

LEGEND

*Land: Enhancing Governance
for Economic Development*



Are development finance institutions equipped to address land rights issues?

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A stocktake of practice in agriculture



Report

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Land: Enhancing Governance for Economic Development (LEGEND) is a DFID programme that aims to improve land rights protection, knowledge and information, and the quality of private sector investment in DFID priority countries. It includes the development and start-up of new DFID country land programmes, alongside knowledge management activities, a challenge fund to support land governance innovations, and management of complementary DFID grants. The implementation of LEGEND is supported by the Core Land Support Team.

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Acronyms

CAO	Compliance Advisor Ombudsman
CDC	The United Kingdom's development finance institution
DEG	German Investment and Development Corporation
DFI	development finance institution
EDFI	Association of the European Development Finance Institutions
ES	environmental and social
FAO	Food and Agriculture Organization of the United Nations
FMO	The Netherlands development finance institution
GDWGL	Global Donor Working Group on Land
IFAD	International Fund for Agricultural Development
IFC-PS	International Finance Corporation Performance Standards
IIED	International Institute for Environment and Development
LEGEND	Land: Enhancing Governance for Economic Development
NGO	non-governmental organisation
OPIC	Overseas Private Investment Corporation (United States)
VGGT	Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security

Executive summary

More and better investment in agriculture could help improve rural livelihoods in low- and middle-income countries. But a wave of investments since 2005 has raised concerns that deals could dispossess rural people and promote exclusionary development models. Recently developed international soft-law instruments provide specific guidance on how to secure land rights in the context of private sector investments. But much remains to be done to translate this guidance into real change.

Bilateral development finance institutions (DFIs) play an increasingly prominent role in the international aid architecture. International guidelines affirm the responsibility of states to ensure respect for land rights when they promote investments overseas and there is growing jurisprudence on the extraterritorial human rights obligations of states, including in connection with business activities overseas. Because of their position between development and commercial worlds, DFIs can be a key player in efforts to align private sector conduct with international norms and standards.

However, land rights issues are often complex and the stakes are high, partly due to the close relationship that exists between land and human rights. Several governments are encouraging their DFIs to work in more difficult environments – including fragile states and post-conflict situations – where land challenges are even more acute. Thus, DFIs may need support to effectively address land rights issues.

About this report

This report reviews the approaches European and North American bilateral DFIs use to address land rights issues in the agriculture sector. It assesses whether the policies and practices that the DFIs apply in environmental and social (ES) matters adequately address land

rights issues; and what areas, if any, present opportunities for improvement.

The report reviews publicly available materials for selected DFIs, particularly their policies and publications. For insights on operational practice, in-depth questionnaires and interviews were carried out with three DFIs. In addition to the DFIs' ES policies, the Voluntary Guidelines on Responsible Governance of Tenure (VGGT) – the key global instrument on land governance – provided an important reference for the analysis.

The IFC Performance Standards and the VGGT

The DFIs' ES systems rely heavily on the Performance Standards of the International Finance Corporation (IFC-PS). These contain detailed operational guidance on addressing land rights issues in an investment context and present significant convergence with the VGGT. That said, the IFC-PS and the VGGT take different entry points and approaches. While the IFC-PS focus on addressing project-specific impacts, the VGGT take a more systemic perspective on land issues and governance. More than the IFC-PS, the VGGT emphasise rights language throughout and reiterate the underlying human rights obligations of states and responsibilities of businesses.

Further, the IFC-PS primarily reflect a 'do no harm' approach, while the VGGT call for 'smallholder-sensitive investments' that positively contribute to policy objectives, such as poverty reduction, food security and rural development. Some such differences reflect the different nature of the two instruments, with the IFC-PS being designed for operational use in commercial investments, and the VGGT primarily to improve land and resource governance. To DFIs, the VGGT may seem an unwieldy tool that offers them limited practical guidance. But the differences also

raise questions as to whether prevailing ES standards fully reflect the latest thinking and policy consensus on land rights. Some DFIs have expressed support for the VGGT and developed guidance to address land rights issues that are covered by the VGGT but not the IFC-PS.

Land rights in operational systems

Responses from the three participating DFIs indicate that, in those institutions, awareness and practices concerning land rights have significantly improved over time. All three participating DFIs have developed, and improved over the years, sophisticated ES systems that cover land rights issues. They also host growing ES teams of dedicated staff that have been described as integrated into investment decision making.

These advances have been made despite the challenging situation DFIs have been operating in. DFI ES teams must deal with several difficult issues, besides land rights. The international pool of land governance experts available to DFIs is relatively small. Prospective clients often approach DFIs after key project parameters have been established; and although DFIs can, and often do, seek changes to align ES systems with their institutional policies, they are rarely able to start with a clean slate.

Areas for improving DFI policies and practices

While these advances and constraints need to be acknowledged, there is a strong case for DFIs to invest in further improving their policies and practices related to land rights, and to play an even more proactive role in improving private sector conduct in this area. If not properly addressed, land rights issues can expose people affected by DFI-financed activities to severe negative impacts and human rights violations. They can also expose DFIs to reputational and operational risks.

As specific DFIs follow somewhat different approaches, opportunities for improvement vary and peer learning could help advance the agenda. In general terms, however, areas for improvement include:

1. Increasing transparency of due diligence processes and establishing systematic opportunities for third parties – including land rights holders, other affected people and non-governmental organisations (NGOs) – to feed into those processes.
2. More fully mainstreaming human rights due diligence across DFI financing, aligning due diligence with the more comprehensive spectrum of land rights issues covered in the VGGT, and considering indirect land rights impacts in the supply chain.
3. Developing approaches to assess and, where relevant, promote improvement of any partnerships which clients establish with land rights holders and/or small-scale rural producers, and creating arrangements to finance independent technical, legal and other capacity support for affected people in their relations with DFI clients.
4. Strengthening arrangements to review investor–state and investor–community contracts, and ensuring that land rights and wider ES issues are fully integrated into contracting along the investment chain – including at both contracting and compliance stages, as well as making arrangements to address land rights issues upon exit.
5. Disclosing DFI–client contracts, and requiring disclosure of underlying investor–state and investor–community contracts – building on advances made on the disclosure of investor–state contracts in the extractive industries.
6. Systematically analysing human rights contexts at both country and project levels to assess and monitor risks for land rights defenders, identifying measures for DFIs and clients to mitigate risks of repression and intimidation, and developing rapid response systems to address threats to project critics.
7. Supporting arrangements for independent third-party monitoring of compliance throughout the project life-cycle, and ensuring that an effective and accessible DFI-level grievance mechanism is in place to handle ES (including land rights) issues.

