

Land Governance in the Dutch Banking Sector Agreement on international responsible business conduct regarding human rights

Report for the Dutch Land Governance Multi-Stakeholder Dialogue (LANDdialogue)



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About this report

This report has been commissioned by the Dutch Land Governance Multi-Stakeholder Dialogue (LANDdialogue). The LANDdialogue aims to contribute to better land governance in line with the principles of the Voluntary Guidelines on the Responsible Governance of Tenure (VGGT). Private sector players, the Dutch government, civil society organizations and knowledge institutions participate in this dialogue. The LANDdialogue enables the parties involved to share knowledge and experiences, and to jointly develop and apply practical solutions that could lead to better land governance.

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Acronyms

EP	Equator Principles
ESG	Environmental, Social and Governance
FAO	Food and Agriculture Organization of the United Nations
FPIC	Free, Prior and Informed Consent
GRI	Global Reporting Initiative
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
IFC	International Finance Corporation
ILO	International Labour Organization
NGOs	Non-Governmental Organizations
OECD	Organisation for Economic Co-operation and Development
OHCHR	Office of the United Nations High Commissioner for Human Rights
PRI	Principles for Responsible Investment
PS	Performance Standards (of the IFC)
SER	Sociaal-Economische Raad / Social Economic Council
UNCERD	United Nations Committee on the Elimination of Racial Discrimination
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples
UNEP FI	United Nations Environment Programme Finance Initiative
UNGA	United Nations General Assembly
UNGPs	United Nations Guiding Principles on Business and Human Rights
VGGT	Voluntary Guidelines on the Responsible Governance of Tenure

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Summary

In October 2016, Dutch banks, trade unions, civil society organizations and the government concluded the *Dutch Banking Sector Agreement on international responsible business conduct regarding human rights* (hereinafter the *Agreement*). This Agreement includes commitments related to land rights, in particular on the requirement of *Free, Prior and Informed Consent (FPIC)*, meaningful and effective consultations and on increasing transparency. In addition, the adhering parties expressed the desire to explore jointly with the LANDdialogue how to broaden the scope of the right to *Free, Prior and Informed Consent* beyond *Indigenous Peoples*.

The LANDdialogue is a multistakeholder platform that aims to contribute to better land governance in line with the principles of the *Voluntary Guidelines on the Responsible Governance of Tenure (VGGT)*. Its participants include private sector players, the Dutch government, civil society organizations and knowledge institutions. The LANDdialogue intends to assist the parties to the Agreement in the implementation phase by providing them with relevant knowledge and expertise to ensure that the Agreement is implemented in a proper and careful manner with regard to land governance issues. This study identifies the opportunities for constructive cooperation between the LANDdialogue and the parties to the Agreement with the ultimate goal of improving the land governance of the corporate clients of Dutch banks.

To define land governance risks, the report explains how many economic activities, ranging from agriculture to road building and from urban development to mining, can create different land governance risks for the people living on, having access to and/or using land resources. It also explains that often various stakeholders can play a role in preventing and mitigating these land governance risks, among which are the banks involved in financing the economic activities in question. Moreover, the report elaborates on the several factors that determine the level of exposure of banks to land governance risks, as well as their potential leverage to prevent or manage such risks. These factors include the location and regulatory and political context of the client's activities, the type of financing, the relative importance of the bank for the client, the role of the bank in a syndicate, the relationship of the bank with the client, the timing when the bank gets involved and the position of the client in the supply chain.

As a next step, the report elaborates on the international normative framework which is relevant for the relationship between companies (including banks) and land governance risks, around two key concepts: the *Corporate responsibility to respect human rights* and the right to *Free, Prior and Informed Consent (FPIC)*. The most important standards defining both concepts, as well as their content, application and scope, are discussed. Following these standards, a pragmatic approach regarding a broader application of the right to FPIC is introduced, which focuses on self-identification as the key element for defining *Indigenous Peoples*.

The report then moves to analyse how Dutch banks apply the normative framework, and, in particular, how do they identify and manage land governance risks. To identify such risks, banks undertake *ESG company assessments* of the companies they are financing, which will include information gathering by means of a questionnaire, an initial risk assessment and periodic reviews, in some cases complemented by and enhanced company assessment. Additionally, banks start to conduct *Value chain analyses* to identify and assess structural human rights impacts throughout the value chain.

To manage land governance risks which have been identified, banks predominantly use *Company engagement* with the companies they are financing. These engagements can result in a mutually agreed improvement plan, which sometimes is linked to a clause in the loan contract. Additionally, banks participate in *Multi-stakeholder initiatives* to share sector knowledge and to stimulate their clients to meet the certification standards.

Finally, the study analyses how banks report on how they identify and manage land governance risks, via their sustainability reports, the UNGP Reporting Framework and the disclosure of transactions.

Using the information gathered and analyses made on land governance risks, the normative framework and the present approaches of banks to identify and manage land governance risks, the study takes a closer look at the Agreement and provides recommendations to the LANDdialogue on how to contribute to the implementation of the Agreement. Following the commitments and plans included in the Agreement, the recommendations focus on three areas:

- **Individual commitments by the banks adhering to the agreement**

- To assist banks in improving the identification of land governance risks, the LANDdialogue could work with banks in the following ways:
 - Understanding when and how land governance risks could emerge;
 - Improving policies;
 - Sharpening assessment tools; and
 - Making other data sources available.
- To assist banks in improving the management of land governance risks, the LANDdialogue could assist the banks in the following ways:
 - Knowledge transfer on preventing and managing land governance risks; and
 - Facilitating a dialogue with NGOs, researchers and other stakeholders.

- **Joint commitments made by all parties adhering to the Agreement**

- To support the parties in exploring a broader application of FPIC, the LANDdialogue could work with them on the following three steps:
 - Improve the joint understanding of the normative framework around FPIC;
 - Come to a better understanding of which groups could be entitled to FPIC, based on self-identification as the main element defining Indigenous Peoples; and
 - Provide recommendations on the broader application of FPIC to international forums including the OECD, Equator Principles and IFC PS.
- To support the parties in improving transparency around how banks identify and manage land governance risks, the LANDdialogue could help to define more specific reporting indicators which would be consistent with the UN Guiding Principles Reporting Framework and the Global Reporting Initiative Guidelines, while giving more specific information related to land governance risks.

- **Working groups set up in the implementation phase of the Agreement**

- To the *Matrix/database working group* the LANDdialogue could suggest to:
 - Assist in further developing a list of key indicators/questions which could help banks to structure their company assessments;

- Explore how to make existing data sources on land governance risks, including research institutes, NGO-driven databases and contacts with local NGOs, accessible to banks; and
- Make an inventory, in cooperation with Dutch embassies, of experts that could be involved to collect further information on land governance issues.
- To the *Leverage working group* the LANDdialogue could provide input by concretizing the factors which determine the level of exposure and potential leverage of banks to land governance risks, by making case studies of situations in which banks tried to use their leverage to prevent or manage land governance risks.
- To the *Value chains working group* the LANDdialogue could offer the knowledge available in its network of research institutes, NGOs and others.
- With the *Remediation working group* the LANDdialogue could share knowledge available in its network of NGOs, researchers, etc. on the question when a bank is deemed to be 'linked to', 'contributing' or 'causing' adverse impacts and on how the adverse impacts could be addressed or remediated.

Chapter 1 Objectives and methodology

This chapter presents the background, project objectives, research questions and methodology for this study.

1.1 Background

In October 2016, Dutch banks, trade unions, civil society organizations and the government concluded the Dutch Banking Sector Agreement on international responsible business conduct regarding human rights (hereinafter the Agreement). This Agreement includes concrete commitments on land rights, in particular on the requirement of Free, Prior and Informed Consent, meaningful and effective consultations (section 4.3.a), and on increasing transparency (section 6). In addition, all the adhering parties expressed the desire to explore jointly with the LANDdialogue – established by the Government of the Netherlands in 2013 at the initiative of Minister Ploumen – how to broaden the scope of FPIC beyond indigenous peoples (section 4.6.a and 4.6.b).

The LANDdialogue is a multistakeholder platform that aims to contribute to better land governance in line with the principles of the *Voluntary Guidelines on the Responsible Governance of Tenure (VGGT)*. Its participants include private sector players, the Dutch government, civil society organizations and knowledge institutions. The LANDdialogue intends to assist the parties to the Agreement in the implementation phase by providing them with relevant knowledge and expertise to ensure that the Agreement is implemented in a proper and careful manner with regard to land governance issues.

The parties to the Agreement ultimately determine the extent to which land governance will play a role in the implementation phase. The LANDdialogue can assist the sector by providing them with relevant knowledge and expertise. In addition, the LANDdialogue can promote cooperation between a wide range of stakeholders in the implementation process.

1.2 Project objectives

This project aims to provide insights into which relevant points of reference on land governance in the Agreement, not limited to the FPIC principle, could be explored further to ensure a proper, effective and diligent implementation of the agreement.

Based on this analysis, the study identifies the opportunities for constructive cooperation between the LANDdialogue and the parties to the Agreement with the ultimate goal of improving the land governance of the clients of Dutch banks.

1.3 Methodology

The research team conducted desk research and interviews for this study. The bibliography was selected by the research team and reviewed and approved by the reference group. It includes an extensive list of relevant studies and reports published by financial institutions, knowledge institutes, governments, international governmental organizations and NGOs. Moreover, Profundo conducted 12 interviews with relevant experts and stakeholders to obtain further information to answer the research questions. The interviews have been particularly useful for understanding the functioning of the banks' human rights due diligence tools (Chapter 4) and the recommendations (Chapter 5). In addition, as requested by the LANDdialogue, the Profundo team had a number of conversations with KIT on alignment issues between this study and a study commissioned by the LANDdialogue to KIT that aims provides insight in the relevance of land governance as a possible priority theme in the IRBC Agreements.

Chapter 2 Banks' exposure to land governance risks

This chapter discusses how banks are exposed to land governance risks, which are created by the companies they are financing. Section 2.1 defines land governance risks. Section 2.2 distinguishes different forms of land governance risks which are linked to different economic sectors. Section 2.3 discusses how banks are exposed to land governance risks through their financing activities.

2.1 What are land governance risks?

Land governance is defined as “the process by which decisions are made regarding access to and use of land and natural resources, the manner in which those decisions are implemented, and the way that potential conflicting interests are reconciled.”¹ This definition thus includes the governance of various forms of land (including forests and other vegetation-covered areas) and water.

For a large part of the global population the access to, use of and control over land directly affects the enjoyment of a wide range of human rights. Based on this acknowledgement, the *VGGT* for instance “seek to improve governance of tenure of land, fisheries and forests. They seek to do so for the benefit of all, with an emphasis on vulnerable and marginalized people, with the goals of food security and progressive realization of the right to adequate food, poverty eradication, sustainable livelihoods, social stability, housing security, rural development, environmental protection and sustainable social and economic development.”²

In line with the emphasis of the Agreement on human rights, we define land governance risks as the risks that the human rights of affected stakeholders, with an emphasis on vulnerable and marginalized people, are negatively impacted by poor land governance. The various risks are discussed further in section 2.2. Affected stakeholders can be defined as all individuals whose human rights have been or may be affected by a company's operations, products or services, including local communities.³

In general, these stakeholders include the people living on, having access to and/or using land resources. Poor land governance can impact their civil, cultural, economic, political and social rights, such as the right to food, the right to culture and the right to housing.

