

Due Diligence Procedures with respect to Land Governance:

Responsibilities for private sector and financial
institutions in implementing VGGT

DRAFT

This paper is written by Solidaridad and ABN AMRO in the context of work being carried out by a Case Team dedicated to supporting implementation of the Voluntary Guidelines on the Responsible Governance of Tenure of Land (VGGT). The VGGT Case Team is part of the Multistakeholder Dialogue on Land Governance (MSDLG) organized by the Dutch Ministry of Foreign Affairs. The case team consists of ABN Amro, Rabobank, ACTIAM, Ministry of Foreign Affairs, Utrecht University, Groningen University, LANDac, FIAN, ActionAid, Oxfam Novib, TNI, Cordaid and Solidaridad.

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BACKGROUND NOTE

This paper is a working document based on the current developments in the international community which develop and implement soft law instruments and create important standards of practice that protect people and communities' land rights, and promote responsible and inclusive investment.

These instruments are a.o.: The Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security (VGGT); The Guiding Principles on Large Scale Land Based Investments in Africa (LSLBI); The Principles for Responsible Investment in Agriculture and Food Systems (RAI) and the FAO-OECD Guidance for Responsible Agricultural Supply Chains.

Testing and improving these instruments is an iterative process to ensure applicability and effectiveness in practice. The approach suggested in this white paper will undergo a similar process of testing and revision based on lessons learnt and feedback from actors with whom the VGGT case team will engage throughout 2016 in the context of the MSDLG.

I Introduction

This White Paper is developed in the context of the VGGT Case Team, where public, private and civil society actors together discussed and analyzed the opportunities and challenges of implementation of the VGGT. The VGGT and Land Tenure in general should be a part of due diligence procedures for land based investments. Due diligence is a critical procedure for private sector and financial institutions to address and identify potential risks in land based investments that actors can be cause, can contribute or be linked to in the light of the Un Guiding Principles. In order to identify, prevent, mitigate and account for how actors address human rights impacts they Pro-active identification of risks and implementation of risk mitigation measures are key to responsibly address potential land governance challenges that could arise in response to investment projects or project finance.

In this paper, questions are drafted¹ to help operationalize the VGGT criteria in practice by actors in the private sector, government and civil society. The drafted questions can be implemented in existing environmental and social due diligence, or can be used as a discussion tool with third parties. The questions reflect the general issues of Land Tenure and are based on the VGGT. These questions are applicable in any type of due diligence procedure.

This paper focusses on Financial Institutions, Civil Society Organizations, Private sector companies and Governmental Agencies and aims to provide a practical guidance how to assess their clients, partners and themselves on land tenure rights.

- **Financial Institutions** have a responsibility to address risks related to land rights in dialogue with their clientele. Although the relationships will differ between direct client support, project finance or investment funds, any lender or investor should raise awareness and institutionalize procedures which actively support respect for land rights and mitigation of negative impacts related to land use or acquisition.
- **Companies** have a responsibility to implement and promote respect for land rights and mitigation of negative impacts related to land use or acquisition resulting from or linked to their operations. This responsibility extends to supply chain partners.
- **Civil society organizations** have a responsibility to assess their (private sector) partners and conduct a due diligence sensitive to land issues before entering into partnership. This is an exercise to mitigate risks but also a way of working which sets an example towards other organizations, companies and government how respect for land rights is brought into practice.
- **Governmental Agencies** have the responsibility to promote land rights in their countries, and to implement due diligence on land rights in their own supplier code of conducts.

¹ Questions are drafted based on due diligence practices at ABN AMRO Bank

II Context

1. Understanding Land tenure and governance issues

Following the dynamic and constructive discussions by public, private and civil society actors, in the context of the VGGT Case Team in (Give date), opportunities and challenges of implementation of the VGGT, this White Paper was formulated to give expression to the ideas developed and analysed during these discussions. . The VGGT, and land tenure in general, should be a part of due diligence procedures for land based investments.

Due diligence is a critical procedure for private sector and financial institutions to identify and address potential risks in land based investments that actors can cause, can contribute to, or be linked to in light of the UN Guiding Principles. Pro-active identification of risks and implementation of risk mitigation measures are key to responsibly address potential land governance challenges that could arise in response to investment projects or project finance.