Possible ways forward

To address these issues, DFIs could pursue two complementary modes of engagement: (1) incremental improvements through technical support, peer learning and lesson sharing; and (2) concerted and sustained action to foster transformative change in the ways the industry handles land rights issues.

1. Lesson sharing, technical support and peer learning to sustain incremental improvements in DFI policies and practices. The first mode of engagement involves DFIs sharing lessons and harnessing technical support to incrementally improve practices in the land-related areas identified above, based on existing channels for exchange. Existing spaces for peer-to-peer learning and technical input can provide vehicles for addressing specific land rights issues (e.g. issues two, three and four in 'Areas for improvement').

This may involve, for example, developing operational guidance on specific land rights issues, or holding thematic sessions at the

events of the Association of European Development Finance Institutions (EDFI). There is also scope for exploring joint initiatives to support the development of a pool of land governance experts that can advise DFIs on land rights issues in due diligence and project implementation contexts.

2. Catalysing transformative change in DFI policies and practices. The second complementary avenue involves catalysing transformative change in the ways DFIs – and the private sector – handle land rights issues. This can be done by more fully mainstreaming human rights issues in all DFI financing and by increasing scope for public engagement with, and scrutiny of, DFI-funded activities. This may include, for example, developing innovative arrangements to open up due diligence processes and make contract disclosure the new normal (addressing issues one and five in 'Areas for improvement'). Concerted DFI action in these spaces is likely to be more effective than isolated initiatives by individual DFIs.

1 Introduction

1.1 The issue

More and better investment in agriculture could help improve rural livelihoods in low- and middle-income countries. But land dispossession associated with a wave of agribusiness plantation deals has undermined the livelihoods of many, and ‘land grabbing’ campaigning has created reputational and operational risks for agribusiness companies and their business partners. One challenge is that many national land governance systems do not provide effective ways to protect local claims to land and resources. Recently developed international soft-law instruments, and guides and toolkits to ‘operationalise’ these instruments, provide guidance with unprecedented granularity on how to secure land rights in the context of private sector investment. But much needs to be done to translate this guidance into real change.

Development finance institutions (DFIs) are ‘specialised development banks or subsidiaries set up to support private sector development in developing countries’ (OECD, n.d.). They include multilateral institutions such as the International Finance Corporation and regional development banks, as well as bilateral DFIs that are usually controlled by one government, and finance activities overseas – such as CDC (United Kingdom), FMO (the Netherlands), the German Investment and Development Corporation (DEG), Proparco (France) and the Overseas Private Investment Corporation (OPIC, United States).

Bilateral DFIs play an increasingly prominent role in the international aid architecture. For example, the combined investment portfolio of European bilateral DFIs has more than tripled over the period 2005–2015 (EDFI, 2017). Bilateral DFIs have supported private sector investments in agriculture, including some that attracted public campaigning against ‘land grabbing’ (for example, GRAIN and RIAO-DRC, 2015, 2016; Swedwatch, 2017; Borrás et al., 2017). At the same time, international guidelines endorsed by states operating bilateral DFIs affirm that governments are responsible for ensuring land rights are respected when they promote land-related investments overseas.¹ There is also growing jurisprudence on the extraterritorial dimensions of international human rights obligations, including the extraterritorial obligations of states in situations where they exert control over business activities overseas (CESCR, 2017).²

Because of their position between development and commercial worlds, DFIs can play a key role in efforts to align private sector conduct with international norms and standards. Their influence is linked both to the leverage they exert on the businesses they finance and the ‘demonstration effect’ their policies and practices have within the private sector at large. At the same time, land rights issues are often complex, and several governments are encouraging their DFIs to work in more difficult environments – including fragile states and post-conflict situations – where land challenges are even more

1 Paragraph 12.15 of the VGGT reads: ‘When States invest or promote investments abroad, they should ensure that their conduct is consistent with the protection of legitimate tenure rights, the promotion of food security and their existing obligations under national and international law, and with due regard to voluntary commitments under applicable regional and international instruments.’

2 For more information, see also ETO Consortium (2011), Milanovic (2011), Joseph (2011), Coomans and Künnemann (2012), I-ACHR (2017), and for more on home-state measures for responsible investment in agriculture, see Fiedler and Karlsson (2016).

acute. The pool of land experts DFIs can access is relatively small and DFIs may need support to address land rights issues most effectively.

1.2 About this report

This report reviews the approaches European and North American bilateral DFIs use to address land rights issues in the agriculture sector. It assesses whether the policies and practices that the DFIs apply in environmental and social (ES) matters adequately address land rights issues; and what areas, if any, present opportunities for improvement. The report draws on a review of publicly available materials relating to major European and North American bilateral DFIs, particularly their policies and publications. For insights on operational practice, in-depth questionnaires were filled out and follow-on interviews were carried out with three DFIs.

In conducting the assessment, the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security (VGGT) provided a key reference. This reflects the broad-based political support and perceived social legitimacy that the VGGT enjoy, largely resulting from the participatory process that led to their development. Several DFIs have expressed support for the VGGT, but their operational systems are typically based on the IFC Performance Standards (IFC-PS). The close relationship between land and human rights, which the VGGT explicitly recognises, also provided a key reference for the research, but detailed analysis of international human rights law is beyond the scope of this exercise.

For the questionnaires and interviews, the team contacted six DFIs, selected on the basis of overall size and/or experience with agriculture. The ES teams of three of those DFIs provided responses through the written questionnaire, the in-depth interview and follow-on exchanges. As a result, the more granular analysis draws on a small number of respondents. However, this research component primarily aimed to shed light on some of the operational issues that can arise in applying ES systems to land rights questions, with a view to deepening understanding of issues beyond the three participating DFIs.

