

15 November 2016

Jürgen Rigterink, Chief Executive Officer
Linda Broekhuizen, Chief Investment Officer
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Re: Submission to Consultation on FMO's draft Sustainability Policy

Dear Mr. Rigterink and Ms. Broekhuizen:

We appreciate the opportunity to provide comments on FMO's draft Sustainability Policy. We commend FMO for undertaking a transparent and public consultation process and providing multiple opportunities for stakeholders to better understand FMO's operations and provide feedback on its proposed requirements. While we welcome FMO's ambitious sustainability vision and its commitment to relevant international standards, the draft Policy does not sufficiently ensure their realization.

The first section of this submission will focus on general comments regarding the draft Policy. The second section of the submission will provide detailed feedback on the draft Position Statements on responsible tax, gender, hydropower, human rights and land governance.

I. General Comments on FMO's Draft Sustainability Policy

The draft Policy leaves too much discretion to FMO for its implementation and application. Without significant revision, the Policy would leave project-affected communities in doubt about what to expect from FMO-financed activities. While FMO's commitment to international standards is laudable, the Policy does not adopt provisions to ensure the realization of its commitment. Finally, limited disclosure of project-related information undermines the effectiveness of the Policy as well as FMO's Independent Complaints Mechanism.

a. FMO's "Realistic Approach" Leaves Too Much Discretion for its Interpretation and Application

One important objective of an environmental and social policy of a development finance institution (DFI) is to identify clearly what it requires and when. Stakeholders and, more importantly, project-affected people need to know what to expect from a client financed by FMO. Exceptions to a policy should only be permitted when they are clearly defined and narrowly tailored. FMO's draft Policy, however, leaves open the possibility that FMO will suspend its application under any number of different circumstances. The result is that the draft reads more like guidance rather than a binding policy, whose requirements can be suspended or waived at FMO's discretion.

i. Scope of Application

Section 2 of the draft Policy states that FMO will "apply this policy to the extent possible" depending on its level of influence.¹ If FMO lacks sufficient leverage over its client to ensure the implementation of its requirements because it is a minority shareholder or a co-financier or for any other reason, then FMO should not make the investment. Otherwise, there would be no consistency in what

¹ Lines 32-33.

stakeholders could expect from FMO-financed activities. Two investments in the same sector and the same region could be held to vastly different standards.

The implementation document referenced in Section 2 describes other broadly defined situations in which FMO requirements may not apply, including when there are “contextual risks” and when the implementation of the standards would have “adverse effects on the clients’ market position”. FMO defines contextual risks as “poverty and inequality, (latent) conflict, a weak rule of law and public governance, legacy issues and the relatively high dependence by local populations on locally available natural and environmental resources, including notably land, water and forests.” In those situations—which we would point out characterize a sizeable portion of development finance, FMO will not require its client to comply with the standards at the time of investment or possibly not at all, but rather only requires its client “to achieve measurable improvement towards standards...over time.” While we recognize that those contextual risks are real and pose practical challenges, we encourage FMO to work with their clients to find creative solutions to overcome those challenges rather than compromise their commitments when the need for them is the greatest. It is exactly the situations FMO describes where communities and the environment need extra protection afforded by FMO policies not less.

Similarly, the protection provided to communities and the environment should not be dependent on the performance of the sector in which FMO invests. The implementation document explains that FMO will suspend application of its Sustainability Policy when its implementation would adversely affect the client’s market position.² While we appreciate FMO’s initiative to raise the standards for the entire sector, that should be in addition to and not instead of requiring its client to comply with its policies.

FMO must commit to applying its Policy to all its clients in all contexts. While it may be difficult to do so in some cases, that is the challenge FMO must meet of delivering sustainable development.

ii. Different Standards for Direct and Indirect Investments

The discretion to suspend the policy can also be seen in the provisions related to FMO investments in financial intermediaries. In recent years, FMO has been associated with projects supported through financial intermediaries that have caused severe social, human rights and environmental impacts, resulting in complaints from affected communities.³ The revised draft Policy does not go far enough to prevent such problems in the future.

