

PRIVATE SECTOR RESPONSIBILITIES IN AGRICULTURAL INVESTMENT UNDER THE VGGT

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Abstract

FAO has commissioned a series of technical guides to assist those wishing to adopt and implement the relevant provisions of the Voluntary Guidelines on the Responsible Governance of Tenure (VGGT). This paper is an abbreviated version of one of the newest of those guides, one aimed at financial investors in the private sector. Entitled, “Responsible Governance of Tenure: A Technical Guide for Investors,” the guide is intended to help investors act with due diligence to achieve socially responsible and financially sustainable investments in agricultural land. The guide recognizes that, while even the best project may elicit criticism, investors who evaluate, structure, operate and monitor their investments in a way that is consistent with the VGGT are likely to create projects that do no harm, maximize benefit-sharing and yield a reasonable return on the investment. This is part of a broader objective of promoting land-based investments in agriculture that are more likely to benefit all stakeholders – investor, local community and government. The technical guide can be found at <http://www.fao.org/3/a-i5147e.pdf>.

Key Words:

Voluntary Guidelines; due diligence; responsible investment; tenure

EXECUTIVE SUMMARY

The Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security (the “VGGT”) were adopted by the UN Committee on Food Security to help all parties—governments, private sector actors and local communities—achieve socially responsible and financially sustainable investments in land, fisheries and forests (FAO 2012). While primarily for governments, certain important provisions of the VGGT are addressed to the private sector, in particular:

Non-state actors including business enterprises have a responsibility to respect human rights and legitimate tenure rights. Business enterprises should act with due diligence to avoid infringing on the human rights and legitimate tenure rights of others. They should include appropriate risk management systems to prevent and address adverse impacts on human rights and legitimate tenure rights.¹

FAO has commissioned a series of technical guides to assist those wishing to adopt and implement the relevant provisions of the VGGT. This paper is an abbreviated version of one of the newest of those guides, one aimed at financial investors in the private sector. Entitled, “Responsible Governance of Tenure: A Technical Guide for Investors,” the guide is intended to help investors act with due diligence to achieve socially responsible and financially sustainable investments in agricultural land. The guide recognizes that, while even the best project may elicit criticism, investors who evaluate, structure, operate and monitor their investments in a way that is consistent with the VGGT are likely to create projects that do no harm, maximize benefit-sharing and yield a reasonable return on the investment. This is part of a broader objective of promoting land-based investments in agriculture that are more likely to benefit all stakeholders – investor, local community and government.

In keeping with the VGGT, the guide focuses primarily on issues of tenure, and only with regard to agricultural land. It does not discuss many other issues important to investment, such as raising capital, preparing business plans, hiring good local management, etc., as such considerations are beyond the scope of the VGGT. Following the recommendations contained herein should make it less likely that an investment will be faced with land-related claims and disputes.

¹ VGGT paragraph 3.2.

For investors, a responsible investment in land begins with a preliminary risk assessment, including an evaluation of high-risk factors, followed by a more comprehensive due diligence process. If the results of the preliminary assessment and due diligence analysis are sufficiently positive, the process continues through the consultation, negotiation, agreement, operational and close-out phases. While the operational and close-out phases are certainly no less important, the guide deals primarily with the preliminary assessment, due diligence, consultation, negotiation and agreement phases, as these are where the biggest tenure-related issues are likely to arise.

To that end, the guide contains seven chapters: (1) an introduction that sets the stage; (2) tenure rights; (3) consultation, participation and negotiation; (4) grievances and dispute resolution; (5) transparency and corruption; (6) food security, human rights, environment and sustainability; and (7) implementation challenges (capacity building and monitoring). Each chapter (other than the introduction) begins with a summary of what the VGGT provide on the issue addressed in the chapter. This is followed by an explanation of the risk to investors related to the issue. Next, the guide provides concrete advice on how the risk can be managed and mitigated. Each chapter ends with a checklist summarizing the main points. This abbreviated paper contains only the summary of what the VGGT say about the issue and the checklist.

In keeping with its focus on the first parts of the project lifecycle, the guide also sets forth a series of high-risk factors which should prompt the investor to abandon the project during or immediately after completing the due diligence phase. In addition, the guide also identifies medium-risk factors that signal the need to proceed with caution, carefully re-examine the project and search for ways to mitigate those risks. If that is not possible, the guide advises the investor not to proceed with the investment.

A senior corporate executive has observed that agricultural land-based investments “which ignore the interests of local communities and the local landscapes are both morally wrong and commercially short-sighted.”² Such investments are more likely to be successful if everyone—investor, local community and government—benefit. The VGGT provide a framework for achieving this win-win-win scenario; this Technical Guide seeks to help investors play their part in achieving that result.

² Bowman, Mark (Managing Director, SABMiller Africa). 2013. Land Rights, not Land Grabs, Can Help Africa Feed Itself. Business Fights Poverty. (<http://community.businessfightspoverty.org/profiles/blogs/mark-bowman-land-rights-not-land-grabs-can-help-africa-feed>)

Risk Factors

For investors, a responsible investment in land begins with a preliminary risk assessment, including an evaluation of high-risk factors, followed by a more comprehensive due diligence process (Smaller 2014). If the results of the preliminary assessment and due diligence analysis are sufficiently positive, the process continues through the consultation, negotiation, agreement, operational and close-out phases. While the operational and close-out phases are certainly no less important, the guide deals primarily with the preliminary assessment, due diligence, consultation, negotiation and agreement phases as it is here that the biggest tenure-related issues arise.

BOX 1-HIGH RISK FACTORS



- There are a significant number of existing or recent disputes or claims involving the land that cannot be resolved.
- The land was originally acquired by the government by expropriation or the project requires expropriation to make it available for development, in either case causing local people to be evicted.
- The project design requires the large-scale transfer of land rights from local people, possibly resulting in many people being voluntarily resettled.
- The country or locality where the project may be situated has significant corruption problems and corrupt activities have been observed in relation to the proposed project and cannot be effectively mitigated.
- There is an active, ongoing conflict in the project area.
- In weak land governance settings, the operator/direct investor has not and will not carry out
 - Participatory stakeholder mapping
 - A comprehensive SEIA (including land tenure, food security, human rights)
 - An inclusive community consultation process
- Where a SEIA has been done, it reveals:
 - Negative impacts on food security that cannot be adequately mitigated
 - Infringements on human rights that cannot be avoided
- Indigenous communities have not given their free, prior and informed consent.
- The site is one where there are forests or is in an area of high conservation value that is likely to be destroyed or harmed by the project.