Indeed, while there is diversity among DFIs and their practices, commonalities also exist – not least because of the central role of the IFC-PS in framing approaches to ES, including land rights issues, across the DFI sector. Some convergence of DFI practices also exists due to DFI peer exchange and co-investment in projects and funds. The findings are therefore expected to be relevant to DFIs beyond the three participating agencies. The identities of the participating DFIs are not disclosed, and – where examples are needed to illustrate issues³ – the report draws on practices from across the DFI sector.

The next section provides a brief characterisation of DFIs, their financing instruments and their ES policies and practices. It also compares prevailing ES standards to the VGGT and discusses the relationship between land and human rights. Section 3 presents the findings of the review of ES policies and practices concerning land rights issues, drawing more extensively on the questionnaires and the interviews with the three participating DFIs. Section 4 outlines possible options for moving forward.

3 For ease of reading, the report does not systematically cite all relevant DFI policies and publications. Instead, it refers to illustrative examples where this is useful to elucidate a particular issue.

2 DFI financing instruments and ES policies

2.1 DFI financing: an overview

DFI practice encompasses diverse financing arrangements and institutional policies and set-ups. This diversity has important implications for the ways in which ES standards are applied. DFIs commonly operate both direct and indirect (or intermediated) investments. The former involve a direct relationship between the DFI and its client. In the latter, financing is intermediated by a fund manager or a bank, and the DFI only has an indirect relationship with the ultimate investee or borrower.

In direct investments, clients are required to comply with the DFI's ES standards. In indirect investments, DFIs require intermediaries (fund managers or financial institutions) to develop ES management systems aligned with the DFI's requirements, and to cascade ES standards down to their clients. Intermediated relations tend to involve less direct DFI oversight of ES issues that may arise in investments supported by the DFI-financed fund manager or bank.

Financing instruments also vary, ranging from equity to lending, political risk insurance and/or guarantees. These various instruments are used for both direct and indirect investments. For example, a DFI can lend (directly) to an agribusiness and (indirectly) to a bank that includes agriculture in its lending portfolio. Different financing arrangements can affect DFI leverage, including in ES matters.

For instance, a substantial or even majority equity stake can enable the DFI to have significant control over an agribusiness and even appoint the company's management. In direct lending arrangements, on the other hand, the DFI is often one creditor among several. Therefore, the relationship with the client is somewhat removed and leverage is often more limited – although ES obligations remain. Relations, and thus leverage, can be even more removed in guarantees and political risk insurance.

Each DFI operates a specific combination of financing arrangements, which can affect its overall leverage in ES matters. Unlike many of its counterparts, for example, OPIC does not operate equity investments, focusing instead on lending, political risk insurance and guarantees. Conversely, DFIs such as FMO, CDC and Proparco do not provide political risk insurance. Until 2012, CDC only operated through indirect investments, but its direct investment portfolio has since grown to account for 74% of financing in 2017.⁴

Beyond this diversity, important commonalities exist across DFIs and their financing arrangements. In relation to all their financing, most, if not all, European and North American bilateral DFIs operate ES systems centred on the application of the IFC-PS. The IFC-PS include standards in the areas of ES risk management, labour and working conditions, resource efficiency and pollution, community health,

4 In 2017, CDC made new commitments of £1,050 million including £774.1 million of direct investments (CDC, 2018).

safety and security, and biodiversity conservation and cultural heritage. Particularly relevant to DFI activities around land rights issues are the IFC-PS on involuntary resettlement (IFC Performance Standard 5) and indigenous peoples (IFC Performance Standard 7).

All three DFIs participating in the research operate systems based on the IFC-PS, and they have all also produced their own policies, procedures and/or publications on ES issues. All three participating DFIs host growing teams of dedicated ES professionals. Interview responses from all three DFIs indicated that the ES teams are integrated into internal decision making – they are involved throughout the due diligence process and feed into the deliberations of the relevant decision-making committee. According to interview responses, ES teams usually give a high-risk rating to projects with land rights impacts, which triggers procedures for additional screening.

Broadly speaking, all three stated that issues identified in the ES due diligence process could lead to a decision not to invest in a business, or feed into an action plan to be implemented by the client, with the aim of achieving compliance with the DFI's ES standards, within a reasonable time. The action plan is integrated into contractual arrangements between the DFI and its client.

Compliance monitoring is based on client reporting and/or visits by DFI staff or consultants, although one participating DFI also highlighted the importance of institutional arrangements, such as an ES board subcommittee. Arrangements for non-compliance vary depending on the financing instrument. In lending, for example, contractual clauses typically allow the DFI to suspend payments. In practice, this option is seen as a last resort and rarely employed, and the emphasis is on engaging to address the issues.

2.2 The IFC Performance Standards and the VGGT

2.2.1 The place of the VGGT in DFI financing

While DFI ES practice draws heavily on the IFC-PS, use of the VGGT has been more limited. This is partly because the VGGT are primarily addressed to states – although some provisions are specifically directed at businesses. Also, the VGGT are not formulated in operational terms, which makes them more difficult to integrate into businesses' internal procedures. However, various guides and toolkits have been developed on how the private sector can operationalise the VGGT (for example, FAO, 2016).

Several European and North American DFIs have engaged with the VGGT. For example, CDC's Code of Responsible Investing states that CDC 'promotes' the VGGT, among other international standards,⁵ and since 2014 Proparco has contributed to developing and used a VGGT-derived conceptual framework in their due diligence processes for land-based agribusiness investments (Comité Technique Foncier et Développement, 2014). Several DFIs have been actively engaged in the work of the Interlaken Group – an informal multi-stakeholder group working to improve private sector practice on land, including by helping to operationalise the VGGT.⁶

As the VGGT enjoy widespread support as the key global instrument on land governance,⁷ and as governments have committed to align aid-supported overseas investments with them,⁸ it remains to be seen if applying the IFC-PS can adequately address the same issues. A recent comparative study conducted by the German Institute for Human Rights highlighted both commonalities and differences between the

5 See Schedule 5 in the CDC Code of Responsible Investing.

6 See the Interlaken Group website at <http://www.interlakengroup.org/>, and particularly Interlaken Group and RRI (2015).

