



Land rights and investments: why the IFC performance standards are not enough

A comparison with the Voluntary Guidelines on the Responsible Governance of Tenure

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Key messages

- Land-based investments – from agriculture and extractives to infrastructure – raise difficult land rights issues, which, if not addressed, can create disruptive disputes, impair local livelihoods and increase businesses' operational costs and reputational risks. Many national legal systems do not protect local claims to land and resources, so legal compliance is often not enough to ensure responsible investment.
- Many businesses apply the International Finance Corporation's Performance Standards on Environmental and Social Sustainability (IFC-PS) to fill the gaps in national law. But this has not sheltered projects from becoming embroiled in difficult land disputes, so existing approaches based on the IFC-PS do not always ensure land rights issues are identified in a timely way or addressed effectively.
- While not formulated in immediately operational terms, the Voluntary Guidelines on the Responsible Governance of Tenure (VGGT) are widely supported as the key global instrument on land governance, highlighting the need – and creating the opportunity – to reconsider existing IFC-PS-centred approaches.
- The VGGT differ from the IFC-PS: they identify people as right holders rather than passive beneficiaries; promote consensual approaches based on partnership rather than involuntary resettlement; call for rethinking investment models, beyond merely establishing safeguards; broaden the spectrum of issues to be considered; and outline roles for both state and non-state actors.
- States should align national legal and institutional frameworks with the VGGT; businesses should ensure their due diligence and operating systems adhere to the VGGT; and advocates can integrate the VGGT into their policy advocacy and support to local actors.
- Donors should support states and advocates in these efforts; sustain the emergence of an international pool of VGGT experts who can advise states, businesses and local actors; and ensure their own development finance institutions and any publicly supported investments abroad adhere to the VGGT.

Introduction

Land-based investments – from agriculture to infrastructure, extractives and manufacturing – raise difficult land rights issues. Left unaddressed, these issues can create disruptive disputes, impair local livelihoods, and increase businesses' operational costs and reputational risks.¹ Many national legal systems do not provide effective ways to protect local claims to land and resources. As a result, legal compliance is often not enough to ensure responsible investment; even deals that adhere to national law may undermine land rights that rural people consider socially legitimate.

Many businesses apply the International Finance Corporation's Performance Standards on Environmental and Social Sustainability (IFC-PS) to fill gaps in national law. As a set of global operating standards consolidated over the past three decades,² the IFC-PS are often thought to reflect international best practice. They provide practical guidance for businesses to handle the environmental and social (ES) impacts of their investments, and Performance Standards 5 on Involuntary Resettlement and 7 on Indigenous Peoples are particularly relevant to land rights issues. Extensive use of the IFC-PS has fostered the emergence of an established field of practice, including experts, resource-kits and procedures for implementation.

However, the IFC-PS have not prevented projects from becoming embroiled in difficult disputes over their land rights impacts. Many ventures that apply the IFC-PS have sparked sustained public campaigns against 'land

grabbing',³ and affected people have taken growing numbers of disputes to courts or complaint mechanisms.⁴ The scale and intensity of this challenge suggests that prevailing approaches based on the IFC-PS do not always ensure land rights issues are identified in a timely way and addressed effectively.

International soft-law instruments developed over the past 10 years provide guidance on how to secure land rights and improve land governance, including in the context of private investment. The Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security (VGGT; see Box 1) are a prominent example. Unlike the IFC-PS, the VGGT are primarily addressed to states, although some provisions are specifically directed at businesses, and they are not formulated in immediately operational terms – though several guides and toolkits identify ways for businesses to implement them.⁵

The VGGT enjoy widespread support as the key global instrument on land governance.⁶ Some states have explicitly committed to ensuring that their land legislation adheres to the VGGT, or have used them as a basis for policy reform.⁷ In addition, key donor governments have resolved to align with the VGGT any overseas investments supported by their aid programmes (G7, 2015), and several companies have committed to ensuring they adhere to them throughout their operations or supply chains (OECD/FAO, 2016). Social actors such as organisations representing rural people, non-governmental organisations and engaged researchers have used the VGGT as a

1 On tenure risk, see Locke et al. (2019).

2 The IFC adopted its Safeguard Policies in the 1990s. These were replaced by the Performance Standards in 2006, which were revised in 2012.