In the preliminary assessment phase, the presence of any of several high-risk factors should prompt a responsible investor to decide not to proceed with the investment. Those factors are listed in Box 1.

The preliminary review could also identify some lesser risk factors, which generally reveal fewer or more limited adverse environmental and social risks and/or impacts that can be mitigated or reversed.³ An investor considering a project that has the somewhat less severe risk factors listed in Box 2 should proceed with caution:

BOX 2-MEDIUM RISK FACTORS



- ◆ The project land area is very large and appears to exceed what can reasonably be put under production over the life of the project, thus raising concerns about speculative motives.
- ◆ The project is situated in a post-conflict setting.
- ◆ Human rights violations have been reported in the area.
- ◆ Indigenous peoples reside on or near the project site.
- ◆ The project will be situated in an area where land rights tend to be undocumented and/or governed by customary law and the operator has yet to do participatory mapping to identify all legitimate rights holders.
- ◆ The communal land targeted by the investor is wrongly categorized as unused or inhabited
- ◆ The local community has not been involved in the project planning phase.
- ◆ Affected stakeholders have not yet been engaged in an effective, culturally-appropriate, gender-inclusive and transparent consultation process.
- ◆ Local communities are not represented in some fashion by competent advisors or advocates where the communities lack the capacity to represent themselves.
- ◆ An independent social and environmental impact assessment—including a gender-sensitive evaluation of potential impacts on land tenure, food security and human rights—(SEIA) of the proposed project has yet to be completed.
- ◆ The SEIA reveals the likelihood of significant negative effects on land rights, food security, human rights or the environment if the project is not revised.
- ◆ A comprehensive written agreement on the terms of any transfers of legitimate formal and customary land rights has not been completed.
- ◆ The project involves a relationship with a Politically Exposed Person (often a senior political official or relative of such an official) who may be deemed to be more susceptible to bribery and corruption.

The presence of one or more of the foregoing “medium” risk factors can make a proposed project problematic. The responsible investor should carefully re-examine any such project in the due

³ The Equator Principles contain a three-part risk analysis that categorizes risk from highest (Category A) to lowest (Category C). That analysis may be useful to some investors. See Principle 1. The Equator Principles Association. 2013. The Equator Principles. (<http://www.equator-principles.com/>).

diligence phase, search for ways to mitigate those risks and, if that is not possible, move on to another project.

I. INTRODUCTION

A. Background

Investments in agriculture have proven to be one of the most effective means of reducing poverty in rural areas of developing countries. Most of the world's poor live in such areas and depend on agriculture for their livelihoods. Substantial increases in agricultural production will be necessary to reduce poverty and food insecurity. Demand for food will also increase rapidly in fast-growing urban areas. This is one reason why demand for agricultural land in developing countries has increased sharply since 2008 (FAO 2014).

Agricultural investments can benefit the communities where the investments are located by giving small farmers greater access to capital, technology, knowledge, and markets. Recipient countries can reap macroeconomic benefits such as increased incomes, economic growth, agricultural production and export earnings. On the other hand, because some agricultural land-based investments occur in countries with weak land rights and governance, these projects sometimes have caused many rural land users to lose rights and access to their land and other natural resources.

Land differs from other asset classes. In much of the world land is profoundly linked to livelihoods, culture, social structures and norms and, of course, access to food, water and shelter. Land sometimes has great cultural significance to people who live on it. Responsible investors must understand how critically important land is to the people who may be affected by their investments and how different categories of rural-dwellers may be affected differently.

The Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security (the "VGGT") were developed and unanimously endorsed by the UN Committee on World Food Security (CFS) in May 2012. The primary objective of the VGGT is to:

[I]mprove governance of tenure of land, fisheries and forests. They seek to do so for the benefit of all, with an emphasis on vulnerable and marginalized people, with the goals of food security and progressive realization of the right to adequate food, poverty

eradication, sustainable livelihoods, social stability, housing security, rural development, environmental protection and sustainable social and economic development.⁴

While primarily for governments, certain key provisions of the VGGT are addressed to non-governmental actors, including businesses and investors.⁵ The VGGT are increasingly seen internationally as a set of best practices for investment in land, forests and fisheries. (The guide deals only with agricultural investments.⁶) Indeed, the guide views the VGGT as minimum standards for responsible investment; thus, it also includes many recommendations that go beyond the VGGT in the interests of further minimizing risk and safeguarding the rights of local communities.

It is important to note that the guide does not purport to provide investors with the ability to respond to all tenure-related issues they may encounter in any setting. Rather, it explains what the VGGT mean and how they can help firms to understand and manage the substantial financial, legal, operational and reputational risks related to land tenure. The ultimate goal is investments that are socially beneficial and yield a reasonable risk-adjusted return.

B. Rationale

Acting in accordance with the VGGT can help investors to better understand and manage the substantial financial, legal, operational and reputational risks inherent in investing in land-based assets in many developing countries. The VGGT and complementary resources provide a great deal of insight and practical advice on how to cope with those risks and thus increase the likelihood of positive financial returns and benefits to local communities. The important links between land rights and human rights also means that complying with the VGGT is an important tool in ensuring that the investment respects human rights.⁷

The reality is that the “rules” applicable to agricultural investments are changing. For decades, many countries have been plagued by weak land governance, caused by a lack of funding, human resource

⁴ VGGT, paragraph 1.1.

⁵ For example, VGGT paragraph 3.2.

⁶ Although the VGGT address both forests and fisheries the guide focuses only on investments in agricultural land. An upcoming technical guide will assist governments in managing agricultural investments and another is directed to lawyers. Previously published guides address fisheries, forests and gender.

