

Vulnerable Groups Primer

Part of the Responsible Investment in Property and Land (RIPL) Guidebook Series

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Introduction

Why is there a need to focus on vulnerable groups during investment processes? Why isn't it enough for companies seeking to conduct responsible land transactions to work with the government or community leaders?

In the context of an investment, a community's resources become increasingly or newly commodified, which amplifies power dynamics within a community and between communities and external stakeholders (including government and business representatives). This creates the potential for inequalities to be entrenched if an investment is not specifically designed to mitigate them. On the other hand, an investment creates an opportunity to promote and establish greater equity by elevating previously unrecognized interests of marginalized or vulnerable groups; external actors connected to an investment can interact with a community in ways that can challenge and change the social norms that disadvantage these groups.

This primer provides guidance for including and protecting vulnerable groups in the context of a land-based investment. It includes the following sections:

- An overview of who may qualify for inclusion in a vulnerable group and descriptions of specific vulnerable groups. This section also covers intersectionality, a key concept for engaging vulnerable groups.
- Step-by-step guidance tracking the RIPL Guidebook process for governments, business, and communities.

Overview

The Voluntary Guidelines on the Governance of Tenure, Fisheries and Forests in the Context of National Food Security (VGGT) aim to improve governance of tenure, fisheries and forests with an emphasis on vulnerable and marginalized people.¹ The

VGGT's Principles of Implementation include a recognition that equity and justice may require *acknowledging differences* between individuals and taking affirmative action to realize equitable tenure rights for “all, women and men, youth and vulnerable and traditionally marginalized people, *within the national context.*”²

These two references to acknowledging differences and to the national context are key concepts for engagement with vulnerable groups. Becoming informed about cultural and community dynamics is necessary to understand differences between groups within the community and how certain groups may be affected variably by an investment; and context will determine which vulnerable groups are present and how they are identified (i.e., what they are called) in a particular context, though characteristics of vulnerable groups apply generally.

Vulnerable groups are those less likely to benefit from an investment because they have lower social status and less influence. Their interests are therefore less likely to be understood and prioritized in the absence of external influence. Investors who aim to "do no harm" must take into account impacts of the investment on vulnerable groups. Investors must identify land rights holders and users who may not have obvious or dominant rights, and then take steps that acknowledge and protect their interests.

Specific Groups

The groups described below commonly fall under the umbrella of “vulnerable groups” in academic, civil society, and intergovernmental publications. This list is not exhaustive. Investors should always consult with local civil society, government officials, and community members to identify other groups that may be particularly vulnerable to the effects of an investment as well as groups that may have interests that may differ from the majority.

Women

Women constitute half the population in any community, and rural women experience poverty and exclusion disproportionately relative to rural men. Women face systemic discrimination in accessing land and natural resources. Women and men have different roles, tasks, and priorities when engaging in agriculture, and women's uses of land and resources are often considered secondary and are therefore more likely to be extinguished or restricted when land is allocated to an investor. Social and cultural norms also limit women's participation in decision making forums and decrease their access to government services and markets.

Youth

As a group, youth often have limited access to land, financial services, and markets. They frequently lack access to information or educational opportunities that would enable them to qualify for employment, and are excluded from policy development and other decision making processes. The definition of “youth” ranges from age 15 to 24³, with various upper ages across countries, as old as 35. As this demographic may be large in many communities, it may not be obvious that they qualify as a vulnerable group.

Religious, Ethnic, and Linguistic Minorities

Groups that are outside the majority in a country, region, or community often face discrimination from more dominant groups; they frequently lack legal recognition of their rights to land and resources, are not consulted when their land is the target of investments or development projects, and they can often be the targets of violence when tensions over land and other resources arise.

