacy land issues particularly seriously. They should:

- **Develop clear corporate policies on land rights**, covering legacy land issues, and including clear commitments to ensure clients, investees and suppliers adhere to the VGGT.
- **Establish follow-up mechanisms** to ensure full compliance with corporate policies and applicable standards.
- **Install land rights issues, including legacy issues, in due diligence processes** in the context of lending or investment decisions, or when establishing supplier relations, including by scrutinising the capacity, commitment and track record of companies.
- **Install land rights issues in lending or investment agreements**, establishing clear requirements that bind companies to action.
- **Engage with the agribusiness partner** (borrower, investee or supplier) to ensure land rights issues are addressed throughout the investment cycle, knowing legacy land issues can become apparent long after an investment is initiated, financed or contracted.
- **Consider discontinuing business relations** as a last resort if there is no realistic prospect of properly addressing land rights issues.

Lawyers, consultants and service providers

Experts advising the above actors can make a real difference in ensuring legacy land issues are duly identified and properly addressed. Depending on the situation, this may involve broadening the horizons of their service provision. Lawyers, consultants and other service providers should:

- Over and beyond national law requirements, **consider relevant international guidance and standards**, including the VGGT, knowing that, depending on the context, conduct complying with national law could still expose clients to reputational and operational risks.
- **Consider the social dimensions of legacy land issues**, in addition to their legal and technical aspects, ensure relevant personnel are properly equipped to understand and address those social dimensions and, to this end, resource project teams with expertise in handling land rights issues and where needed provide in-house training on land rights, including legacy land issues.
- **Rethink land tenure due diligence processes** to investigate land issues not only from a legal and technical perspective but also through articulating to clients the importance of 1) effective community engagement; 2) thorough review of any social impact assessment and of compliance with its recommendations; and 3) data collection on the history of the land acquisition, the context in which it occurred, any consultations conducted and compensation paid and any latent or actual land disputes.
- **Ensure services provided** to design and implement measures addressing legacy land issues **reflect international best practice, including in light of international guidance and standards**, and document

and disseminate lessons learned whenever possible and consistently with any confidentiality requirements.

Governments

While in some ways the concept of ‘legacy’ reflects the perspective of the acquiring company, governments have ultimate responsibility for land governance in their jurisdiction. They have a duty to protect human rights and legitimate tenure rights, and they can play an important role in addressing legacy land issues at both systemic and company levels. Governments should:

- **Establish arrangements to monitor legacy land issues and integrate consideration of legacy issues in land use planning and relevant land governance processes.**
- Where appropriate, **identify and focus efforts on geographic areas** presenting significant potential to generate legacy land disputes, for instance linked to a history of conflict or displacement or to a high concentration of agribusiness operations.
- **Adopt and implement legislation and establish institutions and processes** to deal with any historical land issues, including land restitution programmes where appropriate.
- **Ensure overarching land governance frameworks help prevent or minimise legacy land issues** (for example through more accurate, reliable and transparent land administration systems, and clear rules on prescriptive acquisition where relevant) and include effective and accessible mechanisms (e.g. courts, specialised institutions) to deal with legacy land disputes when they arise.
- With regard to individual operations, ensure legacy land issues are included in **impact assessment processes, screen for legacy land issues when considering reallocating land** from failed agribusiness projects, ensure affected people have **access to legal and other assistance and capacity support, facilitate dialogue between company and affected people** based on FPIC where relevant and **ensure compliance with any terms agreed** between company and affected people.

NGOs

NGOs can play an important role in raising legacy land issues and supporting affected people. However, legacy land issues have tended to remain a marginal issues in work related to the recent wave of large-scale land acquisitions. NGOs should:

- **Mainstream consideration of legacy issues in land rights programming**, including both advocacy and operational activities, in order to identify and raise those issues where needed and to help develop possible ways forwards.
- Where there is demand for it, **support people affected by legacy land issues**, including in the context of

FPIC exercises and more generally in negotiations with companies and government authorities. This may include legal empowerment work, support to community-based organisations, land mapping or technical advice in areas such as law, inclusive business or economic valuation.

- Where appropriate, **act as mediators or facilitators** to support dialogue among companies, government and affected people, and/or establish partnerships with government and the private sector to develop solutions to legacy land issues.
- **Provide third-party monitoring of compliance** with any commitments that agribusiness companies or government authorities may have entered into.

Researchers

The limited publicly available evidence base on legacy land issues is an important constraint on efforts to address such issues. While this Analytical Paper has shed some light on legacy land issues, it can be considered only a first step towards better understanding the issues and possible ways to address them. An important research agenda lies ahead that can bring out the complexities but also fine-tune practical ways forward. Researchers should:

- **Undertake field studies** to document diverse types of legacy land issues, including more broadly defined legacy issues that this paper could not cover, and practical approaches to address those issues – what works where, under what conditions and with what potential for replication and upscaling
- In addition to conventional research dissemination methods, **feed findings into policy and practice** and facilitate international lesson-sharing to inform more granular international guidance, more adapted national policies and more effective interventions by governments, development agencies, NGOs and the private sector.

Donors

Following the formal endorsement of the VGGT, donors have played an important role in supporting international initiatives to develop tailored practical guidance on how to operationalise the VGGT. They have also supported interventions to improve land governance on the ground. These normative and operational efforts are increasingly engaging with legacy land issues, but more can be done. Donors should:

- **Provide technical and financial support** to enable governments, NGOs and researchers to implement the recommendations above. This may include, for example,

supporting government to improve land records and undertake historical analysis of land transactions, and supporting NGOs to accompany villagers in their dealings with government and agribusiness. Interventions should focus on priority geographic areas targeted for agribusiness investments or otherwise presenting high potential for legacy land disputes.

- **Ensure legacy land issues are duly considered in the international normative work they support**, including initiatives to develop or test international guidance and standards, while also ensuring proper coordination of efforts and consistency of messaging, and joining forces whenever possible.
- In the context of private sector development programming, **conduct thorough due diligence on potential private sector partners**, including to screen for capacity to tackle land issues including in a legacy context; **screen for legacy land issues in geographic sites targeted for private sector development interventions**; and **share lessons from experience** through the appropriate channels, including the Global Donor Working Group on Land.

The LEGEND programme

As an ambitious programme addressing the interface between land governance and private sector development, LEGEND can play an important role in advancing understanding of legacy land issues in agribusiness investments. Building on this Analytical Paper, the LEGEND programme should:

- **Catalyse lesson-sharing on legacy land issues** through the LEGEND Knowledge Management work, including through discussion at the UK Land Policy Forum, dissemination via the LEGEND bulletin, integration into the annual LEGEND State of the Debate report and tailored side events at international conferences and policy processes.
- **Screen for legacy land issues** in all grant applications submitted to the LEGEND Challenge Fund, and ensure mechanisms are in place to address any legacy issues that may be identified.
- **Encourage LEGEND partners to mainstream consideration of legacy land issues** throughout LEGEND-supported land governance activities, including all private sector-related work and communications-oriented work.
- Where relevant, **consider legacy land issues in country-level land governance programme development work**, in collaboration with relevant DFID country offices and their respective partners.

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