While the draft Policy states that FI-A clients must apply the IFC PS to its high risk clients, the footnote leaves that in doubt, clarifying that the IFC PS should be applied when PS 5, 6, 7, or 8 is triggered. If any of the other PS are triggered, it seems that the FI client would only have to comply with local law. It is not clear why FMO prioritizes some PS over others. For example, PS 1 on consultation is at the root of ensuring communities are able to identify potential impacts of the project on their lives and livelihoods and to participate in decision-making around these. Relegating this standard to local law completely undermines fundamental rights to participation and consultation. Equally, PS 2 on labour standards is significantly stronger than local law in many countries around the world. For these standards to apply in direct lending but not through FIs is unacceptable.

² Implementation document, section 3.

³ See, for example, the investigation by the IFC’s Compliance Advisor Ombudsman of Banco Ficohsa in which FMO is co-invested: http://www.cao-ombudsman.org/cases/case_detail.aspx?id=209.

The extent to which the IFC PS apply to all other FI clients is also in doubt. For FI-B+ clients—defined as those with portfolios that include business activities with potential adverse environmental or social risks and/or impacts that may be irreversible, FMO only requires its clients to apply the IFC Performance Standards on a “best effort basis.” It is unclear how FMO defines this or what those affected by FMO-financed activities should expect from those clients.

One final example is the Position Statement on Coal, which while laudably excluding coal from direct financing, allows coal financing through financial intermediaries up to a maximum of 20% of the FI’s total balance sheet or total investment portfolio. If it is unsustainable to fund coal directly, it is unsustainable to fund coal indirectly. FMO’s commitment to doubling avoided GHG emissions by 2020 would be further strengthened by refusing to invest in FIs that fund coal-fired power plants, coal mines, and coal infrastructure.

A constructive step forward would be to apply the same standards to both direct and indirect FMO investments.

iii. No Defined Date by which Client Must Comply with Standards

Even when FMO applies its policy, it has broad discretion as to when the client must comply. The policy only states that the client must comply within “a reasonable period” and, at a minimum, within the period of the investment.⁴ That is a very large window within which FMO may require client compliance, leaving project affected communities vulnerable to potential impacts and unaware of when they can expect FMO’s requirements to be met especially because, as detailed below, the environmental and social action plans are not publicly disclosed. Leaving the compliance date until shortly before FMO exits precludes FMO’s monitoring and supervision role and leaves in doubt the client’s continued compliance following project closure. The draft is a step back from the existing Environmental & Social Policy, which states that normally clients would have a “three year period at the maximum to reach full compliance with the requirements.” We urge FMO to keep the existing standard.

iv. Lack of Clarity in the Drafting

Exacerbating the discretion FMO maintains in applying and interpreting its policy is a lack of clarity in the drafting. In general, the draft reads more like a description of what FMO does or how it does it rather than requirements that must be met. For example, it is useful to know that both deal and credit teams have ESG specialists,⁵ but that goes more towards how FMO applies its Policy rather than what is required and when. In this example, FMO should clarify what information is required for scrutiny and how it verifies that information. Later, the draft mentions that FMO may require reports from its clients and may also undertake monitoring visits depending on the risk profile.⁶ FMO should be more specific about its commitments. It should detail how it will monitor clients according to categorization, specifying for which category annual reports are required, for which categories FMO will undertake site visits, how often, etc.

b. Effectiveness of Policy and Complaints Mechanism Depends on Increased Disclosure

⁴ Line 179-181.

⁵ Line 167

⁶ Lines 182-188

We welcome FMO's commitment to disclose information related to its investments before contracting. We hope this will ensure communities are informed of activities that could adversely affect them and provide them with the opportunity to raise concerns and/or suggest how impacts could be avoided or minimized before decisions are finalized. We look forward to working with FMO to make the ex-ante disclosure system as effective as possible.

While the ex-ante disclosure represents significant progress in improving FMO's transparency, the scope of investment-related information that is disclosed pre- and post-approval is extremely limited. Unlike other development finance institutions, FMO does not disclose the environmental and social impact assessments nor the environmental and social action plans for activities it finances. Not only does this prevent project-affected communities from accessing information regarding activities that will impact their lives and livelihoods, it also deprives FMO of a useful source of information to verify that provided by its clients. When project-affected communities know what the client is supposed to do and when, they can provide feedback to FMO on whether the client is meeting its commitments. This is particularly true when the client is not required to be in compliance with the policy at investment, as when there is an environmental and social action plan (ESAP). Without access to the ESAP—which is disclosed at other development finance institutions such as the International Finance Corporation, project-affected people will not be able to determine whether grounds exist for a complaint to FMO's Independent Complaints Mechanism because they will not know when the client must comply with the requirements. Thus, the effectiveness of the Policy and the ICM are dependent on improved disclosure of information.