⁷ See, e.g., Report of the United Nations High Commissioner for Human Rights, 11 July 2014. UN doc. E/2014/86. See, also, the discussion in chapter VI.

capacity and political will. The societal impact of this weakness has grown with increased demand for land. The multi-stakeholder adoption of the VGGT is just one indication that governments, civil society, NGOs, consumers, businesses and others are becoming increasingly aware of the importance of secure land rights and improved governance as capacity building efforts begin to bear fruit. Those with rights to land in low-income countries—governments, local communities, individuals—are becoming increasingly aware of the value of their land. Emerging market governments, supported by donor countries, are moving towards incorporating the VGGT into their national legal frameworks. Thus, investors who want to succeed in those settings must understand the VGGT.

This is an evolving situation, similar to what has happened previously with other social issues such as human rights,⁸ labor rights or environmental protections. Many developing country governments are changing the way they do business.⁹ What constitutes responsible practices has changed and will likely continue to change. This should create a safer and more stable environment for investment in countries that incorporate the VGGT into their land governance laws and practices. But it will also require investors to change and improve their practices as the bar is raised.

Many businesses are aware of this trend and have reacted accordingly. Recently, the business community participated in the development of the recently-adopted Principles for Responsible Investment in Agriculture, and Food Systems (the “Principles”) which explicitly incorporates the land tenure provisions of the VGGT and encourages financiers and businesses to operate in accordance with them.¹⁰ Multinationals¹¹ and others have explicitly endorsed the VGGT as they have come to understand the financial and reputational risks of irresponsible land tenure practices in their supply chains and the potential rewards from doing it right. There are also specific standards and certification processes that apply to commodities, such as biomaterials, palm oil, sugar and others.¹²

Large institutional financial investors have committed to invest in accordance with the Principles for Responsible Investment in Farmland, which includes respect for existing land rights (TIAA-CREF, et al,

⁸ As reflected in part by the adoption of the UN Guiding Principles on Business and Human Rights unanimously endorsed by the UN Human Rights Council in 2011.

⁹ For example, the African Union and others recently adopted the Guiding Principles on Large Scale Land Based Investments in Africa (<http://www.uneca.org/publications/guiding-principles-large-scale-land-based-investments-africa>).

¹⁰ FAO, et al. Principles for Responsible Investments in Agriculture and Food Systems (http://www.fao.org/fileadmin/templates/cfs/Docs1314/rai/CFS_Principles_Oct_2014_EN.pdf).

¹¹ Such as Nestle, Coca Cola, PepsiCo and Cargill.

¹² Citations for these roundtable documents are set forth in the References section.

2011). Many large banks and institutional lenders apply the International Finance Corporation (IFC) Performance Standards (sometimes via the Equator Principles for private lenders) to larger projects.¹³

Investing responsibly can also enhance a project operator’s “social license to operate” in the eyes of the community. A firm that invests in an operator with a social license can be seen as having obtained an analogous social “license to invest.” Investors can earn such a “license” by adopting and implementing due diligence measures covering social and environmental risks in the companies or land-based projects in which they consider investing (Oxfam 2014).

It is important to note that investing responsibly involves going far beyond traditional corporate social responsibility (CSR) practices. It is not enough simply to build a school or medical facility in a community where an investment will be made. Truly responsible investments do far more, as explained in the guide, and seek not only to avoid negative social and environmental impacts but also to create mutually beneficial economic relationships with the affected communities.

All of this means that making potentially profitable land-related investments in developing countries often have high transaction costs. Conducting social and environmental impact assessments—which, as explained later in the guide, also evaluate impacts on land rights, food security and human rights—and consulting effectively with local communities can be costly.

But the costs of getting it wrong can be even higher. If an investment displaces and impoverishes local people, they are likely to find a way to undermine it. Recent research has begun to document just how expensive it can be if land rights-related conflicts arise in an investment. Costs can run into the millions of dollars in some of the more extreme cases.¹⁴

At the end of the day, it simply makes financial sense to invest responsibly. “In fact, the information advantage offered by understanding land tenure risk may well provide a competitive edge in selecting [emerging market economy] ... investment targets. The key for investors is to ask questions and develop

¹³ The IFC has announced that it is committed to following the Principles to ensure that agricultural projects it finances are carried out responsibly and sustainably. (http://www.ifc.org/wps/wcm/connect/region_ext_content/regions/latin%20america%20and%20the%20caribbean/s trategy/corporacion_dinant)

¹⁴ See, e.g., The Munden Project. 2012. The Financial Risks of Insecure Tenure: An Investment View. Rights and Resources Initiative. http://www.rightsandresources.org/documents/files/doc_5715.pdf. (“Munden 2012”)

risk management processes.”¹⁵ Based on the VGGT, the guide provides advice on which questions to ask and the risk management practices to adopt.

C. Target Audience

The primary target audience of this Technical Guide is those organizations that provide capital or manage funds that are ultimately used for investing in and/or operating land-based assets. We refer to this group throughout the guide simply as “investors.” By contrast, an “operator” is the entity that is actually managing the project on the ground. (Some investors may also be operators.) The recommendations contained herein apply equally to both international and domestic investors. All can use it to navigate through the responsible investment and due diligence process.

While absolutely recognizing the critical role smallholders play in ensuring food security and improving livelihoods, the guide is aimed at larger enterprises that have the potential for greater impact on tenure rights—both positive and negative—and greater resources to invest in support of responsible practices.¹⁶

The specific categories of investors to which the guide is directed are:

- **Asset Owners:** pension funds, insurance companies, family offices, private investors, endowment funds and private foundations that have a discretionary mandate over the funds they manage. They can either invest directly in land-based assets or through Asset Managers.
- **Land Aggregators:** publicly listed companies whose core strategy is to invest in and manage land assets.
- **Asset Managers:** firms that manage assets on behalf of Asset Owners – often also responsible for acquiring or arranging financing for the asset. Such firms include private equity (PE) funds, hedge funds and other investment vehicles that have a PE-like structure.
- **State-owned companies or Sovereign Wealth Funds:** they often seek to secure access to the underlying commodities for their home countries.
- **Multinational companies:** large food and beverage companies and others that invest in land as part of their strategy to secure supply and to ensure traceability.

