

### Safeguarding human rights in land related investments: Comparison of the Voluntary Guidelines Land with the IFC Performance Standards and the World Bank environmental and social safeguard framework

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Veröffentlichungsversion / Published Version

Forschungsbericht / research report

Zur Verfügung gestellt in Kooperation mit / provided in cooperation with:

Deutsches Institut für Menschenrechte

#### Empfohlene Zitierung / Suggested Citation:

Windfuhr, M. (2017). *Safeguarding human rights in land related investments: Comparison of the Voluntary Guidelines Land with the IFC Performance Standards and the World Bank environmental and social safeguard framework*. (Analysis / German Institute for Human Rights). Berlin: Deutsches Institut für Menschenrechte. <https://nbn-resolving.org/urn:nbn:de:0168-ssoar-53692-5>

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Analysis

# Safeguarding Human Rights in Land Related Investments

Comparison of the Voluntary Guidelines Land with the IFC Performance Standards and the World Bank Environmental and Social Safeguard Framework

Michael Windfuhr



## The Institute

The **German Institute for Human Rights** is the independent National Human Rights Institution in Germany. It is accredited according to the Paris Principles of the United Nations (A-status). The Institute's activities include the provision of advice on policy issues, human rights education, information and documentation, applied research on human rights issues and cooperation with international organizations. It is supported by the German Bundestag. The Institute was mandated to monitor the implementation of the UN Convention on the Rights of Persons with Disabilities and the UN Convention on the Rights of the Child and established Monitoring Bodies for these purposes.

## Author

**Michael Windfuhr** is Deputy Director of the German Institute for Human Rights since 2011. Since January 2017 he is member of the UN Committee on Economic, Social and Cultural Rights, CESCR. He has contributed to the effort to set standards for the right to food and was actively involved in the elaboration of the "Voluntary Guidelines on the progressive implementation of the right to adequate food" adopted by the FAO Council in November 2004 and the "Voluntary Guidelines on responsible governance of Tenure of Land, Forests and Fisheries in the context of national food security" adopted by the Committee on World Food Security in May 2012. Michael Windfuhr is a political scientist.



Analysis

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## Acknowledgements

This study was commissioned by the German Federal Ministry for Economic Cooperation and Development and written by Michael Windfuhr with support of Petra Balint and Sara Phung of the German Institute for Human Rights (DIMR). The consultants Thomas Hirsch and Frank Mischler contributed further input and support. The Institute for Advanced Sustainability Studies (IASS) was part of the project team, whose employees Charlotte Beck, Elisa Gärtner and Jes Weigelt provided constant support and guidance during the development of this study. Special thanks to Dave Morris, the language editor of this study.

The IASS and the DIMR organised three side events between 2015 and 2016 in Potsdam and at the Global Soil Week to consult about land-related issues with civil society groups as well as experts on soil, human rights and land rights coming from Germany and other countries. The final draft of the study was presented at a seminar organized by the IASS and the German Working Group on land in September 2016.

The DIMR would like to thank the Kreditanstalt für Wiederaufbau (KfW) and the Deutsche Investitions- und Entwicklungsgesellschaft (DEG) for constructive exchanges during the preparation of the study. In particular, we thank Claudia Eckhardt

and Katja Eichner from the KfW as well as Martin Geiger and Christiane Rudolph from the DEG for their comments and inputs to the study. Special words of thanks go to Birgit Gerhardus and Fritz Jung of the Ministry for Economic Cooperation and Development. All remaining mistakes stay in the responsibility of the author.

As part of the project Michael Windfuhr attended a workshop in 2015 with experts from the United States Agency for International Development (USAID), the French Ministry for Foreign Affairs and International Development, the United Kingdom Department for International Development, the African Land Policy Initiative, Babette Wehrmann and Birgit Gerhardus as well as Darryl Vhugen, the consultant from the Food and Agriculture Organization (FAO) who prepared the private sector guide for the VGGT, which the FAO published in 2016. The workshop resulted in the development of an Analytical Grid for investments in agriculture that was written for the New Alliance for Food Security and Nutrition and Grow Africa. It was written to meet a commitment made by the New Alliance Leadership Council in 2014 to develop a harmonized set of operational guidelines for implementing land-based agricultural investments in a responsible manner. The author is particularly grateful for the common work during these days and for the input provided to this study.

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## Executive Summary

The Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security (VGGT) represent a new international legal instrument, which was adopted unanimously in 2012 in the United Nations Committee on World Food Security (CFS). Following the world food crisis in 2007/2008, large-scale investments in land, increased leading to a difficult supply situation of several staple foods globally. The sudden wave of investments immediately caused a variety of problems for persons living on or using the land, such as forced or involuntary evictions accompanied by inadequate compensation. In response to mitigate (or better to prevent) such issues, the VGGT have been developed. The overall aim of the VGGT is to achieve food security and also to realise the right to adequate food while promoting responsible governance of tenure of land, fisheries and forests.

The Voluntary Guidelines are a soft law instrument that does not create new, legally binding obligations for states or responsibilities for private actors, but that applies existing governance standards, particularly for human rights, to the management of land. However, while the title refers to three themes (land, fisheries and forests), the text concentrates primarily on land issues. The VGGT's main parts address the processes of land registration, land transfers and land administration. In each part, the text concentrates to a large extent on the role of states. More than 70% of all paragraphs describe what can be expected from states and what should be avoided in order to establish a responsible governance framework for tenure.

At the same time, it also addresses the roles and responsibilities of non-state actors, particularly private actors and other third-party investors in land. A clear reference is made to the UN Guiding Principles on Business and Human Rights (UNGP, paragraph 3.2) that were adopted in June 2011 by the Human Rights Council. The UNGP describe

the responsibilities of businesses with respect to human rights, while reiterating the core role of states in implementing their human rights obligations. Business actors shall conduct adequate due diligence to ensure that they do not breach human rights.

The VGGT have gained tremendous support during the decision-making process but also subsequently in the follow-up. The positive recognition of the VGGT is a result of the transparent and inclusive two-year multi-stakeholder process that provided the basis for drafting. The document is based on the agreed language from other international negotiations and must be seen as an international legal instrument that collects, combines and further develops many standards relevant to the governance of tenure of land, fisheries and forests. The VGGT are recognised as a detailed and well-elaborated framework that provides sufficient and robust guidance to governments and governmental institutions. They were referred to by the Ministerial Declaration of the G8 in 2013, and also by all subsequent G8 Ministerial Declarations. They are continuously supported by all the G8/G7 summits, and further by the Global Donor Platform for rural development. Additionally, the VGGT were formally supported by a decision of the African Union in 2014 (African Union, 2014).

Following the call for the implementation of the VGGT, particularly at the national level, also the German Government decided to implement the Voluntary Guidelines. Germany supported the development of the VGGT already during the negotiation period. The implementation of the VGGT even became an objective of the government coalition agreement in 2013 that guides the government for the 2013–2017 legislative period.

The German Government committed to implement the VGGT, and to ensure that its own actions (projects and programmes) abroad do not contribute

to infringements of the Voluntary Guidelines as well as human rights. Land is one action area within the new special initiative “One World; No Hunger” created 2014 by the German Federal Ministry for Economic Cooperation and Development (BMZ). The VGGT can provide guidance for the development of cooperation programmes dealing with land governance. They describe what a human rights-based approach to land governance looks like.

The VGGT can be used to support investments financed by German development cooperation in further strengthening a way that they do not lead to any infringements of human rights. The financial component of German development cooperation is organised by the Kreditanstalt für Wiederaufbau (KfW), which grants credits and loans to partner governments. The KfW’s subsidiary, the Deutsche Investitions- und Entwicklungsgesellschaft (DEG) make long-term financing and advice available to private enterprises investing in partner countries. The DEG requires clients to use the International Finance Corporation’s Environmental and Social Performance Standards (IFC PS) when developing and pursuing their investment projects. The KfW has a set of policies that are applied when projects are implemented. All KfW funding activities adhere to the provisions of KfW’s Sustainability Guideline, which describes principles and procedures to assess the environmental, social and climate impacts during the preparation and implementation of FC measures financed by KfW Development Bank. The Sustainability Guideline requires compliance with Environmental and Social Standards of the World Bank for co-operation with public agencies and with the IFC Performance Standards for cooperation with the private sector as well as compliance with the ILO Core Labor Standards and with the UN Basic Principles and Guidelines for Development Based Evictions and Displacement. Furthermore, the Human Rights Guideline of the Federal Ministry for Economic Cooperation and Development is binding for KfW, with a mandatory appraisal of relevant human rights risks and impacts early in the project cycle.

The IFC PS have been written to guide the actions of private sector enterprises, including banks, and “have become globally recognized as a benchmark for environmental and social risk management in the private sector”<sup>1</sup>. The latest version was adopted in 2012, after an 18-month consultation process with stakeholders around the world. The Performance Standards have not been written explicitly within a human rights-based approach. However, they reflect implicitly the content of several human rights standards, and help to avoid infringement of human rights. They were developed with particular sensitivity to land-related problems and vulnerable segments of society. The WB ESF primarily addresses states, and requires them to apply environmental and social standards to projects supported by World Bank loans. These standards were developed in the 1990s, following public discussions on the negative impacts of large dam projects in developing countries, which were supported by public funds through the World Bank. The drafts of the WB ESF were under internal and public review and widely discussed in recent years by the Bank, its member states and other stakeholders. The process has been organised through global consultation with a large variety of stakeholders. The final version was adopted by the World Bank Board on 4 August 2016 (World Bank ESF, 2016).

This study was commissioned by the German Federal Ministry for Economic Cooperation and Development in order to help identify whether there are differences and potential issues in the VGGT that are currently omitted or only partially covered by the IFC PS or the World Bank Safeguards. It will also discuss how potential gaps might be addressed. The intention of the Ministry is that development policy actors in Germany that apply the IFC PS or the World Bank Safeguards can make use of this study to analyse in how far their own use of policies and standards should address potential gaps. Moreover, it will analyse whether there are issues that require closer examination and further investigation in order to provide a complete and adequate framework/international

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1 See IFC web-site: [http://www.ifc.org/wps/wcm/connect/Topics\\_Ext\\_Content/IFC\\_External\\_Corporate\\_site/Sustainability+and+Disclosure/Environmental-Social-Governance/Sustainability+Framework](http://www.ifc.org/wps/wcm/connect/Topics_Ext_Content/IFC_External_Corporate_site/Sustainability+and+Disclosure/Environmental-Social-Governance/Sustainability+Framework) (last accessed: 20.12.2016).

legal instrument committed to ensure the respect for and implementation of human rights.

### Results of the Comparison

The study came to the conclusion that the findings of the VGGT standards and norms can best be compared with the IFC PS and the WB ESF by creating four categories: (1) Issues that are regulated differently in the VGGT or where the VGGT require more attention, particularly when risks are seen in the overall context in which a project is developed; (2) Issues that are covered in the IFC PS and the new WB Framework, but which are given greater attention and as well as importance and are described differently in the VGGT; (3) Issues that are dealt with comparably in the VGGT, IFC PS and the new WB ESF and do not require additional treatment; (4) Issues that are dealt with better in the IFC PS or the WB Framework, with no further treatment needed. A tabular summary (Table 10) with core findings can be found in Chapter 4 at the end of the study.

The IFC PS in its version of 2012 are directed toward clients and private borrowers. They are sensitive to many of the concerns reflected in the VGGT. The comparison has shown that the IFC PS already cover most concerns raised by the VGGT in an adequate and sensitive manner. They present a reasonable and robust framework for project impact assessments related to land issues (category III and IV of the Table 10), and also that most of the core issues of the VGGT are also considered in the IFC PS. The institutions that apply the IFC PS therefore already cover essential core elements of the VGGT.