Apart from such direct human rights impacts, poor land governance can also have impacts on the broader development of society, for instance through corruption, tax avoidance and improper use of land resources. While important, such issues fall beyond the scope of this study.

2.2 Different stakeholders involved in land governance risks

The governance of land resources usually is a complex process, generally involving many stakeholders. Governments at different levels, all kinds of business operating various economic sectors, local communities, media, international institutions, NGOs, financiers and other stakeholders can be involved. Each of these stakeholders plays a role in the land governance process and can be called upon to contribute as much as possible to a proper governance of land resources in the interest of all stakeholders involved.

This study focuses on the possible role and leverage of banks with respect to preventing and managing land governance risks. Before we turn to that topic in section 2.3, this section aims to sketch some of the context in which banks operate. This context is shaped by the activities of other stakeholders, of whom governments and businesses using land resources are the most important.

2.2.1 Governments and land governance risks

Governments at various levels - national, provincial or regional, and local - play a crucial role in preventing and managing land governance risks. Setting up and managing a transparent system to allocate ownership and usage rights (in the form of concessions or otherwise) for the land resources in their jurisdiction, is their primary responsibility. The land governance system set up by governments should be fraud- and corruption-resistant and should guarantee that the human rights of all stakeholders are respected.

As government regulations and actions determines the context in which other stakeholders operate, it should be clear under which legal conditions land can be leased or purchased and how the rights of the present owners, users and inhabitants of the land are protected. Ownership and tenure rights should be clearly defined and sufficiently protected, also involving regulations on compensation and benefit sharing. Governments should also uphold and respect such rules when they take a leading role in land expropriation and allocation for economic development.

But while the role of governments in land governance issues is significant, they cannot operate in a vacuum and hardly ever can start with a clean sheet. They have to deal with vested interests, economic powers, existing agreements and the conflicting interests of many different stakeholders. Different governments deal with this in different ways. It is therefore always of crucial importance to carefully assess the national and local political and regulatory context in which land governance risks emerge. This context determines to a large extent which options and leverage other stakeholders (businesses, banks, NGOs and others) could have to prevent and manage land governance risks. None of these stakeholders can be expected to take the place of governments, but depending on the context they might have less of more options to contribute to preventing and managing land governance risks.

2.2.2 Businesses and land governance risks

Another very significant group of stakeholders are businesses, from small to large, which aim to use land resources for economic activities, ranging from agriculture to electricity generation, from road building to mining. Especially when these businesses are large in terms of investment funds, land areas claimed and potential employment generated, their impact can be huge. On the one hand their economic power can be used to bypass or undermine existing land governance arrangements for their own benefit, while the size of their operations could simultaneously have a strong negative impact on the human rights of many people. Research using satellite imagery by the Munden Project shows that 93% of concession areas issued to large corporations worldwide, were actually inhabited.⁴

But on the other hand, the size and financial means of large businesses can also create opportunities for an inclusive development path, which contributes to food security, poverty eradication, environmental protection and sustainable social and economic development. How large businesses deal with land governance risks is therefore of crucial importance.

It is important to realize that land governance risks can occur in various forms and through various economic activities. Companies operating in sectors with a high dependence on land as an economic resource are more likely to create higher land governance risks. But land governance risks can also occur in other economic sectors which are not specifically land-dependent.

To start building insights in how different land governance risks are linked to different economic activities, Table 1 gives an overview adapted from a study by the Munden Project.⁵ Where possible we have linked different land governance risks to specific economic sectors such as agriculture, energy, forestry, mining and urban development, using case studies available on the BankTrack website.⁶ Inevitably, the overview is rough and generalizing. It should be developed further to serve as a useful tool for the identification of land governance risks (see recommendations in section 5.1.1).

Table 1 Land governance risks and economic sectors involved

Risks	Description	Economic sectors involved
Physical displacement	Physical displacement (relocation) of local communities from the land they occupy during the construction phase. Often this also entails the loss of access to resources.	(Large scale) agriculture, hydropower, mining, oil & gas, urban development, road and railway infrastructure.
Loss of access to resources	Communities are not displaced but lose access to resources they used for income generation. This starts during the construction phase and continues during the operational phase.	(Large scale) agriculture, livestock, forestry.
Destruction of the environment	The release of hazardous materials to the soil, air or waterways in the operational phase contaminates land and resources used by communities, also beyond the areas used directly for economic activities.	Mining, oil & gas, electricity, aquaculture, chemicals, pulp & paper, various manufacturing industries.
Shortage of resources	Overexploitation of the natural resources (including water) available in an ecosystem during the operational phase affects livelihoods of communities, also beyond the areas used directly for economic activities.	Fishery, forestry, agriculture livestock, mining, road and railway development (which facilitates poaching).
Cultural infringement	Impacts on critical cultural heritage that is essential to the identity and/or cultural, ceremonial, or spiritual aspects of (indigenous) peoples' lives, including the use of traditional knowledge. This occurs mostly during the construction phase.	Such impacts could be created by the economic sectors mentioned with the first four land governance risks, in areas where indigenous peoples live.
Lack of compensation and benefit sharing	Lack of fair and equitable compensation (during the construction phase) or benefit sharing (during the operational phase) for the lands, territories and resources which communities have traditionally occupied or used and which have been confiscated, taken, occupied, used or damaged.	This is an additional risk, exacerbating the impacts of the other land governance risks.

Source: Munden Project, BankTrack website

The economic sectors listed in Table 1 are the sectors which are operating in, or close by, the areas where the land governance risks are experienced by local communities. Often these companies are the primary producers of commodities which are traded and processed further in a long, often international, supply chain, involving companies in other economic sectors. As the downstream companies carry a responsibility for responsible procurement, the land governance risks created by

their suppliers affect these companies as well. For example, the food and beverage industry is second only to the extractive industry in being the recipient of accusations from civil society organisations for failing to give adequate consideration to rights related to access to land and water.⁷

Furthermore, it is important to realise that the magnitude of the land governance risks which could be created by the economic activities mentioned in Table 1 will be influenced by the geographical, social and political environment in which the economic activities in question are being set up. For instance, in failed states or countries with high corruption levels and poor law enforcement and in areas in which (armed) conflicts are being waged, land governance risks associated with the mentioned economic activities will generally be higher.

2.3 Exposure of banks to land governance risks

In section 2.2 we defined that governments shape the context in which land governance risks can be prevented and managed in a better or less effective way. And we discussed how different forms of land governance risks are linked to various businesses, operating in different economic sectors. In this section we turn the attention to banks, which can also be contributing to land governance risks.⁸

Banks do not develop mines, roads nor plantations. This means they are not creating or avoiding land governance risks themselves, but they can become exposed to the land governance risks which could be created by the companies they are allocating financial resources to. As the loans and other financial services which banks provide enable companies to make large-scale investments, banks could become involved when these investments create land governance risks.

Through their corporate clients, banks are related to many different economic sectors, active in many different geographies. While this means that banks run the risk that their financial services are used for activities which create land governance risks for many local communities, it also provides banks with ample opportunities to act as agents of change. Potentially, they can use their financial leverage to encourage their clients to address land governance risks in a proper way and create an economic development path which is “for the benefit of all”, as defined by the *VGGT*.

Banks will never be able to do this alone. When all other stakeholders, such as the management and shareholders of their corporate clients as well as local, regional and national governments, move in an opposite direction, banks will usually not be able to turn the tide alone. In many situations, however, there will be more stakeholders which want to prevent or manage land right conflicts, when given the right encouragement as suggested by the *VGGT*. The challenge for banks is to make optimal use of their financial leverage to give this encouragement to the stakeholders involved.

It is therefore of importance to understand which factors determine the level of exposure of banks to land governance risks, and whether and how they might be “contributing to adverse human rights impacts” as defined by the UNGPs.⁹ These same factors will also determine their potential leverage to prevent or manage such risks. While it is beyond the scope of this study to describe and analyse all situational factors beyond the span of control of banks, we focus on the most important factors which are influenced directly by the bank’s decisions:

- **Type of bank and type of financing**

There are different types of banks, which can provide different types of financing to corporate clients, including corporate loans, project finance, trade finance, revolving credits, underwriting of issuances and equity investments. Not all banks provide all forms of financing, often they have specialisations.

Each type of financing creates a different level of exposure as well as different leverage opportunities. We focus on the two types of financing single out in the Dutch Banking Sector Agreement, project finance and corporate loans, although the last category includes so many different sub-categories that some more nuance is needed. We can summarize as follows what the type of financing means for the potential exposure of the bank:

- **Project finance:** if banks are providing project finance to a greenfield project which still needs to be constructed and will create land governance risks during the construction and operations phases, such as a mine, a pipeline, a chemical plant, or an urban development project, their exposure and potential leverage can be high. But the leverage is not the same for all banks involved in the project finance syndicate (see "Role of the bank" below) and the potential leverage would be smaller when the project finance is intended for a project expansion or to replace facilities on an existing site (see "Timing and stage" below).

The potential leverage stems from the no recourse or limited recourse character of project finance: interest and repayment need to come from the revenues of the project, not from other revenues of the borrower. As a result, the leading banks in the project finance syndicate will want to be more than usual involved in the design and day-to-day management of the project. Project finance comes with higher interest rates, which also allows the leading banks to spend more time on due diligence and monitoring of the project.

Combined with the often fairly long maturities, these project finance characteristics imply that the leading banks in the project finance syndicate have better opportunities for identifying, preventing and mitigating land governance risks, especially when the financing is meant for a greenfield project. This has been acknowledged already since 2004 in the global banking sector, when the Equator Principles came being and required signatories to apply the IFC Performance Standards for their project finance activities. Apart from project financing, the scope of the Equator Principles also includes project finance advisory, bridge loans and project-related corporate loans.¹⁰

Corporate loans: while the Dutch Banking Sector Agreement describes corporate loans as a single category, there are actually many different forms of corporate loans which bring with them very different levels of exposure and potential leverage in relation to land governance risks. In comparison to project finance loans, corporate loans do not have a no recourse / limited recourse character and have usually less day-to-day involvement of banks and lower interest rates. Most corporate loans therefore have less exposure and leverage options than project finance has, especially when we talk about the leading banks in a greenfield project finance syndicate.

However, the scope of the Equator Principles nowadays also includes project-related corporate loans, which are earmarked for one specific (new) project. For the leading banks in such a corporate loan syndicate, the leverage could be comparable to that in a project finance situation.