¹⁵ The Munden Project. 2013. Global Capital, Local Concessions: A Data-Driven Examination of Land Tenure Risk and Industrial Concessions in Emerging Market Economies, at 3. Rights and Resources Initiative. http://www.rightsandresources.org/documents/files/doc_6301.pdf. (“Munden 2013”)

¹⁶ For an extensive discussion of smallholder agriculture, see: HLPE. 2013. Investing in smallholder agriculture for food security. A report by the High Level Panel of Experts on Food Security and Nutrition of the Committee on World Food Security, Rome. http://www.fao.org/fileadmin/user_upload/hlpe/hlpe_documents/HLPE_Reports/HLPE-Report-6_Investing_in_smallholder_agriculture.pdf.

- **Financial services sector:** including commercial banks that provide financing to clients that invest in farmland.
- **Bilateral or Multilateral Development Banks:** includes the International Finance Corporation and the regional and national development banks.
- **Commodity traders:** such firms may be exposed to land tenure risk to the extent that they provide trade finance and hedging instruments as part of their operations.

Indirect investors that are one or more steps removed from the underlying assets—perhaps because they are investing in a fund that in turn invests in land—can also use the guide as they evaluate and negotiate with a direct investor and to make clear what the indirect investors expect as a condition of making the investment. Thus, for example, where the guide recommends that direct investors commission (or insist that the operator commission) an independent Social and Environmental Impact Assessment (“SEIA”) during the due diligence phase prior to the investment, an indirect investor will know to ask whether the entity in which it is considering making an investment has a policy that requires SEIAs with acceptable results.

Others in the value chain, such as multinationals or commodity traders that buy agricultural products but do not invest in land may find this Technical Guide useful but it is not written with them primarily in mind.

D. A Word about Scale

The recommendations contained in the guide can be applied to all land-based investments, regardless of size. As a practical matter, however, agricultural investments in developing countries vary widely in terms of land area and capital requirements. Thus, investors considering and then investing in small projects often will not be able to afford the same level of due diligence and risk management activities as larger investments. Therefore, while projects involving millions of dollars probably should be implemented with the assistance of multiple experts, perhaps using an expensive process such as the one required by the International Finance Corporation (IFC),¹⁷ in small projects the investor or operator may have to conduct the due diligence risk assessment with far less expert assistance at less cost.¹⁸ Where appropriate, we emphasize situations where flexibility can be accommodated and how smaller projects

¹⁷ IFC requirements are set forth in the IFC Performance Standards on Social and Environmental Sustainability, January 1, 2012.

http://www.ifc.org/wps/wcm/connect/115482804a0255db96fbffd1a5d13d27/PS_English_2012_Full-Document.pdf?MOD=AJPERES. They are referred to hereinafter as the “IFC Performance Standards.”

¹⁸ Note that the Equator Principles apply only to deals exceeding a certain size in dollar terms.

can do what is necessary to invest responsibly in a financially constrained setting. Often this involves working with local NGOs.

Nevertheless, virtually all investors should be able to use the guide to inform their assessments and management of investments in agricultural land in emerging markets.

E. The Role of Government

The VGGT recognize that government plays the most important role in recognizing and protecting tenure rights, food security, human rights and the environment. Governments also play a crucial role in regulating investments and investors. In many settings, the government is actually a party to the investment contract. The FAO has produced another technical guide entitled “Safeguarding Land Tenure Rights in the Context of Agricultural Investment.” The guide provides advice to government officials responsible for investment promotion, approval and monitoring on how to carry out their duties in a manner consistent with the VGGT (FAO 2015). Investors may wish to consult this other guide to gain a better understanding of the role of government.

Of course, the private sector cannot and should not take on the role of government. However, investors and businesses can support and, in some cases, supplement the activities of government where the government is unwilling or unable to carry out its investment oversight and land governance responsibilities effectively. The guide suggests ways that investors and operators can support and augment the government in a way that respects legitimate tenure rights and reduces investor risk. It also observes that, while investors must always comply with national and international law¹⁹, there will be circumstances where it will be necessary and prudent to go beyond the minimum required by law as set forth in the VGGT.

II. TENURE RIGHTS

A. What Do the VGGT Say?

Under the VGGT, businesses and investors “have a responsibility to respect ... legitimate tenure rights” and “should act with due diligence to avoid infringing on the legitimate tenure rights of others.” To do this, investors “should include appropriate risk management systems to prevent and address adverse impacts on ... legitimate tenure rights....” This requires them or the operators in which they invest to

¹⁹ See VGGT paragraph 2.2.

“identify and assess any actual or potential impacts on ... legitimate tenure rights in which they may be involved.”²⁰

The VGGT also state that “[r]esponsible investments should do no harm, safeguard against dispossession of legitimate tenure right holders and environmental damage, and should respect human rights.”²¹

Investors are advised that they “have the responsibility to respect national law and legislation and recognize and respect tenure rights of others and the rule of law....”²²

An essential goal of the VGGT is gender equality. All stakeholders, both public and private, are urged to ensure equal tenure rights for women and men. Governments are encouraged to “ensure the equal right of

BOX 3-TENURE RIGHTS RISK FACTORS

High Risk

- There are a significant number of existing or recent disputes or claims involving the land that cannot be resolved. This is more likely to be the case in an acquisition, merger or “brownfield” investment scenario, involving an ongoing operation (as opposed to a “greenfield” project where the land is either not being used commercially or is being used for other commercial purposes).
- The land was originally acquired by the government by expropriation or the project requires expropriation to make it available for development, in either case causing local people to be evicted.
- The project design requires the large-scale transfer of land rights from local people, possibly resulting in many people being voluntarily resettled.
- The operator/direct investor has not and will not carry out:
 - Participatory stakeholder mapping
 - A land tenure impact assessment (possibly as part of a comprehensive SEIA)
 - Consultation process with community

Medium Risk

- ◆ The project land area appears to exceed what can reasonably be put under production over the life of the project, thus raising concerns about speculative motives.
- ◆ The project will be situated in an area where land rights tend to be undocumented and/or governed by informal law and the operator has yet to do participatory mapping to identify all legitimate rights holders.
- ◆ An independent SEIA—including an evaluation of potential impacts on land tenure, gender, food security and human rights—of the proposed project has yet to be completed.
- ◆ The SEIA reveals the likelihood of significant negative effects on land rights, food security, gender, human rights or the environment if the project is not revised as recommended by the SEIA.

women and men to the enjoyment of all human rights”²³ and “take measures to ensure that legal and

²⁰ VGGT, paragraph 3.2.