At the same time the comparison identified issues where the VGGT describe land related governance concerns more detailed. Not all aspects are considered in the other frameworks. Most of the concerns go beyond the scope of a single investment project by a private enterprise. Because the VGGT are directed first and foremost to governments, they recommend that land policies for registration, land administration and land transfer should be embedded in a well-developed spatial planning. Those should be linked to regional development plans that consider impacts of land investments on food security, water flows, the environment

and the overall social situation of the potential project region. If such an overall approach of land policy is not given, potential impacts might easily be overseen. Therefore, the study recommends to perform an extra risk assessment (ex ante) if there is the probability a project might cause one or more of these issues. If the project is likely to have such an impact, the second recommendation supports the conduct of substantive human rights due diligence risk assessment to identify potential undesirable impacts. Additionally, the study identified several issues that are covered in the IFC PS and the WB Framework, but which are giving greater attention as well as importance and are described differently in the VGGT (category II). In respect to projects with a high risks land component, the study recommends therefore the utilisation of standards and interpretations presented in the VGGT as a role model when assessing the risks, for example on gender related problems.

In reference to the new World Bank ESF safeguards the comparison comes to partially different conclusions. The WB ESF puts more responsibility toward borrowers own national systems for (land-) governance. At the same time, human rights obligations are not mentioned explicitly in its framework. Under these circumstances, projects and investments with substantive land component might face additional risks and need to get more attention than under the IFC PS framework. The more project impacts depend on the quality of the governance system of a borrower, the better the knowledge of the governance system, its imperfections as well as loopholes needs to be. Therefore, supported projects and given policy advices in the land sector needs to be carefully analysed.

Since most of the findings as well as the structure of the WB ESF and IFC PS are comparable, similar conclusions can be drawn. Nevertheless, there are specificities of the new WB ESF, which are particular relevant for land related projects, yet are differently dealt with in the IFC PS. While the new policy mentions in a broad vision statement that “the World Bank's activities support the realization of human rights”, it does not include human rights protections in the text of its obligations for borrowers. The compliance of any land governance related standard will be difficult to request from

borrower when human rights are not included in the requirements from the outset. Resettlements plans are no longer required before the project approval. These changes affect the overall project planning process and complicate an adequate dealing with land related risks. In projects with high land related risks an extra human rights impact assessment should be foreseen, in order to avoid potential harm.

There is a strong need to have access to additional information and assessments particularly when (1) the participation of affected persons and communities is not properly guaranteed, (2) their right to organise or to speak freely is compromised by

laws with the result of a restriction of their operations. In such situations it becomes problematic to assess the potential risks adequately. The recommendation for projects with a larger land component is that development finance institutions need to follow national developments, with respect to the governance quality and the borrowers capacity, more closely in order to adjust own measures, when the duty bearer is not (or no longer) functioning as needed. The more depends on own decisions, policies and enforcement mechanism of borrowers, the greater transparency is needed and the more it is relevant to use a human rights based approach by promoting accountability in all land related policies.

# 1 Introduction

The Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security (VGGT) represent a new international legal instrument, which was adopted unanimously in 2012 by the United Nations Committee on World Food Security (CFS). The Guidelines are a soft law instrument that does not create new, legally binding obligations for states or responsibilities for private actors, but that applies existing governance standards, particularly for human rights, to the management of land.

The document was developed in response to the rapid increase of often large-scale investments in land, which became evident in the years following the 2007/2008 world food crises. Several factors combined to encourage increased investment in land: The difficult supply situation of several staple foods globally was accompanied by traditional food-exporting countries ceasing exports; Sharp price increases made agricultural produce a competitive raw material for the energy sector, fostering increasing demand for biofuels; The price trends for most agricultural products following the crisis encouraged, for the first time in decades, interest in investing in land and agricultural production. The sudden wave of investments immediately caused problems for persons living on or using the land, such as forced or involuntary evictions with inadequate compensation; and non-communication with – and neglected

participation of – affected individuals or communities. The term ‘land grabbing’ was introduced by research publications from civil society organisations (CSO) and books that described the trend. The problem started to gain prominence within national and international forums.<sup>2</sup> The Committee on World Food Security (CFS), newly mandated during the world food crises, decided in 2010 to start negotiations on a new legal instrument dealing adequately with the problem. Following two years of intensive international negotiations, the document was finalised and adopted in the CFS.

The relevance of land governance problems resulting from social impacts and conflicts was immediately recognised by governments, which then reacted quickly. As early as 2009, several intergovernmental organisations began a fast-track process to adopt seven principles for responsible agricultural investment, intended to provide guidance to investors and avoid investments that might cause harm in local agricultural communities. The international organisations reacted particularly quickly to the land-grab debate, as they wished to avoid such discussions negatively influencing investors and the amount of agricultural investment.<sup>3</sup> The fast-track solution was rapidly developed and promoted in order to avoid a more rigid framework in international law. This approach was seen as inadequate by many states and observers, and the idea of developing comprehensive standards for responsible agricultural

2 Cf. Grain. [www.grain.org](http://www.grain.org); World Bank (2011); Anseeuw, W. et al. (2012: 29). The International Land Coalition developed a definition of land grabs during its 2011 assembly in Tirana, Albania: “Land grabs are acquisitions or concessions that are one or more of the following: (i) In violation of human rights, particularly the equal rights of women; (ii) not based on free, prior and informed consent of the affected land-users; (iii) not based on a thorough assessment, or are in disregard of social, economic and environmental impacts, including the way they are gendered; (iv) not based on transparent contracts that specify clear and binding commitments about activities, employment and benefits sharing; and (v) not based on effective democratic planning, independent oversight and meaningful participation” (Art. 4 of the Tirana Declaration). ILC (2011): *Securing Land Access for the Poor in Times of Intensified Natural Resources Competition*. Report of the ILO International Conference and Assembly of Members, Tirana, Albania 24–27 May 2011.

3 World Bank, FAO, UNCTAD and IFAD (2009): *Principles for Responsible Agricultural Investment (RAI) that Respects Rights, Livelihoods and Resources*, Knowledge Exchange Platform for Responsible Agro-Investment (RAI), [http://www.fao.org/fileadmin/templates/est/INTERNATIONAL-TRADE/FDIs/RAI\\_Principles\\_Synoptic.pdf](http://www.fao.org/fileadmin/templates/est/INTERNATIONAL-TRADE/FDIs/RAI_Principles_Synoptic.pdf) (last accessed: 20.12.2016). Cf. Chapter 1.



investment was then also taken up by the CFS in order to formulate a more substantive response to the problems of large-scale land acquisitions. The CFS decided in 2010 to develop the voluntary guidelines, first on responsible tenure of land, fisheries and forests, and later the Principles for Responsible Investment in Agriculture and Food Security. Both texts are much more elaborate than the seven principles from 2009 and were developed through a broad, multi-stakeholder process.

The Principles for Responsible Investment were negotiated between 2012 and 2014, in an open-ended working group of the CFS through a process similar to the VGGT, and were endorsed by the CFS 2014. They received broad support from states but criticism from CSOs.<sup>4</sup> The core objective of the Principles is to define state obligations and the responsibilities of other actors toward all other issues related to agricultural investments, except the governance of land tenure, which was already covered in the VGGT.

Following their adoption, the VGGT received much support from different actors. The Food and Agriculture Organization of the United Nations (FAO) set up a project to support the implementation of the VGGT. Several guides have been developed since 2012, which offer valuable information and guidance to different audiences on how to implement the VGGT.<sup>5</sup> They were referred to by the Ministerial Declaration of the G8 in 2013 and by all subsequent G8 Ministerial Declarations; they are continuously supported by all the G8/G7 summits, and also by the Global Donor Platform for rural development. Additionally, the VGGT were formally supported by a decision of the African Union in 2014.<sup>6</sup>

Germany already supported the development of the VGGT during the negotiation period. The country was actively involved in the negotiations and also provided financial support for the process in order to allow broad, multi-stakeholder participation. Following the adoption of the VGGT, they were taken up within the activities of relevant ministries. The implementation of the VGGT even became an objective of the government coalition agreement in 2013 that guides the German Government for the 2013–2017 legislative period.

Land is one action area within a new programme to address hunger worldwide, started in 2014 by the German Federal Ministry for Economic Cooperation and Development (BMZ). The German Government committed to implement the VGGT and to ensure that its own actions (projects and programmes) abroad do not contribute to infringements of the VGGT and human rights. The VGGT can provide guidance for the development of cooperation programmes dealing with land governance. They describe what a human rights-based approach to land governance looks like.

The VGGT can be used to support investments financed by German development cooperation in further strengthening a way that they do not lead to any infringements of human rights. The financial component of German development cooperation is organised by the Kreditanstalt für Wiederaufbau (KfW), which grants credits and loans to partner governments. The KfW's subsidiary, the Deutsche Investitions- und Entwicklungsgesellschaft (DEG) make long-term financing and advice available to private enterprises investing in partner countries. The DEG requires clients to use the International Finance Corporation's Environmental and Social

4 The Committee on World Food Security (CFS) endorsed the Principles for Responsible Investment in Agriculture and Food Systems on 15 October 2014. The civil society mechanism of the CFS decided, after the active engagement of CSOs in the negotiation process, not to endorse the principles because they are not fully oriented towards supporting smallholder investment, but also describe rules and standards that can be applied to larger-scale investments (FAO, CFS 2014).

5 To date, the FAO has produced eight technical guides to support the implementation of the VGGT (Issues: Gender, Forestry, Indigenous Peoples, Agricultural Investment, Legal Frameworks, Pastoralists, Private Sector and a preliminary guide to the Fishery sector. The texts are available at: <http://www.fao.org/nr/tenure/voluntary-guidelines/en/> (last accessed: 06.12.16). The most relevant guides for this study are No. 4 on Agricultural Investment and No. 7 on Private Sector. Cf. Chapter 1.

6 Cf. the African Union framework and guidelines on land policy, <http://rea.au.int/en/content/framework-and-guidelines-land-policy-africa> (last accessed: 02.02.17) and the Guiding Principles on Large Scale Land Based Investments in Africa (2014), developed by the African Union, the African Development Bank and the UN Economic Commission for Africa [http://www.uneca.org/sites/default/files/PublicationFiles/fg\\_on\\_land\\_policy\\_eng.pdf](http://www.uneca.org/sites/default/files/PublicationFiles/fg_on_land_policy_eng.pdf) (last accessed: 20.12.2016).

Performance Standards (IFC PS) when developing and pursuing their investment projects. The KfW has a set of policies that are applied when projects are implemented. All KfW funding activities adhere to the provisions of KfW's Sustainability Guideline, which describes principles and procedures to assess the environmental, social and climate impacts during the preparation and implementation of FC measures financed by KfW Development Bank. The Sustainability Guideline requires compliance with Environmental and Social Standards of the World Bank for co-operation with public agencies and with the IFC Performance Standards for cooperation with the private sector as well as compliance with the ILO Core Labor Standards and with the UN Basic Principles and Guidelines for Development Based Evictions and Displacement. Furthermore, the Human Rights Guideline of the Federal Ministry for Economic Cooperation and Development is binding for KfW, with a mandatory appraisal of relevant human rights risks and impacts early in the project cycle.

The objective of this study is to compare the content of the VGGT and its related standards to the main frameworks for environmental and social performance standards used in development cooperation and by the private sector. The study compares the VGGT with the IFC PS as well as to the new WB ESF, from August 2016. The study will identify whether there are differences and potential issues in the VGGT that are currently omitted or only partially covered by the IFC PS or the World Bank Safeguards. It will also discuss how potential gaps might be addressed and how development policy actors that apply the IFC PS or the World Bank Safeguards can make use of this study to analyse in how far their own use of policies and standards should address potential gaps. Moreover, it will analyse whether there are issues that require closer examination and further investigation.