Most corporate loans are, however, given to the client for *general purposes* and not for investments in a specific project. There are many types of loans, which have particular characteristics which can suit different corporate client needs. Term loans with long maturities are most suited for investments and give relatively more leverage, but this also depends on the relative importance of the bank for the client, the role of the bank (see below). Important is also if the loan is secured with collaterals or not. A secured loan strengthens the position of the banks versus the company.

Short-term loans, including trade finance loans, are used by companies to bridge liquidity gaps, for instance because clients only pay of the delivery of goods which need to be produced first. Such corporate loans could still provide some leverage on preventing land governance to the bank, especially when the company is expanding its production or third-party sourcing. But an important factor then is how important preventing liquidity gaps is in the business model of the company.

An overdraft or working capital facility is used for solving short-term cash flow problems, while a revolving credit facility can be used by the client when suddenly an investment or acquisition opportunity arises. Such corporate loan facilities are generally uncommitted, which means that the client often does not use the money - it is just on stand-by. For the bank there is no financial exposure then and only limited leverage.

- **Relative importance of the bank for the client:** The client usually has different sources of finance to fund its investment plans and other financing needs, including equity, bonds, bank loans and other forms of debt. The debt-equity ratio, as well as the composition of the clients' debt, can vary considerably, however. The relative size of the bank's loan, compared to the total assets being financed, is therefore an important factor determining the bank's exposure and potential leverage.
- **Role of the bank in a syndicate:** Project finance and corporate loans can be provided in a bilateral form (by one bank) or in the form of loan syndicate. In a loan syndicate the leverage of the bank can differ considerably with the role of the bank in the syndicate. The leading banks in the syndicate are involved earlier in the process, usually provide more money and have more direct interaction with the client. These leading banks design the loan contract with the contract, including potential conditions relating to environmental, social and governance issues. This means they also have more leverage to prevent and manage land governance risks. Banks joining a syndicate in a later stage usually bring in less money and can no longer influence the conditions under which the loan is provided.
- **Relationship with the client:** The strength of the relationship with the client is of importance for the potential leverage of the bank: the longer and stable the relationship, the more influential the bank can be. It is, however, a competitive market: companies often have the possibility to switch to another bank if they don't like the influence which their present bank tries to exert on their activities.
- **Timing:** Timing, the moment when a bank gets involved, is also important. When a project is still in the pre-construction or design stage, the opportunities to change the project design to prevent and manage land governance risks are strongest. When a bank gets involved in a later stage, when all operations are already up and running, its leverage decreases.
- **Position of the client in the supply chain:** In general, it is likely that the bank's exposure and potential leverage is higher when a company is financed which is directly operating in the area where the land governance risks are experienced by communities. However, as downstream

companies in the supply chain can be involved in the land governance risks created by their suppliers, the banks of those downstream companies are also exposed to these risks and have a potential leverage to prevent and mitigate them.¹¹

2.4 Conclusion

Many economic activities, ranging from agriculture to road building and from urban development to mining, can create different land governance risks for the people living on, having access to and/or using land resources. Often various stakeholders can play a role in preventing and mitigating these land governance risks, among which are the banks involved in financing the economic activities in question. Several factors determine the level of exposure of banks to land governance risks, as well as their potential leverage to prevent or manage such risks. These factors include the location and regulatory and political context of the client's activities, the type of financing, the relative importance of the bank for the client, the role of the bank in a syndicate, the relationship of the bank with the client, the timing when the bank gets involved and the position of the client in the supply chain.

Chapter 3 The normative framework for land governance risks

This chapter provides a concise introduction into the international normative framework which is relevant for the relationship between companies (including banks) and land governance risks. This normative framework is developed around two key concepts: the Corporate responsibility to respect human rights (section 3.1) and the principle of Free Prior and Informed Consent (FPIC, section 3.2). Both sections introduce the relevant standards and explain their application and scope. Moreover, subsection 3.2.3 elaborates on the possible broader application of FPIC, beyond what is explicitly required by the standards discussed.

Apart from this international framework, the specific land tenure regime in the country in which a company operates – e.g. national and local legislation regulating land ownership, land uses, and land acquisition – also impacts land governance risks.¹² While land tenure regimes are an important element for the banks to assess their land governance risks, such issues fall beyond the scope of this study. It clearly is important, however, to give the analysis of the national and local regulatory and political framework a significant place in the process of identifying and managing land governance risks (see recommendations in section 5.1.2).

3.1 Corporate responsibility to respect human rights

In 2008, the *UN Special Representative of the Secretary-General on Human Rights and Transnational Corporations and other Business Enterprises*, the American professor John Ruggie, proposed to the *UN Human Rights Council* a framework on how to define the relationship between business and human rights. The framework rests on three pillars:¹³

- the state duty to **protect** against human rights abuses by third parties, including business;
- the corporate responsibility to **respect** human rights; and
- greater access by victims of human rights violations to effective **remedy**, both judicial and non-judicial.

This framework thus defines the responsibility of businesses when it comes to human rights, vis-à-vis the responsibility of states. Different from states, business do not have to the duty to protect human rights. They do, however, have the responsibility to respect human rights. This means they should be acting with due diligence to avoid infringing on the rights of others, and that they should be addressing harms that do occur because of their actions.

The UN Human Rights Council unanimously welcomed the framework and also extended the Special Representative's mandate until 2011 with the task of "operationalizing" and "promoting" the framework. In this period, professor Ruggie developed the *UN Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework*, which are generally referred to as the UNGPs. In March 2011, the UN Human Rights Council endorsed the UNGPs.¹⁴

3.1.1 Standards

The *UN Guiding Principles on Business and Human Rights (UNGPs)* have become the leading international standard setting the framework of the corporate responsibility to respect human rights that is applicable to all sectors. After the adoption of the UNGPs by the UN Human Rights Council, other corporate social responsibility standards have been aligned with the UNGPs.

For example, the last version of the *OECD Guidelines for Multinational Enterprises* now incorporates a human rights chapter mirroring the UNGPs and establishes recommendations for all sectors. The *IFC Performance Standards*, the leading industry standard for the financial sector which were developed by the International Finance Corporation, were also aligned with the UNGPs. The *Voluntary Guidelines on the Responsible Governance of Tenure (VGGT)*, which are in particular relevant for the topic of this report, also refer to the UNGPs.

The UNGPs are also promoted by many governments, including the Dutch government, through the adoption of *National Action Plans on Business and Human Rights*.

As a result of this international support, a strong international consensus has emerged around the definitions, approach and scope of the UNGPs, which are seen as leading for all businesses, including banks. This is reflected in the Dutch Banking Sector Agreement, as the adhering banks “commit to respect human rights in conformity with the UN Guiding Principles on Business and Human Rights (...) in the full scope of a bank’s business activities”.¹⁵

3.1.2 Approach

According to the UNGPs all companies, including banks, should have the right policies and processes in place in order to try to prevent negative human rights impacts and to respond when they occur. To achieve this, Principle 15 of the UNGP formulates a three-part approach that can be summarized as follows:

- A public **commitment** to respect human rights;
- An ongoing process of human rights **due diligence** to identify and assess human rights risks, integrate the findings into its decision making and actions in order to mitigate the risks, track the effectiveness of these measures, and communicate its efforts internally and externally; and
- Processes for providing **remedy** to anyone who is harmed where the business caused or contributed to that harm.¹⁶

With regard to the second step, the human rights due diligence, Principle 18 of the UNGP states that the identification and assessment of a company’s actual and potential human rights impacts should:

- Draw on internal and/or independent external human rights expertise;
- Involve meaningful consultation with potentially affected groups and other relevant stakeholders, as appropriate to the size of the business enterprise and the nature and context of the operation.

The commentary to this principle further clarifies that to assess their human rights impacts accurately, companies should seek to understand the concerns of potentially affected stakeholders by consulting them directly in a manner that takes into account language and other potential barriers to effective engagement.¹⁷

As the main human rights impacts of a bank’s activities occur through the financing of other companies, the human rights due diligence of banks should focus on checking how their clients perform human rights due diligence. The Dutch Banking Sector Agreement therefore adjusts the text of Principle 18 of the UNGPs by requiring banks to “ascertain that the client processes involve *meaningful and effective consultation* by their clients with potentially affected groups and other relevant stakeholders. The bank should address the client in case of negligence”.¹⁸ The way that the adhering banks are at present operationalizing these commitments is explained in Chapter 4.

Appendix 1 provides a brief overview of some other standards that are relevant for the financial sector and deal with land governance risks.

3.2 Free Prior and Informed Consent (FPIC)

For indigenous or tribal communities, the most important rights are the right to self-determination, rights to lands and resources, the right to culture, and the right to effective participation in decision-making. Self-determination is the collective right of a people or community to pursue its freely chosen pace and path of development. It is enshrined in the International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social and Cultural Rights (ICESCR) and specifically mentioned in Article 3 of the UN Declaration of the Rights of Indigenous People (UNDRIP).¹⁹ Article 27 of the ICCPR grants members of minorities the right to enjoy and practice their culture, language and religion.²⁰

An important prerequisite for the enjoyment of the right to self-determination and culture is the right to effective participation. Minorities, local communities and indigenous peoples do not enjoy full autonomy – although they may be self-governing - but are most often part of a larger State, which means that in order to exercise their rights, effective and meaningful participation is essential to enable them to “be freely in control of their own destinies in conditions of equality.”²¹ Furthermore, especially in the case of indigenous peoples and other marginalized ethno-cultural communities,²² rights to property over their traditional lands and territories are invaluable to protect them since: “The close ties of indigenous people with the land must be recognized and understood as the fundamental basis of their cultures, their spiritual life, their integrity and their economic survival. For indigenous communities, relations to the land are not merely a matter of possession and production but a material and spiritual element which they must fully enjoy, even to preserve their cultural legacy and transmit it to future generations.”²³

The principle of Free Prior and Informed Consent (FPIC) is built on this understanding, as it offers a protective mechanism for indigenous or other vulnerable communities that prevents violation of their rights to lands, resources, consultation and participation. In current international law, FPIC processes are seen as the most important instruments to guarantee inclusion of indigenous peoples in decision making on matters of their concern.

In the standards discussed below, the requirement to ensure effective participation and consultation based on FPIC is limited to “indigenous peoples”. This is problematic, as there is no official legal definition of “indigenous peoples”, nor are indigenous people recognised officially in many countries, and almost entirely on the African continent. A project financed by FMO and RVO (Lake Turkana) showed how this can lead to unintended violations of Human Rights.²⁴ To extent the principle to 'groups that may be in need of similar protection', but to keep them in line with 'indigenous' is problematic. It would be better to extent the principles of the FPIC process beyond indigenous; this will avoid risk and conflicts in mixed communities containing both indigenous and non-indigenous people. This is well reflected in the Dutch Banking Sector Agreement, whereby banks expressed the wish to explore the broader application of FPIC in line with the VGGTs and the FAO guidance on land tenure (paragraph 4.6) in collaboration with the LANDdialogue.