7 See, for example in United Nations General Assembly (2012), Rio+20 Conference (2012), G20 (2012), APF (2012) and FAO (2013).

8 For example in G7 (2015: 11), which reads: 'We thus reaffirm our support for the consistent implementation of and strive to alignment of our own ODA-supported investments with the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security (VGGT) and the CFS Principles for Responsible Investment in Agriculture and Food Systems.'

IFC-PS and the VGGT, pointing to areas where IFC-PS compliance would not fully address land rights issues covered in the VGGT, and vice versa (Windfuhr, 2017).

2.2.2 Differences between the IFC-PS and the VGGT

Different entry points

Before discussing a few specifics, it is important to note that, while both the VGGT and the IFC-PS provide guidance on addressing land issues in investment processes, their entry points are different. The VGGT provide guidance on improving governance in systemic terms; while the IFC-PS set operational standards for commercial investments, including to address gaps in governance frameworks. The IFC-PS are formulated in ways that a company can directly operationalise, while the VGGT primarily discuss the policy, legal and institutional frameworks for addressing land issues. The VGGT are an international soft-law instrument that provides generally applicable guidance,⁹ while DFIs typically establish bilateral contractual obligations for clients to comply with IFC-PS standards.

Varying emphasis on human rights

The VGGT and the IFC-PS also present differences in relation to international human rights law. Land and human rights are closely connected. Examples of the most relevant internationally recognised human rights include the rights to property, housing, 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 self-determination, as well as indigenous peoples' rights to their ancestral territories – to name but a few. That said, all human rights are interdependent and interrelated, so the interface between resource rights and

human rights encompasses all internationally recognised human rights.¹⁰

The IFC-PS reaffirm that 'businesses should respect human rights', consistent with the United Nations Guiding Principles on Business and Human Rights.¹¹ Earlier analyses pointed to substantial overlap between human rights and the IFC-PS (IFC, 2012). However, IFC Performance Standard 5 makes no mention of human rights, while Performance Standard 7 only refers to them when framing its objectives. On the other hand, the VGGT contain many provisions 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, both in general terms and with regard to specific land rights issues; and (3) articulate the relationship between land and human rights in wide-ranging contexts, including private sector investment.¹²

Different approaches to protecting rights not recognised by national law

Both the VGGT and the IFC-PS extend protection to land rights that do not amount to full ownership and/or are not recognised under national law. But they do so with different approaches. The VGGT call for the recognition, respect and protection of all 'legitimate tenure rights', i.e. all land and resource rights that are perceived to be socially legitimate in a given context, even if these 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 and/or held by indigenous peoples.

IFC Performance Standard 5 covers loss of land ownership and/or use rights, loss of 'traditional or recognizable' use rights to natural resources, and loss of communal land and resource ownership and use. It also covers

9 On the legal significance of the VGGT, see Seufert (2013), Cotula et al. (2016) and Cotula (2017a).

10 See VGGT, paragraph 4.8. On the relationship between land and human rights, see De Schutter (2010), Cotula (2017b) and Cordes (2017).

11 IFC Performance Standard 1, paragraph 3.

12 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.

‘certain project situations requiring evictions of people occupying land without formal, traditional or recognizable usage rights’. The approach is centred 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 the two approaches produce similar outcomes in most cases, although field-based research would be needed to assess this. The VGGT centre on protection around a flexible rights-based concept (‘legitimate tenure rights’), coupled with guidance on specific situations, which seems well suited to cater for a diversity of contexts. The explicit link to human rights reinforces the VGGT’s potential to protect wide-ranging land rights: international human rights courts have consistently held that international law protects a wide range of resource claims, even if they are customary in nature and not recognised under national law.¹³ On the other hand, the IFC-PS emphasis on practical tenure situations and livelihood restoration seems easier to operationalise and less prone to contestation about what tenure rights should be considered legitimate.

Implications for guidance on land rights issues in agricultural investments

More specific differences exist between IFC Performance Standard 5 and the VGGT provisions that deal with investment. These differences partly flow from the differences in the overall framing of the two instruments, as discussed above. Drawing on an earlier comparative study of the IFC-PS and the VGGT (Windfuhr, 2017), and on a textual analysis of the IFC-PS and the VGGT, differences include:

- **Project vs systemic approach.** IFC Performance Standard 5 focuses on project-specific land rights impacts, which the project developer can

address through its ES management system.¹⁴ The VGGT take a more systemic perspective on the governance of land and natural resources and they consider the cumulative impacts of multiple forms of land use.

- **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 they go beyond that by 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 poverty reduction, food security and rural development. Aspects of the positive contributions from investments are captured by DFIs’ criteria on development impacts, but the parameters do not necessarily align with those arising from the VGGT.
- **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 lost control of the land. Therefore, VGGT safeguards for legitimate tenure rights could apply in situations where a business takes over an existing agribusiness plantation. In contrast, IFC Performance Standard 5 is essentially silent on legacy situations.
- **Human rights due diligence.** The VGGT reaffirm the responsibility of businesses to respect human rights, calling on them to identify and assess human rights impacts related to land rights. The IFC-PS consider that due diligence against the standards will in most cases cover human rights issues, and state that ‘it may be appropriate’ for clients to complement ordinary ES due diligence

13 See, for example, the extensive jurisprudence of the Inter-American Court of Human Rights on the human right to collective property.

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

with specific human rights due diligence only in ‘limited high-risk circumstances’.¹⁵ As discussed, IFC Performance Standard 5 makes no mention of human rights.

- **Scrutiny of government action: public purpose in commercial investments.** Both the IFC-PS and the VGGT promote negotiated solutions for land acquisition. But many investments rely on compulsory land acquisition, which has often led to contestation. The VGGT, but not the IFC-PS, envisage opportunities to review the stated public purpose, including in the context of judicial proceedings, e.g. to determine whether the stated public purpose is supported by evidence and whether the measures taken are proportionate to the purpose.

