



Briefing

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Legacy land issues

Addressing historical disputes in agribusiness investments

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Key messages

- 'Legacy' land issues arise when a company takes over an existing farming operation and inherits disputes its predecessors left unaddressed. Issues may go back generations, or could be more recent problems passed on by previous owners. They can relate to the conduct of past project developers, or the context in which that conduct occurred.
- Complex histories often mean legacy disputes are among the hardest to resolve. Different actors have an important role to play, including governments and civil society, but this briefing note focuses on what the private sector can do.
- Dealing with legacy land issues is important to redress past injustices, to mitigate reputational and operational risks, and, depending on the situation, to fulfil the responsibility of business to respect human rights.
- In conducting land tenure due diligence, a company should consider legal, social and historical aspects to identify legacy issues effectively. Community engagement can help identify land disputes that legal paperwork alone may not reveal.
- Community engagement and grievance mechanisms are essential in addressing legacy land issues. Possible solutions include i) measures to deal with historical wrongs, such as land restitution and compensation, and ii) mechanisms to ensure communities receive a share in the economic benefits of the agribusiness.
- Land restitution is often the primary remedy for redressing past wrongs, but can involve practical challenges; while benefit sharing can improve local livelihoods but does not right past wrongs. Solutions in real-life situations could combine elements of these approaches, based on effective community engagement.
- Where past transactions involved serious violations, companies should avoid getting involved until disputes are resolved.
- Taking legacy land issues seriously requires clear institutional policies, proper resourcing, specialist expertise, and collaboration with government and non-profits.

Introduction

A dramatic rise in large-scale land acquisitions in low and middle-income countries has led to growing public and media scrutiny of the potential impact on local communities. Some companies take over existing farms, rather than converting new land for agricultural use, partly to minimise displacement and adverse livelihoods impacts. But ‘legacy’ land issues – disputes the previous owner(s) failed to address – can still lead to tensions with local communities and pose significant operational and reputational risks.

This briefing note sets out what the private sector can do to address legacy land issues in agricultural investments. Other actors also have an important role to play, including governments and civil society. For a comprehensive discussion of international standards and emerging good practice for all stakeholders, read *Addressing ‘Legacy’ Land Issues in Agribusiness Investments*.

What are legacy land issues?

Legacy land issues arise when a company takes over an existing farming operation and inherits disputes its predecessors left unaddressed. Issues may go back generations, or could be more recent problems passed on by previous owners. They can relate to the conduct of original project initiators or their successors, or to the context in which that conduct occurred. Subsequent transactions may have transferred the land to the new owner without resolving the underlying disputes.

Complex histories and unclear roles and responsibilities often mean legacy disputes are among the hardest to resolve. They present unique challenges, from strong opposition and entrenched mistrust, to a lack of documentary evidence of original rights and claims by either side. Disputes can arise from violations of applicable law, or when the legitimacy of the acquisition is contested – for example, where affected people think that consultation or compensation was inadequate, or the social or political climate of the time prevented them from being heard.

Why tackle legacy land issues?

In many parts of the world, land is the backbone of the local economy and central to social identity and religious beliefs. Indigenous peoples, smallholders and forest-dwellers with claims to disputed land may experience any subsequent transfers of land rights or changes in use as a continuation of their pre-existing struggles for recognition of their own, historically established land rights.

Dealing with legacy land issues is therefore important in addressing past injustices. It also makes good business sense. Failure to address these issues can foster local opposition to the project, and ultimately undermine the business – for example, through adverse campaigning, land occupation, litigation, sabotage and loss of business

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relationships. Depending on the situation, reaching resolution can also help companies adhere to evolving national legislation, and to the internationally recognised responsibility of business to respect human rights.

A company can face pressure to address legacy land issues, whether or not it is their legal responsibility. This is because how people perceive events surrounding an original land acquisition and subsequent developments can influence local attitudes towards the business – irrespective of how events actually unfolded, whether they complied with applicable laws, and the roles and responsibilities of companies and government.