Thus, this paper is intended to assist various actors, Financial Institutions, Private sector companies, Governmental Agencies, and Civil Society Organizations, with practical guidance on how to assess their clients, partners and themselves on land tenure rights as part of due diligence. Questions are included² to help these actors operationalize the VGGT criteria in practice.. These questions can be implemented in existing environmental and social due diligence, or can be used as a discussion tool with third parties. The questions reflect the general issues of Land Tenure and are based on the VGGT and are applicable in any type of due diligence procedure.

This paper focusses on Financial Institutions, Civil Society Organizations, Private sector companies and Governmental Agencies and aims to provide a practical guidance.

2. Analyzing Land tenure issues

Analyzing land issues prior to investments is very important and necessary in case a company, financial institution or government is directly investing in land. Nevertheless there are also several situations where an investment is not contributing directly to the investment in land, but is only directly linked through its supply chain.³ In these situations it is also necessary to conduct due diligence on land tenure issues. Examples of these situations are:

- Financial Institutions; **Lenders** granting a general loan to a client who is also active in a high risk sector and high risk country (e.g. agricultural, mining, etc.) or **Investors** requesting information on potential investments in companies that operate in high risk countries and/or sectors .
- Governments in tenders for potential suppliers, or partnerships with other (high risk) governments or companies.

² Questions are drafted based on due diligence practices at ABN AMRO Bank

³ Shift, "Business and Human Rights Impacts: Identifying and Prioritizing Human Rights Risks." New York, 2014. https://www.ser.nl/~media/files/internet/publicaties/overige/2010_2019/2014/themarapportage-due-diligence-shift-ser-workshop.ashx

- Civil society organizations before starting a new partnership with third parties in high risk countries and/or sectors.

For companies to take action on the VGGT, we highlight the following set of criteria which are specifically referred to in the VGGT as private sector obligations. These criteria are now formulated as topics for inquiry, discussion and dialogue, which can be directly integrated as part of companies existing due diligence procedures. Making the subject of land governance part of the discussion in business practice is the first step in working towards implementation of the VGGT. The topics raised in these criteria can be implemented in different due diligence procedures, it should be seen as a basis for land rights risk assessments.

Civil society organizations as well as governments should also check if their procedures have the right focus on land tenure risks and take appropriate measures together with their partners towards improvement.

3. Actors who can perform due diligence

The VGGT calls for action on land issues by a diverse range of actors, home states, host states, private sector, financial institutions, academia, civil society organizations and communities. Each of these actors have a role to play in improving land governance and safeguarding human rights and responsible use of natural resources. The VGGT presents an overview of all different aspects of land governance that need to be in place on a national level – e.g. administration, rule of law, spatial planning – and how such processes or system should operate.

This White Paper endeavors to stimulate implementation of the VGGT by stressing the different roles and shared responsibilities that actors have. Solving land issues is not the task or responsibility of one actor, rather a shared effort of partnerships is needed to find solutions. If private sector actors choose to operate in an environment with weak land governance performance, it means that more shall be expected from these companies in building sufficient capacity to map land uses, user rights and support equitable development. The quest for information on analyzing land issues before investments takes place will grow when acting on this sense of responsibility. Taking a precautionary approach and conducting sufficient due diligence (by private sector and financial institutions) with support from academia and civil society groups can and should directly support government with the necessary knowledge and information sources to advance administration and monitoring capacity.

III Actions to support the VGGT

1. Questions for Assessment of Companies

Human rights due diligence is an ongoing process through which the company “knows and shows” that it respect human rights. In this respect the company must know and show its impact on human rights related to land tenure.

The following guidance is intended to assist with the assessment of actual and potential human rights impacts by local **companies**⁴ as they implement the VGGT. If a company is not able to answer the questions, specific goals can be set to work towards full compliance of the standards. In that way a positive impact can be achieved.

- Companies should have an overview of their supply chain and identify where Land /Fisheries/Forest tenure could be impacted
 - o What areas and or countries are companies active in?
 - o Since when are companies active in these areas?
 - o What is the purpose and impact of the activities?
 - o In what areas/ activities occur most Land/Fisheries/Forest Tenure risks?