Divides in professional cultures

Besides the textual differences between the VGGT and the IFC-PS, this research also identified differences in the professional culture of land governance and ES experts. To ES specialists at DFIs, the VGGT may seem an unwieldy tool with limited practical relevance to the work of DFIs given the VGGT’s main focus on states rather than businesses. To land governance specialists, exclusive reliance on the IFC-PS may seem a ‘business as usual’ scenario that does not reflect the advances made through the development of the VGGT. However, as noted above some DFIs have been supportive of the VGGT. Two of the three participating DFIs lamented the limited pool of international land governance experts willing and able to provide consultancy services to DFI ES teams.

15 See VGGT paragraph 3.2 and IFC Performance Standard 1 paragraph 7 and footnote 12.

3 ES policies in practice

In dealing with land rights issues, most European and North American bilateral DFIs apply the IFC-PS and the institutional procedures developed by the DFIs themselves. This section discusses the practical application of land-related ES policies, partly drawing on the written questionnaires and the oral interviews with the three participating DFIs. The issues identified are not intended to be exhaustive. They relate to two main areas:

- How DFIs identify and address land rights issues in due diligence processes.
- How DFIs operationalise land rights issues in contractual and institutional arrangements.

Awareness of, and ability to deal with, these issues in the three participating DFIs has improved in recent years. All three have developed substantial systems for ES due diligence, including project risk-ratings to assess ES risks, internal guidance on identifying land tenure risks and preliminary project-level assessments. All three DFIs identified community consultation and obtaining the ‘social license to operate’ as key processes to facilitate responsible agricultural investment. The three participating DFIs also have processes in place to integrate land rights issues into indirect investments and to monitor land rights issues throughout the investment cycle.

While acknowledging these important foundations, and to further strengthen systems and approaches, this section focuses on opportunities for improvement in DFI policies and practices. As different DFIs work in somewhat different ways, it is recognised that these areas may not be relevant to the same extent, or in the same way, to all European and North American bilateral DFIs.

3.1 Identifying and addressing land rights issues in due diligence processes

Transparency and public engagement in due diligence processes. Due diligence exercises are generally confidential, and community engagement is usually accessed via the prospective client. There are practical reasons for this, but the trend brings up questions as to whether, in such circumstances, affected people – including land rights holders – have effective opportunities to meaningfully contribute their views and inform the ES due diligence.

Further, while confidentiality responds to commercial considerations, it also means that organisations working with land rights holders and affected people, including NGOs, may only learn about a DFI’s potential involvement with a project too late to be able to raise issues or contribute information that could influence the outcomes of ES due diligence. DFIs do at times reach out to trusted non-profits as part of their ES due diligence, but arrangements for doing so transparently and systematically are often lacking.

Greater transparency and disclosure, effective community engagement independent of the prospective client and institutionalised channels for earlier communication with actors that are in a position to contribute insights might help DFIs identify land rights issues in a timely manner. It is worth noting that some DFIs have established arrangements to disclose key project information or documentation, or solicit comments from the public, *before* making final investment decisions – in relation to higher-risk projects (OPIC, 2017) or to all projects while allowing for waivers under certain circumstances (FMO, 2018). This experience could be built upon and further expanded to increase opportunities for meaningful external input into due diligence processes across the DFI sector.

Application of land-related IFC-PS. Depending on each project’s risk classification, ES due diligence exercises are primarily conducted against the IFC-PS. IFC Performance Standard 5 on involuntary resettlement becomes applicable whenever the DFI deems that the project involves – or could be reasonably expected to involve – the acquisition and/or use of land, or physical and/or economic displacement.

Whether a proposed project raises land rights issues, directly or indirectly, and triggers the application of IFC Performance Standard 5, will be obvious in many cases. However, it is possible that in some situations land problems are not picked up. For example, a processing facility that does not involve substantial land acquisition may source produce from farming operations with significant land footprints – yet the IFC-PS do not require consideration of land issues in the supply chain.¹⁶ Also, due diligence for the financing of longstanding agribusiness plantations (i.e. brownfield investments) may fail to identify land problems, as the IFC-PS do not address historical/legacy issues, although some DFIs have developed guidance on how to address these.¹⁷

Earlier research raised concerns about risk classification by some DFIs.¹⁸ Written and oral responses from two of the participating DFIs indicated institutional preferences for ‘erring on the side of caution’, i.e. selecting higher-risk ratings, both when determining a project’s risk classification and by requiring the application of land-related standards to all projects capable of having direct or indirect land ramifications.

The IFC-PS, the VGGT and human rights. As the IFC-PS provide the basis for ES due diligence, the differences with the VGGT, discussed above,

raise a number of issues. For example, one set of issues concerns the extent to which cumulative impacts are properly factored into due diligence processes, for instance where multiple commercial investments increase land scarcity and/or drive land values up, affecting land users who may be impacted only indirectly by the specific project supported by the DFI.

The varying emphasis the IFC-PS and the VGGT place on human rights also has practical implications. As discussed, earlier analyses pointed to substantial overlap between human rights and the IFC-PS (IFC, 2012). Many land-related human rights issues are likely to come up in existing ES due diligence processes, and integrating human rights due diligence into existing ES systems is in line with the Guiding Principles on Business and Human Rights.¹⁹ But a human rights approach to addressing land rights issues involves a distinctive perspective that may otherwise be lost in existing ES due diligence.

While detailed comparative analysis of the IFC-PS and international human rights law is beyond the scope of this report, a human rights approach would inherently place particular emphasis on how contextual factors such as the human rights situation in the country could affect project risks, and on addressing those impacts that pose the greatest risk to people – even if they are more difficult or costly to tackle (Davis, 2018). Also, a rapidly evolving human rights jurisprudence provides pointers relevant to addressing land rights issues that are not necessarily covered in detail by the IFC-PS.²⁰

Further, framing a problem in human rights terms could change the way issues are conceived and trade-offs navigated. This is partly because a human rights approach places special

16 For guidance on addressing land rights issues in supply chains, see OECD and FAO (2016).

17 For example, CDC and DEG (2016). See also Cotula and Berger (2016) and Interlaken Group (2017).

18 For example, Leo and Moss (2016) found that 90% of OPIC-financed projects over the period 2000–2014 had been screened as low risk. The research included financing before ES policy reforms were adopted in 2010 and 2012.

