



# Catalyzing Innovation

ANNUAL WORLD BANK CONFERENCE ON LAND AND POVERTY  
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## **DUE DILIGENCE IN LAND ACQUISITION: LAWYERS AND THEIR RESPONSIBILITIES**

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## Abstract

*Lawyers have responsibilities both to respect human rights and to advise their clients on respecting human rights under the UN Guiding Principles on Business and Human Rights, IBA human rights guidance. The human rights implications of tenure mean that human rights due diligence should also include tenure due diligence and take full account of the standards set out in the VGGT, CFS-RAI and the OECD FAO Agricultural Supply Chains Guidance. Among key issues to consider in due diligence processes is the identification of holders of legitimate tenure rights and other persons potentially affected by an investment, the establishment of a thorough and ongoing process of consultation and engagement, to avoid adverse impacts on the right to an adequate standard of living, including adequate food and housing.*

**Keywords:** VGGT, CFS-RAI, UNGP, due diligence, lawyers, land acquisition



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## Introduction

Land affects the realization of a number of human rights. Disputes over land are often the cause of conflict and land access affects the enjoyment human rights in issues including: poverty reduction, access to livelihoods, development projects and humanitarian interventions, and has a bearing on urban and rural planning, agrarian reforms, post-disaster and post-conflict reconstruction, access to natural resources, property rights, to name but a few. Global issues, such as food (in)security, climate change and rapid urbanization, have refocused attention on land and its use, control and ownership by states, private actors and indigenous peoples and other communities with customary rights. Land acquisition for agricultural investment has been on the rise, and while these investments can be a development opportunity, they carry risks to local population that may lose access to the natural resources that are fundamental for their livelihoods. Lawyers have an important role in advising their client on responsible practices related to land investments – based on relevant documents and principles described below.

The Voluntary Guidelines on Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security (VGGT) were endorsed by the Committee on World Food Security (CFS) in 2012 and the Principles on Responsible Investment in Agriculture and Food Systems (CFS-RAI) in 2014, equally by the CFS.

These soft law instruments build on international human rights, including those covered by the UN Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework (Human Rights Council, 2011).

The responsibilities of the private sector are discussed in all three instruments. FAO supports the implementation of the VGGT and CFS-RAI in its technical work and has published important guidance for governments, private sector and civil society on various aspects, including 11 guides in the Governance of tenure technical guide series, 4 of which (numbers 3, 4, 5 and 7) are highly relevant to investments in agricultural land. Technical guide number 5 is aimed at lawyers and another legal service providers (see annex).

On the CFS-RAI, FAO has published Promoting responsible investment in agriculture and food systems - Guide to assess national regulatory frameworks affecting larger-scale private investments (Legal Paper 101, 2016).



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Finally, in 2018, FAO commissioned from Kate Cook of Matrix Chambers, United Kingdom, *Due diligence, tenure, and agricultural investment - A guide on the dual responsibilities of private sector lawyers advising on the acquisition of land and natural resources*. This has been published preliminarily<sup>1</sup> and is being redesigned at the time of writing to be re-published as the first in a new FAO series of Legal guides.

The final draft was presented at the Annual Conference of the International Bar Association held in Rome in October 2018, where it was well received, and may be the subject of further presentations and webinars organized jointly with IBA and other bar associations in 2019.

This paper is based on and closely follows the guide for private sector lawyers in advising on the acquisition of land and natural resources.

## **Agricultural investment and potential human rights violations**

Both the VGGT and the CFS-RAI are non-legally binding but are to be interpreted and applied consistently with existing national and international legal obligations, including human rights obligations. A breach of the VGGT or CFS-RAI is not in itself a breach of human rights law, but may indicate that a violation of human rights law is occurring because the impacts of the breach lead to a violation of human rights (for example where a failure to recognize customary rights of tenure leads to forced evictions and/ or loss of livelihood).