3.2.1 Standards

The legal basis of the right to Free, Prior and Informed Consent (FPIC) can be found in ILO Convention 169 and the UN Declaration of the Rights of Indigenous People (UNDRIP).²⁵ In the first instance, these formulate obligations for governments, but the general principles are obviously applicable to all important social actors, including companies. Derived from these two documents, FPIC standards are furthermore included in a number of other standards and policy documents, such as Performance Standard 7 of the International Finance Corporation and in the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security.²⁶ The contents of these standards are discussed below:

- **ILO Convention 169**

Convention No. 169 of the International Labour Organisation (ILO Convention 169), adopted in 1989, is the most important legally binding instrument dealing with indigenous peoples' protection. ILO Convention 169 refers to a requirement of consent with regard to relocation of indigenous peoples in article 16. Articles 6, 7 and 15 of the Convention provide the general legal framework with regard to the consultation and participation of indigenous peoples. Article 6 requires that indigenous peoples are consulted in good faith through appropriate procedures and, in particular, through their representative institutions, with the objective of achieving agreement or consent, whenever consideration is being given to legislative or administrative measures that may affect them directly.

The Netherlands ratified ILO Convention 169 on 2 February 1998. Presently 22 states - of which a large number are Latin American states - are party to the Convention.

- **UN Declaration of the Rights of Indigenous People (UNDRIP)**

Although the UN Declaration of the Rights of Indigenous People (UNDRIP) is not a legally binding treaty, it has been endorsed by almost all states worldwide. Within this widely supported UN Declaration, FPIC is enshrined in article 10 on relocation, article 11(2) on cultural, spiritual, intellectual and religious property, article 19 on legislative and administrative measures affecting indigenous peoples, article 28 on redress for damage, confiscation or occupation of indigenous lands, article 29(2) on the storage and disposal of hazardous materials and, most relevant, article 32 on projects affecting their lands, territories and other resources.

- **IFC Performance Standard 7**

The Performance Standards (PS) of the International Finance Corporation (IFC), the private sector arm of the World Bank, are seen as the leading industry standard for public and private banks in dealing with sustainability, human rights and other ESG issues. Already since 2004 the Equator Principles (EP), adopted by the adhering banks to the Dutch Banking Sector Agreement, require the application of the IFC PS when providing project finance facilities to their clients. Later, the EP expanded their scope to cover corporate loans earmarked for specific projects. Several banks, including FMO, follow the IFC PS for all their financial services.

Regarding, Free, Prior and Informed Consent and effective and meaningful consultations the IFC PS 7 recognizes the distinct identities of indigenous peoples and states that indigenous peoples are particularly vulnerable if “their lands and resources are transformed, encroached upon, or significantly degraded.”²⁷ Private sector projects may create opportunities for indigenous communities to “participate in, and benefit from project-related activities that may help them fulfil their aspiration for economic and social development.”²⁸ Clients are therefore required to establish an ongoing relationship with the affected indigenous communities, based on consultation and participation, and to ensure FPIC in certain specific circumstances.²⁹ Additionally, PS 1 and PS 5 are also relevant in relation to FPIC. PS 1 requires environmental and social impact assessments and refers to FPIC for projects which adversely affect indigenous peoples.³⁰ Performance Standard 5 deals with community engagement in relation to land acquisition and involuntary resettlement and refers to the additional requirements – such as FPIC – for indigenous peoples.³¹

- **Voluntary Guidelines on the Responsible Governance of Tenure (VGGT)**

The *Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security (VGGT)* were adopted by the FAO in 2012 to serve as a reference and to provide guidance to improve the governance of tenure of land, fisheries and forests with the overarching goal of achieving food security for all and to support the progressive realization of the right to adequate food in the context of national food security. The VGGT refer to the need for states and other actors to recognize the “social, cultural, spiritual, economic, environmental and political value” of lands, fisheries and forests to indigenous peoples.³² The VGGT refer to the UNDRIP and require participation, meaningful consultation and FPIC when indigenous lands or territories are affected.

The VGGT state amongst others that: “Local communities that have traditionally used the land, fisheries and forests should receive due consideration in the reallocation of tenure rights. Policies should take into account the tenure rights of others and anyone who could be affected should be included in the consultation, participation and decision-making processes.” Furthermore, specifically referring to investments in land, fisheries and forests, the VGGT state: “Responsible investments should do no harm, safeguard against dispossession of legitimate tenure right holders and environmental damage, and should respect human rights. Such investments should be made working in partnership with relevant levels of government and local holders of tenure rights to land, fisheries and forests, respecting their legitimate tenure rights.”³³

The VGGT differ from the IFC PS in recommending to assess a broader array of potential impacts of investments. Not only should responsible investments do no harm, they should “strive to further contribute to policy objectives, such as poverty eradication; food security and sustainable use of land, fisheries and forests; support local communities; contribute to rural development; promote and secure local food production systems; enhance social and economic sustainable development; create employment; diversify livelihoods; provide benefits to the country and its people, including the poor and most vulnerable; and comply with national laws and international core labour standards as well as, when applicable, obligations related to standards of the International Labour Organization.”³⁴

The VGGT include several provisions setting out that investments should not harm local food security, but instead aim for improvement while securing local food production systems. Investors should assess the risks and impacts of their project on food security, especially in relation to affected communities and the local food production system.³⁵

Some of these issues are covered in detail in the IFC PS, such as the overall human rights impact and the environmental sustainability of the project, but others are not covered at all, such as the references to local food security, rural development and spatial planning. Moreover, the VGGTs highlight that the combined impact of several projects in the same region on food security or rural development might differ from the impact of a single project. The IFC PS were written to assess project-related impacts, which means they focus on individual projects. The combined impacts of several projects are normally assessed through regional or spatial planning.³⁶

3.2.2 Application and scope

This subsection elaborates on the application and scope of FPIC, based on the standards introduced in section 3.2.1. In particular, it elaborates on the prerequisite for the successful application of consultation and consent rights; the situations in which FPIC is required; the definition of FPIC and how FPIC should be implemented.

- **Land Rights and Effective Participation/Consultation as a prerequisite of FPIC**

An effective land rights regime is a prerequisite for the successful application of consultation and consent rights. The requirements are laid down in the UNDRIP and in ILO Convention 169 and have been elaborated on by international and regional human rights mechanisms.

Firstly, indigenous peoples have rights to their traditional lands, and to be able to protect communal and customary land tenure, the State has to take care of the delimitation, demarcation and titling of those lands. This was decided by the Inter-American Court of Human Rights in the landmark *Awas Tingni v. Nicaragua* case in 2001.³⁷ These rights may be restricted only when such restrictions are:

1. established by law;
2. necessary and proportional; and
3. have the aim of achieving a legitimate goal in a democratic society.³⁸

Secondly, in the case of indigenous communities - since lands and resources are seen as necessary for their physical and cultural survival - three extra safeguards should be taken into account when development projects affect their lands. These were specified by the Inter-American Court of Human Rights in the 2007 *Saramaka* judgment which dealt with logging concessions granted to a Chinese company by the Surinam government without consulting or informing the Maroon communities that lived in the concession areas. The Court ruled that first, the effective participation of the members of the people concerned must be ensured, which implies - at a minimum - good faith consultations with the aim of achieving free, prior and informed consent. Secondly, a reasonable benefit from the proposed plan must be guaranteed, and thirdly, prior environmental and social impact assessments must be conducted.³⁹ This three-step test is in line with article 32 of the UNDRIP and has been reaffirmed by the African Commission of Human and Peoples' Rights in the *Endorois v. Kenya* decision of 2010.⁴⁰

Moreover, on the international level, the UN Human Rights Committee has similarly stated that: "The enjoyment of those rights may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them. The protection of these rights is directed to ensure the survival and continued development of cultural identity, thus enriching the fabric of society as a whole."⁴¹

- **Situations in which FPIC is required**

The UNDRIP contains a general requirement in article 19 to consult indigenous peoples in order to obtain their free, prior and informed consent whenever legislative or administrative decisions affect them. Similarly, General Recommendation No. 23 of the United Nations Committee on the Elimination of Racial Discrimination (UNCERD) calls upon states to: "Ensure that members of indigenous peoples have equal rights in respect of effective participation in public life and that no decisions directly relating to their rights and interests are taken without their informed consent."⁴²

More specifically, FPIC is required when hazardous materials are stored on community lands (art. 29 UNDRIP), when their cultural, intellectual, religious or spiritual is taken (art. 11(2) UNDRIP), in cases of community relocation or resettlement (art. 10 UNDRIP, art. 16 ILO Convention 169) and when projects affect "their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources" (art. 32(2) UNDRIP). When such development projects have a major impact on community territories, obtaining FPIC becomes a mandatory requirement.⁴³

In the VGGT, a broad requirement - derived from the UNDRIP - for meaningful consultations and obtaining FPIC from indigenous and other communities is included in paragraph 9.9.⁴⁴

IFC Performance Standard 7 is more specific on when FPIC is required. PS7 requires FPIC in cases where:

- the project impacts lands and natural resources subject to traditional ownership or under customary use;
- if the client proposes to locate a project on, or commercially develop natural resources on, lands traditionally owned by, or under the customary use of, indigenous peoples and adverse impacts, such as loss of access to resources or restrictions on land use, may be expected;
- where a project may significantly impact critical cultural heritage; and
- where a project proposes to use the cultural heritage, knowledge, innovations or practices of indigenous peoples.⁴⁵

The IFC PS7 requirements are in line with the international standards discussed in sections 3.1.1 and 3.2.1.⁴⁶

It is useful to note that the situations in which FPIC is required according to UNDRIP, IFC PS and VGGT are similar to the land governance risks described in Table 1.

- **Further definition of FPIC**

The application of the right to Free, Prior and Informed Consent (FPIC) requires all four elements to be applied properly:

- **Free** or freely implies that no coercion, intimidation or manipulation occurs in the negotiations and decision-making process. It is important to take into account that very often some form of coercion will be present, and means like offers, pleas or bids may easily turn into forms of more 'hostile' coercion like very subtle forms of bribery.
- **Prior** should imply consent has been sought sufficiently in advance of the start of a project and respects time requirements for internal deliberation and debate within communities.

- **Informed** implies a large number of informational requirements depending on what kind of project is proposed. But generally it should include information that covers:
 - the nature, size, and scope of the project;
 - the reasons for the project;
 - timeframes;
 - which areas will be affected and similar types of information.

Furthermore, it includes information about the impact assessments and what kind of benefit sharing is involved. It also refers to the process itself: what kind of consultation process is proposed and what are the other relevant procedures? Additionally, informed refers to questions about effective and adequate communication. How to make sure that communities understand what is offered or proposed and how to make sure that their views are understood properly?

- **Consent** includes good faith negotiation, consultation and participation, by means of a dialogue that allows the parties to find appropriate solutions in an atmosphere of mutual respect. Inclusion of vulnerable groups - such as women, youth, the elderly - in the decision-making process is an important matter. Furthermore, indigenous peoples should be able to participate through their own freely chosen representatives and customary or other institutions.