- Companies should have an overview of all people/communities that could be affected by their operations (Cause/Contribute or Linkage to) as defined in the UN Guiding Principles.
 - o Does the company know who is impacted by their operations through their value chain? Did they consult with communities/NGO's/governments on who's Land/Fisheries/Forests tenure rights are affected?
 - o What (local) mitigating factors are in place to prevent (potential) negative impacts?

- Companies that could cause/contribute or are linked to impact on Land/Fisheries/Forests tenure rights of people/communities in their value chain should have a sustainability policy in place describing their standards on:
 - o Prohibition of illegitimate land acquisition
 - o Commitment to engage with stakeholders
 - o Perform social and environmental impact assessment before activities take place
 - o Respect for formal and informal land/ fisheries/ forestry tenure rights
 - o Respect for local communities and avoid conflicts over usage of land and resources
 - o Respect the rights of indigenous peoples and apply FPIC
 - o Respect for women's rights and equal opportunities
 - o Respect for small scale producers (smallholders)
 - o Commitment to remedy and compensation

⁴ Companies in this context are defined as the companies that operate locally. For Financial Institutions these companies are their clients, so the questions should be asked at clients. For Government companies could be suppliers, and for NGO's these companies can be partners.

- Companies should have transparent procedures on contracting and leasing of land/fisheries/forestry tenure. In addition they should communicate transparently with material stakeholders to ensure meaningful consultation of local communities as well as Free-Prior and Informed Consent of indigenous peoples.
 - o What procedures has a company established on contracting/ leasing of Land/Fisheries/Forestry Tenure rights?
 - o In what way has a company developed a list of material stakeholders and how do they communicate with these stakeholders?
 - o What mechanisms does the company have for monitoring and implementing its contract commitments?
 - o How does the company ensure transparency during contract negotiations?
 - o Does the company have a complaint/grievance mechanism in place, and how does it work?
 - o In what way does the company comply with Free, Prior and Informed Consent (FPIC) of indigenous peoples?

- Companies should have a management system in place to implement all policy standards and prevent and address adverse impacts on Land/Fisheries/Forestry tenure rights.
 - o In what way does the company show commitment to Land/Fisheries/Forestry tenure rights? (e.g. policies, respect international human rights and partnerships with local NGO's)
 - o What capacity has the company in place to manage its policies on Land/Fisheries/Forestry tenure rights. Who is responsible for compliance with policies and does the company have a (certified) management system in place?
 - o How does the company make clear in its business relationships the importance it places on respect for human rights?
 - o Does the company have a negative track record on Land/Fisheries/Forestry tenure rights issues? And if so, in what way does the company respond to the negative impacts in order to remedy them?

2. Best Practices

Examples of how to implement VGGT in future due diligence procedures of;
(This section is new and under construction, we hope to add some more examples after broader consultations)

- Financial Institutions;^{*} (proposed strategy)
 - Assess the FI's activities and define how FI's could be, through their clients, linked with land rights issues. FI's can assess what kind of products they provide for these clients and in what way they can use their leverage to engage with them on the topic.
 - FI's could review their policies and client questionnaires, to implement the relevant questions and topics on land rights issues
 - FI's could set up educational programs for relationship managers who work with clients in high risk sectors/countries.
 - FI's could engage with clients and collaborate with them on setting targets to improve land right issues. Clients should set their own annual target in line with international developments, and the FI will monitor them on their performance every year.
- Government Agencies;
- Civil Society Organizations .

^{*}(This is an ABN AMRO example, broader consultation with other FI's will take place in the future to get a broader perspective)

Best practices for Private Sector: Actions to support the VGGT

Based on the publication of the Interlaken Group⁵ which focuses on private sector responsibilities, there are a number of proactive actions companies can take in addition to a strong due diligence procedure to support and contribute to implementation of the VGGT:

- Implement the VGGT and integrate them into the company's operating policies.
- Encourage national and local governments to implement the VGGT.
- Actively engage national counterparts (governments, civil society groups, and communities) in discussions on the goals and principles of the VGGT.
- Encourage suppliers, business partners , service providers, peer companies and industry players to support the VGGT.
- Encourage suppliers to make changes in their operations to ensure they adhere to the VGGT and to advocate for adoption of the goals and principles of the VGGT by local and national governments.