In the context of continued commercial pressure on agricultural land globally, there is a need to examine the role and responsibilities of private sector lawyers when advising their clients on agricultural investments. Lawyers can prevent and/or address and mitigate adverse human rights impacts on holders of legitimate tenure rights when advising on or conducting their due diligence and risk assessment processes on behalf of their clients. It is important to note that legitimate tenure are not only those tenure rights formally recognized by national law, but also those rights that, while not currently protected by law are considered to be socially legitimate in local societies. Two types of legitimate tenure rights can be identified as follows:

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<sup>1</sup> <http://www.fao.org/documents/card/en/c/CA2922EN>



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<p>Legal legitimacy (legitimate through the law; legally recognized)</p>	<ul style="list-style-type: none"> <li>• Ownership rights recognized by law including rights of individuals, families and groups, and customary rights recognized by the law;</li> <li>• Use rights recognized by law including leases, sharecropping and license agreements;</li> <li>• Servitudes/easements.</li> </ul>
<p>Social legitimacy (legitimate through broad social acceptance even without legal recognition)</p>	<ul style="list-style-type: none"> <li>• Customary and indigenous rights to resources vested in the state in trust for the citizens;</li> <li>• Customary rights on state land, e.g. forest communities;</li> <li>• Informal settlements on private and public land where the state has accepted that it is not possible to relocate the people;</li> <li>• Squatters on private and public land who have almost fulfilled the requirements for acquiring the land through prescription or adverse possession.</li> <li>• Not formally recognized traditional fishing grounds.</li> </ul>
<p>Source: FAO. 2016. Responsible governance of tenure and the law</p>	

Lawyers need to develop sound knowledge and understanding about risks of human rights violations linked to environmental and natural resources rights. Frequently, the risk of infringing on land related human rights is not evident. The International Federation of Surveyors (FIG) estimates that 70 percent of land in developing countries are not registered. In such contexts land information systems may be ineffective and the information outdated, leading to uncertainty about whether lands are being occupied and used or not. Often, land allocated to national and foreign large-scale land investments are inhabited by indigenous peoples and other communities with customary tenure rights. Even if those rights might not be formally recognized by national legislation - and that is frequently the case, they are protected by international and human rights law.

Private companies investing in agriculture need to have a clear understanding about the nuanced realities of the countries where they are investing. That is not always the case, as they may trust official data about tenure rights not realize the potential gaps. In this context, lawyers have a pivotal role being knowledgeable and advising their clients about issues that are not always evident as the one mentioned above.

A case judged by the African Commission on Human and Peoples' Rights – *The Social and Economic Rights Action Center and the Center for Economic and Social Rights versus Nigeria* - illustrates how forced evictions can contribute to human rights violation. This case dealt with the forced eviction and



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destruction of land of the Ogoni people in the Niger Delta region of Nigeria by State (armed forces and State oil company) and non-State actors (transnational oil corporation). The Commission found implicit rights to food and to adequate housing, and consequently the prohibition of forced eviction, in the African Charter. Specifically, the right to food was found to be implicit within the right to life (Article 4), the right to health (Article 16) and the right to economic, social and cultural development (Article 22) of the African Charter. The right to adequate housing was found to be implicit in the right to property (Article 14), the right to health (Article 16) and the right to protection of the family (Article 18(1)) of the African Charter.

The fact that the land granted to this investment was occupied by local population with customary tenure systems was not considered by the State. The Commission found that the destruction of individual and communal farmland by acts and omissions of the State amounted to violations of the obligations to respect and to protect the implicit rights to food and adequate housing.

With adequate legal assistance and appropriate due diligence the transnational oil corporation involved in this case could have prevented the above mention violations, which underlines the important role of lawyers assisting this kind of company.

*Source: OHCHR. 2015. Land and Human Rights: Annotated Compilation of Case Law. New York.*

## The dual responsibility of lawyers

The corporate responsibility to respect human rights under the UNGP has a dual aspect for lawyers: (1) through its impact on the professional duties of the lawyer (including in-house counsel) towards the investor client and (2) through the impact on the law firm's responsibilities as a business in its own right and in the light of its own corporate social responsibility (CSR) commitments. Lawyers have the professional and ethical responsibility to avoid and address adverse impacts on human rights arising from their own conduct, and to prevent and mitigate impacts that are directly linked to actions of their business clients.

In the light of this dual responsibility, private sector lawyers advising on agricultural investments need to consider how their professional obligations are affected by the standards laid down in the VGGT and CFS-RAI and associated human rights, considering also guidance in this area issued by the International Bar Association (IBA).

IBA guidance highlights the potential role of lawyers as 'wise counsellors' advising in a proactive and preemptive way on potential legal risks and exercising professional leverage. The VGGT provide that professionals who provide services to investors should undertake due diligence to the best of their ability when providing their services, irrespective of whether it is specifically requested.