19 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’ (para. 17).

20 See, for example, CESCR (2003) on the right to water and OHCHR (n.d.) on the rights of land/human rights defenders.

emphasis on the perspectives of affected people, who are considered as active right holders rather than passive ‘project beneficiaries’ (Davis, 2018). Thus, there are questions as to whether only requiring human rights due diligence in exceptional circumstances could, in effect, marginalise consideration of human rights at a time when human rights impact assessments are being mainstreamed.

Partnerships with land rights holders and small-scale rural producers. As already mentioned, the VGGT go beyond a ‘do no harm’ approach and call for ‘smallholder-sensitive investments’ based on partnerships with land rights holders and small-scale rural producers. In many situations, these two groups overlap at least in part, although this is not always the case. Partnerships can take many forms, partly reflecting a diversity of situations – from land leases negotiated with local landholders to community development agreements that contractualise the provision of social infrastructure. Outgrower/ingrower schemes are common arrangements for including local actors in the business, especially for suitable commodities, such as sugarcane and palm oil.²¹

Depending on the process and the terms, such collaborative models can provide the foundations for equitable partnerships, or for exploitative arrangements. For example, research has documented both positive and negative experiences with contract farming – with common risks including unfair pricing, farmer indebtedness and a lack of farmers’ voice (German et al., 2018). Recognising the potential positive and negative outcomes, the Food and Agriculture Organization of the United Nations (FAO) has developed extensive guidance,²² while UNIDROIT, FAO and the International Fund

for Agricultural Development (IFAD) produced a legal guide to negotiating contract farming agreements (UNIDROIT et al., 2015).

The review of DFI materials identified gaps in this area. The IFC-PS do not provide any guidance on how a DFI could assess the fairness of a partnership that a prospective client may have developed, or how to support the operationalisation of more equitable partnerships. The DFIs’ development impact criteria tend to be too high-level for a granular examination of a proposed or existing partnership. Some DFI documentation presents the development of an outgrower scheme as an inherently good thing, and a way to develop good community relations or address tenure problems, without acknowledging the potential negative impacts.

Given the asymmetries in negotiating power that often characterise relations between agribusinesses on the one hand and land rights holders and small-scale rural producers on the other, there are also questions about what arrangements DFIs have in place to ensure the latter have the technical, legal and other support needed to engage on an equitable basis.²³ The three participating DFIs did not report any experience with setting up and resourcing trust funds, independent of the client, to source capacity support for land rights holders and small-scale rural producers – whether to negotiate new partnerships with the client or to renegotiate existing ones. However, one participating DFI is now exploring this issue.

Social differentiation. Land relations typically raise major – and highly variable and context-specific – issues of social differentiation, for example, in terms of status, wealth, income, gender, age and disability. DFI responses

21 Outgrower schemes involve contract farming arrangements with independent producers, often around a ‘nucleus’ plantation operated by the company. Ingrower schemes refers to a similar arrangement, with the growers cultivating company-held land. Outgrowers/ingrowers can present very diverse socio-economic profiles, including a considerable variety in scale of operations, but the main concern here is (in the words of the VGGT) about legitimate land tenure rights holders, small-scale rural producers and sustainable rural development.

22 In particular, see the materials available on the Contract Farming Resource Centre: <http://www.fao.org/in-action/contract-farming/en/>.

23 On supporting land rights holders in negotiations with agribusinesses, see Szoke-Burke et al. (2018). For an example of community-oriented materials on the IFC-PS, see FPP (2017).

highlighted that it is established practice to require ES consultants or studies to consider social differentiation. Based on the evidence available, however, it is impossible to draw firm conclusions on how effectively these issues are addressed in ES due diligence. One DFI expressed interest in deepening approaches to address gender and other social differentiation.

3.2 Integrating land rights issues into contractual and institutional arrangements

Contracts between DFIs and their clients. All three participating DFIs integrate ES issues into their contracts with clients. As a rule, financing agreements are normally not disclosed, so this review could not examine contracts. Interview responses indicated that contractual sanctions are rarely used for ES non-performance, with priority being given to addressing the issues through constructive engagement. Two of the three participating DFIs did not appear to have institutional guidance on how to address any negative ES impacts upon exiting the contractual relationship with a client – for example, where an exit deprives the DFI of any leverage and the client proves unwilling to address outstanding land rights issues.

One participating DFI expressed interest in peer-to-peer learning among DFIs on ways to contractualise ES issues, including land rights issues. This would apply to contractual relations both with direct clients and – even more so – with fund managers (on cascading down contractual requirements throughout the investment chain), and it would cover both contracting and compliance stages.

Investor-state and investor-community contracts. Separate issues arise in relation to the underlying investment contracts, for example the lease contract a client may have concluded with the government, inherited from a corporate acquisition or – where relevant – signed directly with local land rights holders. In most

cases of direct investment, these contracts will have already been signed by the time the DFI becomes involved. A key issue concerns the mechanisms for the DFI to review these contracts at due diligence stage, and where relevant, to seek modifications to ensure that contractual arrangements are aligned with the DFI's ES policies and easily enforceable.

All three participating DFIs stated that they typically review the underlying investment contracts as part of their due diligence. These reviews are led by legal departments, with ES teams contributing in relation to ES provisions. However, there appeared to be limited awareness about contractual clauses that, while not labelled as ES, can significantly affect ES issues. Stabilisation clauses provide one example (see Box 1). While this research could not engage with the DFIs' legal departments, interview responses suggested that more work can be done in reviewing and, where necessary, seeking modifications of non-ES contractual clauses through an ES prism.

Transparency of DFI-client and investor-state/investor-community contracts. DFI-client contracts are not systematically disclosed for reasons of confidentiality. As compliance with the DFIs' ES standards can have material implications for people affected by the project, there is a strong case for these people to know about the contractual arrangements that are meant to give teeth to those standards. This would require the DFI-client financing agreements, or relevant portions thereof, to be publicly disclosed.