The IFC PS have been written to guide the actions of private sector enterprises, including banks, and "have become globally recognized as a benchmark for environmental and social risk management in the private sector". The latest version was adopted in 2012, after an 18-month consultation process with stakeholders around the world. The Standards have not been written explicitly within a human rights-based perspective. However, they reflect implicitly the content of several human rights standards, and help to avoid infringement of human rights. They were developed with particular sensitivity to land-related problems and vulnerable segments of society. The World Bank Safeguards primarily address states, and require them to apply environmental and social standards to projects supported by World Bank loans. The standards were developed in the 1990s, following public discussions on the negative impacts of large dam projects in developing countries, which were supported by public funds through the World Bank. The second draft of the WB ESF safeguards was under review and widely discussed in recent years by the Bank, its member states and other stakeholders. The process has been organised through global consultation with a large variety of stakeholders. The final version was adopted by the World Bank Board on 4 August 2016.<sup>7</sup>

Following the adoption of the VGGT, several actors developed material to guide their implementation. A considerable number of donors developed their own guides on how to implement the VGGT in their own development policies or to orient the actions of other actors, in particular the private sector.<sup>8</sup> The material was developed to support those investors willing to invest in rural areas, and to help them understand the requirements. The FAO has set up its own team to develop information material and guidance on how to implement the Voluntary Guidelines for different actors and issue areas. In 2016 the FAO published a private sector guide that is also relevant as background

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7 The process has been quite comprehensive and is well documented on the World Bank website. The final version can also be found at: <http://www.worldbank.org/en/news/press-release/2015/08/04/world-bank-board-committee-authorizes-release-of-revised-draft-environmental-and-social-framework> (last accessed: 10.12.2016).

8 Reference to the French Guide and to the USAID guide can be found on the website of the Global Donor Working Group on land: <https://www.donorplatform.org/land-governance/global-donor-working-group-on-land> (last accessed: 10.12.2016).

material for this study.<sup>9</sup> A preliminary version of those sectoral guidelines was used by several donors to develop an analytical grid for implementation of the VGGT by private sectors.<sup>10</sup> These two texts are very well structured, and have therefore been taken into account for this study in order to describe what the VGGT expect from private actors by using language that has been intensively consulted by many actors. The FAO developed the guide in a broader process with input from many stakeholders. This study uses the useful analytical scheme developed by the FAO, both to avoid inventing a new framework and also to facilitate comparison with the IFC Performance Standards and the new World Bank Environmental and Social Safeguard Framework.

The analysis has the following structure: The second chapter is devoted to the development of the VGGT. It presents the structure of the Guidelines' text and discusses both its strengths and limitations as a new international legal instrument. It identifies how the VGGT describe states' obligations at the national level, but also which obligations must be met by states when investing and acting abroad, also in cooperation with development aid.

The comparison presented in the **third chapter** is based on that analytical framework, and compares the VGGT with the standards included in the IFC PS and WB ESF. The analysis identifies which actions the VGGT stipulates as being relevant for

private actors, and compares those to relevant provisions of the IFC PS and the final version of the WB ESF. Both frameworks (IFC and WB safeguards) have many similarities as safeguard instruments (e.g., they often use the same wording) but, nevertheless, also deviate from each other, particularly as they address different actors. The findings of the comparison are grouped into four different categories: (1) Issues that are regulated differently in the VGGT or where the VGGT require more attention, particularly when risks are seen in the overall context in which a project is developed; (2) Issues that are covered in IFC PS and the new WB framework, but which are given greater attention as well as importance and are described differently in the VGGT; (3) Issues that are dealt with comparably in the VGGT, IFC PS and the new WB ESF and do not require additional treatment; (4) Issues that are dealt with better in the IFC PS or the WB framework, with no further treatment needed.

The analysis concludes with Chapter 4, which provides a summary of the comparison and the recommendations that can be drawn from it. This chapter includes Table 10, which compares the most relevant provisions from the various frameworks. The executive summary at the beginning of the report provides an overview of the study findings. Along with the concluding Chapter 4, it enables a full overview of the main findings of the study.

9 The FAO developed the first draft of a private sector guide in 2014, titled: "Operationalizing the Voluntary Guidelines on the Responsible Governance of Tenure: A Technical Guide for Investors". This draft was used to develop "The Analytical Framework for Land Based Investments in African Agriculture". The FAO technical guide was finally integrated into FAO-VGGT Technical Guide No. 7 (2016) "Responsible Governance of Tenure. A Technical Guide for Investors" (Rome, 92 pp). Also relevant is FAO-VGGT Technical Guide No. 4 (2015) "Safeguarding Land Tenure Rights in the Context of Agricultural Investment" (Rome, 112 pp).

10 New Alliance (2015).

## 2 Voluntary Guidelines on Responsible Governance of Tenure of Land, Fisheries and Forests

### 2.1 Strengths and weaknesses of the new legal instrument

The United Nations *Voluntary Guidelines on Responsible Governance of Tenure of Land, Fisheries and Forests* (VGGT<sup>11</sup>) were adopted in May 2012 in the UN Committee on World Food Security (CFS). They were developed during a two-year process of intensive negotiations in an open-ended working group of the CFS, a format that also allows non-state actors to participate in the negotiations. In the context of the CFS, multi-stakeholder participation was institutionalised. Civil society has developed its own civil society mechanism (CSM), which coordinates all inputs from civil society actors with the CFS, as the private sector is doing in developing its own private sector mechanism (PSM).<sup>12</sup> The CFS mandate was renewed during and after the world food crises of 2007/2008, because the UN system proved to be slow and poorly coordinated during the crises. In order to guarantee better information and coordination in future, the CFS, a pre-existing committee, was revitalised with a new mandate and a multi-stakeholder orientation.

One of the first projects started by this renewed international governance mechanism for food security issues was a response to the rapid increase

in large-scale land investments that was observed in the months following the price increases seen in most agricultural produce after the world food crises. It was decided to develop a new, international legal instrument in relation to land tenure governance. The issue was seen as particularly important due to the wave of investments in land and other forms of land transfers after 2008 in many parts of the world. In 2009, the CFS decided to develop the VGGT. The negotiations took place from 2010 to 2012. Finally, the document was adopted unanimously, which was surprising for negotiations on such a complex issue as land. This result also supported the newly established CFS, showing the relevance of the institution.<sup>13</sup>

Following the food price crises, after decades of low world market prices for many agricultural products, due to the intensive use of agricultural subsidies in the EU and the USA, the changing price trends in agricultural markets initiated a wave of investment in land. Different actors became active based on different motivations:

Some investments were and are made by other states or state enterprises. During the crises, some food-exporting countries ceased exports of staple food products. Due to concerns that world markets could close down again in any further food crises as they did in 2007/2008, these

11 The Voluntary Guidelines will also be referred to as VGGT or as the Guidelines throughout the document.

12 Cf. Websites referring to the United Nations Committee on World Food Security (CFS): <http://www.fao.org/cfs/en/> (last accessed: 07.03.2017), Civil Society Mechanism (CSM): <http://www.csm4cfs.org/> (last accessed: 07.03.2017) and Private Sector Mechanism (PSM): <http://agrifood.net/docs/cfs-2015-private-sector-engagement/45-cfs-42-annotated-agenda> (last accessed: 07.03.2017).

13 This is of great importance to the new CFS because it is the first international standards-setting instrument adopted by the CFS. Despite addressing such a complex series of issues, consensus was reached within two years. This can be seen as a good signal for the capacity of the CFS to regulate complex global issues with respect to food security challenges.

actors bought land in order to ensure food supplies for their own populations.

Other investments in land were based on/derived from speculative reasons because land is seen as a safe haven after the financial crisis of 2009 and the low-interest policies of most central banks.

A third group of investors is from private companies that identified new opportunities to invest in agriculture, including both national and international investors. A fourth motivation for investments was associated with the energy and fuel markets. The parallel trend of high prices for energy and the search for more carbon-neutral energy sources supported increasing worldwide demand for biofuels.

The increasing amount of land transfers was documented by several studies at that time,<sup>14</sup> and the term 'land grabbing' was used to indicate that several of those investments were associated with negative environmental, social or human rights impacts. Quite often, the land bought, leased or designated for production was already used by persons living and working on the land, often representing weaker segments of society without documented user or property rights. The exact figures of land transfers are still debated, and differences have been highlighted between announced and actual land deals. Nevertheless, the trend is visible since the world food crises, which generated sufficient attention to enable the CFS to become active so quickly. Several donors and CSOs initiated established the Land Matrix Initiative, an observatory to monitor large-scale land acquisitions (see footnote 13).

The second assessment of the Land Matrix Initiative was recently published (Nolte et al., 2016).<sup>15</sup> The assessment concludes that land acquisitions are still an important trend. While the overall data availability is still limited and many aspects are not researched and understood comprehensively,

some trends are evident. While in 2012 many projects were in an initial phase (intended projects) and it was still unclear how many projects would finally be concluded and operated, today it is possible to infer that many projects have been realised. In particular, agricultural land acquisitions have become increasingly (around 70%) operational. The average time to get projects started seems to be approximately three years. The majority of projects relate to food crops. Of the overall 26.7 million ha of operational agricultural land that is documented by the land matrix, 9.2 million ha are devoted to food crops, essentially oil seeds such as *Jatropha*, cereals like corn and wheat, and sugar. The second-largest area is cropped with palm oil (5.6 million ha) followed by biofuels (5.1 million ha). Around 40% of all deals involve private actors, more than originally thought in the literature, particularly in Africa and Latin America. Another 30% involve firms listed on stock exchanges, with a larger focus on Asia and Europe. Investment firms and state actors account for only 15% of all deals. During the first month after the world food crisis, they presented the largest group of actors involved in land deals, but their relative importance has since declined slightly.<sup>16</sup>

Also evident is that land acquisitions, particularly cropland investments, often target relatively highly populated areas. Therefore the projects under operation do have significant social-economic and ecological impacts. These impacts can be positive because several projects in these relatively densely populated areas involve smallholder farmers in the surrounding areas as contract farmers. Nevertheless, the overall research on impacts is still not well developed, although it is possible to conclude that local communities are often bypassed by decisions affecting them. The information on displacement and compensation is very limited. In at least one-third of all projects, people lost access to land but might have been compensated.

14 The World Bank first conducted an analysis in 2009. Several donors and CSOs initiated an observatory to monitor large-scale land acquisitions. They established the Land Matrix Initiative, a platform of more than 40 institutions and organisations hosted by the International Land Coalition (ILC), which organised a website with information on all relevant projects. A first report documenting the results of that observatory was published in 2012, cf. Anseeuw, W. et al. (2012).

15 The second analysis was published in October 2016.

16 All figures in this paragraph are taken from Nolte et al. (2016).



The increase of investments in 2009 and subsequent years was to a certain degree surprising because rural areas in many parts of the world had suffered severe public and private underinvestment over several decades. In many states, rural areas and rural populations are not the focus of governmental attention, and were neglected. The African Union decided in 2003 that all states should invest at least 10% of their budgets on agriculture and rural development.<sup>17</sup> Twelve years later, fewer than 10 states had achieved that goal. As a consequence, rural areas are often forgotten areas, characterised by very weak governance institutions and infrastructure. Institutions are weak throughout all governance areas, ranging from land registration to support for farmers or rural economies. Rural areas also suffer from weak access to credits, market information, weather services, support for dealing with the effects of climate change and other agricultural extension services in general. Private investment was also weak. Smallholders often lack the resources to make investments and also lack access to credit and larger private investments. Moreover, they were reluctant to invest for many years due to the very low world market prices for most agricultural produce. Even many food-producing multinationals had withdrawn from direct production in recent decades, abandoning the risks associated with agricultural production and instead using the cheap world market prices to buy their resources.<sup>18</sup>

The price trend change in 2008 was needed, particularly in order to attract private investors again. Nevertheless, substantial increases are still required in public investment. After decades of underinvestment, public investments are urgently needed in rural areas in order to increase governance in these areas as well as to support the weaker and more marginalised groups living in

rural areas. Private investment alone will prove insufficient if infrastructure remains weak, conflicts are predetermined and more vulnerable groups are easily overlooked. This is exactly what has occurred in many cases of so-called land grabbing. The public infrastructure, ranging from land cadastre institutions up to courts dealing with land conflicts, are missing or deficient for managing the sudden large influx of capital in a sustainable manner. Combined with substantial numbers of reported and documented land grabs,<sup>19</sup> this situation created an atmosphere that made it possible to develop and adopt the VGGT, with its strong emphasis on governance and human rights.