3 See for example GRAIN and RIAO-RDC (2015; 2016); Swedwatch (2017); and Borras et al. (2017).

4 See for example Daniel et al. (2016).

5 See for example FAO (2016) and Cook (2019).

6 See for example United Nations General Assembly (2012); Rio+20 (2012); G20 (2012); APF (2012); and FAO (2013).

7 For example, Sierra Leone's National Land Policy of 2015 specifically refers to the VGGT as an instrument that informed national policy reform (section 1.3).

basis for their work on land policy reform and private investments.⁸

As governments, businesses and social actors appropriate the VGGT to address land rights issues in an investment context, practices are emerging to move from principles to action. One challenge is to reconsider existing approaches based on the IFC-PS in the light of advances reflected in the VGGT. To do so, it is necessary to clarify the areas in which the VGGT differ from, and add value to, the IFC-PS.⁹

This briefing note identifies such areas, drawing on a textual analysis of the IFC-PS and the VGGT, and summarising findings from more detailed research.¹⁰ The note first explores differences in the overall approach of the IFC-PS and the VGGT. It then pinpoints differences that relate specifically to land rights in an investment context and considers the operational implications of these. Finally, it outlines recommendations for governments, businesses, donors and social actors.

Box 1 Overview of the VGGT

The VGGT are the first comprehensive global instrument that provides guidance to states and non-state actors on how to promote responsible land governance. They were endorsed unanimously in 2012 by the Committee on World Food Security (CFS), the top United Nations body in matters of food security.

This endorsement came after two years of extensive multi-stakeholder consultations and a year of intergovernmental negotiations. While not legally binding, the VGGT have since received widespread expressions of high-level political support, including from the UN General Assembly, the G8 and the G20. Some VGGT provisions reflect binding international law, including provisions on gender equality and respect for human rights.

The VGGT call for the recognition and protection of all ‘legitimate tenure rights’. This marks an important shift in thinking about land rights. It recognises that, alongside rights created or acquired through formal procedures (‘legal’ tenure rights), policy and practice should recognise and respect rights that enjoy social legitimacy – for example by virtue of customary use or fairness of land acquisition.ⁱ

This shift has implications for states, which the VGGT call on to reform laws, policies and institutions. But it also affects businesses, which are called upon to respect rights that may have no legal backing. Doing this would require, for example, reconfiguring land tenure due diligence: conventional approaches based on legal paperwork may shed light on legal compliance and the robustness of the ‘chain of title’, but they can fail to identify land rights issues that are grounded in local perceptions of social legitimacy. Such issues include those that stem from complex customary tenure systems, from historical grievances and from contestation of local and national leaders.

i For a fuller discussion of the notion of ‘legitimate tenure rights’, see Cotula et al. (2016): 19–25.

8 See for example Franco (2016) and LandCam (2019).

9 The VGGT have shortcomings, and the IFC-PS may present advantages over them, including their more practical and operational nature. However, this briefing note focuses on areas where the VGGT enhance existing practice based on the IFC-PS.

10 The briefing note draws on relevant sections of Cotula et al. (2019), which further developed earlier analyses, particularly Windfuhr (2017).

Comparing the overall approaches of the VGGT and the IFC-PS

Different entry points

Both the VGGT and the IFC-PS provide guidance on addressing land rights issues in investment processes, but their entry points are different. The VGGT deal with improving land governance in holistic terms: they identify systemic measures for upholding legitimate land rights and strengthening governance frameworks, and they clarify the roles and responsibilities of different state and non-state actors. On the other hand, the IFC-PS set operational standards businesses should apply in the design and implementation of a commercial investment – including to fill gaps in governance frameworks. The VGGT are an international soft-law instrument that provides generally applicable guidance, while the IFC-PS are often given legal effect through their integration into the bilateral contract that a lender and its client conclude in order to implement an investment project.