Indigenous Communities

Though an estimated 65% of the world’s land is held collectively or communally, only a fraction of this land is legally recognized.⁴ Communities occupying this land are frequently vulnerable to those who have greater economic, social, or legal power simply because they lack documentation and legal recognition of their rights. This includes both those communities officially designated as indigenous, and those who could qualify as indigenous under international law and do qualify under best practice standards for investments.⁵

Pastoralists or Nomadic Herders

Pastoralists (who make an income from livestock) and agro-pastoralists (who make an income from livestock and cultivating crops) make up a significant portion of the population in rural areas worldwide.⁶ Because they may only be present in an area for part of the year (e.g., due to grazing patterns), their interests and uses of land may not be immediately visible. These groups have often suffered from forcible eviction from their traditional lands for the creation of game reserves, extractives, and infrastructure projects.⁷

Migrants

In many contexts, a community defines itself as comprised solely or primarily of those who were born into the community. People who have moved into a community from different parts of the country or are from different ethnic groups may face different rules regarding access, use, ownership, or inheritance of land. This is especially applicable to women, who often “marry into” communities, but are not considered members of the community apart from a relationship to their husbands. Migrants and strangers may be disadvantaged in the context of an investment when decisions are made about whose land should be sold or leased to an investor; they are less likely to be included in consultations, have less clout to protect the land they use, and may not even view their rights or interests as cognizable.

Intersectionality

The concept of intersectionality calls for the recognition that not all people who are members of a vulnerable group will experience discrimination in the same way or to the same degree,⁸ and that membership in more than one group may compound individual disadvantages. Race and ethnicity, gender, status or class, and other social markers combine to determine an individual’s experience of their place in a community, including any experience of marginalization or vulnerability.⁹ None of these social markers should be understood or addressed in a vacuum.

For example, a middle-aged married woman with children who is part of a community’s dominant ethnic group will experience gendered realities very differently from a single, divorced, childless woman who is a pastoralist or migrant. A young man may face challenges in accessing or owning land, but those challenges are multiplied for young women by the social norms that limit women generally, as well as those that apply in specific discriminatory ways to younger women, including marital status.¹⁰

Investors should be proactive—identifying what different members of a community *want*—in addition to identifying how they may be impacted by an investment. Treating groups as constituencies in this sense can help an investor build and maintain social license for the investment. This holistic approach can also produce better protections for the legitimate tenure rights and other human rights of members of vulnerable groups.

Step-By-Step Guidance

Phase 1: Preparing for Investment

Task 1: Develop and Implement Policies, Commitments and Frameworks

It is important that government examine the sufficiency of laws and the capacity of local administrative bodies to enforce protections. Laws should protect the social, cultural, and environmental aspects of land ownership and use, which are highly valued by vulnerable groups and often overlooked or inadequately protected. Legal frameworks governing investments should also accord with international human rights standards.

Protecting vulnerable groups from investment impacts may require regulating abuse of customary tenure by traditional authorities and elites. Land speculation and other forms of land concentration should also be monitored and mitigated, as vulnerable groups often inhabit land where governance is weak or absent.

To mitigate impacts, government should consider leveraging efforts by civil society organizations (CSOs) that directly work with vulnerable populations. CSOs can advocate with governments for legal review, legislative reform, and better implementation and enforcement of laws pertaining to investment and any international covenants or national laws intended to protect vulnerable groups. CSOs can contribute to legal reform efforts by providing information about gaps and needs in rural areas to government entities, business, and other civil society actors.

For business, company should develop policies that comport with the standards of the VGGT and other international standards. With respect to vulnerable groups, this should include a commitment to recognizing all legitimate tenure rights and interests, including seasonal land users and others whose rights may not equate to ownership or that may be considered secondary, as well as a commitment to active and ongoing engagement with those groups as part of a community engagement plan. Regardless of the status of national legal and policy frameworks, businesses should commit to doing no harm to vulnerable groups and seeking to benefit women and men in these groups via their investments

Task 2: Conduct Initial Due Diligence

Business should evaluate and understand domestic laws and policies, and determine whether national laws prohibit discrimination in rights to land on the basis of vulnerabilities identified above, as well as any categories of vulnerabilities that become evident during community engagement. Business should work with governments and CSOs to protect vulnerable groups in the context of an investment by identifying which demographics are likely to be impacted by the investment and take stock of investments currently occurring.