Based on the low level of investment in rural areas in the decades before the world food crises, all forms of investments in 2008 and 2009 were welcomed by the FAO (2009) and other intergovernmental experts.<sup>20</sup>

Before the development of the VGGT, there was already – as described briefly above – a first and quickly initiated attempt to develop a standard for responsible investments in land. This initiative was started just after the new CFS started to look into the land issue in 2009. Particular international organisations wanted to support the trends in agricultural investment through the fast-track formulation of some responsibility standards in order to guide potential investors on best practice and how to increase public support for such types of investment. A list of seven principles for responsible investments was developed in 2010 (Responsible Agricultural Investment Principles) by the World Bank, the International Fund for Agricultural Development (IFAD), the FAO and other donors. This fast-track attempt to develop principles for responsible agricultural investment received a lot of support from donors and intergovernmental organisations (IGOs), but failed in

17 More background information on the 2003 Maputo Declaration can be found on the NEPAD website: <http://www.nepad.org/resource/au-2003-maputo-declaration-agriculture-and-food-security> (Last accessed: 10.12.2016).

18 Cf. UNCTAD (2014) World Investment Report 2014 and Windfuhr, M. (2013).

19 Cf.: [www.grain.org](http://www.grain.org) and World Bank (2011) and Anseeuw, W. et al. (2012).

20 FAO (2009) "How to Feed the World 2050". [Conference proceedings]. [http://www.fao.org/fileadmin/templates/wsfs/docs/expert\\_paper/How\\_to\\_Feed\\_the\\_World\\_in\\_2050.pdf](http://www.fao.org/fileadmin/templates/wsfs/docs/expert_paper/How_to_Feed_the_World_in_2050.pdf)



the long run to achieve legitimacy, inter alia due to the weak elaboration process.<sup>21</sup>

In 2010, the CFS accepted the task of standard-setting in this area, and decided to develop its own instrument, namely the VGGT. It consecutively elaborated the Principles of Responsible Investment in Agriculture and Food Systems within its mandate and through a broad, multi-stakeholder negotiation process which took place in 2013 and 2014. Eventually, in October 2014, they were adopted in the CFS.<sup>22</sup>

### Comprehensive negotiations process

The VGGT gained tremendous support during the decision-making process but also subsequently in the follow-up. The drafting process was generally considered to be adequate, as demonstrated by the resulting highly comprehensive document. This positive recognition of the VGGT is a result of the transparent and inclusive two-year multi-stakeholder process that provided the basis for drafting. The VGGT has also been recognised as a detailed and well-elaborated framework that is sufficiently robust to provide guidance to governments and governmental institutions. The document is based on the agreed language from other international negotiations and must be seen as an international legal instrument that collects, combines and further develops many standards relevant to the governance of tenure of land, fisheries and forests. Even the 2013 G8 summit endorsed an initiative to support the implementation of the VGGT.<sup>23</sup>

Meaningful implementation is now required, both for home and host countries of investments. This also requires that donors should bring all their instruments into line with the VGGT, beginning with direct project support, including policy advice, up to support for investment funds. Implementation is also required of private investors in agriculture. Several multinational companies, inter alia, Coca Cola, Nestlé and Pepsi,<sup>24</sup> recently

announced that they will respect the VGGT in all further operations. Therefore, it is useful to discuss how the VGGT can best be implemented by different actors.

## 2.2 Importance and relevance of the VGGT for different actors

The importance and relevance of the VGGT for relating or guiding actors that want to invest in agricultural land can be explained by highlighting six different features of the text:

### 2.2.1 Multi-stakeholder accountability

Adequate to deal with the problems that investments in land might create, the VGGT address all actors involved by describing their respective obligations and responsibilities in this context. In the full title (Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security), the phrase “in the Context of National Food Security” was chosen as analogous to the Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food in the Context of National Food Security (Right to Food Guidelines), adopted also unanimously in 2004 by the FAO Council. As with the Right to Food guidelines, the purpose of the annex on national food security is to highlight the importance of national action and national obligations for the implementation of these guidelines. The intention of the drafters was to make clear that it is first and foremost the state which is the primary duty bearer, and needs to guarantee fair as well as proper land administration and management of land transfers. The state has to set the rules for investors and ensure that the rule of law is applied in all cases of land investment. Accordingly, the majority of the VGGT paragraphs are directed towards state actors.

21 The Principles for Responsible Agricultural Investments can be found on the UNCTAD website: <http://unctad.org/en/Pages/DIAE/G-20/PRAI.aspx>; The IGOs have also created a knowledge platform: Inside RAI. <https://www.responsibleagroinvestment.org/> (last accessed: 07.03.2017).

22 Cf. footnote 3, cf. FAO and CFS (2014).

23 Cf. Paragraph 44 of the G8 Lough Erne Declaration (2013).

24 Cf. FAO (2014b) [press release of 15.04.2014]: <http://www.fao.org/news/story/en/item/224619/icode/> (last accessed: 02.02.2017).

The primary objective of the framework is to: “improve governance of tenure of land, fisheries and forests. They [the Voluntary Guidelines] 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 (Guideline 1.1, of the VGGT)”.

At the same time, the VGGT are far from being restricted to the responsibilities of host states. They also discuss the role of those states that invest in other countries abroad, either directly or through state-owned companies or sovereign wealth funds. As shown by the cases of large-scale land investment in recent years, several of the largest land deals were concluded by third states, often by state-run agencies. Therefore, the VGGT take into consideration the role of states that act abroad, both as autonomous actors but also as home states of business enterprises that invest abroad. For the first time, the obligations of home states for business actions abroad are explicitly recognised in an inter-governmentally negotiated document: “When States invest or promote investments abroad, they should ensure that their conduct is consistent with the protection of legitimate tenure rights, the promotion of food security and their existing obligations under national and international law, and with due regard to voluntary commitments under applicable regional and international instruments (Guideline 12.15, of the VGGT, FAO (2012)).” This formulation, which was proposed by the African Group during the negotiation process, goes beyond agreed language and recognises the obligation of home states with regard to support for the economic activities of businesses abroad.

VGGT Guideline 3.2 directly addresses the responsibilities of non-state actors. The wording of this particular paragraph is essentially taken from the United Nations Guiding Principles on Business

and Human Rights (UNGP) (Guidelines 3.2 of the VGGT P).<sup>25</sup> It highlights that “business enterprises should act with due diligence to avoid infringing on the human rights and legitimate tenure rights of others”.<sup>26</sup> The VGGT require that business enterprises “should include appropriate risk management systems to prevent and address adverse impacts on human rights and legitimate tenure rights”. VGGT Guideline 3.2 follows the UNGP in describing what is expected from business enterprises. Moreover, further provisions in the VGGT also set out what is expected of business enterprises (see below). Overall, far fewer paragraphs deal with the direct responsibilities of business enterprises than those addressing the obligations of states. The document consistently differentiates between state obligations and responsibilities of private actors and, thus, complies with the core differentiation of the UN Guiding Principles on Business and Human Rights. For this reason, the importance and co-responsibility of private actors to prevent breaches of human rights during the process of land acquisition, transfer and operation is recognised.

### 2.2.2 Human rights-based approach

The document incorporates a human rights-based approach (HRBA), with various sections of the document reflecting the importance of human rights:

- (1) It addresses the accountability of all relevant actors in precise language, and is based on existing human rights obligations under binding treaties, such as the right to adequate food within the International Covenant on Economic, Social and Cultural Rights. Moreover, the document covers all levels of government, (local, district, regional to national) and thus provides for adequate regulation of land tenure, which requires governmental acts and activities at all levels. The accountability of states acting abroad is also taken up, as are the responsibilities of other actors. The framework is therefore very clear on the various roles of different stakeholders in guaranteeing human rights standards.

<sup>25</sup> United Nations (2011b).

<sup>26</sup> Quote from VGGT (3/2).

- (2) The document provides a clear description of human rights principles as part of the overall description of principles for implementation, such as non-discrimination, transparency and participation.<sup>27</sup>
- (3) In all major parts of the document (land registration, transfer and administration), processes are described in a human rights-based manner, inter alia with the participation of all relevant groups, with access to justice or functioning complaint mechanisms at all levels.
- (4) The framework expresses, throughout the text, what should be avoided when land investments take place; these are generally potential violations of human rights. It takes the concerns of vulnerable groups seriously, which are reflected in all parts of the text. These parts systematically refer to different vulnerable groups in rural areas, including smallholder farmers, pastoralists, fishers and hunters, as well as indigenous peoples.
- (5) The term governance is used to describe a government that is sensitive and responsible to its human rights obligations and respects the rule of law. Governance goes hand in hand with sensitivity to people's concerns and their participation at all levels in processes related to land as well as with reversibility. Affected persons or communities can file complaints when necessary or when they feel that they are not being treated adequately.
- (6) Finally, the text incorporates a gender perspective. Existing forms of gender discrimination are taken into consideration in all parts of the text concerning land registration, transfer and administration.

### 2.2.3 Structure

All these elements are applied to the three main dimensions for the governance of land tenure:

land registration, all forms of land transfer and land administration.<sup>28</sup> The structure of the text is clear. All three main parts of the document include precise descriptions of core concerns:

- (1) **Land registration** is the activity where most problems occur in terms of recognising legitimate tenures rights, or where most problems historically originated and developed. Many land transfer processes suffer from a weak baseline situation. Many land governance problems are founded in the historically incomplete recognition of land users. Problems were substantial when certain groups (e.g., ethnic minorities) were overlooked, or when in traditional land use settings, individual access rights were not taken care of or not recognised from a gender perspective. In socialist settings, where formally all land belongs to the state, often the factual land use patterns are not adequately registered, so that land can be transferred without consideration of the historic land use. Land registration is therefore the starting point for any meaningful recognition of those persons that use land.
- (2) **Land transfers** can be managed better when conducted in a sensitive and comprehensive manner. If the current status of land registration is incomplete or if several land users are not formally recognised or identified, land transfer processes present a high risk of infringing human rights. Land transfer processes in situations of incomplete land registration should start from robust research into the current land use situation in order to understand the harm to potentially affected persons. Furthermore, it needs to be established whether mitigation measures can be taken in order to compensate affected persons' losses. Where mitigation is impossible or conflicts emerge concerning a particular project and its impacts, then land transfers might become problematic and should not be pursued.

<sup>27</sup> Principles for implementation are contained in part 3B of the VGGT (FAO, 2012).

<sup>28</sup> Land registration is covered in Chapter 3, land transfers in Chapter 4 and land administration in Chapter 5 of the Voluntary Guidelines (FAO 2012).

(3) As with the two other main themes of the VGGT, **land administration** is sensitive to potential governance problems such as corruption, access to grievance mechanisms, etc. The content of the VGGT describes in detail what is expected of appropriate land administration from a human rights perspective.

### 2.2.4 Legitimate tenure rights

The content of the VGGT is based on the term “legitimate tenure rights”. This was introduced to the negotiation and strongly promoted by Brazil, based on the conviction that the text needs to pay utmost attention to those individuals or groups who do not have recognised user rights even when they have used their land for a long period: This can be persons or groups who have historically used land but have never been formally recognised; it can be persons or groups who make their living from forest products collected from publicly or privately owned forests; or those such as pastoralists, etc., who use common land for their income-generating activities. The text is written to increase the sensitivity to all those individuals and groups who are dependent on land but lack any formal recognition. The legacy of the land needs to be fully understood. This can positively be described as a human rights-based approach.