While the IFC-PS apply across sectors, the VGGT emphasise agriculture and food security, with regards to both the types of investments they cover and the socioeconomic impacts they consider. This emphasis aligns with the institutional mandate of the Committee on World Food Security – the UN body that hosted the negotiation of the VGGT. But although some VGGT provisions explicitly refer to agricultural production and investments, VGGT guidance on respecting and protecting legitimate tenure rights may be relevant to any land-based investments – including extractive industry projects, infrastructure, and manufacturing facilities.¹¹

In line with their respective entry points and sectoral emphases, the VGGT and the IFC-PS play different roles in investment processes. The IFC-PS primarily establish safeguards to ensure investments do not undermine affected livelihoods, while the VGGT raise more fundamental issues about the sorts of investments to pursue in the first place. In relation to

agriculture, the VGGT call on states to support investments by small-scale rural producers as well as public and private ‘smallholder-sensitive’ investments (VGGT paragraph 12.2). And by recommending that states systematically recognise, respect and protect local land rights – including those of small-scale rural producers – the VGGT aim to create from the bottom up the conditions for investments that respond to rural people’s needs and aspirations.

Different ways to consider land rights

Both the VGGT and the IFC-PS extend protection to land and natural resource claims that do not amount to full ownership or are not recognised under national law. But the approaches they take to doing so are different. The VGGT call for the recognition, respect and protection of all ‘legitimate tenure rights’ – that is, all land and resource rights that are perceived to be socially legitimate in a given context, even if those rights are not recognised by law. Several VGGT provisions spell out implications for specific types of legitimate tenure rights, including those based on customary systems or held by indigenous peoples.

IFC Performance Standard 5 applies to economic and physical displacement that results from transactions affecting a range of specified tenure situations, including land ownership and/or use rights, ‘traditional or recognizable’ use rights to natural resources, and communal land and resource ownership and use. It also covers ‘certain project situations requiring evictions of people occupying land without formal, traditional or recognizable usage rights’ (IFC-PS 5, paragraph 5). The approach centres on ensuring that affected people are restored to at least the same livelihood position they were in before the project. IFC Performance Standard 7 establishes additional safeguards for indigenous peoples.

It is possible that, in identifying relevant land and resource claims, the two approaches produce similar outcomes in most cases, although field-based research would be needed

11 Referring to water and subsoil resources, the preamble of the VGGT states: ‘While recognizing the existence of different models and systems of governance of these natural resources under national contexts, States may wish to take the governance of these associated natural resources into account in their implementation of these Guidelines, as appropriate’ (paragraph 4).

to assess this. Relative to VGGT guidance, the IFC-PS's emphasis on practical tenure situations and livelihood restoration seems easier to operationalise, less prone to contestation about what tenure rights should be considered legitimate, and more suited to cater for affected people who do not claim tenure rights. But the VGGT's use of the flexible concept of legitimate tenure rights might cover situations that are not explicitly contemplated in IFC Performance Standard 5, and the VGGT's emphasis on social differentiation throughout, for example with regards to gender,¹² could lead to more fine-grained understandings of complex tenure arrangements.

Involuntary resettlement vs negotiated partnerships

The premise of the IFC-PS is that commercial projects can lead to involuntary resettlement and proceed without the consent of affected people¹³ – although they emphasise this should be avoided whenever possible, and Performance Standard 7 provides for consent-based approaches with regards to indigenous peoples. Rather than affirming or recognising rights, the IFC-PS primarily provide guidance on developing resettlement packages to ensure that displaced people are, in practice, not worse off.

If properly implemented, this guidance can help manage livelihood impacts, and the IFC-PS's emphasis on livelihood restoration often entails more generous measures than national rules requiring compensation for loss of land and resources (Schwartz et al., 2018). But the compulsory acquisition of socially legitimate land rights to pave the way for a commercial project can itself expose businesses to disputes and contestation – especially if the project does not respond to local development agendas.

The VGGT, on the other hand, centre protections around a rights-based concept ('legitimate tenure rights'). Their starting point is that people have rights, which should be respected even if they are not legally recognised. This inherently reflects a different balance in the public and private interests at stake, which permeates the VGGT section specifically dealing with land-based investments (VGGT section 12). The VGGT also reaffirm international instruments that refer to free, prior and informed consent for indigenous peoples (VGGT paragraphs 9.9 and 12.7).