Just as important, business should learn how land laws and laws intended to benefit vulnerable groups are being implemented and enforced at the local level, and assess whether communities, traditional authorities, and local officials understand their duties to these groups under international law, national law, and customary law.¹¹ Business s can receive assistance in this task from local CSOs, academics, and international NGOs engaged directly with communities.

Checklist

- Is the country a signatory to the Covenant on Economic, Social and Cultural Rights and other binding international human rights instruments?
- Does the Constitution include a nondiscrimination clause that applies to vulnerable groups either generally or specifically?
- Are women guaranteed equal rights to own land (including in inheritance and marital property regimes)?
- Does legislation relevant to land include provisions to protect ethnic and religious minorities (and other vulnerable groups) in the context of land ownership and use?

Phase 2: Community Engagement and Assessments

Task 1: Engage and Consult with Community Members

Because customary law is usually not documented, but is often the prevailing mode of land allocation and access, consultations are required to understand how customary law deals with the land use of vulnerable groups. Engaging with and respecting the rights and interests of vulnerable groups within a community will require a variety of tactics. Tenure rights and land use interests of these groups may

not be recognized by the community, and stakeholders may therefore need to engage with such groups over a period of time to adequately consult with and include them.¹² Stakeholders must understand and account for power imbalances within a community and between a community and business or government actors.¹³ The goal should be that negotiations, contracting, and business operations produce equitable results.

Identify Vulnerable Groups

Work with the community and with local CSOs or consultants as facilitators to identify vulnerable groups and potential impacts, as well as the best entry points for consultations with these groups. It is important that the facilitator be a neutral third party who can adequately represent vulnerable groups' interests. "Frontloading" engagement by understanding community dynamics early in the investment process can save time and money later. This commitment to seek local expertise and input should be included at the onset, in the design of a community engagement plan.

Understand Cultural Expectations

Vulnerable groups may not feel welcome at full community meetings, or may not feel free to speak when those with more status are present.¹⁴ Power dynamics can obscure the legitimate interests of land users, and this can be compounded by the prospect of an investment, leading to intra-community conflict. Consultations with community members and others with knowledge of the community can help to reveal how these dynamics may play out, and how they can be mitigated or addressed.¹⁵

Establish Rapport

Initial meetings with the community should serve to establish trust; this requires knowledge of local culture and time. This need to establish trust pertains to relations with the entire community, especially if there is a national history of compulsory acquisition or legacy acquisition issues¹⁶, but trust is especially important in forming relationships with women, youth, pastoralists, and other vulnerable groups. Such groups may perceive that their interests will not be taken into account in an investment agreement and may not expect assistance in advocating for themselves.

Develop a Pragmatic Approach

In consultation with local experts, stakeholders should map out community dynamics as well as tenure rights and interests, and use this information to structure consultations. For example, meeting times should be structured to allow for participation by all affected land users, or held successively to allow groups to meet

separately or at their convenience. This is especially important for seasonal land users (e.g., pastoralists), who may be absent from the community for long periods, and women, who may have household responsibilities that keep them from attending meetings, in addition to social constraints that may discourage their participation. Communication must be designed inclusively as well. Women and other vulnerable groups are more likely to be illiterate and vulnerable "strangers" may speak a different language than more dominant community members, and making information accessible to vulnerable groups may require extra measures.

Set Expectations

All stakeholders should be prepared to invest time and resources in the community engagement process, and should understand that consultations will be an iterative and ongoing effort.¹⁷ An atmosphere of dialogue should be established, including solicitation of community interests and expectations, and disclosure of the proposed scope of the project, including potential benefits to the community. Explicit conversations with community leaders and other members of the dominant group, preferably in a public context where members of vulnerable groups are present, will help to establish expectations of inclusive engagement from the beginning of the investment process.¹⁸

Task 2: Conduct Community Assessments

Once a community has been introduced to the prospective investment, it is important to understand clearly what resources the community already has and what support it will need to engage effectively in the investment process. Communities start on an unequal footing with external stakeholders, due to lack of information and resources and lack of access to formal power structures. This disadvantage is heightened for vulnerable groups, whose rights and interests are more easily jeopardized or violated by others in the community (e.g., some customary and statutory rules allow male family members to evict widows).