Information should also be available for the sub-projects of FMO's financial intermediary clients. At a minimum, FMO should harmonize its policies with the best practices of other development finance institutions and require, as IFC does, its private equity clients to disclose sub-projects both on FMO's site and the client's site. FMO could also follow IFC's lead and ask commercial banking clients in contract negotiations to agree to disclose high risk sub-project investments. Those that do not agree to this request should have their names published on FMO's website. Without disclosure of FI sub-projects, communities will not have the necessary information to be able to access FMO's accountability mechanism.

Fundamental to the effectiveness of the ICM is ensuring that project-affected communities are aware of its availability. While the draft Policy and the Position Statement on Human Rights makes reference to the ICM as an important element of FMO's commitment to sustainability, the mechanism cannot fulfill its intended objective if those who most need it are not aware of its existence. Reference to the ICM in the Policy and FMO's website are not sufficient to guarantee project-affected people have information about the ICM because they often are unaware of FMO's investment, lack access to the internet, and the information is not available in local languages. We strongly urge FMO to require its clients to disclose the availability of the ICM to project-affected communities.

FMO relies heavily on consultants for its due diligence, monitoring and supervision. Consultants may—though not frequently enough—solicit information from project affected communities, but those communities do not know what is reported back to FMO. If those consultants are as independent as FMO claims, their reports should be shared with project affected communities and published on FMO's website. This would provide communities the opportunity to verify the information.

We recommend that additional project-related information be disclosed, including environmental and social impact assessments, environmental and social action plans, and the environmental and social monitoring reports.

c. Implementation of Commitments to International Standards is not Adequate

The list of standards which FMO seeks to “uphold” is commendable but their implementation is not assured. FMO conflates the IFC’s Performance Standards with the other standards referenced, asserting that implementing the Performance Standards satisfies the requirements found in the other standards.⁷ They do not.

The UN Guiding Principles on Business and Human Rights (UNGPs) and the OECD Guidelines on Multinational Enterprises, which incorporate the UNGPs, call for human rights due diligence, including assessment of actual and potential human rights impacts.⁸ The assessment, which can be part of an environmental and social assessment,⁹ must draw on human rights expertise¹⁰ and “include explicit references to internationally recognized human rights.”¹¹

The IFC Performance Standards make very little reference to human rights. They do not require assessment of impacts against human rights standards. Indeed, Performance Standard 1 provides in a footnote that, “In limited high risk circumstances, it may be appropriate for the client to *complement* its environmental and social risks and impacts identification process with specific human rights due diligence as relevant to the particular business.”¹² If the ESIA required by the Performance Standards met the criteria of human rights due diligence, it would not be necessary to undertake an additional human rights process in certain circumstances. Similarly, the IFC has developed a Guide to Human Rights Impact and Management that describes a process of assessing risks explicitly against human rights standards.¹³ Such a tool would not be necessary if the ESIA required under PS1 fulfilled the criteria for human rights due diligence.

A human rights impact assessment is not necessarily looking at different things, it looks at things differently. The findings of the assessment will identify what specific rights will be affected and what is required by international law to remedy that impact. That is not information that is found in an ESIA conducted under the IFC’s Performance Standards. The assessment should include impacts that the client “may cause or contribute to through its own activities, or which may be directly linked to its operations, products or services by its business relationships.”¹⁴ Specifically, lines 66-72 are not sufficient because it fails to recognize the clients’ responsibilities with regard to impacts they are directly linked to through business relationships.

If FMO wants to realize the human rights due diligence called for by the UNGPs and the OECD Guidelines, it must revise the draft Policy to incorporate the following: 1) It is not sufficient for FMO to screen all transactions on ESG risk;¹⁵ it must assess the human rights risks—including risks posed by the investment context—of the activities it finances; and 2) Either as part of an ESIA or as a stand-alone assessment, FMO must require its clients to assess human rights impacts that it may cause, contribute to, or which may be directly link to through its business relationships. To do so, FMO will

⁷ Lines 102-105.