A separate VGGT provision does anticipate that states may acquire land on a compulsory basis for public-interest projects (VGGT section 16). But it also establishes safeguards to ensure rights are respected – for example, subjecting acquisition to clearly specified public-purpose requirements and providing for legal redress to challenge the acquisition.¹⁴ Use of compulsory acquisition to transfer land for commercial activities raises real questions about the meaning and bounds of public purpose: while many national laws do adopt a broad or ill-defined notion of public purpose, purely commercial ventures would be expected to acquire land through negotiated arrangements with tenure right holders, and to not be eligible for the actual or prospected activation of the state's coercive powers.

When it comes to land-based investments, the VGGT specifically call for smallholder-sensitive approaches that are based on partnership rather than expropriation (VGGT paragraphs 12.2, 12.4, 12.6 and 12.11). This is in line with the recognition that, in practice, consensual solutions are key if a venture is to enjoy local support and succeed in the longer term.

12 See for example VGGT paragraphs 3B.4, 4.6, 4.7, 5.4, 5.5, 6.6, 7.4, 8.11, 9.2, 9.7, 9.10, 10.1, 11.6, 12.11 and 16.1.

13 IFC Performance Standard 5 applies to situations where the 'affected persons or communities do not have the right to refuse land acquisition or restrictions on land use' (paragraph 1).

14 For example, VGGT paragraph 16.1 reads: 'States should expropriate only where rights to land, fisheries or forests are required for a public purpose. States should clearly define the concept of public purpose in law, in order to allow for judicial review. ... They should respect all legitimate tenure right holders, especially vulnerable and marginalized groups, by acquiring the minimum resources necessary and promptly providing just compensation in accordance with national law.'

Varying emphases on human rights

Land and human rights are closely connected. The human rights to property, housing and food (where people depend on natural resources for their food security), to enjoy one's own culture (where traditional cultures are connected to land and resources) and to self-determination, as well as indigenous peoples' rights to their ancestral territories are just a few relevant, internationally recognised examples. And given that all human rights are interdependent and interrelated, the interface between resource rights and human rights encompasses all internationally recognised human rights (VGGT paragraph 4.8).

In line with their use of rights-based concepts, the VGGT place considerable emphasis on the connection between land and human rights. In their provisions, there are many that: (1) relate the VGGT's overarching policy goal to the realisation of the right to adequate food; (2) reiterate the human rights obligations of states and reaffirm the responsibility of businesses to respect human rights, calling on businesses to identify and assess human rights impacts related to land rights; and (3) clarify the relationship between land and human rights in wide-ranging contexts, including private sector investment.¹⁵

The IFC-PS reaffirm that 'businesses should respect human rights', consistent with the United Nations Guiding Principles on Business and Human Rights (IFC-PS 1, paragraph 3). But their operational guidance focuses on livelihood impacts rather than human rights approaches. In discussing involuntary resettlement, IFC Performance Standard 5 makes no mention of human rights, while Performance Standard 7 on indigenous peoples refers to them only when framing its objectives. Also, the IFC-PS clarify that a specific human rights due diligence may only be required in 'limited high risk circumstances' (IFC-PS 1, paragraph 7, footnote 12).

Earlier analyses pointed to substantial overlap between human rights law and the IFC-PS (IFC, 2012). Existing ES due diligence processes

may well identify many land-related human rights issues, and integrating human rights due diligence into existing ES systems is in line with the Guiding Principles on Business and Human Rights.¹⁶ But a human rights approach to addressing land rights issues involves a distinctive perspective that may otherwise be lost in existing ES due diligence.

First, framing a problem in human rights terms can change the way issues are conceived of and ultimately addressed. This is partly because a human rights approach places special emphasis on the perspectives of affected people and identifies them as active right holders rather than mere recipients of resettlement packages (Davis, 2018). Second, a human-rights-based approach would pay particular attention to how contextual factors – such as the human rights situation in the country – could affect project risks, thus going beyond the traditional project focus of approaches based on the IFC-PS (ibid).

Third, a rapidly evolving international human rights jurisprudence provides pointers relevant to addressing land rights issues that are not necessarily covered in detail by the IFC-PS, such as the right to water (CESCR, 2003) and the rights of land/human rights defenders (OHCHR, n.d.). These issues mean that only requiring human rights due diligence in exceptional circumstances could marginalise consideration of human rights at a time when human rights issues are being mainstreamed.