- **Implementation of FPIC processes**

A number of comprehensive practical guidelines on the application of FPIC processes have been developed over the past years.⁴⁷ Common elements of a successful FPIC process include:

- Identification of indigenous communities and other stakeholders that may be affected by a certain project.
- Identification of the (customary or formal) rights and representative institutions of the involved indigenous peoples.
- Participatory mapping of the lands, territories, and resources, including sacred sites.
- Conducting social, cultural and environmental impact assessments, using a participatory approach.
- Agreement on community developed FPIC protocols, taking into account traditional decision-making structures.
- Provision of sufficient time and resources to conduct the decision-making process. But also awareness raising about the planned activity and capacity building in communities to enter into negotiations, both internally and in relation to other actors.
- Sufficient information and consultation rounds: it is essential that all communities and groups within communities are informed and consulted in a way that is culturally appropriate and understandable.
- Producing consent agreements: these may have many forms and may entail compensation provisions, benefit sharing schemes, scope, duration and targets of the projects, relevant rights, and policies.
- Creating effective review and grievance mechanisms: FPIC is an iterative process and a principle that has to work both prior and post the decision-making moment(s).

The character and form of the FPIC process depends on the scope and content of the proposed project and the nature of the rights and interests at stake; there is no single success formula.

3.2.3 Broader application of FPIC

In the standards discussed in section 3.2.1, the requirement to ensure effective participation and consultation based on FPIC is limited to “indigenous peoples”. This is problematic, as there is no official legal definition of “indigenous peoples”. Globally, a wide variety of communities could be seen as “indigenous peoples” and a legal definition would inevitably lead to the exclusion of groups that may be in need of similar protection.

There are two well-known working definitions of “indigenous peoples”. One is developed by José-Martínez Cobo, who conducted a vast study into the problem of discrimination against indigenous peoples for the UN. Another one is included in ILO Convention 169.⁴⁸ Both of these definitions focus on a number of objective criteria, for instance that indigenous peoples often have a special spiritual relation to their lands, often retain their own institutions, are culturally distinct from other groups in society, and often are minorities in their states of residence. However, both definitions also include a more fundamental subjective criterion of self-identification.

This pragmatic approach towards indigenous peoples and similar communities is reflected in both the VGGT and IFC PS7. The VGGT mention that they are applicable to “indigenous peoples and other communities with customary tenure systems.”⁴⁹ IFC PS7 states that the term “indigenous people” is used in a generic sense and refers to distinct social and cultural groups. These groups may possess the following characteristics in varying degrees:

- Collective attachment to geographically distinct habitats or ancestral territories in the project area and to the natural resources in these habitats and territories;
- Customary cultural, economic, social, or political institutions that are separate from those of the mainstream society or culture; or
- A distinct language or dialect, often different from the official language or languages of the country or region in which they reside.⁵⁰

Issues of definition may lead to exclusion of groups from benefiting from the protection of collective land rights and FPIC. The UN, ILO and Inter-American Court of Human Rights advocate a pragmatic approach by which vulnerable ethno-cultural communities are protected.⁵¹ The Tirana Declaration extends the application of FPIC to local communities and affected-land users as well.⁵²

Similarly, in 2009 the Special Rapporteur on the Right to Food, Olivier De Schutter, developed a set of core principles and measures to address the human rights challenge of largescale land acquisition and leases. One of these principles states: “In principle, any shifts in land use can only take place with the free, prior and informed consent of the local communities concerned.”⁵³

Some certification schemes for the sustainable production of commodities such as the Forest Stewardship Council (FSC) do the same.⁵⁴ The Principles and Criteria of the Roundtable on Sustainable Palm Oil (RSPO) state: “No new plantings are established on local peoples’ land where it can be demonstrated that there are legal, customary or user rights, without their free, prior and informed consent.”⁵⁵ But other certification schemes for sustainable commodity production put much less emphasis on land governance risks.⁵⁶

In determining whether a group is entitled the right to FPIC and related rights, self-identification is seen as the most important element according to the UNDRIP (art. 33) and ILO Convention 169 (art. 1(2)).⁵⁷ Moreover, the existing working definitions of “indigenous peoples” are not meant to exclude communities and groups that share a similar level of vulnerability and that are in need of similar protection.

3.3 Conclusion

This chapter elaborated on the normative framework which is relevant in relation to the relationship between companies (including banks) and land governance risks. The standards are grouped, around two key concepts: the corporate responsibility to respect human rights and the right of indigenous peoples to Free, Prior and Informed Consent (FPIC). Additional to the standards discussed in this chapter, a number of other standards have been included in Appendix 1 . This serves to illustrate how sector-specific standards can help generate industry expertise that will be necessary to translate general standards into measurable indicators.

When elaborating on a possible broader application of FPIC, beyond what is explicitly required by the standards discussed, the chapter suggested a pragmatic approach based on self-identification as the most important element to define Indigenous Peoples.

Chapter 4 How Dutch banks deal with land governance risks

This chapter elaborates on how Dutch banks identify and manage land governance risks created by the companies they are financing. The description is largely based on interviews with banks involved in the Dutch Banking Sector Agreement: ABN Amro, FMO, ING Bank and Rabobank and a review of publicly available information. The reader must note that these are four different banks with diverse mandate (commercial vs. development), ownership structure, size, geographic footprint and business model (in terms of type of clients they serve). Therefore, the information provided in this chapter has been generalized, and, in practice, there are differences in the functioning of the tools and the policies that set the framework of these tools. It nevertheless gives important insights to the LANDdialogue on how Dutch banks conduct human rights due diligence.

The structure of the chapter is as follows: Section 4.1 focuses on identification of land governance risks. Section 4.2 concentrates on how these land governance risks are managed. In section 4.3 we discuss what banks report on how they identify and manage land governance risks.

4.1 Identification of land governance risks

To be able to deal with land governance risks created by the companies they are financing, banks need to identify such risks in a timely fashion in the due diligence process which is normally preceding any financing. This process should provide banks with the information they need in order to understand the specific land governance risks linked to the proposed financing, as well as the action they need to take to prevent and mitigate them.

It is important to note that “land governance risks” refers to the risks that the human rights of affected stakeholders, with an emphasis on vulnerable and marginalized people, are negatively impacted by poor land governance (see further in section 2.1). While such risks might be linked to financial and reputational for the bank itself, this is not necessarily the case.⁵⁸ As required by Principle 18 of the UNGPs (section 3.1), the bank should ascertain that the client has undertaken meaningful and effective consultation with potentially affected groups and other relevant stakeholders.

This section provides an overview of the tools used by the Dutch banks in this respect. The reader must note that the information has been generalized and that, in practice, there can be differences between the banks in the policies and the functioning of the tools. It nevertheless gives important insights to the LANDdialogue on how Dutch banks conduct human rights due diligence.

Banks use two main tools to identify actual and potential human rights impacts: ESG assessments and value chain analysis. ESG assessments can in turn be divided into company assessments and transaction assessments. Company assessments aim to identify specific human rights risks related to banks’ client relationships, and transaction assessments have to objective to take a decision regarding lending. Value chain analyses aim to identify and assess structural human rights impacts connected to banking activities.

4.1.1 ESG assessments

All banks interviewed screen companies and transactions, to identify and assess human rights risks related to their client relationships. To conduct ESG assessments, banks make use of their internal risk assessment tools (primarily intended to measure the financial risk of a company), in which they have incorporated human rights criteria (as part of measuring the ESG risk of a company).

The subject of the assessment can be a company, if the objective is to decide whether to accept a new client. The subject can also be a specific transaction, if the objective is to take a decision regarding lending. The client assessment measures the client's capacity and track record to manage environmental and social issues (including land governance-related human rights risks). The transaction assessment measures the environmental and social risks (including land governance-related human rights risks) associated with a specific transaction.

In the company assessments as well as in the transaction assessments, different phases can be discerned. They usually start with information gathering, followed by an initial risk assessment. This stage can be complemented by a more in-depth assessment. In a later phase, reviews will follow.

- **Information gathering**

For the initial assessment, banks use a questionnaire to collect information. The questionnaire asks for general information about the company, such as the countries and sectors where a company operate in, as well as all needed financial information.

Moreover, the questionnaire has a section to collect information related to the ESG risks of a company. Banks do so by incorporating in the questionnaire the criteria defined in their exclusion policies (describing what banks do not finance) and their sector-specific policies (describing their position with regard to the ESG impacts associated to a sector).

Both exclusion policies and sector-specific policies can include human rights criteria that are relevant for the topic of this study. For example, ABN Amro states in its exclusion list that the bank will not knowingly finance "activities resulting in the infringement of the rights of indigenous and/or vulnerable groups without their Free Prior and Informed Consent (FPIC)" and activities "causing human rights violations, e.g. child labour, the exploitation of children, bonded and/or forced (child) labour and human trafficking".⁵⁹ FMO is piloting a human rights risk assessments to determine where HRRA should be systematically included in the due diligence process.⁶⁰ Whether and to which extent, the criteria incorporated in the questionnaire is aligned with the international normative framework differs from bank to bank. While important, such analysis falls out of the scope of this study.

The primary source of information to answer the questions in the questionnaire are the clients themselves. Usually, the Client Portfolio Manager (who is in charge of managing the relationship with the client) or a staff person of the ESG Risk Department of the bank fills in the questionnaire, based on information obtained from the client. Additional information can be gathered from public sources and financial databases.

- **Initial risk assessment**

Based on the information gathered in the questionnaire, the bank assigns a risk level to a client and/or a transaction. Often, risk qualification involves a combination of sectoral criteria (type of activity) and geographical criteria (location of the activity).

- Geographical criteria evaluate the countries where the client operates and/or where the funds will be used. The bank's country risk tools assign a level of risk to a country. For example, low, medium and high-risk. This rating usually includes environmental and social indicators. Often, banks use the standard country risk tools generated by external service providers, such as RepRisk and Sustainalytics. In addition to this, some banks complement the country risk tools of the external service providers by integrating other benchmarks (such as the Freedom House or Transparency International) to generate their own country risk tool for ESG risks.

Furthermore, FMO has recently introduced a new early warning screening tool for all new transactions to identify if there is a current or recent record of violence against human rights defenders in the location or country where we plan to invest.⁶¹

- The sectoral criteria evaluate the sector in which a client operates and/or where the funds will be used. Sectors are also classified according to the level of risk. Usually, the sectors for which the banks have developed a sector-specific policy are considered risky, such as the extractive sector, the agriculture sector, the manufacturing sector, the infrastructure sector and the chemicals sector. The sector-specific policies describe the ESG risks associated to the sectors. When the tool detects (from the information provided by the client) that a company is active in a risk sector, the tool activates the relevant questions. These questions are usually based on the sector-specific policies, but they can be complemented with internal guidelines. For example, the sectoral-specific policies of ING, Rabobank and ABN AMRO's require the client to demonstrate compliance with IFC Performance Standards (which includes Free Prior and Informed Consent (FPIC) requirements for indigenous people) when financing projects.⁶² Whether and to which extent, the criteria incorporated in the questionnaire is aligned with the international normative framework differs from bank to bank. While important, such analysis falls out of the scope of this study.