It is guided by the understanding that governments need to focus and pay due attention to particularly vulnerable individuals or groups. Such groups are particularly important in the context of large-scale land acquisitions because they are often overlooked or neglected within the processes of land registration, administration or transfer.

The term ‘legitimate’ was promoted by Brazil at the same time. This seeks to ensure that, while careful registration must be conducted of all users, it is important that all projects include a deadline after which no-one is entitled to move to that area in an attempt to obtain compensation or resettlement gains. Claims need to be legitimate, e.g., people need to have a history at the location. Clear processes of land registration will help governments when registering land, or investors when planning to buy or rent land.

### 2.2.5 Grievance mechanisms

Access to justice or to effective grievance mechanisms is a core element for all three main parts of the VGGT. Because debates on the history of land use or ownership can be complex, it is often the case that processes of land registration or administration will not proceed without mistakes. Such mistakes can occur in properly understanding the tenure rights of groups that were not yet registered, or by underestimating the forms of income derived from the use of land in unregistered circumstances. In all these cases, functioning complaint mechanisms are essential not only for developing sensitivity to potential conflicts but also to allow those people to be heard, whose cases have been overlooked or wrongly assessed.

It is important for grievance mechanisms to be accessible and functional:

Accessible implies that affected persons, groups or communities are realistically able to use such mechanisms. Firstly, such mechanisms must be physically accessible: They need to be located close enough in terms of geographical distance and travel costs; guarantee access without any barriers for persons with disabilities; should be accessible to all persons and groups with legitimate tenure rights, even when they are non-documented; and should be accessible, minimising language barriers, etc.

Secondly, the term functional implies that complaint mechanisms must be capable of taking decisions within an adequate period of time. Additionally, weaker groups of society must be fairly heard and should be provided access to legal support. Moreover, legal aid should be provided to those who otherwise would not have access to a lawyer and to the justice system. The VGGT recommend the use of various forms of complaint or grievance mechanisms, because they can vary in their competences and accessibility. Courts are the basis for any system based on the rule of law. However, in some countries, the court systems are slow, costly and difficult to access. Therefore, the VGGT recommend that land conflicts should potentially also be taken up by ombudspersons or complaint mechanisms internal to land administration institutions. When people feel overlooked or wrongly treated in land registration, administration

and transfer processes, it is useful to have a direct and immediate mechanism to address their problems. When such mechanisms do not work appropriately, an appeal must be possible via the normal legal system.

Additionally, it is also recommended that private land investors install their own mechanisms for resolving grievance or complaint, in order to provide all people potentially affected by land investments the opportunity to object against negative impacts they might face. The VGGT reflect the importance of effective and functioning complaint mechanisms as developed in the UNGP. One pillar of the UNGP is devoted to the issue of remedies and to functioning complaint mechanisms. As national legal systems can be inefficient or dysfunctional, they propose a multipronged system of complaint mechanisms – ranging from courts to internal grievance mechanisms – in order to guarantee effective remediation for victims of human rights violations. Guideline 31 includes criteria for measuring the effectiveness of non-judicial grievance mechanisms.<sup>29</sup>

Grievance mechanisms are particularly important in situations of conflicts over land. Land disputes or conflicts are often linked to major power struggles within countries or regions. Often, governments are unwilling to properly regulate the governance of land tenure at the national level. Sometimes, governments or their officials can be complicit in problematic land registration or transfer processes, and might be actively involved in discriminating against certain individuals or groups, including through corruption.

### 2.2.6 Participation

Consultation and participation in decision-making is a strong component of the VGGT. The document has strong provisions for both participation and the effective and meaningful consultation of: (1) indigenous communities (Guideline 9.9), which includes the free, prior and informed consent

(FPIC) provision; and (2) a general participation clause (Section 3B6), which regulates that all other persons or groups who are potentially negatively affected by land governance processes should have the free and meaningful possibility to be heard and to participate in the relevant decision-making.<sup>30</sup>

To sum up: The VGGT are an international legal instrument for standard-setting in the areas of land tenure processes, which are particularly sensitive to the human rights obligations of states and the responsibilities of other actors. At the same time, the framework is written in a pragmatic spirit, containing many operational details for best practices in land registration, administration and transfer.

### Limitations of the instrument

The VGGT have been developed to improve the governance of tenure of land, fisheries and forests. They therefore focus on the role of governments. Such an orientation is particularly important because governance in land issues is at stake in many countries and requires urgent improvements. At the same time, state mechanisms do not always function well: they might be unable or unwilling to establish and to adequately fund the necessary governance institutions. States can be complicit and biased in supporting elites in their access to land, while discriminating against weaker segments of society and persons or groups living in vulnerable situations. Consequently, while improvements are needed in the governance capacities of states, they might be weak allies in doing so. Is it realistic to expect so much from governments, as the VGGT do, or would it be better to focus more on the role of other, non-state actors? The VGGT must be understood in a way that, without a good system of governance for the tenure of land, forests and fisheries, it is very difficult to deal adequately with conflicts over the tenure, ownership and use of land. Therefore, the VGGT describe in detail how governance should

<sup>29</sup> Cf. Guidelines 31 of the UNGP (UN 2011a).

<sup>30</sup> Two sections of the VGGT (FAO 2012) are of particular interest: “Consultation and participation: engaging with and seeking the support of those who, having legitimate tenure rights, could be affected by decisions, prior to decisions being taken, and responding to their contributions”; the formulation of 3B6 is: “taking into consideration existing power imbalances between different parties and ensuring active, free, effective, meaningful and informed participation of individuals and groups in associated decision-making processes”.



be set up. Private actors also have responsibilities to avoid harm and infringement of human rights, but the governance setting needs to be established by the state. A document that describes in detail what can and should be expected from states/governments also has the potential for helping both civil society groups and private actors know what they can and should expect from governments. Furthermore, it can also be used to monitor the state's performance in land tenure governance. On the other hand, the text does not describe in detail what to do in cases where the government does not function properly.

The content of the VGGT is limited in its understanding of how access to land impacts people's livelihoods. It focuses on the formal recognition of legitimate tenure rights as well as on the quality of governance of land tenure. For many poor families, access to communal grazing land or collecting fruit from a nearby forest might contribute an important share of the family income. If access to such resources is affected by land transfer or land registration processes, the potential impacts on these people's incomes need to be taken into consideration. Complaint mechanisms must be sensitive to and deal with such income and livelihood effects.

The core issue of the document is the governance of land tenure, forests and fisheries. While many governance issues are similar in the area of tenure of forests and fisheries, particularly concerning general principles (participation, eliminating corruption, etc.), the text nevertheless lacks detail when concerning forests and fisheries. The FAO has attempted to address these weaknesses by asking its implementation team to also develop technical guides on the governance of forests and fisheries.<sup>31</sup>

Between 2010 and 2013, the FAO Committee on Fisheries (COFI) undertook a broad consultation on the situation of small-scale fisheries worldwide. In 2013 and 2014, a technical committee developed the text of the Voluntary Guidelines for Securing Sustainable Small-Scale Fisheries in the Context of Food Security and Poverty Eradication (the SSF Guidelines) which were adopted in June 2014 at the 31<sup>st</sup> session of the COFI. Notably, the SSF Guidelines adopted the VGGT model, which can be seen as an amendment to missing aspects of the VGGT text on fisheries. In the interim, the FAO has begun an implementation process that can be seen as complementary to the implementation of the VGGT.<sup>32</sup>

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31 FAO (2013a). A preliminary version for a technical guide on fisheries is also available (cf. FAO 2013b). All technical guides can be accessed at: <http://www.fao.org/nr/tenure/information-resources/en/> (last accessed: 12.12.2016).

32 FAO (2015). In October 2016, the FAO organised an expert seminar to discuss a human rights-based approach to implementing the SSF Guidelines. As a result of that seminar, the publication of a technical guide is planned.



## 3 Comparison of the VGGT with the IFC PS and the World Bank ESF

The Performance Standards on Environmental and Social Sustainability of the International Finance Corporation (IFC PS) and the World Bank Environmental and Social Framework (WB ESF) are instruments to increase the social due diligence of projects financed by banks. Both are already sensitive to land issues caused by the increasing importance of land transfer and use of land ownership applied to many development projects, particularly those related to infrastructure, energy and mining. Therefore, the Voluntary Guidelines on Responsible Governance of Tenure of Land, Forests and Fisheries (VGGT) covers many issues and aspects that also form core issue of the two frameworks.

In order to identify differences between the instruments, this chapter will compare the standards and norms of the VGGT with those of the IFC PS and the WB ESF by summarising the issues dealt with by each.

The findings are grouped into four different categories: (1) Issues that are regulated differently in the VGGT or where the VGGT require more attention, particularly when risks are seen in the overall context in which a project is developed; (2) Issues that are covered in IFC PS and the new WB framework, but which are given greater attention as well as importance and are described differently

in the VGGT; (3) Issues that are dealt with comparably in the VGGT, IFC PS and the new WB ESF and do not require additional treatment; (4) Issues that are dealt with better in the IFC PS or the WB framework, with no further treatment needed. The following (table 1) presents an overview of the relevant issues.

### 3.1 Comparison with IFC PS

The IFC PS define private sector enterprises responsibilities how to manage their environmental and social risks. The latest version (published in 2012) applies to investments after January 2012, whereas the former version was valid starting 2006. In conjunction with the “Equator Principles”, both are estimated to cover nearly 90 percent of investments and support to projects in emerging markets.<sup>33</sup>

The IFC PS are part of the toolkit to increase the sustainability of private sectors enterprises. For the IFC, these standards need to be applied within a process of social due diligence as they help to “guard against unforeseen risks and impacts” and “improve financial and operational performance”. Additionally, they pursue the aim of increasing the acceptance of projects among local communities and governments. The IFC summarises that clients should obtain a social licence to operate.

<sup>33</sup> Figures are taken from the IFC website’s explanatory booklet “Understanding IFC PS” (IFC 2011). The Equator Principles are based on the IFC PS and were adopted by more than 70 of the world’s largest investment banks.

**Table 1: Overview: A comparison of core issues between the IFC PS and WB ESF**

Issue Categories	IFC PS	WB ESF
<b>Substantive differences</b>		<ul style="list-style-type: none"> <li>- Human rights</li> <li>- Borrower's own system</li> <li>- Flexibility</li> </ul>
<b>Category I:</b> Issues that are regulated differently in the VGGT or where the VGGT require more attention than the IFC PS and WB ESF	<ul style="list-style-type: none"> <li>- Forced eviction due to public purpose</li> <li>- Corruption</li> <li>- Other issues               <ul style="list-style-type: none"> <li>- Food security</li> <li>- Rural development</li> <li>- Smallholder farmers</li> <li>- Restriction by size</li> <li>- Rule of law</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>- Forced eviction due to public purpose</li> <li>- Corruption</li> <li>- Other issues               <ul style="list-style-type: none"> <li>- Food security</li> <li>- Rural development</li> <li>- Smallholder farmers</li> <li>- Restriction by size</li> <li>- Rule of law</li> </ul> </li> <li>- Importance of human rights</li> </ul>
<b>Category II:</b> Issues that are covered in the two frameworks but would require further clarification or specification	<ul style="list-style-type: none"> <li>- Importance of human rights</li> <li>- Legitimate tenure rights</li> <li>- Attention to particularly vulnerable groups</li> <li>- Gender issues</li> <li>- Meaningful participation</li> <li>- Transparency of project information</li> <li>- Relevance of grievance mechanism</li> </ul>	<ul style="list-style-type: none"> <li>- Legitimate tenure rights</li> <li>- Attention to particularly vulnerable groups</li> <li>- Gender issues</li> <li>- Meaningful participation</li> <li>- Transparency of project information</li> <li>- Relevance of grievance mechanism</li> <li>- Indigenous peoples' issues</li> <li>- Forced evictions/involuntary resettlements</li> </ul>
<b>Category III:</b> Issues that are dealt with sufficiently in the IFC PS and the WB ESF	<ul style="list-style-type: none"> <li>- Comprehensive Environmental and social (ES) assessments</li> <li>- Issues of indigenous peoples</li> <li>- Protection of land rights</li> <li>- Forced evictions/involuntary resettlements</li> <li>- Integration into management processes</li> <li>- Stakeholder engagement</li> </ul>	<ul style="list-style-type: none"> <li>- Comprehensive ES assessments</li> <li>- Protection of land rights</li> <li>- Integration into management processes</li> <li>- Stakeholder engagement</li> </ul>
<b>Category IV:</b> Issues that are regulated better in both frameworks than by the VGGT	<ul style="list-style-type: none"> <li>- How to address imperfect governance</li> <li>- Livelihood impacts</li> </ul>	<ul style="list-style-type: none"> <li>- How to address imperfect governance</li> <li>- Livelihood impacts</li> </ul>