Illustrative differences in guidance on land rights issues in land-based investments

More specific differences exist between IFC Performance Standard 5 on Involuntary Resettlement and the VGGT provisions that deal with investment. These differences partly flow from the overall framing of the two instruments, and they can translate into significant operational implications – with some issues being addressed

15 See VGGT paragraphs 1.1, 2.2, 3.2, 3B.1, 3B.4, 4.1, 4.3, 4.8, 4.9, 9.3, 12.4, 12.6, 12.8, 16.7, 16.9.

16 The commentary to the Guiding Principles states: 'Human rights due diligence can be included within broader enterprise risk-management systems, provided that it goes beyond simply identifying and managing material risks to the company itself, to include risks to rights-holders' (paragraph 17).

more fully in the VGGT, and others in the IFC-PS. This means that even projects that comply with the IFC-PS could conflict with VGGT guidance. Ensuring adherence to the VGGT may require complementary action by states, businesses and other actors. For example, the VGGT enhance existing practice based on the IFC-PS in the following areas.

Operating standards vs land governance.

As the VGGT consider land rights and investments from a governance perspective, they provide extensive guidance on the conduct and accountability of public authorities – an aspect that is outside the scope of the IFC-PS. Take compulsory land acquisition for a public purpose, which has often been used to implement land-based investments. The VGGT (but not the IFC-PS) envisage institutionalised opportunities for landholders to seek review of the stated public purpose, including through judicial proceedings (VGGT paragraph 16.1). This would be, for example, to determine whether the stated public purpose is supported by evidence and whether the measures taken are proportionate to the purpose (Schwartz et al., 2018).

The spatial dimension: project-based vs systemic approach. IFC Performance Standard 5 focuses on the land rights impacts of a specific project, which the project developer will address through its ES management system.¹⁷ On the other hand, the VGGT take a more systemic view: they consider the cumulative impacts of multiple forms of land use, including multiple investments in the same area, and they emphasise the role of comprehensive land-use planning (VGGT paragraph 12.4; VGGT section 20). As a result, adherence to the VGGT may result in the identification of a wider range of impacts, including those originating from the way a project intersects with other prior or planned projects.

The time dimension: ‘legacy’ land rights issues. In protecting all socially legitimate tenure rights and referring to their restitution when unduly dispossessed, the VGGT indicate that land rights can remain legitimate even after their holders have been dispossessed of the land (VGGT section 14). As such, VGGT

safeguards for legitimate tenure rights could apply in situations where a business takes over an existing venture, if in its establishment or operation historical wrongs occurred. In contrast, IFC Performance Standard 5 focuses on the new management’s operating standards and is essentially silent on legacy situations. Complaints related to legacy land rights issues have been filed with the Compliance Advisor Ombudsman, which is the independent accountability mechanism for the International Finance Corporation (CAO, 2015).

Do no harm vs positive contribution.

The emphasis on livelihood restoration in IFC Performance Standard 5 primarily reflects a ‘do no harm’ approach. The VGGT state that responsible investments should do no harm but also go beyond this in calling for smallholder-sensitive investments based on partnerships with land rights holders and small-scale rural producers, and for investments to positively contribute to policy objectives such as food security and rural development (VGGT paragraph 12.4).

Power imbalances and technical assistance.

More than the IFC-PS, the VGGT explicitly recognise power imbalances, social differentiation and the need for affected people to have access to professional (e.g. technical and legal) assistance. The VGGT also emphasise the responsibilities of professionals in providing services to the best of their abilities and in accordance with applicable standards (see Box 2).

Conclusion

Both the VGGT and the IFC-PS provide guidance on addressing land rights issues in investment processes. Both call on businesses to consider resource claims that are not recognised under national law. But the two instruments reflect different approaches. While the IFC-PS primarily aim to ensure that livelihoods affected by involuntary resettlement are restored, the VGGT emphasise rights – and the social legitimacy of those rights irrespective of their legal recognition. This identifies people as active

17 However, the IFC published a good-practice handbook on cumulative impact assessment and management (IFC, 2013).

Box 2 Ensuring independence and accountability in professional assistance

Relations between project developers and local actors (e.g. local government bodies, tenure rights holders, affected people) typically involve power imbalances and differentiated access to resources, information and expertise. Government support to the project can compound these imbalances. Any consultation or negotiation is meaningless if local actors cannot access independent professional support.