⁸ UNGP principle 17.

⁹ UNGP principle 18, commentary.

¹⁰ UNGP principle 18.

¹¹ Report of the Special Representative on business and human rights, John Ruggie, Protect, Respect and Remedy: a Framework for Business and Human Rights, A/HRC/8/5, 7 April 2008, para 61.

¹² PS1, FN 12 (emphasis added).

¹³ https://www.unglobalcompact.org/docs/issues_doc/human_rights/GuidetoHRIAM.pdf

¹⁴ UNGP principle 17(a).

¹⁵ Line 140.

need to develop or adopt tools that explicitly reference human rights standards. FMO should consider contracting outside assistance in developing its human rights due diligence tools.

In addition to a commitment to respect human rights standards, FMO should also commit to protect those who would defend human rights. We urge FMO to revise its draft Policy to adopt a zero-tolerance commitment to the killings of and violent acts, threats and intimidation against human rights defenders, as they are defined by the UN Declaration on Human Rights Defenders. To implement this commitment, FMO must adopt measures described below and in a separate submission on human rights defenders, which is incorporated here by reference.

II. Comments on FMO's Position Statements

In general, FMO's positions statement lack ambition. They rarely commit FMO or its clients to more than what is already required by the IFC Performance Standards.

a. Hydro Power Plants

We appreciate the inclusion of a position paper on hydropower plants, especially in light of FMO's recent experiences in Honduras and Panama. However, we believe that statement overestimates the benefits of hydropower, including those from dams, weirs, and run-of-the-river projects, and underestimates the risks, and seemingly does not require more than what is already required by FMO's Policy.

FMO asserts that "Hydro power contributes to the dual objectives of (1) providing reliable and affordable energy to businesses and households in developing countries and (2) the fight against climate change."¹⁶ That statement is not supported by evidence in many cases.

- The costs of hydropower projects are often underestimated given the average high cost overrun of dam construction and maintenance. Moreover, hydropower is often considered one of the cheapest sources of electricity because its full environmental and social impacts are often not properly evaluated and are underestimated in the project's cost-benefit analysis.
- FMO claims to provide energy to *businesses and households*. It is important here to state that in practice hydropower often provides energy for economic activities and fails to reach the people living near the hydropower plant, who are often those most in need. In addition, these economic activities generate their own environmental and social impacts that are not considered in the assessments required by lenders.
- It is at best questionable to what extent hydropower plants contribute to the fight against climate change. Numerous scientific studies have demonstrated that hydropower projects, especially in the tropics, can be a significant contributor of methane, comparable, in some cases, to fossil fuel plants in terms of greenhouse gas production. This is because reservoirs and large impoundment areas emit greenhouse gases due to rotting vegetation, while the water discharged through turbines and spillways can also contribute greenhouse gases. Furthermore, the planning of hydropower dams often involves the removal or flooding of vast forest areas, which serve as carbon sinks. In addition, dams often also increase the vulnerability of people experiencing the impacts of climate change by significantly changing and weakening the functioning of healthy ecosystems and therefore decreasing people's adaptive capacities.

¹⁶ Lines 19-20

- In addition to the risks articulated in lines 25-31, hydropower projects can cause great health risks due to changes in water quality and flows, changes in livelihoods and diets, and the influx of construction workers into local communities.
- Hydropower projects are prone to corruption and often take place in weak governance zones which lack transparency, accountability and control.

The measures that FMO proposes to address these risks are vague and do not go beyond what is already required by FMO's Policy. FMO commits to undertaking a "rigorous investigation" of the client's capacity and willingness to address environmental and social risk. It is unclear how that differs from the assessment FMO would conduct of any of its clients. Similarly, the Position Statement requires its hydropower clients to comply with the IFC's Performance Standards, but that is already required by FMO's Policy. If FMO intends to conduct heightened due diligence on its hydropower clients or require its clients to comply with stronger environmental and social standards, this Position Statement does not articulate it. We recommend that FMO commits to best practice standards in hydropower development by making a commitment that the principles outlined by the World Commission on Dams (2000) are applied in the planning, construction and operation of all hydropower projects and its associated transmission and distribution facilities. In particular, we recommend the following measures be included in the Position Statement:

- FMO commit to invest in hydropower only after having investigated and compared the long-term social, economic and environmental sustainability of other sources of sustainable energy.
- FMO should commit to ensuring that full project impacts are examined by requiring that necessary environmental, health, and social baseline data is available prior to the project's impact assessments and considered in all project documents, and assessment of human rights impacts with explicit reference to human rights standards is conducted, taking into account the context in which the project operates.
- Include in its agreements with its clients clauses requiring them to respect human rights, failure for which should result in withdrawal and full repayment of investments.
- In order to help reduce hydrological impacts of the projects that FMO chooses to invest in, FMO should commit to ensure that its client has accounted for and incorporated environmental flows into the project's design and operations.
- While the client should bear primary responsibility for hydropower decommissioning activities, FMO should ensure that the necessary preparations and finances for a project's future decommissioning are adequately considered and integrated within the planning processes of every hydropower project that FMO invests in.
- FMO should go beyond the IFC PS and require free, prior and informed consent for all local communities affected by FMO's projects who are dependent on their land for their livelihoods. See our comments on the Land Governance Position Statement for further suggestions on how to strengthen the implementation of FPIC.
- FMO should improve its transparency by publishing impact assessments, monitoring reports, and environmental and social action plans. Further, FMO should disclose information about the "external industry experts" it hires to monitor its projects.

b. Gender

We appreciate the inclusion of a separate position paper on gender and its ambition to deliver positive outcomes for women. However, we think FMO's Position Statement on gender can be strengthened in the following ways:

- While we believe it is very important to recognise and assess the possible positive impacts on gender equality from FMO's investments, FMO must first ensure that it assesses and addresses any adverse impacts on women's rights. This should also include the less obvious, secondary impacts on women. The Position Statement should describe how gender should be incorporated into a broader assessment of human rights impacts, and include the roles, wishes, needs, rights and access to natural resources women have in that specific region and context. Crucial for this is to include gender disaggregated information pertaining to the economic and socio-economic condition of affected persons.¹⁷
- Including women much earlier on in the process can help ensure the project respects their rights. FMO's Position Statement does not clearly recognize the need to include women's voices in decision and consultation processes, such as impact assessments or FPIC processes. FMO should make clear that meaningful consultation is gender inclusive and responsive. This means that FMO does not invest only in projects with a positive impact on women but takes a pro-active role in responding to women's needs by also investing in projects prioritised by women.
- When talking about the possible positive impact of job creation, the Position Statement mentions that "FMO has set out to monitor and report on the number of jobs for women and women's access to the market place."¹⁸ We believe that this is too narrowly formulated. When looking at the impact of an investment on job creation for women it is important to realize that the number of jobs is not the most important indicator. Jobs that are created by a local investment are often temporal and poorly paid. It is also important to monitor whether the jobs created for women do not add more burden on women's already heavy work load in the family and household as this may cause further inequalities. Therefore it is not only the number of jobs created for women that should be assessed but, more importantly, the quality of the jobs and whether they offer equal pay.
- The Position Statement lacks clarity on what FMO requires from its clients with regards to gender. It states that "FMO requires, ..., its clients to operate in a non-discriminatory manner"¹⁹ and "Where relevant and applicable, FMO will seek further opportunities in achieving gender equality in the due diligence phase with the client."²⁰ We would recommend that FMO requires its clients to avoid adverse impacts of projects on women, including that the client specifically incorporates gender in its human rights policy. This should become a structural, mandatory part of the due diligence process.

c. Responsible Tax

FMO can increase its contribution to sustainable development by committing to a responsible tax policy. We believe FMO has the responsibility not only to commit to this itself but also to use its leverage to improve the tax practices of their clients. We, therefore, welcome FMO's Position Statement on Responsible Tax and appreciate the efforts FMO has put into this matter in the last few years. However, we recommend the following changes in order to strengthen and provide more clarity about what is required by its clients:

- The Position Statement should be more outspoken on the importance of good tax practices and recognize the harmful features of tax havens.

¹⁷ Like the requirements already included in the policy of the Asian Development Bank (ADB).

¹⁸ Line 35.

¹⁹ Lines 36-37.

²⁰ Line 40.