### 3.1.1 Category I: Issues where the VGGT go beyond the IFC PS/Issues that are regulated differently in the VGGT or where the VGGT require more attention than the IFC PS and WB ESF

The areas in which the VGGT demand at least partly higher standards than the IFC PS and therefore adjustments of the performance standards are needed:

#### 3.1.1.1 Concerning forced evictions

A key issue concerns the circumstances in which land can be acquired, and how involuntary resettlement is regulated. According to the IFC PS, “Resettlement is considered involuntary when affected persons or communities do not have the right to refuse land acquisition or restrictions on land use that result in physical or economic displacement. This occurs in cases of (i) lawful expropriation or temporary or permanent restrictions on land use, and (ii) negotiated settlements in which

**Table 2: IFC PS – Category I**

#### Issues that are regulated differently in the VGGT or where the VGGT require more attention than the IFC PS and WB ESF

In projects that include large land transfers and a high-risk land component, the overall societal impact of a project and finance investments can exceed the direct impact of that specific project:

- Forced eviction due to public purpose. National regulations following the VGGT go further than the IFC PS and should be respected;
- Corruption in land policies needs particular attention, beyond the overall anti-corruption policy of development finance institutions. When land policies in one country are infected by a corruptive environment, the overall governance issues around land transfers and acquisitions are changed;
- Other issues are those where a project might have an impact on the following areas linked to general policy developments; where the project contributes to (e.g., through greater influx of private investments) – or where the cumulative impacts of similar projects in one region cause – substantive changes and impacts in the following areas:
  - Food security
  - Rural development
  - Smallholder farmers
  - Restriction by size
  - Rule of law

#### Recommendations

In these cases, a pre-check (prima facie) is recommended to determine whether the project might cause substantive problems in one of these areas. If that upfront pre-check is showing negative impacts, another more in-depth land-related impact assessment should be conducted (possibly in conjunction with all other impact assessments during project preparation). Checks could be based on the analytical grid developed by the New Alliance (2015).

the buyer can resort to expropriation or impose legal restrictions on land use if negotiations with the seller fail (IFC PS 5.1)". Hence, the IFC PS allow involuntary resettlement when it is minimised in size; and, additionally, where appropriate measures for the mitigation of adverse impacts on displaced persons as well as host communities are carefully planned and implemented (IFC PS 5.2).

Involuntary resettlement is differentiated from forced eviction, which is defined as the "permanent or temporary removal against the will of individual, families [...] from the homes and/or lands, which they occupy without the provision of, and access to, appropriate forms of legal and other protection (IFC PS 5.2)". Forced eviction should not be implemented. An exception can be made when forced eviction is conducted in accordance with the law and when the requirements of the IFC PS 5.24 are met. Its core elements are based on the "UN Basic Principles and Guidelines on Development Based Evictions and Displacements (UN Basic Principles)" from 2007.<sup>34</sup> In comparison, the IFC PS define forced eviction as a removal of local residents "against the will/coerced displacements" which takes place "without the provision of, and access to appropriate forms of legal or other protection".<sup>35</sup> In an explanatory footnote the UN Basic Principles define the conditions under which eviction is allowed or possible: "The prohibition of forced evictions does not apply to eviction carried out both in accordance with the law and in conformity with the provisions of international human rights treaties." The quote is comparable in wording and content with the IFC PS 5.24, which also links the legal framework to the requirements of the performance standard itself.

The IFC definitions of forced eviction and involuntary resettlement are adequate and in line with the UN Basic Principles and comparable to the VGGT, which include the clear provision that "responsible

investments should do not harm, safeguard against dispossession of legitimate tenure rights, and environmental damage, and should respect human rights (Guideline 12.4. FAO 2012)". Moreover, the VGGT link responsible investments to the need to respect the rights of particularly vulnerable groups in the overall context of rural development. This idea is covered in the IFC PS, but in cases of large scale land investments an additional human rights risk assessments might be required in order to evaluate the potential impact on such groups to its full amount.

A major difference is that the VGGT additionally include a public purpose provision. Such a provision is not contained in the IFC PS and surpasses the project logic which is the basis for the IFC PS. When a state follows the specific VGGT recommendation to limit the scope of expropriations to public purposes, development finance actors should respect such a law. If this case is not regulated in national law, it is difficult to implement such a provision. A reason for this could be the difficulty of achieving an agreed-upon definition of a public purpose. Development finance actors themselves should also make sure that they or their clients do not lobbying for the purpose to change taken policy decisions in order to protect certain lands from expropriation or those declaring land as indigenous lands.

### 3.1.1.2 Corruption

While the IFC PS does not address the issue of corruption, the VGGT highlight the problem at all levels. Development finance institutions have their own strict policies, separated from the IFC PS, for dealing with issues of corruption. These provisions are client-oriented. The client shall should avoid corruption in all actions. Furthermore, the IFC PS describe the responsibilities of the private sector when governance is weak: "in absence of host governments procedures [...]".

34 The "UN Basic Principles and Guidelines on Development-based Evictions and Displacements" was developed in 2007 by Miloon Kothari, the Special Rapporteur on adequate housing (UN-Doc: A/HRC/4/18). They are increasingly used by development institutions, and were reflected when developing the 2012 IFC PS.

35 "...the present guidelines apply to acts an/or omissions involving the coerced or involuntary displacement of individuals, groups and communities from homes and/or lands and common property resources that were occupied or depended upon, thus eliminating or limiting the ability of an individual, group or community to reside or work in a particular dwelling, residence or location, without the provision of, and access to, appropriate forms of legal or other protection (Paragraph 4 of A/HRC/4/18, Page 3)."

The IFC PS does not directly mention corruption, nevertheless it/they could be interpreted as regarding corruption as one of the areas in which government action is needed.<sup>36</sup>

The VGGT describe the actions that states and other actors should take concerning expropriation and corruption (Guideline 16, FAO 2012): “All parties should endeavour to prevent corruption, particularly through use of objectively assessed values, transparent and decentralized processes and services, and a right to appeal (VGGT 16.6, FAO 2012)”. The advantage of the VGGT is that it links the issue of corruption directly to land policies as well as to governmental processes associated with land tenure, which are highly susceptible to corruption. States are obliged to control and avoid corruption, but at the same time, investors are required to carefully analyse and understand the corruption climate of the country concerned or the locality where an investment is planned. In scenarios where corruption is identified or considered very likely, the investment should not proceed. Therefore, as the issue of corruption requires more attention, the recommendation is to conduct an additional risk assessment in land related projects

### 3.1.1.3 Other issues

The greatest difference between the IFC PS and the VGGT concerns their recommendations on assessing investment proposals. The VGGT recommend assessing a broader array of potential impacts, while the IFC PS recommend assessing only those directly linked to land-related issues. In guideline 12.4, the VGGT formulate that responsible investments should do no harm and should strive to contribute to several other policy objectives “[...] such as poverty eradication, food security and sustainable use of land, fisheries and forests; support local communities; contribute to rural development; promote a secure local food production systems; enhance social and economic sustainable development; create employment;

diversify livelihoods; provide benefit 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 ILO [International Labour Organization]”. As this enumeration may appear to present a broad ‘shopping list’ of issues, it should be regarded as a working definition of elements for responsible investment. Some issues are covered in detail in the IFC PS, such as the overall human rights impact or environmental sustainability of the project; others are not covered at all, such as the references to local food security, rural development and spatial planning.

Moreover, the VGGT highlight the overall impact of large-scale land acquisitions on these other issues. If several projects are realised in the same region, the combined impacts on food security or rural development differ from the impact a single project might have. 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. The VGGT support the idea that if such a regional planning does not exist or does not function, investors need to analyse the overall context in which projects are realised. This is particularly relevant for issues such as food security, rural development or the impacts on smallholder farmers. The IFC PS precisely define to what can be expected from an individual investment. According to the IFC PS, investors should control their impacts. The overall societal impacts, addressed by the VGGT as being particularly relevant for state action, can hardly be influenced by investors, particularly those related to overall objectives for rural development or spatial planning. The IFC PS encourage investors to study the potential effects of projects; as well as to develop the capacity to do so even when government policies considering rural development or spatial planning are weak or non-existent. The

<sup>36</sup> The Guiding note 21 to IFC PS 1 (IFC 2012): “Where relevant, the identification of risks and impacts should also consider the role and capacity of third parties (such as local and national governments, and contractors and suppliers), to the extent that they pose a risk to the project, recognizing that the client should address these risks and impacts in a manner that is commensurate with the client’s control and influence over the third party actions.”

VGGT require investors to bear in mind the overall societal impacts. The Guidelines encourage, for example, the diversification of livelihoods (through rural employment, outgrower schemes, etc.).<sup>37</sup>

### Food security

Concerning food security, the VGGT include several provisions<sup>38</sup> 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. Moreover, the impacts should be addressed through a mitigation plan. While IFC PS 1 (2012) would potentially allow the assessment of food security impacts in the overall response to environmental and social impacts, the issue is not specifically mentioned in this framework. Besides these potential risks, any agricultural investment might also have general positive outcomes for food availability or incomes in the respective region. The VGGT place great emphasis on food security impacts, because of the potential contradiction between agricultural investment and overall economic gains versus negative outcomes for particular(ly) vulnerable groups. Therefore, the VGGT formulate a common thread for investments that contributes to food insecurity at the local level (Guideline 12.12, FAO 2012).

### Rural development and institutions

The VGGT also address the broader societal impacts of a project. The VGGT represent the first standard-setting document of the newly created Committee on World Food Security, and are therefore grounded in a broader understanding of rural development and functioning institutions that guarantees responsible governance of tenure. Responsible investments should respect local livelihoods and seek to address the overall aspects of rural development, such as rural employment, local supply chains, etc. Moreover, the VGGT are

written in accordance with the understanding that tenure institutions should respect such a broader understanding of rural development. VGGT Guideline 20 encourages states to employ spatial planning functions to legally constrain the use of tenure rights in order to support balanced and sustainable territorial development. Spatial planning should reconcile and harmonise different land use objectives and should therefore be conducted in a very participatory way.<sup>39</sup>

### Smallholder farmers

The VGGT highlight the importance of land investments and potential changes in land tenure for smallholder farmers. The Guidelines recognise “that smallholder producers and their organizations in developing countries provide a major share of agricultural investments that contribute significantly to food security, nutrition, poverty eradication and environmental resilience” (Guideline 12.3, FAO 2012). Smallholder farmers and their families are described as one of the groups that might potentially be marginalised or made vulnerable due to their status and limited influence in policy making. States are therefore encouraged to support investments by smallholders as well as public and private smallholder-sensitive investments. The first encouragement of the VGGT requires more than expressed in the IFC PS, whereas the second one could potentially be integrated into regular Environmental and Social Due Diligence (ESDD).