⁵ Respecting Land and Forest Rights: Risks, Opportunities and a Guide for Companies Support for aligning your operations with the Voluntary Guidelines on the Responsible Governance of Tenure (August 2015) by Interlaken Group

- Conduct reviews of land holdings and the holdings of suppliers to check for and address tenure issues.
- Implement an integrated tenure risk management system for investment planning, business operations, and mergers and acquisitions.
- Educate employees about informal and customary tenure rights, corruption prevention, and business models that can prevent harm to neighboring or host communities' land rights.
- Report on progress in meeting the VGGT.
- Consult communities in line with international standards.

The questions drafted in this paper are intended to assist with the implementation of the first bullet on "implement the VGGT and integrate them into the company's operating policies". Where the Interlaken group has described the actions that can be taken by VGGT actors, this paper tries to give a practical implementation of the topics raised in the VGGT. These papers complement each other.

Appendix 1: VGGT in relation to other standards and guidelines

Considering the multitude of standards and guidelines for responsible investment and sustainable production (such as i.e. OECD Guidelines⁶ UN Ruggie Principles⁷, IFC performance standards⁸, Equator Principles⁹, and a number of voluntary sector and commodity standards¹⁰), it is helpful to understand where the VGGT is coming from and how it underpins existing efforts towards better practices in land based investments.

The VGGT came into being in 2012 as a response from the Committee on World Food Security (CFS)¹¹ to deal with the rush of land based investments in neglected rural areas, with weak governance and lack of protection for human rights. The VGGT are the first globally endorsed instrument of soft law that deals with the politically sensitive issue of access to land and other natural resources with strong reference to the state's obligations under international law, especially international human rights instruments¹². Despite its voluntary status, the references to binding international law (e.g. human rights, ILO) makes the VGGT the first instrument in international law that addresses land issues, stressing responsibilities for home states, host states as well as private sector. It would be a great signal of a shift takes place from soft law measures towards hard law in an international framework, which can provide private sector and the financial sector more clarity and guidance moving towards a level playing field.

The VGGT provides a framework for analysis of land issues and the status of land governance in a country or region, with clearly assigned responsibilities for both states as well as private sector to take action in safeguarding human rights and enabling inclusive economic development. Based on this understanding, we recommend that the VGGT functions as a benchmark on the topic of land governance that should be taken on board by other standards and guidelines, to prevent disparities or – even worse - neglect of dealing with existing land issues, with human rights abuses as a result. Therefore the VGGT should be acknowledged and incorporated consistently in every existing standard, in case such references are not yet made, to stimulate coherent action on land issues.

⁶ www.oecd.org OECD is developing a new guideline on how to perform due diligence. When these guidelines go public, we will incorporate these in the white paper.

⁷ <http://business-humanrights.org/en/un-secretary-generals-special-representative-on-business-human-rights>

⁸ http://www.ifc.org/wps/wcm/connect/c8f524004a73daeca09afdf998895a12/IFC_Performance_Standards.pdf?MOD=AJPERES

⁹ <http://www.equator-principles.com/>

¹⁰ Such as e.g. RSPO for Palm oil, Bonsucro for Sugarcane and BCI for Cotton.

¹¹ <http://www.fao.org/cfs/cfs-home/cfsevents/vgg/en/>

¹² <http://www.rural21.com/english/news/detail/article/new-instruments-for-better-land-governance-0000828/>

Appendix 2: Salient Human Rights Issues in Land Tenure

To understand how to implement the VGGT, it is important to understand the underlying issues. Why do we need the VGGT, how do land based investments cause an adverse impact on human rights and who are the rights holders of these human rights?

Importance of land for livelihoods

In many parts of the world the majority of people live and work in rural areas, where they highly depend on land as a primary resource for food and income. Also in urban areas security of land use and legitimate tenure rights are vital for peoples basic needs and livelihoods. Without a place for oneself to live, to access food and water, to earn a living and to form part of a community, people will not have an adequate standard of living. To secure and safeguard these basic needs and human rights, rules and standards with respect to the right to own and use land are necessary.