## Due diligence

Businesses are required, under UNGP 15(b), to conduct human rights due diligence. Due diligence is also addressed under the VGGT and CFS-RAI. A combined reading of the UNGP and the VGGT confirms that



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the human rights impact of investments should be factored into due diligence processes. Law firms will wish to be able to demonstrate that they operate due diligence internally as well as supporting their clients to conduct appropriate due diligence.

Due diligence is an ongoing process to enable businesses to ‘know and show’ that they are addressing their human rights impacts through assessing impacts, taking integrated action in response to identified impacts, and tracking and monitoring, and communicating the company’s efforts to address its human rights impacts.

The stages of due diligence include:

- adopting and integrating into existing systems a policy on human rights due diligence;
- assessing actual and potential impacts on human rights and tenure rights by:
  - mapping impacts through conducting surveys of potential areas of investment/ land acquisition, including baseline data on those with tenure rights and user rights, legally recognized or not (e.g. Indigenous Peoples’ customary rights), or otherwise likely to be impacted by the project;
  - carrying out a regulatory review of relevant national (and where applicable, customary) laws governing tenure and the rights of those likely to be affected, including vulnerable groups, indigenous peoples and vulnerable individuals;
  - conducting consultation and ensuring participation of all potentially affected stakeholders;
- integrating the findings from the survey, consultation and proactive impact assessment into subsequent responsive action, including in the preparation of contracts and agreements for approval by the relevant authorities and parties to the agreements and taking action to prevent or mitigate any breaches/potential breaches of human rights and associated tenure rights;
- tracking and monitoring impacts on human rights and tenure rights;
- communicating and reporting on how those impacts are being addressed; and
- establishing and operating appropriate grievance mechanisms.

## Consultation and Participation

Assessing human rights impacts means seeking to take into account the perspective of potentially affected stakeholders wherever possible, through meaningful engagement with them or their representatives.



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Understanding their perspective is essential in order to accurately assess the severity and probability of impacts on them.

The VGGT are to be implemented on the basis of a robust approach to consultation as Principle 3B.6 makes clear:

...engaging 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...

The requirement for meaningful consultation and participation as part of human rights due diligence is also a robust one, as indicated in international human rights jurisprudence and in guidance issued by international bodies, including FAO and international courts and tribunals. As emphasised by the African Commission on Human and Peoples Rights in the *Enderois* case<sup>2</sup>, participation should be meaningful and effective to comply with human rights standards. Communities should not simply be presented with a fait accompli. In the case of *Sarayaku v Ecuador*, the Inter-American Court of Human Rights (IACtHR) looked at cases decided in the Americas and elsewhere and concluded that the obligation to consult: 'in addition to being a treaty-based provision, is also a general principle of international law'.

In *Saramaka People v Suriname*, the IACtHR held that:

...in order to guarantee that restrictions to the property rights of the members of the Saramaka people by the issuance of concessions within their territory does not amount to a denial of their survival as a tribal people, the State must ...ensure the effective participation of the members of the Saramaka people, in conformity with their customs and traditions, regarding any development, investment, exploration or extraction plan ...

The Court noted that those safeguards were consistent with the observations of the UN Human Rights Committee, the text of several international instruments, and the practice in several States parties to the American Convention on Human Rights.

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<sup>2</sup> Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v Kenya



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The Court then went on to specify that:

These consultations must be in good faith, through culturally appropriate procedures and with the objective of reaching an agreement... Early notice provides time for internal discussion within communities and for proper feedback to the State. Finally, consultation should take account of the Saramaka people's traditional methods of decision-making ...

Under the VGGT, States are required to ensure that transfers of rights do not have any undesirable impacts on local communities and to ensure the fair and equitable involvement of legitimate community bodies in the process. The VGGT call for States to ensure that investments are consistent with the principles of consultation and participation. These are core requirements for any responsible agricultural investment. Where proposed investments affect indigenous peoples, consultations should aim to obtain their Free, Prior and Informed Consent (FPIC).