The risk assessment tool determines a client and/or a transaction overall risk profile assigning a level of risk, for example, low, medium and high. When the client or the transaction carries a high risk, additional due diligence will apply.

- **Enhanced assessment**

For clients or transactions which are qualified as high risk in the initial assessment, the ESG Risk Department⁶³ will conduct an enhanced assessment to evaluate sustainability performance and will benchmark this against industry standards. For this research, the ESG Risk Department makes use of the company reports generated by external service providers such as Sustainalytics and Vigeo-EIRIS. Often, this information is complemented with further research by the ESG Risk Department using for example, public information sources such as media reports, research studies or NGO reports or shared information from peer networks.

The framework of the enhanced assessment differs from corporate loans to project finance:

- For corporate loans, the bank's sector-specific policies define the standards. Often the questions asked to the companies mirror the principles of the policies (and no further detailed is added).
- For project finance transactions the Equator Principles apply, which require more in-depth due diligence, as they require an analysis of the environmental and social impact assessment and management plans of the project.

Examples of the questions that the ESG Risk Department looks at are the following:

- does the client have stakeholder engagement policy in place?;
- how does the client maintain relationships with key stakeholders i.e. local communities where operations take place?; and
- is there a mechanism or a policy in place for dealing with grievances and complaints from the communities in which the client operates?⁶⁴

The outcomes of the enhanced assessment will be used by the bank's Credit Committee to decide if the financing will be granted to the client. Also, the research will be used to guide the engagement with the company (see section 4.2.1).

- **Reviews**

In general, the level of risk associated with a client and/or a transaction determines how often the review of the assessment takes place, but also what can motivate a review. The review is also different for corporate loans than for project finance.

For corporate loans the timeline of the revision is up to the banks. Generally, the Client Portfolio Manager (who is in charge of managing the relationship with the client) is responsible for reviewing the clients' portfolio on a yearly basis (annual review). The review of a client is performed through a new client questionnaire based on the current status of the client. In case a review triggers high risk, additional research might be necessary and the ESG Risk Department is involved again (as in the initial assessment).

In addition, high risk companies can be reviewed on an event-driven basis. Ad hoc revision might be triggered due to a major change in the strategy of the company, an expansion to sensitive activities or in case of a material social or environmental incident.

For project finance transactions and/or project related loans the Equator Principles require, as a minimum, yearly monitoring. During the monitoring the client and project are assessed against IFC PS. In the case that a client is not in compliance with those standards 'corrective action plans' are required to bring the project back into compliancy.

4.1.2 Value Chain Analysis

Recently, some banks have begun to use value chain studies to identify and assess structural human rights impacts throughout the value chain, from upstream to downstream. The value chain analysis uses desk research and multi-stakeholder interviews and dialogue. Value chain analysis are useful to identify:

- relevant activities of the company or a business partner in the value chain;
- stakeholders that could be affected by those activities;
- specific human rights impacts that could result; and
- the banks position throughout the value chain.

Identifying the banks position in a value chain is particularly useful to brainstorm on possible approaches to strengthen the bank's due diligence approaches and to ascertain how to best use the bank's leverage throughout the value chain in which clients operate. For example, as a result of a value chain study on cocoa, ABN Amro decided to use its leverage over cocoa traders and processors to encourage upstream players in the value chain to stop human rights abuses.⁶⁵

4.2 Management of land governance risks

When banks identify land governance risks related to their financing activities, action needs to be taken to prevent and/or address them. That implies integrating the findings across relevant internal functions and processes, taking appropriate action and tracking and assessing the responses.⁶⁶ Subsections 4.2.1 and 4.2.2 elaborate on the tools used by the banks to manage land governance risks: engagement with companies and participation in multi-stakeholder initiatives.

4.2.1 Company engagement

Company engagement – communicating through meetings and letters – is the main tool used by Dutch banks to manage land governance risks associated with their client relationships. Generally, banks use company engagement to bring to the attention of their clients' issues that they are concerned about. This engagement is usually motivated for two reasons:

- A controversy associated to the company, which is detected during an enhanced company assessment. Company reports from external service providers often include a controversies scan section, which collects (negative) media coverage and NGOs reports about the company, including on human rights related issues. The objective of the company engagement is then to gain information on how the company has dealt with the controversy and – where necessary – act upon that.
- When a company is associated with high risks, the banks can engage pro-actively with the company. For example, a bank can engage with a company to improve its policies and practices which can have an impact on the company's suppliers as well. This in turn could have the objective of producing a wider effect, by causing other similar companies to take notice and improve their policies and practices as well. This type of company engagement can cover a broad range of topics that are relevant for land governance issues, including the rights of indigenous peoples or industry standards and certifications.⁶⁷

The results of the risk assessment tool will likely determine the extent of the engagement with a company. As a general rule, the higher the level of risk, the more frequent the engagement will be.

The results of the company engagement can differ per bank and per client. Some banks are more critical and ask clear commitments to improvements within a set timeframe, including the consequences if no progress is made. Such commitments can then result in an action plan developed by the company, including a monitoring and reporting system on progress. Other banks take a more passive stance, without requesting time-bound targets for improvement.

To ensure that the company lives up to the commitments made during the company engagement process, especially when these are detailed in an action plan, the bank can include a covenant in the financing agreement. In principle, this would give the bank the right to ask for early repayment of its loan when the company defaults on the agreements made in the covenant.

Apart from individual company engagement, some banks also participate in collaborative engagements. This occurs when a group of banks (and sometimes other investors) come together to engage in dialogue with companies on environmental, social and governance (ESG) issues. Some of the platforms that banks use to start collaborative engagements are the VBDO and the UNPRI. These platforms can have a specific focus on engagement topics that can be relevant for land governance, such as human rights and extractives or labour practices in agricultural supply chains.⁶⁸

4.2.2 Participation in multi-stakeholder initiatives

Another way for banks to deal with land governance risks, is to participate in multi-stakeholder initiatives such as the Roundtable on Sustainable Palm Oil (RSPO) or the Forest Stewardship Council (FSC) to share sector knowledge and to stimulate their clients to meet the certification standards. For example, ABN Amro, ING Bank and Rabobank participate in the Financial Institutions Task Force of the RSPO, which does outreach to local regionally operating banks and hosts consultants that share advancements related to tools to manage and assess Environmental and Social risks in the palm oil supply chain.⁶⁹

Moreover, banks often incorporate the certification principles as a guidance in their company engagements. For example, ABN Amro integrates the RSPO Principles and Criteria as the reference for their engagements in the palm oil sector.⁷⁰ It also offers support to their clients on how to implement certifications.⁷¹

4.3 Reporting on land governance risks

As part of the *Corporate responsibility to respect human rights*, companies should track the effectiveness of efforts to address human rights impacts and communicate these efforts to affected stakeholders, and where, appropriate, reporting on them publicly, such as where impacts are or may be severe.⁷² To this effect, banks should not only inform the public about their own activities, but they also have to be as transparent as possible about how they identify and manage the land governance risks created by the companies and projects which they finance. In this section we discuss how Dutch banks integrate such information according to GRI guidelines in their sustainability reports (section 4.3.1), if they are using the UNGP Reporting Framework (section 4.3.2) and if they are reporting on individual transactions (section 4.3.3).

4.3.1 Sustainability reports

The sustainability reports of the Dutch banks include references to the bank's sustainability policies, but also provide data to measure the implementation of these policies. Banks use the indicators developed by the Global Reporting Initiative (GRI) as their guideline for sustainability reports. The general GRI Reporting Principles and GRI Standard Disclosures are complemented by GRI's Sector Disclosures that elaborate more on the transparency requirements for specific types of companies and industries.⁷³

The GRI Sector Disclosure for the Financial Sector, amongst other, requires the following indicators to be filled in:

- Description of the finance and investment framework regarding environmental and social issues and insight into how the financial institution ensures that investments meet the conditions set in its policies.
- The number of companies with which there has been interaction on social and environment topics (in line with GRI FS10).
- Consultation with civil society organisations and other stakeholders.
- Disclosure of the number of all current and recently closed project finance deals and project related corporate finance deals, including the information required by the Equator Principles III.
- Information on investments, divided according to region, size and sector (FS6).⁷⁴

Research from Profundo to the Fair Bank Guide shows that banks generally include a good degree of information on the first three indicators.⁷⁵

Regarding the two last indicators, commercial banks disclose the number of projects financed according to the EP, but do not provide the name of the companies involved. Dutch banks are clearly improving in the reporting on their outstanding loans when it comes to the economic sectors and subsectors these clients are active in. A more detailed break-down per region could still be an improvement for some banks.⁷⁶

4.3.2 UNGP Reporting Framework

The UNGP Reporting Framework, published in February 2015, is a comprehensive framework for companies to report on how they respect human rights in practice, in line with the UNGPs. The Framework consists of a short series of smart questions that relate to the company's governance of human rights risks and its management of its salient human rights issues: the human rights at risk of the most severe negative impact through the company's activities and business relationships. The guidance for the Reporting Framework also includes extensive references to other reporting initiatives, such as the International Integrated Reporting Framework and the Global Reporting Initiative.⁷⁷

In 2016, ABN Amro was the world's first financial institution to report using the UNGP Reporting Framework. As part of the Dutch Banking Sector Agreement, all the adhering banks to the Agreement agreed to report on human rights using the UNGP Reporting Framework.⁷⁸

4.3.3 Disclosure of transactions

Based on a pilot conducted from July 2016 to December 2016, FMO has recently incorporated a "Ex-Ante Disclosure", which is the disclosure of transactions before contracting for a period of 30 days. FMO will disclose transactions that are placed in risk category A and risk-category B+, which involve the acquisition of new land. In this way, FMO creates an opportunity for stakeholders to provide input to FMO's investment decisions.⁷⁹

4.4 Conclusion

This chapter focused on how Dutch banks apply the normative framework, and, in particular, how they identify and manage land governance risks. To identify such risks, banks undertake *ESG assessments* of the companies they are financing, which includes information gathering by means of a questionnaire, an initial risk assessment and periodic reviews, in some cases complemented by and enhanced company assessment. Additionally, banks start to conduct *Value chain analyses* to identify and assess structural human rights impacts throughout the value chain.

To manage land governance risks which have been identified, banks predominantly use *Company engagement* with the companies they are financing. These engagements can result in a mutually agreed improvement plan, which sometimes is linked to a clause in the loan contract. Additionally, banks participate in *Multi-stakeholder initiatives* to share sector knowledge and to stimulate their clients to meet the certification standards.

This chapter also described how banks report on how they identify and manage land governance risks, via their sustainability reports, the UNGP Reporting Framework and the disclosure of transactions.

This information is used in Chapter 5 to formulate recommendations to the LANDdialogue on how to contribute to the implementation of the Agreement in a proper and careful manner with regard to land governance issues.