²¹ VGGT, paragraph 12.4.

²² VGGT, paragraph 12.12.

²³ VGGT, paragraph 3B4.

policy frameworks provide adequate protection for women and that laws that recognize women's tenure rights are implemented and enforced.”²⁴ The VGGT instruct parties to agricultural investment contracts to see to it that the “negotiation process should be non-discriminatory and gender sensitive.”²⁵

Agricultural investments often have a substantially different and greater impact on women. Men are often in a better position to benefit from the investments while women are more likely to be negatively affected. Those seeking a more comprehensive discussion of women's land tenure rights and the VGGT should consult the FAO publication entitled “Governing Land for Women and Men-A Technical Guide to detailed advice on ensuring that women's tenure rights are identified and respected.

B. Tenure Rights Risk Management Checklist

Agricultural investments can create value for all affected parties. But causing harm to legitimate tenure rights is a significant risk factor in these investments. In the most extreme cases, financial harm can run into the millions of dollars. Legitimate tenure rights include both formal, documented rights and informal, usually undocumented rights. They often include those with seasonal or overlapping rights, such as those held by pastoralists. Particular attention should be paid to the rights of women.

- ✓ In the project design phase, consider project models that do not involve the transfer of land rights from smallholders and other local people, or at least minimize the extent to which such transfers are necessary. In all cases, avoid projects that require expropriation and eviction. An important risk mitigation strategy is to avoid resettlement of all kinds, voluntary or involuntary.

- ✓ Identify and recognize all land rights.
 - Consult with experts on national and local customs and practices relating to land.
 - Meet with government officials and review government land records.
 - At a very early stage, begin consultations with the community, ensuring women, youth and vulnerable groups are represented (see Chapter 3).
 - Carry out a participatory mapping exercise in which the community assists in identifying and mapping all local land rights holders and uses.

- ✓ During the due diligence process commission or require an independent SEIA to identify potential impacts the project may have on the tenure rights identified by participatory mapping and on the environment, gender, food security and human rights. (See Chapter VI.) It should also recommend

²⁴ VGGT, paragraph 5.4. See also paragraphs 4.6, 7.1, 7.4, 9.6 and 11.6.

²⁵ VGGT, paragraph 12.11.

how adverse impacts can be mitigated.

- ✓ If the SEIA reveals possible or actual negative effects on legitimate tenure rights, attempt to reconfigure the project to avoid the negative impacts. There are a variety of reconfiguration measures that may be suitable, depending on the circumstances, including:
 - Exploring alternative investment models that do not result in the large-scale transfer of land rights, including partnerships with local land-rights holders and contracts with small-scale producers.
 - Utilizing a different land acquisition structure, such as a lease instead of an outright acquisition or a lease term that is shorter in duration.
 - Avoiding the resettlement of people by considering feasible alternatives. If voluntary resettlement cannot be avoided, those resettled should be promptly and adequately compensated and have continued access to resources and alternative livelihoods.
 - Reducing the amount of land to be acquired for the project, and/or modifying boundaries to minimize impact.
 - Allowing community members to continue to use at least a part of the land for subsistence farming.

- ✓ If it proves impossible to avoid the negative impacts on local tenure rights, do not proceed further with the investment.

III. CONSULTATION, PARTICIPATION AND NEGOTIATION

A. What do the VGGT say?

The VGGT promote the widespread use of consultation with and participation by all those affected by a proposed investment. “Consultation and participation” is defined as:

[E]ngaging with and seeking the support of those who, having legitimate tenure rights, could be affected by decisions, prior to decisions being taken, and responding to their contributions; taking into consideration existing power imbalances between different parties and ensuring active, free, effective, meaningful and informed participation of individuals and groups in associated decision-making processes.²⁶

²⁶ VGGT, paragraph 3B6.

The VGGT urge governments and other parties (including investors) to consult effectively with all stakeholders, including “Indigenous peoples and other communities with customary tenure systems, smallholders and anyone else who could be affected...”²⁷ Indigenous peoples are afforded particular attention as investment projects affecting their land tenure rights require their free, prior and informed

BOX 4-CONSULTATION AND NEGOTIATION RISK FACTORS

High Risk

-  The operator has not and will not carry out a culturally appropriate and inclusive participation and consultation process with all affected parties in the community.
-  Indigenous communities have not given their free, prior and informed consent.

Medium Risk

-  The local community has not been involved in the project planning phase.
-  Affected stakeholders have not yet been engaged in an effective, culturally-appropriate and transparent consultation process.
-  All relevant information about the project has not been disclosed in the consultation.
-  A comprehensive written agreement on the terms of any transfers of legitimate formal and informal land rights has not been completed.
-  Indigenous communities reside on or near the project site.
-  Consent has been obtained only from traditional authorities.

consent (FPIC) before they may proceed.²⁸ Other communities are entitled to consultation and participation.²⁹

B. Consultation and Negotiation Checklist

Projects that do not include adequate consultation, participation and the approval of local people are likely to incur substantially higher costs than those that do because it is difficult, if not impossible, to identify and recognize tenure rights, assess impacts or develop a productive ongoing relationship with the local community. In most cases, consultation should be an inherent part of the SEIA.

- ✓ Consult with a local expert familiar with the customs and culture of the community with which the investor will engage.

²⁷ VGGT, paragraph 7.3. See, also, VGGT paragraph 8.6 calling for consultation with “anyone who could be affected” by policies affecting tenure rights, and VGGT paragraph 9.9 providing for consultation with indigenous communities and other communities with customary tenure rights.

²⁸ VGGT, paragraph 9.9.

²⁹ VGGT, paragraph 12.7.