Where consultation and participation are conditions for investment, a failure to conduct consultation and participation in good faith would undermine the basis for the investment. Lawyers will wish to advise on the duty of good faith in relation to consultation and participation, having regard to the VGGT, UNDRIP and international human rights instruments and jurisprudence, including the requirement that participation be meaningful (capable of affecting the outcome). Guidance on consultation, participation and negotiations with affected communities and individuals emphasises the importance of early consultation and of planning the consultation, participation and negotiation process in a community engagement plan that the community has agreed to at the outset (FAO, Technical Guide No 7 2016). Good faith consultations go well beyond a right to be informed, to an openness on the part of the investor to engaging with community concerns and modifying the proposal accordingly, bearing in mind the requirement to prevent or mitigate adverse human rights impacts in UNGP 13 and Principle 3B.6 of the VGGT.

## **Transparency, reporting and disclosure**

The VGGT make transparency an implementing principle (para. 3B.8) and repeatedly highlight the importance of States and non-State actors ensuring transparency as to land use and tenure rights, providing that 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 human rights obligations. States and other parties are directed to: 'ensure that information on market transactions and information on market values are transparent and widely publicized, subject to privacy restrictions'. If contracts and impacts



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assessments are not made public, investors and governmental authorities cannot be held to account for them. Investors and those advising them have distinct duties in this regard, concerning their conduct of impact assessment, due diligence and arrangements for monitoring and tracking impacts. Technical guidance published by FAO suggests that the following could be made transparent: contracts; environmental and social assessments; feasibility studies, the identity of the ultimate beneficial owner of a project or partner; and ‘all other relevant information other than that which is truly confidential from a competitive standpoint’ (FAO Technical Guide No 7, 2016).

Technical guidance on investment safeguards underlines the importance of transparency and disclosure including on contract compliance, impacts and any measures taken or planned to mitigate negative impacts. Investors should also disclose and make publicly available information about the company including its previous experience of similar investments and any ‘tenure rights disputes/violations and/or other environmental or social disputes/violations’ to which it has been a party. This should continue through the life of the investment (FAO Technical Guide No 4, 2015).

The Reference Annex to the 2016 IBA Practical Guide on Business and Human Rights for Business Lawyers addresses the issues that may arise for lawyers advising on disclosure and transparency, recognising that lawyers:

...may be concerned that disclosure of certain information that is critical to the company may then be used against the company in litigation or public campaigns... UNGP 21 recognises that companies cannot be expected to disclose commercially sensitive information, including information that is legally protected against disclosure.

The Reference Guide then goes on to point out that:

‘At the same time, there may be benefits to the company from increased transparency on human rights that can offset the risks to the company. In the context of tenure rights and associated human rights, lawyers will wish to advise on the specific risks and benefits in each case’ case.

UNGP 20 calls on businesses to track the effectiveness of their response to the human rights impacts of their activities in order to verify whether adverse human rights impacts are being addressed. The commentary states that they should make particular efforts to track the effectiveness of their responses to



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impacts on individuals from groups or populations that may be at heightened risk of vulnerability or marginalization.

Agreements involving large-scale transactions of tenure rights should be monitored, and States should take corrective action to enforce agreements and protect tenure rights where needed (VGGT). This may be particularly relevant to the position of those who have lost forage or grazing rights, those undertaking contract farming or outgrowing arrangements, and those who have been promised benefits to compensate for loss of access to land.

There is growing support for transparency in supply chains, which may in turn require transparency in relation to individual commercial agricultural investments. Lawyers should advise on the implications of accounting for human rights impacts through the supply chain from production onwards and as to the risks to the company where these impacts are considered to affect the reputation of products derived from primary production, which has infringed tenure rights and associated human rights.

As indicated in technical guidance for investors, there is growing international support for making investment contracts public, including from the UN Special Representative on Business and Human Rights, the IBA and the UN Special Rapporteur on the Right to Food. Lawyers will wish to take account of this international support for transparency from leading human rights bodies in the context of advising on transparency and in relation to confidentiality standards where these include a public interest test for disclosure.

## **Drafting contracts**

Guidance documents stress the need for meaningful participation and consultations, and in some cases for the process of FPIC in the context of contracts for land acquisition.

The requirement for meaningful consultation and participation derives from human rights law and is reflected in human rights jurisprudence and in guidance issued by international bodies. The UNGP Principles for Responsible Contracts (Appendix D) which govern state investor contracts, and IBA guidance, as the 10 UNGP contract principles help guide the integration of human rights risk management into contract negotiations.



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FAO is collaborating with UNIDROIT (the International Institute for the harmonization of private law) in preparing a Legal guide on agricultural land investment contracts (see Bergman, Tirado and Vidar's paper to the 2019 WBLP Conference).