Chapter 5 Recommendations to the LANDdialogue

This chapter provides the LANDdialogue with recommendations on where and how the LANDdialogue could support the parties to the Agreement in ensuring that land governance risks are addressed in a practical and effective way by Dutch banks.

The recommendations are divided according to the two types of commitments included in the Agreement: individual commitments (section 5.1) and joint commitments (5.2). 'Individual commitments' refer to the commitments made by the adhering banks and 'joint commitments' refer to the commitments made by all parties to the Agreement together.

Additionally, section 5.3 will make recommendations on the possible role the LANDdialogue could play in supporting the four working groups set up by the adhering parties to implement the Dutch Banking Sector Agreement.

5.1 Supporting the implementation of individual commitments

Individual commitments refer to the adhering banks' commitments to conduct human rights due diligence according to the provisions of the Dutch Banking Sector Agreement. This section provides recommendations to the LANDdialogue on how they could support the adhering banks in this process. Subsection 5.1.1 gives recommendations on the identification of land governance risks, while subsection 5.1.2 addresses the management of land governance risks.

5.1.1 Improving the identification of risks

Following the Dutch Banking Sector Agreement, the adhering banks should, within two years, take the following steps with regard to the identification of land governance risks and other human rights risks:⁸⁰

- Ascertain that the client processes involve meaningful and effective consultation by their clients with potentially affected groups and other relevant stakeholders. The bank should address the client in case of negligence; and
- Require that clients and prospective clients provide the information needed for identifying and assessing actual and potential human rights impacts related to the client or the transaction at hand. For the client and transaction assessment procedures, inspiration can be drawn from, for example, the UN Guiding Principles Reporting Framework.

Based on these commitments, as well as on the normative framework (see Chapter 3) and the present procedures used by the Dutch banks to identify land-governance risks (see Chapter 4), Profundo considers that the LANDdialogue could draw on its knowledge and network to help the banks improve the identification of land governance risks. In particular, the LANDdialogue could support the adhering banks to live up to their commitments in a meaningful and effective way with the following activities:

- **Knowledge transfer on land governance risks**

There are many different land governance risks, linked to quite a number of economic sectors (see Table 1). No matter which formal policies and tools are adopted by a bank, a significant precondition for using such policies and tools in a meaningful way will be that all relevant bank staff have a basic understanding of the relevant risks and the normative framework. The context, why the bank includes certain criteria and questions in its policies and tools, should be clear to everybody working with them.

It is therefore important that not only the staff of the ESG Risk Department, but all Client Portfolio Managers working with clients in relevant economic sectors, understand the land governance risks linked to the sectors their clients are active in (see Table 1). This helps to raise the right questions during the due diligence process, also beyond the literal questions included in the questionnaire, to be able to really understand and assess the situation and the actions taken by the client.

Also, the relevant bank staff should have a basic understanding of the normative framework as summarized in Chapter 3, to understand what is expected of the company (which is asking for financing from the bank) with respect to human rights and land governance risks more broadly. In combination with this international normative framework, bank staff should also take into account the land tenure regime in the country where the project and/or company activities take place.

Recommendation: The LANDdialogue could offer to organize a workshop for bank staff on land governance risks.

- **Improving policies**

The standard practice of banks to work with self-developed exclusion lists and sector-specific policies, entails the risks that not all relevant land governance risks are addressed – or not in a proper way. Not only do policies differ between banks in terms of the economic sectors for which they acknowledge potential land governance risks, the specific risks they see and the groups they see potentially affected (see Table 1). Also between the policies of the same bank we see clear differences in these fields, with some sector policies identifying land governance risks better than others and some economic sectors not covered by sector policies at all. Some policies rely heavily on certification standards such other than RSPO and FSC, while land governance risks are not referred to as a priority subject in various certification schemes that promote sustainable production (section 3.2.3).

Recommendation: The LANDdialogue could analyse the policies of the adhering banks and could advise on how to improve their clarity, consistency and effectiveness, by assessing whether, and, in case, how the banks' policies:

- deal with land governance risks in relation to all relevant economic sectors mentioned in Table 1;
- discuss the different types of land governance risks defined per economic sector in Table 1;
- rely too much on certification schemes, as these often do not treat land governance risks as a priority topic;
- give sufficient attention to the scope and application of FPIC, as discussed in section 3.2.2; and
- define for which groups FPIC is required, as discussed in section 3.2.3.

- **Sharpening assessment tools**

The primary assessment tool used by banks to identify land governance risks is a questionnaire, in which the criteria included in the bank's policies are translated into a set of questions. Profundo's assessment of these questionnaires is that the intended translation of criteria into questions has often been done in a too generic way and only in a binary form (meaning that they require a yes/no answer). This makes the current tools not sensitive enough to identify land governance risks the banks will be exposed to through their financing activities.⁸¹

Take the following example: “Does the client have a stakeholder engagement policy in place?” This question can only be answered with yes or no, which means that neither the quality of the public commitment nor its actual implementation in practice are taken into account.

Recommendation: The LANDdialogue can analyse the existing assessment tools used by the adhering banks and can make practical and effective recommendations to improve them to more comprehensively identify land governance risks. Importantly, especially for the uses of the tools for corporate loan transactions, the tools should assess the risks created by all corporate entities belonging to the same business group as the borrower.

- **Making other data sources available**

To answer the questions raised in their assessment tools, banks rely to a large extent on information from the clients themselves and from external service providers. Often, these data do not provide enough contextual information, which is key for a good identification of land governance risks. In addition, research conducted by the Munden Project⁸² highlighted the importance for banks to complement their companies’ assessment with a local, data-driven risk assessment.⁸³ Local data are key to provide information about the land governance and tenure systems on the ground, to understand for example in how far the land rights of local inhabitants and indigenous peoples are acknowledged and protected under the national law.

When the initial assessment flags a high risk, banks can undertake a more comprehensive risk assessment which could give more insight in such issues. FMO, for instance, has introduced “contextual risk assessment for their highest risk projects, looking at risks to civil, labour and political rights, those associated with land and other natural resources, as well as issues related to security, conflict and corruption”.⁸⁴

The challenge, however, is to improve the preceding phase of the initial risk assessment. In-depth research, which could even require the hiring of local consultants, is significantly time (and resources) consuming to be done for each and every single transaction. Banks need easily accessible, yet more in-depth and more reliable, data sources to complement the information given by their clients themselves. This is especially challenging in relation to corporate loans to big business groups, which can have operations in dozens of countries across different continents. To assess in an efficient and reliable manner the land governance risks which could be created by all these operations, is key to have access to reliable data sources.

Recommendation: The LANDdialogue could explore, together with the banks and with the government, how to make existing data sources on land governance risks available for the due diligence processes of banks. These data sources could include research institutes and NGO-driven databases (such as Environmental Justice Atlas, Land Matrix and IAN) as well as contacts with local NGOs, researchers and consultants. Via the Dutch government, Dutch embassies could maybe also become involved to play a role in making an inventory of experts with a strong local and international expertise on land governance issues that could be involved to collect further information from different sources.

5.1.2 Improving the management of risks

In the Dutch Banking Sector Agreement, the adhering banks make a number of commitments regarding the prevention and management of land governance risks. These commitments are:⁸⁵

- Regarding project finance, banks will *require* clients to ensure that:
 - FPIC is carried out where and how the IFC PS or the VGGT require this;

- Meaningful and effective consultations with potentially affected groups and other relevant stakeholders are carried out where and how the IFC PS or the VGGT require this.
- Regarding corporate loans, banks will *actively promote* their clients to ensure that:
 - in case of situations where there is a fair possibility of land rights violations, that FPIC is carried out where the IFC PS or the VGGT require this;
 - in case of situations where there is a fair possibility of land rights violations, meaningful and effective consultations with potentially affected groups and other relevant stakeholders are carried out where the IFC PS or the VGGT.
- Banks will integrate the findings from the impact assessments across relevant internal functions and processes and take appropriate action. With respect to this step of the banks, all parties to the Dutch Banking Sector Agreement:
 - Acknowledge that there might not be a 'one-size-fits-all' approach for how individual banks engage with their clients on preventing and addressing adverse human rights impacts.
 - Agree that the engagement process of the adhering banks to this agreement needs to be time limited and result oriented. The steps to be undertaken by the adhering banks should ideally consist of the following elements:
 - Actively promoting to act in conformity with the UNGPs among new and existing clients and promoting to act in conformity with the OECD Guidelines among new and existing clients in OECD member countries;
 - Dialogue with new and existing clients on preventing and addressing adverse human rights impacts;
 - Time-bound improvement plans with new clients and instances resulting in new improvement plans among existing clients on preventing and addressing adverse human rights impacts (unless none are identified);
 - Monitoring the time-bound improvement plans of clients;
 - Seeking ways to increase leverage;
 - Depending on individual project circumstances include clauses on respecting human rights in loan contracts;
 - If the client is repeatedly not able or willing to comply with the material due diligence requirements, the bank should, after a credible assessment of potential adverse human rights impacts of doing so, take corrective measures, and as a last resort at the discretion of the bank decide to end the relationship with the client.
 - Where it is necessary to prioritise actions to address actual and potential adverse human rights impacts, the adhering banks to this agreement should first seek to prevent and mitigate those that are most severe or where delayed response would make them irremediable.

To support the adhering banks to live up to these commitments, Profundo considers that the LANDdialogue could transfer knowledge on the management of land governance risks and facilitate a dialogue with other relevant stakeholders. Concretely, the LANDdialogue could undertake the following:

- **Knowledge transfer on land governance risks**

The LANDdialogue could play an important role in helping banks understand how land governance risks can be effectively prevented and managed by the companies they are financing. This would include helping the banks to understand the details of the normative framework as summarized in Chapter 3 and of the specific of the land tenure systems and regulatory and political environments in which their clients operate.

This could be complemented with an analysis of lessons learned in case studies, which would give practical guidance on issues such as how companies can organize meaningful consultation and FPIC, in a difficult legal context for instance. Such scientific knowledge could help banks to negotiate realistic improvement plans with their clients.

Also, the LANDdialogue could help the banks with insights which could help to prioritize on which clients to focus their efforts to prevent and manage land governance risks, based on the likelihood and irremediability of these risks.

- **Facilitating a dialogue**

On their own, banks will not be able to manage all land governance risks created by their clients. Collaboration between like-minded stakeholders is needed. In this respect, it is important that relevant stakeholders, both among the parties to the Dutch Banking Sector Agreement and other stakeholders, have a better understanding of each other's aspirations and limitations. Collaboration on preventing and managing land governance risks is only possible when it is based upon this joint understanding, which is how sometimes lacking.

The LANDdialogue could therefore take the initiative to organize a dialogue between banks, NGOs and other stakeholders to share concerns and expectations, as well as aspirations and limitations. By involving in the dialogue stakeholders who are not parties to the Dutch Banking Sector Agreement, such as foreign (local) NGOs, researchers and other experts, the LANDdialogue could also contribute to a broader understanding among stakeholders and to the identification of good practices in the prevention and management of land governance risks.