While it is impossible to fully offset the asymmetries, assistance in areas such as law, business and economics, and in sectoral fields such as agronomy, can help local actors make informed choices and approach companies and authorities from a position of greater strength. More than the IFC-PS, the VGGT explicitly recognise this: numerous VGGT provisions emphasise the value of professional support in land governance and in investment processes, and some refer to compliance with standards of quality in the provision of that support.ⁱ

Implementing this guidance may require rethinking the ways in which professional support is financed and provided. For example, some businesses cover the cost of assistance provided to the local actors with whom they (or their business partners) engage. But unless properly structured, these arrangements can expose service providers to conflicts of interest, raise questions about lines of accountability, and ultimately affect the quality of the services.

To ensure that professionals are truly independent of the business and accountable to their real clients, there is a need to develop new mechanisms (e.g. trust funds over which the business has no control, or contributions to basket funds that apply beyond individual projects). Assistance must also be available beyond project approval, for example to support monitoring of compliance and to deal with any grievances (CCSI, 2019).

i VGGT paragraphs 3B6, 6.6, 6.8, 9.10, 10.3, 12.9, 12.13, 14.4, 21.6.

right holders, rather than passive beneficiaries, and this can change the way in which issues are understood and ultimately addressed.

For example, IFC Performance Standard 5 is premised on involuntary resettlement, while the VGGT promote consensual approaches based on partnership rather than expropriation. The VGGT also address issues that are not fully covered in the IFC-PS, such as the conduct of public authorities, the cumulative impacts of investments and historical land grievances. And while the IFC-PS establish safeguards but do not question prevailing investment models, the VGGT call for reconsidering more fundamentally the types of investment to pursue – favouring approaches that are smallholder sensitive and contribute to public goods such as food security and rural development.

These differences mean that applying the IFC-PS may fail to address land rights issues

covered in the VGGT. Much existing practice is based on the IFC-PS, and these blind spots mean that land rights issues may not be identified in a timely way, effectively addressed or redressed when harms occur. This also means that businesses may be exposed to significant land tenure risks even if they apply the IFC-PS.

To tackle these issues, states, businesses, social actors and donors have different roles and responsibilities:

States. While some governments have relied on the IFC-PS to align national law instruments with international best practice, the VGGT provide a more relevant international benchmark against which states can review and reform their public policies, laws and institutions. This is because the VGGT take a systemic (rather than project-based) approach and extend to the conduct of public authorities – two important considerations for

public regulation.¹⁸ States should lead these VGGT-based review and reform processes, with the active participation of organisations representing the interests of rural people.

Firms and their business partners.

Businesses committed to international best practice – both the operating companies and their business partners such as lenders and buyers – should upgrade their systems and processes to align them with the VGGT. This would involve, for example, rethinking due diligence to consider the more comprehensive spectrum of rights and issues covered in the VGGT (e.g. legacy issues and cumulative impacts) and to create systematic opportunities for affected people to feed into due diligence processes. It would also involve taking a rights-based approach to address land rights issues and pursuing investment models that are based on consensual partnerships with local actors.

Social actors. Besides monitoring compliance with the IFC-PS and activating any available IFC-PS accountability routes (e.g. the IFC Compliance Advisor Ombudsman), social actors can: advocate for states to align policy and legislation with the VGGT, and facilitate public

participation in reform processes; support the implementation of VGGT-aligned policies and laws, and assist local actors as they interact with businesses and government agencies; and document land rights violations and, where relevant, help local actors obtain legal redress.

Donors. Translating the VGGT into real change, including in an investment context, can incur costs, and donors should support states and social actors in the efforts outlined. In addition, donor governments have responsibilities where they are also an investor's home country (VGGT paragraph 12.15). In these cases, they should ensure that any publicly supported investments abroad are consistent with the VGGT and that their own development finance institutions adhere to the VGGT and promote them among businesses. Given the lack of a community of VGGT practitioners that is comparable, in size and consolidation, to that of IFC-PS specialists, donors can also play a key role in expanding the international pool of experts who can provide VGGT-sensitive advice to states, businesses and local actors.

18 However, the IFC-PS provide complementary insights on ways to ensure that compensation instruments, in cash and/or in kind, adequately restore affected livelihoods.

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