## Protection of environmental and human rights defenders

Technical guidance for investors stresses risk assessment and that high risk investments should not be proceeded with (Governance of tenure technical guide No 7). UNGP 23(c) provides that businesses should treat 'the risk of causing or contributing to gross human rights abuses as a legal compliance issue wherever they operate'. It also refers to the need to address violence directed at environmental and land defenders as a human rights risk in the context of large-scale land acquisition, as reflected in the VGGT and in the recently adopted Escazu Convention. These risks relate to the most serious violations of human rights law and rule of law principles and should be a priority for those advising on agricultural investments.

## Remedies

Businesses must have in place processes to enable the remediation of any adverse human rights impacts they cause or to which they have contributed (UNGP 15(c)). The VGGT confirm that businesses should provide operational level grievance mechanisms where appropriate, where they have caused or contributed to adverse impacts, thus incorporating the duties laid down in the UNGP.

Local communities impacted by agricultural investment are unlikely to have access to legal and technical advice. Law firms can play a key role in ensuring that grievance mechanisms meet standards of fairness and due process, including by ensuring that communities are independently and legally represented in accordance with their own wishes.

## Key recommendations

- Law firms should review their internal policies on human rights and the UNGP in order to ensure that these incorporate explicit consideration of the protection of legitimate tenure rights and associated human rights. The review should refer to and be informed by the VGGT, the CFS-RAI and the OECD-FAO Guidance and associated technical guidance;
- In-house counsel should ensure that the business has a policy on due diligence which enables it to meet international standards on the protection of tenure rights in the area of agricultural investment and in particular to avoid and address adverse human rights impacts;



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- Law firms should ensure that they advise clients on the implications of the VGGT, CFS-RAI and OECD/FAO Guidance in the context of agricultural investment. Legal advisors should ensure that all legal, reputational and financial risks associated with breach of these international standards are brought to the attention of clients, including in the context of due diligence;
- In relation to the drafting of contracts, lawyers should advise that the key issues should be addressed in line with standards laid down in the VGGT and associated human rights including, early meaningful consultation and participation of those likely to be impacted by the investment, transparency, remediation and grievance procedures;
- Law firms should be vigilant to the need to advise clients on the importance of promoting the protection of environmental and human rights defenders who are involved in actions relating to the client's investments;
- Firms should endeavour to ensure that grievance processes are designed and conducted in accordance with due process and fairness standards, and that any tension between these and their professional duty to the client should be raised with the client.



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## **ANNEX. Governance of tenure technical guides by FAO, 2013 – 2018**

FAO. 2013. Governing land for women and men: a technical guide to support the achievement of responsible gender-equitable governance of land tenure. Governance of tenure technical guide No. 1. Rome.

FAO. 2013. Improving governance of forest tenure: a practical guide. Governance of tenure technical guide No. 2. Rome.

FAO. 2014. Respecting free, prior and informed consent: practical guidance for governments, companies, NGOs, indigenous peoples and local communities in relation to land acquisition. Governance of tenure technical guide No. 3. Rome.

FAO. 2015. Safeguarding land tenure rights in the context of agricultural investment: a technical guide on safeguarding land tenure rights in line with the Voluntary Guidelines for the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security, for government authorities involved in the promotion, approval and monitoring of agricultural investments. Governance of tenure technical guide No. 4. Rome.

FAO. 2016. Responsible governance of tenure and the law: a guide for lawyers and other legal service providers. Governance of tenure technical guide No. 5. Rome.

FAO. 2016. Improving governance of pastoral lands: implementing the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security. Governance of tenure technical guide No. 6. Rome.

FAO. 2016. Responsible governance of tenure: a technical guide for investors. Governance of tenure technical guide No. 7. Rome.

FAO. 2016. Governing Tenure Rights to Commons: A guide to support the implementation of the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security. Governance of tenure technical guide No. 8. Rome.

FAO. 2017. Creating a system to record tenure rights and first registration. Governance of tenure technical guide No. 9. Rome.

FAO. 2017. Improving ways to record tenure rights. Governance of tenure technical guide No. 10. Rome.

FAO. 2018. Valuing land tenure rights. A technical guide on valuing land tenure rights in line with the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security. Governance of tenure technical guide No. 11, Rome.