5.2 Supporting the implementation of joint commitments

This section provides recommendations to the LANDdialogue (building from the findings of this study and the recommendations already made in section 5.1) on how to support the implementation of joint commitments included in the Agreement. Joint commitments are made by all Parties adhering to the Agreement, not just the banks alone. The following joint commitments are relevant in this respect:

- Exploring a broader application of FPIC (subsection 5.2.1); and
- Improving transparency (subsection 5.2.2).

5.2.1 Exploring a broader application of FPIC

Section 3.2 has described the normative framework of the right to Free, Prior and Informed Consent (FPIC) and effective and meaningful consultations. In doing so, it has first examined the scope and content of FPIC to clarify what is legally required when conducting an FPIC process. A number of steps for the successful application of FPIC were presented. Furthermore, the definition of indigenous peoples and the broader application of FPIC was examined.

The LANDdialogue could build on that analysis to support the parties of the Agreement in exploring the broader application of FPIC, in three steps:

- The first step should be to improve the joint understanding of the normative framework around FPIC, especially with regard to the situations in which FPIC should be applied (when FPIC should be applied) and which groups have a legal right to FPIC (FPIC for whom). FPIC is part of the mandatory consultation process that needs to take place when indigenous peoples are affected by projects. It requires consultations that are conducted in the absence of coercion (freely), in a well-informed manner and that allow sufficient time for community deliberation and decision-making. A further important point is that there is no official legal definition of “indigenous peoples”. Globally, a wide variety of communities could be seen (and see themselves) as “indigenous peoples” and a legal definition carries the risk of excluding groups that may be in need of similar protection.
- The second step should aim to come to a better understanding of which additional groups could be entitled to FPIC (in different geographies, in relation to different economic sectors). This discussion can build on the objective criteria summarized in section 3.2.3 on the broader application of FPIC, but should also acknowledge that the subjective criterion of self-identification is seen as the most important element by the UNDRIP and ILO Convention 169. This means that the parties should look jointly for certain indicators for groups that should fall within the scope of the protective scheme for “indigenous peoples”. These criteria and indicators should not exclude communities and groups that share a similar level of vulnerability and that are in need of similar protection. They should leave room for context-specific criteria, depending on the geography, economic sector and other contextual criteria. To work with such a context-specific definition in practice, access to reliable, contextual information is then key (see recommendations in section 5.1.1).
- The third step should use the outcomes and conclusions of the first two steps to support the parties to the Agreement to provide recommendations on the broader application of FPIC to international forums including the OECD, Equator Principles and IFC PS.

The role of the LANDdialogue could be to facilitate this three-step discussion and enrich it with knowledge and experiences available to the LANDdialogue network.

5.2.2 Improving transparency

Section 6 of the Dutch Banking Sector Agreement deals with Transparency and reporting.⁸⁶ The banks adhering to the Agreement make a number of commitments, which are not repeated here. The LANDdialogue could play a role in helping the banks and the other parties to the Agreement implement these commitments, thereby increasing transparency and improving reporting with regard to land governance risks. The UN Guiding Principles Reporting Framework and the Global Reporting Initiative Guidelines should be guiding in this respect, whereby the LANDdialogue could engage with the banks to improve their reporting

To give stakeholders a meaningful insight in the banks’ efforts to identify, prevent and manage land governance risks, the LANDdialogue could collaborate with the banks to define more specific reporting indicators which would be consistent with the UN Guiding Principles Reporting Framework and the Global Reporting Initiative Guidelines, while giving more specific information related to land governance risks. These indicators could include:

- the number of financings of the bank in all relevant economic sectors mentioned in Table 1, split out by sector and by geography;
- the number and percentage of clients assessed on land governance risks;

- the information sources used for the assessments;
- the number and percentage of clients not being financed as a result of the assessment on land governance risks;
- the number and percentage of clients with whom improvement plans were agreed as a result of the assessment on land governance risks; and
- the success rate of the improvement plans agreed with clients as a result of the assessment on land governance risks.

5.3 Supporting the working groups

This section provides recommendations to the LANDdialogue on how to support the four working groups set up in the framework of the implementation of the Agreement. The working groups work on a Matrix/Database, on Leverage, on Value Chain Mapping, and on Remediation.

The recommendations made in this section are based on publicly available information, as the information regarding the current activities of the working groups remains confidential to the participating parties of the Agreement. Based on the information we have on what the working groups are doing and on the analysis made in this study, the following subsections provide recommendations to the LANDdialogue on how to strengthen the work of these working groups, thereby ensuring that sufficient attention is given to land governance risks.

5.3.1 Matrix/database working group

The aim of the Matrix/database working group is to develop a matrix/database tool that will provide the banks with relevant information on actual and potential human rights impacts. The adhering banks aim to use the information from the matrix/database as a tool to identify land governance risks and other human rights risks when making a ESG assessments.⁸⁷

In line with the underlying goal of the Matrix/database working group, the LANDdialogue is recommended to suggest a slightly different approach to give the banks access to reliable, situation-specific data on the land governance risks. A static, supply-driven instrument as a matrix or database will never be able to capture the full complexity of land governance risks which could be created by the activities of a specific company in a specific geographic and political context. Data would be never complete, easily outdated and partly never used.

The LANDdialogue could suggest working with the parties adhering to the Dutch Banking Sector Agreement – banks, NGOs, trade unions and government – to:

- Develop a list of key indicators/questions which could help banks to structure their ESG assessments to successfully identify land governance risks (see recommendation ‘Sharpen assessment tools’ in section 5.1.1).
- Explore how to make existing data sources on land governance risks, including research institutes and NGO-driven databases (such as Environmental Justice Atlas, Land Matrix and IAN), and contacts with local NGOs, accessible to banks (see recommendation ‘Make other data sources available’ in section 5.1.1).
- make an inventory, in cooperation with Dutch embassies, of experts with a strong local and international expertise on land governance issues that could be involved to collect further information (see recommendation ‘Make other data sources available’ in section 5.1.1).

5.3.2 Leverage working group

Within the Leverage working group, the parties of the Agreement agree to work together and commit themselves to conducting and publishing a study on good practices of how to increase leverage regarding human rights for corporate lending and project finance.⁸⁸ The LANDdialogue could provide input to this study, by building further on the factors which determine the level of exposure and potential leverage of banks to land governance risks, as introduced in section 2.3. Apart from factors which are specific to the geographic and political situation in which the clients operate, the following more general factors are decisive:

- Type of financing;
- Relative importance of the bank for the client;
- Duration of the relationship with the client; and
- Position of the client in the supply chain.

In collaboration with the banks, the LANDdialogue could further concretize these factors by making case studies of situations in which banks tried to use their leverage to prevent or manage land governance risks.

5.3.3 Value chains working group

The Value chains working group is undertaking value chains analyses for specific high-risk sectors that are material to the banks. The analysis will start with the palm oil, cocoa and gold value chains.⁸⁹

The LANDdialogue could offer support to these value chains analyses, by contributing knowledge available in its network of research institutes, NGOs and others, on the main land governance risks in these chains, the drivers of these risks and the power relations in the value chain. The last aspect also links to the Leverage working group, see section 5.3.2.

5.3.4 Remediation working group

The Remediation working group aims to further explore when a bank is deemed to be 'linked to', 'contributing' or 'causing' to adverse impacts following their financing activities in specific cases and how the adverse impact in these instances could be addressed or remediated.⁹⁰

The LANDdialogue could offer support to this working group by sharing knowledge available in its network of NGOs, researchers, etc. on the two questions this working group is looking at:

- the question when a bank is deemed to be 'linked to', 'contributing' or 'causing' to adverse impacts following their financing activities in specific cases, overlaps with the question of the level of exposure and potential leverage of the bank. Following the approach suggested in section 5.3.2, a set of objective criteria can be developed to assess the level of involvement in, or responsibility for, the land governance risk created by the company which was financed by the bank;
- on the question how the adverse impact could be addressed or remediated, the LANDdialogue could contribute knowledge on best practices and lessons learned with regard to remediation efforts in concrete cases.

Appendix 1 Other standards relevant for the financial sector

As stated in section 3.1.1, the UNGPs establish general recommendations that are applicable to all sectors. Below are summarized other standards that are relevant for the question how the financial sector can deal with preventing and managing land governance risks.⁹¹

- **The OECD Guidelines for Multinational Enterprises** are recommendations addressed by governments to multinational enterprises operating in or from adhering countries. The governments adhering to the Guidelines are committed to their promotion at the national level. With the objective to clarify the expectation of the OECD Guidelines in different sectors, the OECD has established sector-specific working works. The OECD Working Party on Responsible Business Conduct on due diligence in the financial sector aims to clarify expectations of responsible business conduct in the context of enterprises operating in the financial sector. The working party issued in 2016 a set of key considerations for institutional investors which includes recommendations on how to identify and manage human rights risk taking in consideration the characteristic of investors and their portfolios.⁹²
- **The OECD-FAO Guidance for Responsible Agricultural Supply Chains** contains relevant recommendations for the financial sector, including:
 - Setting up a framework for risk-based due diligence, describing the five steps that enterprises should follow to identify, assess, mitigate and account for how they address the adverse impacts of their activities. In doing so, the guidance suggests that risk assessment should incorporate “red flags” regarding the location of the activity, specific products that are associated with high risks and the track record of business partners. Such situations should motivate enhanced due diligence, which could include on-the-ground verification of qualitative circumstances for red flags. Two of the examples given are particularly relevant for the LANDdialogue:
 - identifying weak governance areas, and
 - identifying where tenure rights are weakly defined or contested.
 - Propose measures for risk mitigation and prevention, including an explanation about the risks of adverse impacts arising along agricultural supply chains. For example, about the risks associated with the lack of consultation and the lack of safeguards to protect land tenure rights.
 - Guidance on how to implement FPIC for indigenous peoples.⁹³
- **The Analytical Framework for Land-Based Investments in African Agriculture** developed by land experts from the African Union, UN Food and Agriculture Organisation (FAO), and several donor governments -including Great Britain, Germany, France and the United States was designed to help investors ensure that their land-based investments are inclusive, sustainable, transparent, and respect human rights. The framework includes:
 - Practical guidance on how to conduct stakeholder engagement, providing an overview of indicators that can be used by investors.
 - Red lines that indicate in which situations investment projects should be cancelled if no alternatives can be found. For example, rejecting the transfer of land rights to investors involving tracts of land that exceed the amount reasonably required for the true purpose of immediately using the land for agricultural activities.⁹⁴

- **The Principles for Responsible Investment in Agriculture and Food Systems** developed by the FAO Committee on World Food Security states, very similarly to UNDRIP, that responsible investment in agriculture and food systems should incorporate effective and meaningful consultation with indigenous peoples, through their representative institutions in order to obtain their FPIC (Principle 9).⁹⁵

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