- ✓ Create a community engagement plan to guide the process.
- ✓ Begin the consultation early in the project planning phase and continue throughout the due diligence phase, negotiation of the terms and operation of the project.
- ✓ Using the results of the participatory mapping exercise identified in Chapter II, ensure that all affected stakeholders—not just those with formal land rights—are consulted with.
- ✓ Design and plan the consultations to take account of the customs, culture, language, decision-making practices and interests of the group. They should be voluntary, inclusive, honest, collaborative, based on shared information and offer opportunities for meaningful feedback.
- ✓ Recognize that different groups within the community, such as women and pastoral groups, may require different interactions in terms of style, location or timing and adopt measures to ensure that these groups can meaningfully participate.
- ✓ Provide all relevant information to the community in culturally-appropriate formats.
- ✓ Engage in multiple consultation sessions over time and continue over the life of the project.
- ✓ Create a record of any decisions made during the consultations.
- ✓ If the investment affects the land or resources of indigenous peoples, ensure that the project does not proceed without their free, prior and informed consent. The right to consent includes the right to say no to the project or to offer to consent only if certain conditions are met.
- ✓ Consider adopting a policy that requires FPIC in all cases in order to reap the long-term benefits of positive relationships with the local community.

IV. GRIEVANCES AND DISPUTE RESOLUTION

A. What Do the VGGT Say?

The VGGT recognize that governments have the primary responsibility for developing and operating mechanisms to resolve disputes over tenure rights. Governments are advised to:

Provide access to justice to deal with infringements of legitimate tenure rights. They should provide effective and accessible means to everyone, through judicial authorities or other approaches, to resolve disputes over tenure rights; and to provide affordable and prompt enforcement of outcomes.³⁰

³⁰ VGGT, paragraph 3.1(4).

Governments are told to provide “timely, affordable and effective means of resolving disputes over tenure rights, including alternative means of resolving such disputes....”³¹ Such mechanisms should be “accessible to all, women and men, in terms of location, language and procedures.”³²

The VGGT also give the private sector a role to play:

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.³³

B. Grievances and Dispute Resolution Checklist

Unresolved claims and grievances can undermine the project or saddle it with additional costs associated with dealing with claims of those who believe they have been harmed.

- ✓ Creation of an appropriate non-judicial grievance and dispute resolution procedure should be one of the subjects discussed with the community in the consultation process. The procedure should be defined jointly by the community and the investor.
- ✓ In many cases, it may be necessary to consult with an expert for assistance in designing the process.
- ✓ As with effective consultation processes, the grievance mechanism should be compatible with the customs, culture, language, decision-making practices and interests of members of the community, including women.
- ✓ The mechanism should lead to prompt and fair resolution of grievances and disputes.

V. TRANSPARENCY AND CORRUPTION

A. What Do the VGGT Say?

In several sections, the VGGT emphasize the importance of transparency and avoiding corruption on the part of all parties involved in or affected by investments in land. For example:

³¹ VGGT, paragraph 4.9 and 21.1.

³² VGGT, paragraph 21.1.

³³ VGGT, paragraph 3.2.

States should endeavor to prevent corruption, particularly through increasing transparency, holding decision-makers accountable, and ensuring that impartial decisions are delivered promptly.³⁴

States and other parties should ensure that information on market transactions and information on market values are transparent and widely publicized, subject to privacy restrictions.³⁵

State and non-state actors should adhere to applicable ethical standards. They should publicize and monitor the implementation of these standards in the operation of markets to prevent corruption, particularly through public disclosure.³⁶

All forms of transactions in tenure rights as a result of investments in land, fisheries and forests should be done transparently in line with relevant national sectoral policies and be consistent with the objectives of social and economic growth and sustainable human development focusing on smallholders.³⁷

Contracting parties should provide comprehensive information to ensure that all relevant persons are engaged and informed in the negotiations, and should seek that the agreements are documented and understood by all who are affected.³⁸

Other sections promote transparency and urge stakeholders to avoid corruption in connection with expropriation and compensation, information on tenure rights, valuing such rights and dispute resolution processes.³⁹

³⁴ VGGT, paragraph 10.5.

³⁵ VGGT, paragraph 11.4.

³⁶ VGGT, paragraph 11.7.

³⁷ VGGT, paragraph 12.3.

³⁸ VGGT, paragraph 12.11.

³⁹ VGGT, paragraphs 16.6, 17.5, 18.3, 18.5 and 21.5.

BOX 5-TRANSPARENCY AND CORRUPTION RISK FACTORS

High Risk

-  The country or locality where the project may be situated has significant corruption problems and corrupt activities have been observed in relation to the proposed project.
-  Joint venture or other local partners in the investment have been involved in corrupt activities.

Medium Risk

-  Affected stakeholders have not yet been engaged in an effective, culturally-appropriate and transparent consultation process that included disclosure of all relevant, non-proprietary information about the project.
-  The local project partner or operator is refusing to disclose non-proprietary information to stakeholders (including local communities).
-  Application of the rule of law is weak in the country or region where the project is located.

B. Transparency and Corruption Checklist

Corruption in relation to investments in land is harmful to all stakeholders. Engaging in corrupt activities can also expose investors to criminal liability and substantially increase project costs.

- ✓ To manage the risk presented by corruption, investors should:
 - Become informed about the overall climate of corruption in the country and locality where the investment will occur; and
 - Adopt and comply with policies and processes that promote transparency and that demonstrate “no-tolerance” for corruption. They should insist that those in which they invest do the same.
- ✓ No-tolerance corruption policies must be operationalized by the development and use of internal controls, including monitoring and compliance programs.

Transparency increases the likelihood that the public, especially the local community, will not oppose the investment. Lack of transparency can have the opposite effect.

- ✓ Being transparent should be an integral part of the process of stakeholder engagement, consultation and community relationship-building.
- ✓ Investors should see to it that all information related to the transaction is available to the public except that which is legitimately commercially sensitive.
- ✓ Contracts, especially those involving large tracts of land, should be made public, again subject to legitimate confidentiality concerns.

VI. FOOD SECURITY, HUMAN RIGHTS AND THE ENVIRONMENT AND SUSTAINABILITY

The VGGT address many issues that are important to investors, operators and the people living in the communities in which agricultural land-based investments are made. This chapter discusses the due diligence and risk management implications of three of those issues: food security, human rights and the environment.

A. Food security

1. What do the VGGT say?

Ensuring food security for all is at the heart of the VGGT. They seek to provide a pathway to “the overarching goal of achieving food security for all and to support the progressive realization of the right to adequate food in the context of national food security.”⁴⁰

The VGGT note that “responsible public and private investments are essential to improve food security”⁴¹, and that responsible investments should actively strive to improve food security.⁴² There is a particular emphasis on the importance of supporting smallholder farmers because of the important role they play in ensuring food security in much of the world.⁴³ Investors are also told that their investments “should not contribute to food insecurity.”⁴⁴

BOX 6-FOOD SECURITY RISK FACTORS

High Risk

Impacts on food security that cannot be adequately mitigated.