The UN Guiding Principles on Business and Human rights¹³ state that companies should define those human rights that are at risk of the most severe negative impacts through its activities or business relationships. These are defined as the most salient human rights issues.¹⁴ Severity is defined in the Guiding Principles as those impacts that would be greatest in their scale, their score and their remediability. In addition to severity, the impacts should have some likelihood of occurring in the future, should be negative (to cause harm) and focus on the risk to people, not on business.

The following issues are identified:

- **The right to receiving a living income:** this human right derives from article 1, 3, 25 and 26 of the Universal Declaration of Human Rights (UDHR). Everyone has the right to a standard of living adequate for the health and wellbeing of him/herself and family (Article 25). Insecure land tenure rights, fishing rights and forest tenure as well as weak governance systems for the protection of these rights can particularly negatively affect the income of many people. In rural areas, the poorest people are often landless.¹⁵ 75% of the worlds population live in rural areas where land is a primary source of income, security, opportunity and status, more than half of these families lack access to land.¹⁶
- **Equal Rights/ Discrimination:** women are at an increased risk of losing land as they often do not have secure rights to land they farm. Their link to land rights is often through family (brothers, fathers, husbands). When their link is taken away by illness, violence or immigration, the women are often denied legitimate tenure rights to land or forest and lose their sources of food, income, and shelter.¹⁷

¹³ UN Ruggie principles, 2011: <http://business-humanrights.org/en/un-secretary-generals-special-representative-on-business-human-rights/un-protect-respect-and-remedy-framework-and-guiding-principles>

¹⁴ UNGPreorting p. 22 ; http://www.ungpreorting.org/wp-content/uploads/2015/02/UNGGuidingPrinciplesReportingFramework_withimplementationguidance_Feb2015.pdf

¹⁵ Palmer, Arial, Metzner, Willmann, Muller, Kaleero and Crowley "improving the governance of Tenure of Land, Fihseries and Forests" p. 48.

¹⁶ FAO

¹⁷ www.Landesa.org

- **Right to housing:** to fulfil the right to adequate housing, land is a critical element. The right to adequate housing is a component of an adequate standard of living. People should always be able to live somewhere in security, peace and dignity. Security of tenure and the protection against forced eviction are important elements to identify if the right to adequate housing is protected.¹⁸ The right to housing includes the right of protection against forced eviction and relocation. Eviction often takes place in urban areas, but also occurs in rural areas among landless groups.
- **The right to food:** “Roots of the problem of hunger and malnutrition are not the lack of food but lack of access to available food”.¹⁹ Access to food requires access to resources, which include legitimate tenure rights to land. Many people in rural areas suffer from hunger because they do not have access to secure land tenure, or their owned land is so small it is not enough for adequate food for them and their families.
- **The right to water;** “everyone is entitled to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses”.²⁰ Access to water can be affected negatively by changes in land use, land access or ownership. Lack of responsible water management in one area can also effect other areas in the water basin, for example by depleting ground water sources or contamination, both affecting water availability and water quality downstream.²¹
- **Indigenous rights and community land rights:** one of the key areas of international human rights law indicates the land rights for indigenous peoples. Indigenous people are vulnerable for losing the land that is tied to their spiritual, cultural and social identities. Indigenous communities mostly have informal or customary land rights. In case a company requires land that belongs to an indigenous community, a process of Free, Prior and Informed Consent (FPIC) is mandatory.

¹⁸ Institute for Human Rights and Business “land rights issues in International Human Rights Law:” p. 5

¹⁹ Committee on Economic Social and Cultural Rights, General comment 23, The right to adequate food (art. 11).

²⁰ CSRCR, General comment 15: the right to water.

²¹ Water is not part of the scope of the VGGT. However, responsible management of water relates to responsible land use and respect for the human right to water.