Identifying legacy land issues: due diligence processes

Land tenure due diligence checks provide an avenue for companies to identify legacy issues. To effectively identify legacy land issues, a company would need to consider legal, social, and historical aspects of land acquisitions and subsequent transfers and changes in land use and occupation. Transactions that do not appear problematic in legal paperwork and official accounts can belie significant tensions. Such problems can only be identified through community engagement.

Virtually all land has formed the object of dispute at some point in history. So one question is how far back in time it is necessary to look when screening for legacy issues. National law may provide some answers, by time-barring old claims or protecting good-faith possession.

But perceptions of legitimacy matter, and for people having a strong cultural, social and spiritual connection to the land even events that happened decades before can be relevant to the present. For international human rights courts, what matters is whether affected people maintained a genuine relationship with the land they were dispossessed of. Some legacy disputes have deep historical roots, dating back to colonialism.

Addressing legacy land issues

1. Community engagement and grievance mechanisms

Community engagement based on a genuine commitment to dialogue and finding resolution is the foundation of effective efforts to address legacy land issues. There is a strong case for applying ‘free, prior and informed consent’ processes, where relevant, to address issues left unresolved



Tea fields, Cameroon. Credit: Carsten ten Brink

at the time of the original land acquisition. Companies should also provide an open and accessible grievance mechanism for communities to voice their concerns before these escalate.

2. Fact finding and land mapping

Legacy land issues often involve contested facts and differing views of the same incident. Independent or participatory fact finding creates shared understanding between businesses and communities, providing a solid basis to work towards resolution. Trusted, credible third parties can be called upon to conduct independent technical assessments. Participatory land mapping and delimitation can clarify historical claims and enable the parties to reach agreement on acceptable boundaries.

3. Land restitution and compensation

Land can have special social and cultural value, marking it as irreplaceable in the eyes of indigenous or local communities. Partial or full land restitution is often the primary remedy for redressing past wrongs in such cases, although it may not always be possible or appropriate if, for example, land has been substantially damaged or altered. Human rights courts have ordered governments to effect land restitution in some instances involving indigenous peoples.

Virtually all land has formed the object of dispute at some point in history

Paying compensation may also help address historical injustices, especially in cases where inadequate compensation was awarded at the time of the original land acquisition, or compensation was paid to the wrong people. But it is sometimes difficult to identify and reach all original right-holders and their descendants. Compensation payments can also compound inequities: if men or local elites controlled the land, they may capture the entire compensation for themselves.

4. Sharing economic benefits

While restitution and compensation aim to redress past wrongs, another set of approaches involves ensuring affected communities receive a share of the economic benefits resulting from the agribusiness. Responsible business practice involves fair benefit sharing regardless of any legacy disputes.

Examples include extending an outgrower scheme, a community development fund or a stake in the business to the affected parties. Depending on its design and implementation, this approach may help improve local livelihoods and promote support for the project, although it does not ultimately deal with historical wrongs.

Depending on dialogue between the company and affected parties, solutions in real-life situations could combine these approaches. For example, the parties may agree that the company return part of the land and establish a community development fund to ensure community support for its continued operations. Shared understanding reached through independent or participatory fact-finding can provide the foundations to guide choices on the most appropriate ways forward.

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Clear red lines

It is important for companies to establish clear ‘red lines’ on legacy land issues. Where past transactions involved serious violations, companies should consider not getting involved until disputes are resolved through national or international dispute settlement systems. Some companies – downstream buyers, for instance – have discontinued business relationships in situations where a suitable solution could not be found.

Working with governments, non-profits and service providers

Collaboration with governments, independent non-profits and experienced service providers is important, as legacy situations typically present a variety of complex issues going beyond what a private company can achieve. This requires understanding how different actors can help, a positive attitude towards dialogue and collaboration, and effective arrangements for external engagement.