Medium Risk

- ◆ An independent SEIA—including an evaluation of potential impacts on land tenure, gender, food security and human rights—of the proposed project has yet to be completed.
- ◆ The SEIA reveals the likelihood of significant negative effects on food security but includes effective ways to mitigate those effects if properly implemented.

2. Food Security Checklist

⁴⁰ VGGT, preface.

⁴¹ VGGT, paragraph 12.1.

⁴² VGGT, paragraph 12.4.

⁴³ VGGT, paragraph 12.2.

⁴⁴ VGGT, paragraph 12.12. Principles number 1 provides further guidance.

Agricultural investments can negatively affect access to food of local populations, especially if the project causes them to lose land on which they have grown food for subsistence. This is likely to provoke strong opposition, thus posing a significant risk to the investment.

- ✓ Identifying and addressing risks related to food security should be included in the SEIA as part of the broader process of identifying impacts on local communities. The SEIA should include a plan to address those impacts. If the local food security impact is likely to be too great, the investor should not invest.
- ✓ Responsible investors can go beyond “do no harm,” and attempt to improve food security through strategies that can improve availability, access, stability of supply or utilization of food.

B. Human rights

1. What Do the VGGT Say?

The VGGT provide that investors and businesses have a duty to respect and avoid infringing on human rights and to identify, assess and remedy any negative impacts they have on such rights.⁴⁵ Thus, a “responsible investment” is one that respects and does no harm to human rights.⁴⁶

Generally speaking, human rights include civil, cultural, economic, political and social rights. While the VGGT do not provide a comprehensive list of applicable human rights, the international conventions referenced include:

- The Universal Declaration on Human Rights.⁴⁷
- The International Labor Organization Convention (No 169) concerning Indigenous and Tribal Peoples in Independent Countries.⁴⁸
- The Convention on Biological Diversity.⁴⁹
- The United Nations Declaration on the Rights of Indigenous Peoples.⁵⁰

Generally, the most important human rights framework applicable to investors is the UN Guiding Principles on Business and Human Rights referred to later in this section.

⁴⁵ VGGT, paragraph 3.2.

⁴⁶ VGGT, paragraph 12.4.

⁴⁷ VGGT, paragraph 1.1.

⁴⁸ VGGT, paragraph 9.3.

⁴⁹ VGGT, paragraph 9.3. While the Convention on Biological Diversity is not a human rights instrument, its provisions relating to indigenous peoples are particularly relevant to the VGGT.

⁵⁰ VGGT, paragraph 9.3.

BOX 7-HUMAN RIGHTS RISK FACTORS

High Risk

-  The SEIA finds negative impacts on human rights that cannot be adequately mitigated.

Medium Risk

-  Human rights violations have been reported in the area.
-  There is conflict or post-conflict instability near the project site.
-  An independent SEIA—including an evaluation of potential impacts on land tenure, gender, food security and human rights—of the proposed project has yet to be completed.
-  The SEIA reveals the likelihood of significant negative effects on human rights but includes effective ways to mitigate those effects if properly implemented.

2. Human Rights Checklist

The risk to investors if a project violates human rights arises in part from possible civil or criminal liability and in part from the local opposition such violations will cause. Land acquisitions expose investors and operators to significant risks of violating human rights.

- ✓ Risks arising from negative impacts on human rights should be managed as part of the SEIA which should assess actual and potential human rights impacts and lead to a plan to avoid or mitigate those impacts, if it is possible to do so. If it is not possible, the investor should forego the investment.
- ✓ Investors should also integrate human right protections throughout their business and insist that businesses in which they invest do the same.

C. Environment and Sustainability

1. What do the VGGT Say?

According to the VGGT, one of the characteristics of a responsible investment is that it does not harm the environment.⁵¹ Governments are advised to “promote the sustainable use of land, fisheries and forests and conservation of the environment.”⁵² The VGGT recognize the important role that smallholders play in environmental resilience.⁵³ And they instruct governments to adopt tenure-related policies that address climate change and include all affected parties in consultations and implementation of climate change mitigation strategies and mechanisms.⁵⁴

⁵¹ VGGT, paragraphs 12.4 and 12.12.

⁵² VGGT, paragraph 11.2.

⁵³ VGGT, paragraph 12.2.

⁵⁴ VGGT, Part 23.

BOX 8-ENVIRONMENT AND SUSTAINABILITY RISK FACTORS

High Risk

- The SEIA finds negative impacts on the environment that cannot be adequately mitigated.

Medium Risk

- ◆ The site is one where there are forests or is in an area of high conservation value.
- ◆ An independent SEIA—including an evaluation of potential impacts on land tenure, food security and human rights—of the proposed project has yet to be completed.
- ◆ The SEIA reveals the likelihood of significant negative effects on the environment but includes effective ways to mitigate those effects if properly implemented.

2. Environment and Sustainability Checklist

The risks to investors arising from potential harm to the environment are twofold. First, such harm will likely engender stakeholder opposition to the project. Second, causing harm to the environment, or failing to abide by laws requiring environmental impact assessments, may subject operators and investors to civil or criminal liability.

- ✓ Investors can best manage the risk by requiring effective environmental impact assessments before deciding whether to proceed with the project, whether or not required by law, as part of the SEIAs.
- ✓ The ultimate result of an environmental impact assessment should be a plan to manage environmental risks. The plan should describe how the operator will prevent, minimize and mitigate the project's projected harmful environmental impacts.
- ✓ The result of the SEIA might indicate that the project is untenable and, therefore, the investment should not proceed.
- ✓ To ensure objectivity, the SEIA should be conducted by an independent third party.

VII. IMPORTANT IMPLEMENTATION CHALLENGES

As the preceding chapters demonstrate, responsible agricultural investments, while potentially beneficial for all concerned, are not easily achieved. This chapter addresses two particular implementation challenges—building local capacity and monitoring—and suggest strategies for addressing them.