Map Uses of and Rights to Land

Working with CSOs or other local facilitators, stakeholders should map community land rights and uses to include the rights and interests of vulnerable groups.¹⁹ The mapping process should inform subsequent community assessment steps, including evaluation of project impacts, inquiry about past acquisitions, valuation of rights and interests, and establishment of community engagement meeting structures and timelines. Vulnerable groups should be represented in the mapping process and their uses of land and interests recalled and incorporated at every stage of investment planning, contracting, and implementation. Mapping should cover all

rights and interests, including all "secondary" interests held by women, seasonal land users, tenants, sharecroppers, etc. Inclusivity requires going beyond formally recorded rights and interests to recognize those that exist in practice.

Include Community Governance Structures

To ensure that the interests of vulnerable groups are accounted for, it is critical that those mapping rights and interests understand power dynamics within the community. Men in positions of leadership and male heads of households traditionally serve as the voice of the community. Stakeholders should therefore be prepared for more powerful actors within the community or government officials to resist broadening consultation to include women and other vulnerable groups. Ideally, the community will already have an organized governance structure and clear knowledge of land uses and rights among community members, including vulnerable groups. However, many communities are beset with conflicts over land and land use, and the prospect of an investment may heighten land conflicts. Working to address corruption and power imbalances that affect communities or exist within them is part of the work of engagement.²⁰

Checklist

- Have seasonal uses of land (e.g., pastoral, agricultural) and secondary uses of land (e.g., forest resources, water sources) and their users been identified and recorded?
- Do all community members, including members of vulnerable groups, understand that the interests of all land users are to be considered and that benefits of the investment should be distributed as equitably as possible?
- Have additional measures to include all vulnerable groups been made available to the extent possible (e.g., mobile legal aid services for pastoralists, separate meetings, etc.)?
- Does the community engagement plan include specific measures at each step for representation of vulnerable groups?

Phase 3: Developing an Equitable and Inclusive Contract

Task 1: Negotiate and Draft the Contract

Representation

At the contracting phase, ensure the interests of vulnerable groups are represented.

²¹ As these groups are unlikely to possess negotiation and contracting skills, and are likely to face social barriers that limit participation in the process, they should be accompanied or represented by an external party who can advocate effectively for them. This representative should be chosen by the groups themselves.

Noting Differences

Again, it is important to recognize how intersectionality plays a role. For example, women within male-headed households may face different barriers than women who are heads of households. Thinking of women in these two separate situations (and others) will be important to ensuring their rights and interests are protected.

Critical elements of equitable contracting for vulnerable groups include:

- Clear references to each group and how each group will be accommodated and benefited in the investment arrangement;
- Representation of the interests of these groups, and;
- Inclusion in design and implementation of grievance mechanisms and ongoing monitoring processes.

Task 2: Review and Sign the Contract

The principles laid out above for including vulnerable groups in community engagement should be followed during contracting negotiations and contracting. Extra effort will be required to equalize power imbalances, communicate effectively, and elicit and incorporate the interests of these groups adequately. These efforts must generally go beyond national law to meet international standards for fair contracting. Assistance from a local facilitator is needed to understand cultural nuance and build and maintain social license during contracting.

Phase 4: Implementing and Monitoring the Investment

Task 1: Develop and Implement a Plan to Address Land-Related Issues

Consultation practices should continue throughout the implementation phase, though the form of consultation can shift. It is important that clear two-way channels of communication are established between the business and community members. Keep in mind that vulnerable groups are less likely to have access to information and grievance mechanisms than other community members. Appointed staff, designated forums, and clear processes for community engagement can create and maintain accessibility.