Transparency issues are also relevant to investor-state and investor-community contracts. While a significant number of extractive industry investor-state contracts are now publicly available, progress has been considerably more limited in the agriculture sector.²⁴ Multilateral DFIs, such as the IFC, have been instrumental to advancing contract disclosure in the extractive industries,²⁵ and the International Monetary Fund's Guide on Resource Revenue Transparency

24 See ResourceContracts.org and OpenLandContracts.org.

25 See IFC's website page on contract disclosure (https://www.ifc.org/wps/wcm/connect/industry_ext_content/ifc_external_corporate_site/ogm+home/priorities/contract+disclosure).

Box 1 Non-ES clauses with potentially significant ES impacts: the case of stabilisation clauses

Stabilisation clauses are found in many investor–state contracts for long-term natural resource projects. While contractual practice is very diverse, these clauses generally aim to stabilise the law applicable to the project over project duration. Depending on the formulation, this might mean that new national laws – potentially including in ES fields – would not apply to the project, or else they would apply only if the government offsets or compensates the company’s losses (e.g. linked to higher costs).

While land rights issues often arise in the early stages of project implementation, they are relevant throughout the duration of the project – for example, where the implementation plan envisages the phased expansion of the cultivated area. Application of the IFC-PS often raises standards well above national law. But some ES issues may not be adequately covered by the IFC-PS (see the section above on partnerships with land rights holders and small-scale rural producers). Further, the project’s life-cycle may be considerably longer than the DFI’s involvement, and thus possibly the existence of arrangements to promote and monitor compliance with the IFC-PS. Therefore, stabilisation clauses could have a bearing on land rights issues in DFI-financed projects

In 2009, the IFC – together with the then United Nations Special Representative to the Secretary-General for Business and Human Rights, John Ruggie – conducted a study on stabilisation clauses and human rights. The study concluded that, ‘Stabilization clauses may be used formally to protect investors from having to comply with new social and environmental laws or to gain compensation from the state to pay for such compliance’ (Shemberg, 2009: 35). The United Nations Guiding Principle on Business and Human Rights provide guidance on addressing these issues.¹

1 See Principle 9 and Annex on Principles for Responsible Contracts.

identifies contract disclosure as a key feature of best practice in extractive industry legislation (IMF, 2007: 15).²⁶

Against concerns about confidentiality of commercially sensitive information, global databases and national governments have released contracts without publicly known adverse consequences for any of the parties involved – and disclosure does not prevent redacting genuinely confidential (e.g. proprietary) information.²⁷ DFIs could play a more proactive role in promoting disclosure as the new industry standard in agriculture.

Land rights defenders. Recent years have witnessed increased repression and intimidation of land rights defenders – from community members to activists and NGOs – in the context of large-scale investments. Documented repressive measures include murder, enforced

disappearance, violent attacks, threats, and judicial and other forms of harassment. At least 207 land rights defenders were murdered in 2017, with agribusiness emerging as the most dangerous sector (Global Witness, 2018). A repressive context, whether at the country level or around a specific investment project, means that people cannot freely speak out (or be perceived to have spoken out) and that the conditions are not in place for meaningful consultation and community engagement.

This challenge is becoming more pressing as civic space shrinks in many countries and as donor governments encourage their DFIs to work in more challenging environments. Growing guidance is available on how DFIs can identify and address these issues both at due diligence stage and throughout the duration of the project. This includes systematically analysing human

26 Consultations are ongoing for the revision of the International Monetary Fund’s guidance on these issues.

27 On the benefits of contract transparency, see CCSI (2016).

rights contexts at both country and project levels, identifying measures to mitigate risks of repression or intimidation, integrating anti-reprisal clauses in DFI–client contracts, and establishing rapid response systems to address threats to project critics (Coalition of the Flemish North-South Movement et al., 2016; OHCHR, n.d.).

Grievance mechanisms. Complaint mechanisms associated with some multilateral DFIs are increasingly used, particularly the IFC Compliance Advisor Ombudsman (CAO). On the other hand, experience with complaint mechanisms among some bilateral DFIs appears to be embryonic, if now rapidly evolving. DFIs would typically require clients to establish a project-level grievance mechanism. But different approaches have emerged in relation to the DFIs’ own grievance mechanisms. For example, DEG and FMO have set up a joint grievance mechanism and Proparco is in the process of joining it. On the other hand, OPIC has its own Office of Accountability, which deals with ES issues or complaints and includes a channel for problem solving; while CDC has developed a ‘complaints and whistleblowing’ arrangement for

reporting alleged breaches of the CDC Code of Responsible Investing.

More implementation time for these DFI grievance mechanisms will be needed to assess their design and effectiveness in addressing land-related issues. Additionally, this study did not have access to data concerning project-level grievance mechanisms. However, some of the existing arrangements do not provide meaningful opportunities for independent review or effective remedy, and they differ in fundamental ways from established multilateral arrangements such as the IFC CAO.

Issues about the availability and effectiveness of grievance mechanisms seem even more acute for indirect investments, as the ES sensitivity of financial intermediaries may vary and information about the DFI’s involvement may not be readily accessible. Beyond cases involving alleged violations of ES standards, there do not appear to be systematic mechanisms for involving third parties, such as land rights holders and NGOs, in the day-to-day monitoring of compliance with ES standards.

4 Conclusion and ways forward

4.1 Key findings and recommendations

This report reviewed the practice of European and North American bilateral DFIs in relation to land rights issues in the agriculture sector. Drawing on a review of publicly available materials and on written questionnaires and follow-on interviews with selected DFIs, the report assessed whether ES policies and practices adequately address land rights issues, and identified opportunities for improvement.

4.1.1 The IFC Performance Standards and the VGGT

The DFIs' ES systems rely heavily on the IFC-PS. These contain detailed operational guidance on addressing land rights issues in an investment context. They present significant convergence with the provisions of the VGGT – the key global instrument on land governance. However, the IFC-PS and the VGGT take different entry points and approaches. While the IFC-PS focus on addressing project-specific impacts, the VGGT take a more systemic perspective to land issues and governance. More than the IFC-PS, the VGGT emphasise rights language throughout, recognise the close relationship that exists between land and human rights, and reiterate the underlying human rights obligations of states and responsibilities of businesses.