1. Governments

Governments have primary responsibility for land governance. They may have contributed to the dispute in the first place, if they allocated the land to the initial developers, and then to the new owners, without consultation. Depending on the circumstances, national law or international human rights law may require governments to address historical wrongs.

Government action can involve developing legislation and establishing remedies to deal with historical land issues. Depending on capacity, governments could also

contribute information from historical and cadastral records, where these are available, and help to develop negotiated solutions in specific disputes.

2. Non-profits

Independent non-profits can provide communities with pro-bono legal advice, and technical advice in areas such as inclusive business or economic valuation. They can also act as mediators to facilitate dialogue between companies, governments and affected people. Some non-profits offer third-party compliance verification for commitments made by businesses and government authorities.

3. Service providers

Lawyers, consultants and other service providers can help companies identify and address legacy land issues. This may require developing or consolidating new professional skills, for example how to consider social and historical issues in due diligence processes.

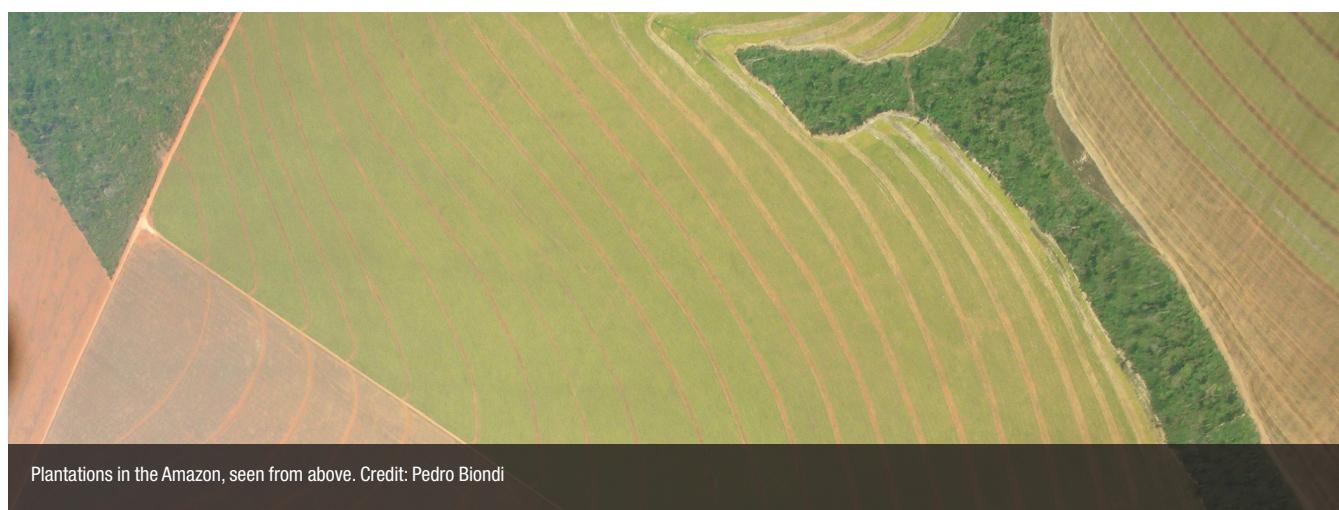
4. Donors

Donors can support the work of governments and non-profits, particularly where capacity gaps constrain effective action. They can also help to develop the necessary skills among national service providers, particularly where historical circumstances make legacy land issues more prevalent.

Recommendations

Agribusinesses should:

1. Create corporate policies on land rights and legacy land issues, aligned with the United Nations *Guiding Principles on Business and Human Rights* (Guiding Principles) and the *Voluntary Guidelines on the Responsible Governance of Tenure* (VGGT), including clear operational guidance and explicit ‘red lines’.