Develop and Implement an Enduring Grievance Mechanism

A grievance mechanism that is effective for vulnerable groups and complies with international standards will require additional efforts. States and business should provide vulnerable groups with adequate access to grievance mechanisms, as well as administrative and judicial services.²² These measures should include affordable legal support, like paralegals or para-surveyors, and mobile versions of these services for those who lack access to government or business services. The VGGT calls for governments to ensure that vulnerable groups in particular have access to dispute resolution at the local level, including customary forms of dispute resolution where they exist, and that those methods should provide fair, reliable, accessible, prompt, and non-discriminatory resolution of tenure rights disputes.²³

Include the broadest possible representation of land users in the consultation process described above to reduce the likelihood that decisions will be disputed later. Including vulnerable groups from the beginning will create a more comprehensive implementation plan that takes into account the broad range of interests and land uses.

Incorporate feedback obtained during early consultations into the design, implementation, management, and monitoring of the grievance mechanism. The grievance mechanism should be compatible with local customary dispute resolution mechanisms, but should also account for the ways vulnerable groups' interests and concerns may go unheard in customary settings. For instance, customary fees may be prohibitive for women and those with lower status.

Checklist

- Is there a clear point of contact with a business representative who is accessible for all community members (e.g., visits the community on specified days and times)?
- Are services provided to mobile or remote groups (e.g., pastoralists) so that their interests are solicited in any decision making processes and they can lodge grievances if needed?
- Are customary dispute resolution norms well understood, documented, and available to members of vulnerable groups?

Task 2: Develop and Implement an Ongoing Monitoring and Evaluation Plan

Once investment operations are underway, contract a neutral third party to ensure compensation and other benefits are equitably distributed to vulnerable groups, contract terms are adhered to, adverse impacts are mitigated, and grievance mechanisms are accessible.²⁴

Resources

- Abby Hardgrove et al., *Youth Vulnerabilities in Life Course Transitions*, (2014) at 2, UNDP Human Development Report Office, available at: http://hdr.undp.org/sites/default/files/hardgrove_boyden_hdr_2014.pdf
- FAO, *Module 5 - Governing Land for Women and Men*, (2013) available at: <http://www.fao.org/3/a-i3114e.pdf>
- FAO, *Respecting Free, Prior and Informed Consent*, (2014), available at: <http://www.fao.org/3/a-i3496e.pdf>
- Inter-Réseaux, SOS Belgium, *Pastoralism in Sub-Saharan Africa: Know its Advantages, Understand its Challenges, Act for its Sustainability*, (2012) at 1, available at: http://www.fao.org/fileadmin/templates/agphome/documents/rangelands/BDS_pastoralism_EN.pdf
- Hanna Pioske, “*What Does Intersectionality Mean for International Development?*” (July 2016), available at: <http://www.cipe.org/blog/2016/07/08/what-does-intersectionality-mean-for-international-development/#.WXIuE8bMx0s>
- Human Rights Watch, *The Plight of Religious Minorities in India*, (2014), available at: <https://www.hrw.org/news/2014/04/04/plight-religious-minorities-india>
- Lorenzo Cotula et al., *Addressing ‘legacy’ land issues in agribusiness investments*, (2016), available at: <https://landportal.info/library/resources/legend-analytical-paper-2/addressing-legacy-land-issues-agribusiness-investments>
- Minority Rights Group International, *Moving towards a Right to Land: The Committee on Economic, Social and Cultural Rights’ Treatment of Land Rights as Human Rights*, (2015) at 8, available at: http://minorityrights.org/wp-content/uploads/2015/10/MRG_Rep_LandRights_Oct15.pdf
- Namati, *Community Land Protection Facilitators Guide*, (2016), available at: <https://namati.org/resources/community-land-protection-facilitators-guide/>
- Oxfam, *Repoliticising Intersectionality: How an intersectional perspective can help INGOs be better allies to women’s rights movements*, (2015) at 5, available at: <http://policy-practice.oxfam.org.uk/publications/re-politicising-intersectionality-how-an-intersectional-perspective-can-help-in-594583>
- USAID (2015) *Operational Guidelines for Responsible Land-Based Investment* at 17, https://www.land-links.org/wp-content/uploads/2016/09/USAID_Operational_Guidelines_updated.pdf