Further, the IFC-PS reflect a 'do no harm' approach, while the VGGT call for 'smallholder-sensitive investments' that positively contribute to policy objectives, such as poverty reduction, food security and rural development. Some such differences reflect the different nature of the two

instruments, with the IFC-PS being designed for operational use in commercial investments, and the VGGT primarily to improve land and resource governance. But the differences also raise questions as to whether prevailing ES standards fully reflect the latest thinking and policy consensus on land rights. Some DFIs have expressed support for the VGGT and have developed guidance to address land rights issues that are covered by the VGGT but not the IFC-PS.

4.1.2 Land rights in operational systems

In more operational terms, responses from the three participating DFIs indicate that, in those institutions, awareness and practices concerning land issues have significantly improved over time. High-level political engagement by the DFIs' host country governments to support new international instruments, such as the VGGT, has helped to raise awareness of the importance of land tenure-sensitive investment. All three participating DFIs have developed, and improved over the years, sophisticated ES systems that cover land rights issues. They also host growing ES teams of dedicated staff that have been described as integrated into investment decision making.

These advances have been made despite the challenging situation DFIs have been operating in. DFI ES teams must deal with several difficult issues besides land rights. The international pool of land experts available to DFIs is relatively small. Prospective clients often approach DFIs after key project parameters have been established (e.g. after a concession contract has been signed); and although DFIs can, and often do, seek changes to align ES systems with their institutional policies, they are rarely able to start with a clean slate.

4.1.3 Areas for improving DFI policies and practices

While these advances and constraints need to be acknowledged, there is a strong case for DFIs to invest in further improving their policies and practices related to land rights, and to play an even more proactive role in improving private sector conduct in this area. If not properly addressed, land rights issues can expose people affected by DFI-financed activities to severe negative impacts and human rights violations. They can also expose DFIs to reputational and operational risks – a point illustrated by advocacy targeting DFI-financed agribusiness investments.²⁸

As specific DFIs follow somewhat different approaches, opportunities for improvement vary and peer learning could help advance the agenda. In general terms, however, areas for improvement include:

1. Increasing transparency of due diligence processes and establishing systematic opportunities for third parties, including land rights holders, other affected people and NGOs to feed into those processes.
2. More fully mainstreaming human rights due diligence across DFI financing, aligning due diligence with the more comprehensive spectrum of land rights issues covered in the VGGT (e.g. legacy issues and cumulative impacts) and considering indirect land rights impacts in the supply chain.
3. Developing approaches to assess, and where relevant promote improvement of, any partnerships that clients establish with land rights holders and/or small-scale rural producers, and creating arrangements to finance independent technical, legal and other capacity support for affected people in their relations with DFI clients.
4. Strengthening arrangements to review investor–state and investor–community contracts (including the land rights and wider ES implications of non-ES clauses such as stabilisation clauses), and ensuring that ES issues, such as land rights, are fully integrated into contracting throughout the investment

chain – from DFI–client contracts and the cascade of contracts in indirect investments, to investor–state contracts – covering both contracting and compliance stages, as well as including arrangements to address land rights issues upon exit.

5. Disclosing DFI–client contracts and requiring disclosure of underlying investor–state and investor–community contracts, building on advances made on disclosure of investor–state contracts in the extractive industries.
6. Systematically analysing human rights contexts at both country and project levels to assess and monitor risks for land rights defenders, identifying measures for DFIs and clients to mitigate risks of repression and intimidation, and developing rapid response systems to address threats to project critics.
7. Supporting arrangements for independent third-party monitoring of compliance throughout the project life-cycle, and ensuring that an effective and accessible DFI-level grievance mechanism is in place to handle ES (including land rights) issues.

While all these areas of DFI practice are directly relevant to identifying and addressing land rights issues, some are more encompassing and are relevant to other ES issues as well. In addition to these specific issues, this research has also raised more general questions about the scope and leverage for DFIs to ensure the correct application of ES standards across the wide range of financing arrangements, including indirect investments and financing instruments (such as lending and, even more so, insurance) that involve more removed relations with operating companies.

4.2 Possible next steps

To address these issues, DFIs could pursue two complementary modes of engagement: (1) incremental improvements through technical support, peer learning and lesson sharing; and (2) concerted and sustained action to foster

28 For example, GRAIN and RIAO-RDC (2015, 2016), Swedwatch (2017) and Borrás et al. (2017). On the cost of tenure conflict, see Alforte et al. (2014).

transformative change in the ways the industry handles land rights issues.

1. Lesson sharing, technical support and peer learning to sustain incremental improvements in DFI policies and practices. The first mode of engagement involves DFIs sharing lessons and harnessing technical support to incrementally improve practices in the land-related areas identified above, based on existing channels for exchange. For example, European DFIs already exchange on a six-monthly basis and bilateral DFIs outside Europe participate in exchange events they have an interest in. The Interlaken Group also provides a space for lesson sharing on land rights issues.

Such existing spaces for peer-to-peer learning and technical input can provide vehicles for addressing specific land rights problems, such as issues two, three and four above. This may involve, for example, developing operational guidance on specific land rights issues, or holding thematic sessions at the events of the Association of European Development Finance Institutions (EDFI) or in connection with the work of the Interlaken Group. There is also scope for exploring joint initiatives to support the development of a pool of land governance experts that can advise DFIs

on land rights issues during both the due diligence process and project implementation.

2. Catalysing transformative change in DFI policies and practices. The second, complementary avenue involves catalysing transformative change in the ways DFIs – and the private sector – handle land rights issues. This can be done by more fully mainstreaming human rights issues in all DFI financing and by increasing scope for public engagement with, and scrutiny of, DFI-funded activities. This may include, for example, developing innovative arrangements to open up due diligence processes and make contract disclosure the new normal (addressing issues one and five on p.24). Concerted DFI action in this space is likely to be more effective than isolated initiatives by individual DFIs.

In these areas, additional scoping would be needed to develop a shared agenda and to identify pathways to change, constraints and opportunities, likely sources of resistance and potential allies. These allies are likely to include progressive sovereign wealth funds, socially conscious pension funds, multilateral financial institutions, financial regulators in certain countries and private investment funds promoting socially responsible investment.

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