A. Capacity building

1. What Do the VGGT Say?

In a variety of sections, the VGGT recognize the importance of helping local communities manage and optimize the impact of investments in land where they live. Governments are encouraged to provide support to “people so that they can enjoy their tenure rights and fulfil their duties”⁵⁵ and to “ensure that competent bodies responsible for land, fisheries and forests have the human, physical, financial and other forms of capacity.”⁵⁶

The VGGT also urge all stakeholders to help communities utilizing customary tenure systems and indigenous communities to “increase the capacity of their members to participate fully in decision-making and governance of their tenure systems”⁵⁷ and provide legal and technical assistance to those communities so they can participate in the development of laws and policies affecting their tenure rights.⁵⁸ Governments are also encouraged “to provide technical and legal support to communities and participants” in efforts to obtain formal legal recognition of informal tenure rights.”⁵⁹

Notably, the Principles strongly urge investors to help to build local capacity.⁶⁰

2. Local Capacity Building Checklist

Inadequate local capacity threatens agricultural projects in three ways: (1) communities that cannot effectively protect their tenure rights and engage with investors may be less likely to support the project; (2) local smallholders may be unable to supply the project with an adequate supply of high quality farm products where the project relies in part on out-grower production; and (3) communities may lack enough trained workers required by the project.

- ✓ Investors can provide technical and financial assistance to help communities improve their ability to engage more effectively in the investment. Knowledgeable communities will be in a better position to engage in community mapping, consultations, negotiations, resolution of grievances and ongoing interaction with the project.

⁵⁵ VGGT, paragraph 7.5.

⁵⁶ VGGT, paragraph 8.10

⁵⁷ VGGT, paragraph 9.2.

⁵⁸ VGGT, paragraph 9.10.

⁵⁹ VGGT, paragraph 10.3.

⁶⁰ The Principles numbers 2-4.

- ✓ Investors should encourage operators to build the capacity of out-growers by providing them with agricultural extension services, seeds and other inputs, irrigation or equipment so that they can produce higher quality crops at greater volumes.
- ✓ Investors can support employee training with an emphasis on moving such employees into management roles over the medium to long term as they gain skills and experience.

B. Monitoring

1. What Do the VGGT Say?

The VGGT stress the importance of monitoring the impact of large-scale investments affecting tenure rights. Governments have the primary responsibility for monitoring the overall impact of investments in their countries. But all parties have a responsibility to track the effect of particular projects:

States and affected parties should contribute to the effective monitoring of the implementation and impacts of agreements involving large-scale transactions in tenure rights, including acquisitions and partnership agreements.⁶¹

This provision complements another section that calls for all parties, including businesses, to monitor the implementation of ethical standards to help prevent corruption.⁶²

2. Monitoring Checklist

Effective monitoring of measures to mitigate the risks arising from adverse social and environmental impacts is itself an essential risk management strategy.

- ✓ Discuss monitoring in the consultation process and include the community in project monitoring.
- ✓ Utilize contracts that clearly set forth all promises and responsibilities of all parties.
- ✓ Make contracts, SEIAs and all relevant information about the project available to the public.
- ✓ Include a specific monitoring provision in the SEIA mitigation plan.
- ✓ Cooperate with government monitoring.

⁶¹ VGGT paragraph 12.14.

⁶² VGGT paragraph 11.7. See, also, The Principles number 10.

VII. SUMMARY OF KEY MESSAGES

This Technical Guide is intended to help investors act with due diligence to achieve socially responsible and financially sustainable investments in agricultural land. While even the best project may harm some interests and elicit criticism, investors who evaluate, structure, operate and monitor their investments in a way that is consistent with the VGGT will increase the likelihood of achieving this goal.

The key messages in the guide can be summarized as follows:

- Investments in agricultural land can have a profound impact—both positive and negative—on the communities where the investments are located. In recent years, many projects have caused rural land users to lose rights and access to their land, water and other natural resources.
- Although the VGGT are aimed primarily at governments, operating in a manner consistent with the VGGT can help investors manage the substantial financial, legal, operational and reputational risks associated with investing in agricultural land in most developing countries.
- In the project design phase, operators should consider project models that do not involve the transfer of land rights from smallholders and other local people. In all cases, investors should avoid projects that require expropriation and eviction. An important risk mitigation strategy is to avoid resettlement of all kinds, voluntary or involuntary.
- An investor should conduct a preliminary analysis of a prospective investment to look for any high-risk factors that, in most cases, indicate that the investment is too risky.
- The due diligence analysis of each prospective project should include:
 - Participatory mapping of all land rights holders, including formal, customary and informal rights; and
 - A comprehensive social and environmental impact assessment that identifies the potential impact on land rights, livelihoods, human rights, food security and the environment and describes whether and how negative impacts can be mitigated.
- Projects that do not include adequate, ongoing consultation and the approval of local people are likely to incur substantially higher costs than those that do. Without an adequate process of consultation and participation it is difficult, if not impossible, to identify and recognize tenure rights, assess impacts or develop a productive ongoing relationship with the local community. Therefore, all projects should incorporate an inclusive and culturally appropriate consultation process that, if possible, leads to the free, prior and informed consent (FPIC) of affected stakeholders.

- Investors should adopt and implement a policy requiring fair resolution of any disputes involving land or other issues, employing a culturally sensitive grievance process agreed to by all stakeholders. It may be necessary to create a mechanism that supplements formal legal dispute resolution processes.
- Investors should adopt and insist upon “no-tolerance” of corruption policies and maximum transparency policies that require disclosure of all project information that is not legitimately commercially sensitive.
- Often it will be in the interest of investors to support efforts to build local capacity to respond to and participate in agricultural investments.
- Effective monitoring of measures to mitigate the risks arising from adverse social and environmental impacts is itself an essential risk management strategy.

The guide should be part of a process of continuous improvement. It is very important for investors and operators to be involved in establishing best practices and improving them over time based on real-world experience. It is also in their interests to encourage governments to insist on compliance with the VGGT and other measures of responsible investment as this will tend to provide a level playing field for all.

At the end of the day, land-based investments in developing countries are more likely to be successful if everyone—investor, local community and government—benefit. The VGGT provide a framework for achieving this win-win-win scenario; this Technical Guide seeks to help investors play their part in achieving that result.

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