### Restrictions by size

The VGGT consider the possibility of states restricting large-scale land transactions by size in order to keep the impacts at a more manageable level. Such a reflection is directed toward governments (Guideline 15.2, FAO 2012). The guideline indicates particular contexts where a high degree of ownership concentration is combined with a significant level of rural poverty. A policy of redistributive reforms is one tool to

37 Cf. the VGGT provisions at: 7.5; 8.10; 9.2; 9.8; 9.10; 10.3 (FAO 2012).

38 Food security is mentioned in the title and overall objectives of the VGGTs (Guideline 1.1, FAO 2010); and in the chapter dealing with investments: 12.1; 12.2; 12.4; 12.12. (FAO 2012).

39 “States should ensure that there is wide public participation in the development of planning proposals and the review of draft spatial plans to ensure that priorities and interests of communities, including indigenous peoples and food-producing communities are reflected (Guideline 20.4, FAO 2012)”.



facilitate broad and more equitable access to land as a productive resource, and to achieve inclusive development. Guideline 15 encourages states to reconsider such policy tools as a legitimate option in circumstances mentioned above (FAO 2012). However, such decisions are issues of state policy and subject to political decisions. Furthermore, the guideline describes that any redistributive reform needs to respect the rule of law and international human rights standards. It is not applicable to private actors involved in land-based investment; nonetheless, private actors might be affected by the adoption of government policies that promote redistribution. Guideline 15 therefore prescribes that such reforms should ensure, firstly, consistency with state obligations under national and international (human rights) laws, and secondly, clearly defined state objectives in terms of redistribution.

#### **Rule of law**

At several points, the VGGT highlight the importance of respecting national laws and the rule of law: “Investors have the responsibility to respect national law and legislation and recognize and respect land rights of others and the rule of law in line with the general principles for non-state actors as contained in these Guidelines (Guideline 12.12, FAO 2012)”. Such recognition of the rule of law is also part of the IFC PS. In the VGGT framework, particular importance is given to the respect for national court processes, because land investments are often influenced by powerful actors. The VGGT contain references to protecting national court processes from power, making them transparent and non-corrupt. Additionally to such issues, the sensitivity to power regulations and lobby influences should be integrated into the regular ESDD to enable its identification as a potential problem linked to land-based agricultural investments.

To sum up: Referring to the ‘other issues’ mentioned earlier, the VGGT require sensitivity toward a wide range of impacts. Those fall within the usual scope and detail of environmental and social impact assessments according to the IFC PS, in case they are related to specific investment

projects. Most of these issues require governance, guidance and government regulation at the same time in order to guarantee appropriate rural development based on the involvement of people, communities, smallholder farmers etc. Such state actions are not and cannot be fully covered in the IFC PS.

As mentioned above, it is recommended that the issues illustrated in category I are evaluated within an additional human rights risk-assessment in cases when projects require large-scale land acquisitions or involuntary or forced displacements in situations characterised by severe rural poverty and weak governance. In such situations, an expansion of the ESDD in compliance with the IFC PS is required, and normal assessments should be made more sensitive to these additional issues. Here, a two-step approach is recommended. At first, projects should be reviewed if they might impact the issues mentioned previously. Only if a specific impact can realistically be expected should a second, in-depth check follow. In this case, development finance actors need to decide whether or not prolongation of the project is possible.

#### **3.1.2 Category II issues: Issues that are covered in IFC PS but which are given greater attention/importance and described differently in the VGGT**

Each of the following seven issues are covered in the IFC PS. The VGGT have specific concerns related to these issues, which are not directly covered in the IFC PS. Therefore, recommendations are formulated on how these specific concerns or dimension could be taken up into Environmental and Social Action Plans (ESAPs) that are developed to cope with the findings under the IFC PS, or by extra attention of clients. These concerns could be communicated to clients prior to any impact assessments. The environmental and social impact assessments could be applied to specific concerns or sensitivities the VGGT mentions referring to land related projects in the following areas:

### Table 3: IFC PS - Category II

#### Issues that are covered in the IFC PS and the WB Framework, but which receive greater attention and importance and are described differently in the VGGT

- Importance of human rights and quality of governance needs to be understood properly in order to determine potential risks,
- Definition of legitimate tenure rights
- Attention to particularly vulnerable groups
- Gender issues
- Meaningful participation
- Transparency of project information
- Relevance of grievance mechanism

#### Recommendation

In projects with a high-risk land component, the use of the VGGT interpretation of issues is recommended due to its sensitivity.

#### 3.1.2.1 Importance of Human Rights

Both the IFC PS and the VGGT take up the general recommendation provided by the UNGP that “[b]usiness should respect human rights, which means to avoid infringing on the human rights of others and address adverse human rights impacts business may cause or contribute to”.<sup>40</sup> Paragraph 1.3 (FAO 2012) also highlights that each of the IFC PS provides elements relevant to human rights: “Due diligence against these Performance Standards will enable the client to address many relevant human rights issues in its project”. The description of the objectives and the scope of applications in IFC PS 1.4 refers to business activities, and clarifies that they should “identify and evaluate environmental and social risks and impacts”. It makes no explicit mention of potential human rights impacts. The objective should be read in the light of IFC PS 1.3 for a profound understanding in terms of human rights. Nevertheless, most parts of the IFC PS continue to ask for ESDD and do not mention human rights in particular. Footnote 12 in IFC PS 1.7 states that in certain high-risk circumstances the client may need to complement the regular ESDD with due diligence on human rights.<sup>41</sup> According to this IFC PS provision, human rights due diligence is only

required in exceptional circumstances. In contrast, both the VGGT and the UNGP require regular due diligence checks on human rights and ensuring the non-infringement of human rights.

Therefore, it is advisable to request that all clients are, in future, particularly sensitive to IFC PS 1.3, and to ensure that due diligence also covers human rights issues as well as the client’s non-infringement of human rights. Due to the high risks incorporated in land-related transfers, it is recommended that human rights due diligence should be added to the normal ESDD, when a project involves substantive transfers of land. The analytical grid of the New Alliance (2015) offers a practical tool for meeting these obligations.

#### 3.1.2.2 Legitimate tenure rights

While both the IFC PS and VGGT frameworks are particularly sensitive to all forms of non-formal ownership of land, the VGGT are more detailed, describing legitimacy of access as a socially developed outcome. While the IFC PS already recommends identifying all potentially affected communities with recognisable rights, the VGGT build on the concept of socially legitimate tenure

40 VGGT Paragraph 3.2 (FAO 2012).

41 “In limited high-risk circumstances, it may be appropriate for the client to complement the process of environmental and social risks and impacts identification process with specific human rights due diligence as relevant to the particular business”, Footnote 12 in IFC PS 1.7.

rights. In this sense, the term “socially legitimate” means an addition to recognisable usage rights. The VGGT are centred around the phrase “legitimate tenure rights”. The term was not formally defined in the drafting process, because land tenure issues and access to land are regulated differently between countries, sometimes even differing between local systems. Hence, a general definition of legitimacy is not applicable to all situations but depends on local definitions: “The term ‘legitimate tenure rights’ is used by the VGGT to emphasize not only those land rights that are already legally secured, but to include all other land rights that are deemed locally to be socially legitimate”.<sup>42</sup> Thus, every land-based investment has to start from the question of whether the national laws accurately recognise and effectively protect legitimate land rights, including customary rights and informal tenure.

What remains unclear in the VGGT, is how far the land use history should be traced back in order to determine the ‘legitimacy’ of land rights. On the other hand, most land conflicts concern differing understandings of who has been legitimately using the land in a historic perspective. The term “legitimate land use” was introduced, specifically by Brazil, in order to differentiate between land that has been used for generations or years by vulnerable groups, but without any formal recognition; and land that might have been illegitimately appropriated by migrants to a region when a project is launched, with the aim of securing a share of any anticipated compensation. The historic dimension of legitimacy can strengthen the “cut-off date for eligibility” approach of the IFC PS, which prescribes that the client is not required to compensate or assist those who encroach on the project areas after a given cut-off date.<sup>43</sup>

The IFC PS and the VGGT in combination provide an ideal framework to understand, identify and recognise rights as well as to assess the impacts on all affected persons. The framework can be taken up to mandate environmental and social consultants, who conduct a first assessment of

the situation, to carefully review the different societal settings for legitimacy. In practice, many consultants already apply such methods.

### 3.1.2.3 Attention to particularly vulnerable groups

Both frameworks are sensitive to address the impacts on all potentially affected groups. While the IFC PS require the measurement of all impacts on all affected persons and communities, the VGGT enumerate potentially vulnerable groups in detail. In general, both formats cover the issue in a satisfactory manner. The specific enumeration is more sensitive to the implications for food security among groups such as smallholder farmers. Therefore, it is recommended that the impact assessment should list particularly vulnerable people related to the specific project in order to identify particular elements of discrimination. If relevant, the impacts on smallholders as a vulnerable group should be taken into consideration. This could be requested from all clients and expressed in the guidance note on impact assessments.

### 3.1.2.4 Gender issues

The IFC PS especially recognise the importance of gender issues. IFC PS 5 presents an exception with no specific reference to gender issues. Neither the sections on land registration nor on compensation for physical or economic displacement specifically mention problems that women might face. In contrast, guiding note 50 related to IFC PS 1 requires that “gender-differentiated impacts should be assessed and the risks and impacts identification process should propose measures designed to ensure that one gender is not disadvantaged relative to the other [...]”. The VGGT include strong references to gender issues in all aspects of land policies, starting with land registration up to land transfer and land administration. Therefore, it is required that clients apply the IFC PS and, additionally, employ great sensitivity to gender issues in their assessments of land-based investments.

<sup>42</sup> Cf. footnote 3 of the analytical framework for investors (New Alliance 2015).

<sup>43</sup> Cf. IFC PS 5 paragraph 23.

### 3.1.2.5 Meaningful participation in all project phases – how to address adverse political environments (shrinking political space)

Both frameworks are similarly sensitive to the importance and need for meaningful participation. Participation of all relevant stakeholders is a key concern in both the IFC PS and the VGGT. Effective consultation should be commensurate with the project's risks and adverse impacts, and finds expression in the IFC PS 1.30 (2012). The IFC PS differentiate between affected communities with potentially significant adverse impacts, and the consultation as well as the participation of indigenous peoples. Concerning the first group, the client should conduct an "informed consultation and participation (ICP) process" (IFC PS 1.31, 2012)". The same procedure is applicable for indigenous peoples, with the extension of the client's task in certain circumstance, to obtain their Free, Prior and Informed Consent (FPIC).<sup>44</sup> The IFC PS therefore make the same differentiation as the VGGT. The VGGT have a general participation principle (VGGT 3B6), which highlights the role of individuals and existing power imbalances: Consultation shall happen "prior to decisions begin taken" and by "taking into consideration existing power imbalances between different parties and ensuring active, free, meaningful and informed participation of individuals and groups in associated decision-making processes". The VGGT include several provisions encouraging actors to ensure that counterparts have sufficient capacity to engage in meaningful participation. Therefore, both the IFC PS and VGGT differentiate between communities affected by potentially significant adverse impacts, and the consultation and participation of indigenous peoples. The VGGT also address the state and adverse political environments, i.e., situations where the political space to express concerns is limited, and participation as well as consultation are severely restricted: In countries where large-scale land-based investments are conducted, this is a common practice/situation. As a recommendation, clients should be sensitive in their application of IFC PS to situations where the host governments is not weak but

strong, in the sense of limiting the political space for monitoring and expression by civil society. They also require that affected persons and communities should have sufficient capacity to engage in participation and consultation.

### 3.1.2.6 Transparency for project information (land transaction prices)

The VGGT strongly call for transparency of all project-related information. In addition, the IFC PS 1 recognises the need for affected communities to have access to all relevant information (IFC PS 1.29, 2012). The information required from the client is described in paragraph 29 of IFC PS 1. Depending on the scale of the project and the significance of its risks and impacts, such information "[...] could range from full Environmental and Social Assessments and Action Plans [...] to easy-to-understand summaries of key issues and commitments".<sup>45</sup>

The VGGT go further, as they specifically ask governments to publish the prices for land transactions and land valuation. As the disclosure of such information requires a legal basis and is reliant on governmental decisions, no recommendation is made here. The IFC PS already require any investor to disclose all information that is not legitimately commercially confidential.