- o Line 16, for example, states that “contributions to governments are relevant for each nation...”. We suggest that this is replaced by “contributions to governments are *essential* for each nation...”.
 - o FMO should add a sentence clearly distancing themselves from the use of tax havens for both themselves as well as their clients.
- We feel it is important for FMO to show that they are willing to go beyond legal compliance when tax issues are concerned and also ask this from their clients. Therefore we suggest that line 23/24 and line 36 are replaced by “FMO complies with both the *letter and the spirit* of national and international tax regulations”. This language is also in line with the OECD Guidelines for Multinational Enterprises.
- FMO’s Position Statement on tax should include effective safeguards to ensure that it will only engage with tax-responsible clients. FMO should be clearer on what it asks from its clients. We therefore suggest that the Position Statement includes the following requirements for FMO’s clients, including financial intermediaries:
 - o A significant tool for indicating clients that have abusive tax planning practices is to require that they publicly disclose key figures and accounting data, such as company structures, beneficial ownership and country-by-country reporting. We, therefore, suggest that line 29/30 would be replaced by “FMO requires clients to explain and publicly disclose their corporate structures, its ultimate beneficiary ownership and requests the disclosure of the tax payments in each of the countries the clients are operating in (so called country-by-country reporting)”.
 - o FMO must require clients to have responsible tax policies in place which go beyond legal compliance. The policies should be public and explain how a company approaches high-risk international tax planning issues, such as the use of tax havens or low-tax jurisdictions in their company structure. This can be crucial in revealing the company’s risk appetite and tax responsibility levels, which are key elements for any investor to assess before committing funds.
 - o When financial intermediaries are concerned FMO should additionally ask their clients to ask the above from their clients.
- FMO should include a strong and clear commitment on what actions it takes if one of their (future) clients engages in active tax evasion and/or base erosion. This should include a clear statement about not engaging with clients involved in such practices as well as include this in the contracts as grounds for terminating the financial relationship.
- Communities affected by a FMO-financed project should be allowed to raise issues regarding tax evasion and/or base erosion in their complaints to the Independent Complaints Mechanism.
- In line 38, FMO mentions that it acts in line with the covenant that FMO has signed with the Dutch authorities. This provided little assurance on tax matters because the Dutch tax authorities are largely linked to tax heavens. We suggest that FMO commits to not only act in line with the covenant they have signed with the Dutch authorities but additionally makes clear arrangements with the tax authorities of all countries where FMO operates.

d. Land Governance

We are pleased to see that FMO included a separate statement on land governance in its Sustainability Policy universe. However, this Position Statement lacks ambition and does not reflect FMO’s intention to “do good” with their operations. As a development bank, FMO can be expected to not merely mitigate the negative impacts of its operations but to invest in projects with true positive impacts for people and the environment. While FMO claims to “apply the highest standards

of ethics and integrity to our business activities,”²¹ this position paper does not reflect that. Indeed, the Position Statement does not seem to require anything beyond what is already required by the IFC Performance Standards. We therefore would like to suggest the following improvements:

- Commit to respecting the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries, and Forests in the Context of National Food Security (VGGTs). It is a great missed opportunity for FMO not to include adherence to the FAO’s VGGTs. The VGGTs are developed for “States; implementing agencies;... local governments;... indigenous peoples and other communities; civil society; private sector; ...to assess tenure governance and identify improvements and apply them.”²² This means both governments, financiers and other private sector actors should implement them. Other private banks, such as the Rabo Bank, already publicly endorse the VGGTs.²³ Furthermore, FMO is actively involved in the Multistakeholder Dialogue on Land Governance, convened by the Dutch government. The main goal of this dialogue, as agreed by all the parties involved, is to improve land governance practices in line with the VGGTs. Moreover, the Dutch government publicly committed to strive for implementation of the VGGTs for all government instruments for international investments,²⁴ which should also apply for FMO’s activities. With 51% of the shares owned by the Dutch Government, FMO should follow its more progressive policy on land governance. It is unclear, then, why FMO does not include the VGGTs in its Position Statement. The VGGTs provide better protection for land rights as compared to the IFC PS in the following ways:

- While the VGGT’s are not binding, its principles are anchored in international human rights standards, for example in the Human Rights Framework of the United Nations (the OHCHR).²⁵ This would greatly add to the strength of the position paper on land governance as the draft so far lacks the anchoring of land governance in international human rights standards.
- The VGGT’s show a more inclusive understanding of the impacts an investment can have on land rights issues. Paragraph 12.12 of the VGGTs, for example, states that “Investments should not contribute to food insecurity and environmental degradation”.²⁶ This also includes indirect effects investments can have on people’s land use that do not live directly in the project area. FMO’s Position Statement does not make clear whether or not indirect effects are taken into account. Line 16, for example, states that “FMO invests in projects that may require land acquisition or result in restrictions on land use.”²⁷ We suggest to add to this sentence “...that may require land acquisition or result in restrictions on land use for both directly affected people as well as indirectly affected people by a possible change in food security or environmental degradation.” Similarly, line 32-34 states “land acquisition and its potential environmental, social and human rights impacts are a priority from the first

²¹ Line 13/14 of the Position Statement on Land Governance.

²² FAO, “Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries, and Forests in the Context of National Food Security”, 2012.

²³ “We take responsibility to promote sound and fair land governance practices, including the guidance of the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests (VGGT).” <https://www.rabobank.com/en/images/rabobank-land-governance-statement.pdf>

²⁴ Ministry of Foreign Affairs, “Actieplan en jaarrapportage Beleidscoherentie voor Ontwikkeling”, 13 June 2016.

²⁵ See for example http://www.ohchr.org/Documents/Publications/Land_HR-StandardsApplications.pdf

²⁶ FAO, “Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries, and Forests in the Context of National Food Security”, 2012.

²⁷ Line 16.

assessment of an investment project.....”²⁸ We suggest changing this into “land acquisition and direct and indirect changes on land use”.

- The VGGTs also include a broader understanding of the complexity and diversity of land tenure and land use in different contexts. The VGGTs refer to legitimate land tenure rights which includes informal and customary land use rights.²⁹ The position paper of FMO does not mention the importance of protecting informal and customary land rights. It is important to include this because many countries where FMO invests have complicated land tenure structures. We believe that it would add to the Position Statement to better reflect the complexity of land ownership and land use in many of the countries in which FMO invests by referring to legitimate land use and tenure rights.
- Improve Implementation of Free Prior and Informed Consent
 - In line 34-38, FMO states that “in all projects that involve land acquisition, FMO requires its clients to implement a process of effective and meaningful consultation”.³⁰ In lines 43-45, when indigenous people are concerned, “FMO requires its clients to undertake a free, prior and informed consent (FPIC) process for the use of their lands, resources, traditional knowledge, or intellectual property”.³¹ We believe that free, prior and informed consultation and consent should apply, in addition to indigenous people, to all other affected communities dependent on their land and natural resources for their livelihoods.
 - Furthermore, this should not only apply in projects that involve land acquisition but also projects that affect land use in more indirect ways and be extended to informal and customary land ownership.
 - While it is true that the host government has a duty to obtain FPIC under international law, its failure to do so does not absolve FMO or its client from its responsibility. It would therefore be good to include more clarity on how FMO understands this role and responsibility. This is especially important in countries with weak governments and in situations where different regulatory frameworks regarding land co-exist (e.g. legal, customary and informal frameworks). The FAO Guidance on implementation of FPIC provides various useful recommendations for FMO in this regard.³²
 - Similarly, FMO should clarify what it requires of its clients; what information FMO requests to demonstrate that FPIC has been obtained; how FMO verifies that information; what FMO does if the governments and/or clients fail to implement FPIC in a satisfactory manner; and how FMO guarantees the right of land users when the FPIC agreements are not being implemented. Again, the FAO Guidance on the practical implementation of FPIC provides several useful steps on how to implement FPIC in a meaningful way.³³ Recent events in projects such as Agua Zarca and Barro Blanco have sadly shown the complexity of implementing FPIC, and this new Position Statement is a good opportunity to show FMO’s improved understanding of the matter.

²⁸ Line 32-34.

²⁹ FAO, “Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries, and Forests in the Context of National Food Security”, 2012.