Appendix 3: ABN AMRO due diligence and land rights, an example

ABN AMRO does not have a specific policy focused on Land Tenure, the subject is addressed in several sustainability policies. ABN AMRO has specific sustainability policies for high risk sectors. The protection of land rights is an issue in several sectors. The extractive sectors (oil, gas and mining), the agriculture sector, the manufacturing sector, the infrastructure sector (such as dams) and the chemicals sector are four specific high risk sectors looking at land tenure rights.

Land rights issues are part of our Human Rights due diligence. Due to our collaboration with Shift²², we are developing our due diligence in line with the UN Guiding Principles on Business and Human Rights.

Procedure of managing sustainability risks (including Land tenure rights)

- Risk Identification; could the bank/client cause, contribute to, or are they linked to an adverse impact on land tenure rights through its business?
- Assessment; has the client the right capacity, commitment and track record on sustainability issues including land tenure rights?
- Approval; If the client is managing sustainability risks properly, positive advise is given to start a relationship with the client. When the client is not yet on the right track, but is willing to start an engagement with ABN AMRO to improve its capacity, commitment and track record within two years, positive advise is given to start a relationship with the client. If the client does not have the right commitment, capacity and track record in place and does not want to start an engagement with ABN AMRO, negative advise is given to a relationship with the client.
- Monitoring and reporting; when a client is accepted and active in a high risk sector from a sustainability perspective, we review the client every year and with every new credit given. Especially when we started engagement to improve with a client.

Due Diligence process; within ABN AMRO there are several policies and questionnaires in place that address land tenure issues. ABN AMRO has an exclusion list in place where it excludes companies carrying out certain activities. In addition to the exclusion list, ABN AMRO has several sustainability (sector) policies in place describing sustainability standards set by ABN AMRO. These standards are being implemented through client questionnaires.

- Ø Exclusion List; The ABN AMRO Exclusionist does not specifically mention Land tenure rights, but excludes "Resettlement of indigenous and/or vulnerable groups without Free Prior and Informed Consent (FPIC)" Which is an important part of respecting legitimate tenure rights
- Ø Sector Policies: ABN AMRO has marked several sectors as high risk from a sustainability perspective, and has drafted policies that focus on these sectors to mitigate the sustainability risks. ABN AMRO has drafted sustainability policies for the energy sector, mining sector, manufacturing sector, agricultural sector, chemicals sector, transport sector, defence sector and commercial real estate sector.

All sector policies have standards for clients that cover parts of the VGGT. These standards include;

²² Shift, "Business and Human Rights Impacts: Identifying and Prioritizing Human Rights Risks." New York, 2014.

- Clients should respect human rights including indigenous people rights (Agri)
- Clients should especially care for the wellbeing of those who are affected by their operations (Agri)
- Clients show respect for ecosystems and biodiversity (agri)
- Clients should care for local community and avoid conflict over usage of land and resources (Agri-Forestry/Fisheries/ Tobacco)
- Clients should mitigate risks of deforestation, water pollution, soil depletion and potential impacts on local communities (Tobacco)
- Bank clients need to engage constructively and openly with stakeholders (local communities in particular) (Energy)
- Bank clients demonstrate their commitment to human rights protection and environmental protection, including air emissions, waste and waste water management. (Energy)
- A client that itself also produces raw materials has a policy to combat deforestation and land-grabbing. The client complies with the Free and Prior Informed Consent (FPIC) principle when acquiring land. (Manufacturing policy)
- The client has a policy in the Suppliers Code of Conduct to combat deforestation and land-grabbing in wood production. (Manufacturing policy)

Ø Client Questionnaires

For several sectors there are clients questionnaires in place that translate the policy standards into questions clients should answer. Specific questions for our Agri clients include;

6. Does a clients have Stakeholder Engagement policy in place
7. How does the client maintain relationships with key stakeholders i.e. local communities where operations take place
8. Is there a mechanism or a policy in place for dealing with grievances and complaints from the communities in which the client operates?

Ø Equator Principles:

In project financing, ABN AMRO analyses whether the project finance requests are compliant with the Equator Principles, which are based on the IFC Performance Standards including IFC Performance standard 5; Land Acquisition and Involuntary Resettlement. With the Equator Principles Projects are assessed on several social and environmental standards contained in the Equator Principles. The Equator Principles