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- ¹ FAO, *Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security* ¶1.1 at 1 (2012) [hereinafter “VGGT”], available at <http://www.fao.org/docrep/016/i2801e/i2801e.pdf>
- ² FAO, *supra* note 1, 3B(3) at 5.
- ³ Abby Hardgrove et al., *Youth Vulnerabilities in Life Course Transitions*, (2014) at 2, UNDP Human Development Report Office, available at: http://hdr.undp.org/sites/default/files/hardgrove_boyden_hdr_2014.pdf
- ⁴ Rights and Resources Initiative, “Who Owns the World’s Land?” at 1 (2015), available at https://rightsandresources.org/wp-content/uploads/GlobalBaseline_web.pdf
- ⁵ Minority Rights Group International, *Moving towards a Right to Land: The Committee on Economic, Social and Cultural Rights’ Treatment of Land Rights as Human Rights*, (2015) at 8, available at: http://minorityrights.org/wp-content/uploads/2015/10/MRG_Rep_LandRights_Oct15.pdf
- ⁶ Antonio Rota and Silvia Sperandini, *Livestock and Pastoralists*, (2009) at 1 (FN1), IFAD, available at: <https://www.ifad.org/documents/10180/0f4e4134-4354-4d08-bf09-e1a6dbec3691>
- ⁷ Minority Rights Group, *supra* note 5, at 7.
- ⁸ Oxfam, *Repoliticising Intersectionality: How an intersectional perspective can help INGOs be better allies to women’s rights movements*, (2015) at 5, available at: <http://policy-practice.oxfam.org.uk/publications/re-politicising-intersectionality-how-an-intersectional-perspective-can-help-in-594583>
- ⁹ Hanna Pioske, “What Does Intersectionality Mean for International Development?” (2016), available at: <http://www.cipe.org/blog/2016/07/08/what-does-intersectionality-mean-for-international-development/#.WXluE8bMx0s>
- ¹⁰ FAO, *Youth and Agriculture: Key Challenges and Concrete Solutions* (2014), available at <http://www.fao.org/3/a-i3947e.pdf>
- ¹¹ FAO, *supra* note 1, ¶12.4 at 21
- ¹² FAO, *Respecting Free, Prior, and Informed Consent: Practical guidance for governments, companies, NGOs, indigenous peoples and local communities in relation to land acquisition* (2014), at 14, available at <http://www.fao.org/3/a-i3496e.pdf>
- ¹³ FAO, *supra* note 1, 3B(6) at 6
- ¹⁴ FAO, *Governing Land for Women and Men* at 14 (2013), available at <http://www.fao.org/3/a-i3114e.pdf>
- ¹⁵ Namati Community Land Protection Facilitators Guide at 34 (2016), available at: <https://namati.org/resources/community-land-protection-facilitators-guide/>
- ¹⁶ Lorenzo Cotula et al., *Addressing ‘legacy’ land issues in agribusiness investments*, (2016) at 6, available at: <https://landportal.info/library/resources/legend-analytical-paper-2/addressing-legacy-land-issues-agribusiness-investments>
- ¹⁷ FAO, *supra* note 12, at 13;
- ¹⁸ Namati, *supra* note 15, at 49.
- ¹⁹ FAO, *supra* note 1, ¶7.4. at 11
- ²⁰ FAO, *supra* note 1, ¶9.12 at 16
- ²¹ FAO, *Module 5 - Governing Land for Women and Men* at 82 (2013), available at <http://www.fao.org/3/a-i3114e.pdf>
- ²² FAO, *supra* note 1, ¶4.9 at 7
- ²³ FAO, *supra* note 1, ¶21.3 at 33
- ²⁴ See United States Agency for International Development (“USAID”), *Operational Guidelines for Responsible Land-Based Investment* at 7 (2015), available at https://www.land-links.org/wp-content/uploads/2016/09/USAID_Operational_Guidelines_updated-1.pdf