Plantations in the Amazon, seen from above. Credit: Pedro Biondi

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- 2. Invest in the human resources needed to design and implement those policies**, in terms of both staff numbers and skills, including setting up dedicated in-house units where feasible, sourcing land tenure specialists, hiring local land officers for substantial projects, and providing in-house training to relevant staff. Smaller businesses may struggle to establish substantial in-house teams, but could contract external service providers.
 - 3. Invest in robust land tenure due diligence**, including the early involvement of social responsibility units, collecting data on historical and ongoing disputes, and bringing in specialist expertise – and consider not getting involved if serious past violations cannot be addressed.
 - 4. Implement and monitor ‘land legacy’ strategies**, including informing communities of new management, building trust through transparency, conducting community consultations, applying any consent requirements to address issues left unresolved, and collaborating with external organisations, such as non-profits.
 - 5. Take measures to address legacy land issues**, such as independent/participatory fact-finding missions, land restitution, compensation, and benefit sharing, based on effective community engagement.
 - 6. Establish grievance and dispute settlement mechanisms**, complying with the parameters set by the Guiding Principles.

Lenders, end investors, development finance institutions, and buyers should:

- 1. Create corporate policies on land rights and legacy issues**, including clear operational guidance and explicit ‘red lines’, and ensuring clients, investees and suppliers adhere to the Guiding Principles and the VGGT and are in full compliance with applicable standards.¹
- 2. Invest in the human resources needed to design and implement those policies**, in terms of both staff numbers and skills, including setting up dedicated in-house units where feasible, and sourcing trainings and specialist expertise.
- 3. Incorporate land rights and legacy issues in due diligence checks**, including for lending and investment decisions, scrutinising the capacity, commitment and track record of companies when establishing supplier relations, and considering not getting involved if serious violations cannot be addressed.
- 4. Ensure land rights are addressed throughout the investment cycle**, installing legacy land issues in lending

or investment agreements that bind companies to action, and engaging borrowers, investees and suppliers on the possibility of issues emerging long after an investment.

Lawyers, consultants and service providers should:

- 1. Consider international guidance and standards beyond legal requirements**, recognising that mere legal compliance can still expose clients to reputational and operational risks.
- 2. Resource teams with specialists**, including offering in-house training on land rights and legacy issues, and investing in experts experienced in the social dimensions, as well as the legal and technical aspects.
- 3. Stress to the client the importance of the social dimensions, community engagement and historical data collection in due diligence checks**, including thorough review of compliance with the recommendations of any past social impact assessments, and gathering contextual information on the past acquisition, consultations, compensation and latent or current land disputes.
- 4. Research international best practice on remedial measures**, documenting and disseminating lessons learned whenever possible and consistently with confidentiality requirements.

Additional resources

- Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security. <http://www.fao.org/nr/tenure/voluntary-guidelines/en/>.
- Guiding Principles on Business and Human Rights, http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf.
- Addressing ‘Legacy’ Land Issues in Agribusiness Investments: A LEGEND Analytical Paper, by Lorenzo Cotula, Thierry Berger and Philippine Sutz. <https://landportal.info/library/resources/legend-analytical-paper-2/addressing-legacy-land-issues-agribusiness-investments>. See also the extended bibliography in this analytical paper.
- A Guidance Note on Managing Legacy Land Issues in Agribusiness Investments, CDC and DEG, http://www.cdcgroup.com/Global/20879_CDC_LandLegacy_AW_160630_WEB%5b2%5d.pdf.
- Guidance for Legacy Land Issues, by Rights and Resources Initiative for the Interlaken Group (forthcoming).

¹ Several development finance institutions use the International Finance Corporation’s *Performance Standards on Environmental and Social Sustainability*, but these standards provide little guidance on legacy land issues.

Land: Enhancing Governance for Economic Development (LEGEND) is a DFID programme that aims to improve land rights protection, knowledge and information, and the quality of private sector investment in DFID priority countries. It includes the development and start-up of new DFID country land programmes, alongside knowledge management activities, a challenge fund to support land governance innovations, and management of complementary DFID grants and supported by a Core Land Support Team.

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