³⁰ Line 34-38

³¹ Line 43-45

³² FAO, “Respecting free, prior and informed consent - practical guidance for governments, companies, NGOs, indigenous peoples, local communities in relation to land acquisitions”, 2014

³³ FAO, “Respecting free, prior and informed consent - practical guidance for governments, companies, NGOs, indigenous peoples, local communities in relation to land acquisitions”, 2014

- Involuntary resettlement

- Line 64-68 state that “FMO encourages clients to avoid land acquisition involving involuntary resettlement.... However, where involuntary resettlement is unavoidable,....it should be minimized and appropriate measures to mitigate and/or compensate adverse impacts on displaced persons and host communities should be carefully planned and implemented. It is thus FMO’s premise to ensure that these impacts can either be avoided, and if not, mitigated and compensated within the premise of a “Do no harm” approach.” FMO could and should make a stronger statement. As a development bank FMO should strive to invest in projects that truly do good for people and the environment and not only to mitigate the harm of economic activities. Therefore any project that includes involuntary resettlement (even if legal under national law) should not be acceptable to FMO.

e. Human Rights

While we appreciate FMO’s clear commitment to respect human rights, as we described in the previous section, FMO has not articulated requirements that ensure that it and its clients meet this commitment. Assessment under the IFC’s Performance Standards, which FMO relies on,³⁴ falls short of what is required by human rights due diligence. This is because the Performance Standards do not incorporate explicit reference to human rights standards nor require human rights expertise for those conducting the assessment. We suggest that the Policy require that FMO and its client conduct human rights due diligence, as defined by the UNGPs. The Position Statement, then, should articulate exactly what methodology its clients should follow. Similarly, the Position Statement should describe how FMO undertakes its own human rights due diligence, what sources it consults, what information it requests from its client, etc.

To implement zero zero-tolerance commitment to the killings of and violent acts, threats and intimidation against human rights defenders recommended in the previous section, we suggest that the Position Statement include the measures that it will take to meet that commitment, including:

- Assess the investment context to determine if the freedoms of expression, assembly, and association are sufficiently ensured such that FMO’s policies can be implemented adequately by its client;
- Require its client to identify potential human rights impacts that the project may cause, contribute to, or exacerbate—in addition to or expressly incorporated within the assessment required by the International Finance Corporation’s Performance Standards, and to work with clients to fully address any potentially adverse human rights impacts;
- Identify and publicly disclose measures FMO and its client will take to prevent and mitigate the risks found by the assessments, including specific actions needed to protect human rights defenders;
- Include in its agreements with its clients clauses requiring them to take all reasonable measures to prevent, investigate and respond to reprisals, failure for which should result in withdrawal and full repayment of investments;
- Develop and institutionalize creative methods to enable people, including marginalized and discriminated against groups, to freely participate in consultations regarding FMO-financed activities and give or withhold their consent, as appropriate, without risk of reprisals;
- Develop a rigorous process for monitoring for threats to or other reprisals against people who express their views about FMO-financed projects;

³⁴ Lines 42-43, 52.

- Develop an urgent response system to address threats to HRDs who criticize FMO-financed activities and implement—with the consent of the HRDs—protection measures, including communication with local authorities, coordination with Dutch embassies and the Ministry of Foreign Affairs, and/or speaking out publicly in defense of HRDs; and
- Ensure that those communities likely to be affected by a project are aware of and feel safe in approaching FMO’s Independent Complaints Mechanism (ICM) and empower the ICM to examine any instances of retaliation for opposition to the project and/or participation in the mechanism process.

Again, the effectiveness of the commitments made in this Position Statement is dependent on the disclosure of information critical to project-affected communities. We reiterate our recommendation that assessments, including human rights assessments, ESAPs, and monitoring reports are shared with project-affected communities and publicly disclosed.

The Position Statement also makes reference to FMO’s Independent Complaints Mechanism as part of its commitment to human rights. As described above, however, the mechanism is only effective if project-affected communities know of its availability. Currently, there is no requirement for clients to disclose information about the ICM to project-affected communities. FMO’s support for its mechanism and its commitment to accountability is seriously undermined by its failure to ensure that those who most need the ICM are aware of it.

Again, we appreciate the opportunity to provide comments on FMO’s draft Sustainability Policy. If we can provide any additional information, please do not hesitate to contact us.

Sincerely,

Anna van Ojik, Both ENDS
Kris Genovese, SOMO