### 3.1.2.7 Relevance/support of public grievance mechanism – rule of law problems

The VGGT emphasize the importance of grievance and complaint mechanisms at all levels of land policies, starting with land registration, land administration, up to land transfers. The VGGT formulate the need for private actors to offer accessible complaint mechanisms. They follow the structure of the UNGP, which illustrate all necessary steps required to secure meaningful access to justice in the Third Pillar ("Access to Remedy"). Firstly, the state must ensure that all affected persons have access to justice. If national courts do not guarantee access to justice, states could use non-judicial grievance mechanisms such as the National Contact Points of the OECD or National Human

<sup>44</sup> The special circumstances requiring FPIC are described in IFC PS 7 (2012, indigenous peoples).

<sup>45</sup> Quote: IFC PS 1, Footnote 26 (2012).

Rights Institutions. Beside these formal mechanisms, the UNGP ask all private actors to establish their own functioning grievance mechanism. Such company-based complaint mechanisms should follow the effectiveness criteria of the UNGP on inter alia legitimacy, accessibility, predictability, equity, transparency and rights-compatibility.<sup>46</sup> The IFC provisions predict a grievance mechanism for affected communities, to be offered by a client. This is also in line with the UNGP. As the IFC PS do not provide much information about the relationship between such client-based grievance mechanisms and the judicial system, it is recommended that in a project whose impacts go far beyond clients' actions, development finance institutions should not only require clients to encourage affected communities to use their own grievance mechanism, but also to use judicial and quasi-judicial systems in order to deal with grievances and complaints effectively.

### 3.1.3 Category III: Issues that are dealt with sufficiently in the IFC PS

The third category relates to provisions in the IFC PS that comply fully with the core concerns in the VGGT. Besides the issues mentioned above, the IFC PS are generally a very sensitive tool to identify and monitor all project-related risks and impacts for land-based investments. The following issues address key concerns in the VGGT, but also demonstrate their adequate coverage by the IFC PS.

**Table 4: IFC PS - Category III**

#### Issues that are dealt with sufficiently in the IFC PS

- Comprehensive system to assess and manage all relevant environmental and social issues
- Indigenous land issues and FPIC
- Protection of land rights
- Forced eviction/involuntary resettlement
- Integration into management systems
- “Meaningful participation” during design and project implementation

#### 3.1.3.1 Comprehensive system to assess and manage all relevant environmental and social issues

The UNGP are written with a clear message to private actors, whose core can be summarised as: Know your risks, and report on them and your mitigation strategy. The IFC PS 1 requires each client to implement a process for risk and impact identification consistent with internationally recognised good practices for using professional skills, diligence, prudence, etc. Moreover, the basic idea of IFC PS 1.7 is the comprehensiveness of assessments: “They will consider all relevant environmental and social risks and impacts of the project, including the issues identified in Performance Standards 2 through 8, and those who are likely to be affected by such risks and impacts.” The accompanying footnote 12 also encourages private actors to go beyond the standard for assessment of environmental and social impacts when required by particular circumstances: “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.” With this provision, the IFC PS requires assessment of human rights impacts under high-risk circumstances. While there is no universally-defined understanding of high-risk circumstances, it could and should be interpreted as situations in which severe human rights infringements occur or can be foreseen. In comparison to the IFC PS interpretation of high-risk circumstances, the UNGP require actors to pay particular attention to situations where an investment might have large impacts; an actor is highly influential; or severe human rights impacts are predictable.<sup>47</sup> High-risk circumstances should also include situations in conflict areas or where the impacts of a project might foster or fuel local or regional conflicts.

#### 3.1.3.2 Indigenous land issues and FPIC

The protection of indigenous peoples receives broad attention in the VGGT, expressed by an extra guideline (Guideline 9). The IFC PS also contain

<sup>46</sup> Cf. Guiding Principle 31 for these effectiveness criteria.

<sup>47</sup> See UNGP, guideline 14.



their own performance standards concerning indigenous peoples, with the objective “to ensure that the development process foster full respect for the human rights, dignity, aspirations, culture and natural resource-based livelihoods of Indigenous Peoples”. Except for the differing scope of the FPIC provision (see above), the VGGT content on indigenous peoples is fully covered by the IFC PS. The FPIC provision refers to all indigenous communities that are closely tied to their lands and related natural resources, which are often traditionally owned and under customary use. Additionally to legally recognised indigenous lands, both the VGGT and the IFC PS require that states recognise and protect the legitimate tenure rights of indigenous communities’ ancestral land on which they live. Guideline 9 extends the same protection to other communities (those not termed or classified as indigenous) with customary tenure systems that have legitimate tenure rights to ancestral lands. Again, this provision is basically the same in both the VGGT and IFC PS: The VGGT formulation guarantees that “indigenous peoples and other communities with customary tenure systems should not be forcibly evicted from ancestral land (VGGT 9.5)”.

### 3.1.3.3 Protection of land rights

The VGGT require states to protect all legitimate tenure rights. According to the VGGT, private actors are expected to conduct human rights due diligence, which includes the protection of legitimate tenure rights. In contrast, the IFC PS do not employ this specific term. Nevertheless, the level of protection envisaged in the IFC PS (Nos. 1 and 5) is notable. The IFC PS also extend such protection to situations of involuntary restrictions on land use or access to natural resources. When avoidance of such restrictions is not possible, displacement of affected persons should be minimised by exploring alternative project designs. The exploration of alternatives in relation to the design of investment projects is also a key concern in the VGGT. The Guidelines require the evaluation of alternative investment options by involving the persons living in the area of the planned project.

Both the VGGT and IFC PS are aware that formal protection cannot be required only from private actors, since it is a state obligation. The IFC PS

also request investors to exercise utmost care when land tenure governance is weak. In such circumstances, the client is required to take over functions that ideally should be fulfilled by the state. The VGGT (as a framework negotiated between states) directly address state obligations, whereas the IFC PS (which is a tool directed to private actors) discuss more explicitly what could be expected in situations of imperfect governance.

### 3.1.3.4 Forced eviction/involuntary resettlement

IFC PS 5 begins with a clear recommendation to avoid forced eviction (IFC PS 5.3, 2012). The provision concerning forced eviction is consistent with the UN Basic Principles and Guidelines for development-based evictions and displacements, except for the public purpose provision in the VGGT (cf. section 4.1, above). Permanent or temporary removal of affected individuals and groups against their will is not allowed (IFC PS 5.24, 2012) without the provision of, and access to, appropriate forms of legal and other protection. Additionally, in cases where expropriation complies with national laws and legislation, the VGGT request states to respect all legitimate tenure rights to acquire only the minimum resources required, and to provide prompt and just compensation.

### 3.1.3.5 Integration into management systems

IFC PS 5 calls on all clients to “anticipate and avoid or where avoidance is not possible minimize adverse social and economic impacts from land acquisition or restrictions on land use [...] (IFC PS 5.3, 2012)”. The IFC PS require that the land-related performance standard 5 is managed through the client’s environmental and social management system as outlined in PS 1 (IFC PS 5.4, 2012). With these provisions, the IFC PS have taken up the call from the UNGP that companies should implement an adequate system of risk identification. Additionally, the identification of human rights-related risks should be integrated into a company’s management system.

### 3.1.3.6 “Meaningful participation” during design and project implementation

The term “meaningful participation” is essential for all affected persons. Without participation,



affected persons have no say in the implementation of a project, and the impacts on them can hardly be assessed in a fair way. The acknowledged importance of participation is expressed by the incorporation of a general participation clause in the implementation principles (VGGT 3B6, cf. above) as well as by its repeated mention throughout the document. Investors should identify every land user potentially affected, and should not neglect vulnerable groups within communities. Relevant stakeholders should be contacted early – during as well as after the implementation of the project. Furthermore, information sharing shall be done in a timely and transparent manner. The IFC PS are comparably sensitive to participation issues as the VGGT.<sup>48</sup> Similarly to the VGGT, they require early identification of all relevant stakeholders, particularly addressing potentially affected communities. Moreover, the IFC PS pay notable attention to meaningful stakeholder engagement, and encourage the development of a stakeholder engagement plan and framework as well as the disclosure of relevant project information for the purpose of helping affected communities to understand the risks, impacts and opportunities.

### 3.1.4 Category IV: Issues dealt with in better in the IFC PS

This subchapter illustrates issues that are regulated more comprehensively and in greater detail in the IFC PS than in the VGGT.

**Table 5: IFC PS - Category IV**

**Issues that are better regulated in the IFC PS than in the VGGT**

- Addressing imperfect governance
- Livelihood impacts and compensation for lost assets

#### 3.1.4.1 How to address imperfect governance

The IFC PS were written with the understanding that governance in the land sector might be weak. In comparison, the VGGT describe the desirable structure of a land governance and administration system, but do not suggest possible actions in cases of poor governance. Therefore, the application of the IFC PS provides an excellent benchmark for clients to analyse the quality of a given governance system in respect to potential legal/governmental loopholes. Consequently, the due diligence requirement can be derived to ensure that potential loopholes are effectively addressed.

The IFC PS, however, encourage clients and investors to consider how to operate a certain project under scenarios of sub-optimal governance. The analytical grid for the New Alliance gathered potential questions that investors should ask for in order to assess the land rights situation in a given country:

- “Does national law accurately recognise and effectively protect legitimate land rights, including customary rights and informal tenure...?”
- What records exist that document the legacy of land rights in project areas?
- Are there administrative, legal or customary authorities who act as guarantors of these rights and/or collective management rules...?”
- Have all legitimate local land rights (including those holding customary, secondary overlapping, seasonal and other use rights) been validated for the project area...?”
- Are there minorities or other vulnerable groups in the project area?
- How secure are women’s and pastoralist’s rights to use and/or own the land?”<sup>49</sup>

The involvement of involuntary resettlements presents a particular case. In this event, the IFC PS are written with the expectation that land tenure governance is typically weak. The client’s conduct of due diligence is expected to be higher in order to understand the situation properly, particularly when the state does not function (adequately).

<sup>48</sup> Stakeholder engagement is discussed in IFC PS 25ff.: “Stakeholder engagement is the basis for building strong, constructive, and responsible relationships that are essential for the successful management of a project’s environmental and social impacts” (IFC PS 25).

<sup>49</sup> Analytical grid (cf. above in FN, p. 8): The questions are formulated on the base of the recommendation of the Guide for private investors of USAID and the Operational guide of the French cooperation.

This is a valuable additional regulation, which is not described in the VGGT but yet reflects the spirit of the VGGT, which aims at/demands good governance from states. Another notable provision in the IFC PS is the encouragement of clients to collaborate with and/or support relevant governmental institutions involved in the land sectors. Private investors need to use, respect and support national institutions, even those that are partially weak. This will strengthen governance in the land sector of a given country in the long term. Decisions taken by government institutions can provide more security and clarity in complicated land situations compared with negotiations solely among private actors. The analytical grid also recommends that investors respect red lines, and to withdraw from a project when essential human rights issues concerning the legacy of land rights, the inability to clarify legitimate land user rights or issues of compensation and resettlement cannot be clarified in a particular situation due to weak governance.

#### 3.1.4.2 Livelihood impacts and compensations for lost assets

The IFC PS also cover situations where involuntary restriction on land use is likely, economic displacement might occur or existing access to natural resources by persons or groups might be affected. Concerning economic displacement of persons without legally recognisable claims to land, the IFC PS 5 requires compensation for lost assets other than land. With the objective of extending the interpretation of recognisable user rights to all persons with legitimate tenure rights (cf. above) and to include compensation for lost assets other than land<sup>50</sup> at full replacement cost, the IFC PS present a far-reaching provision in recognising human rights standards.

In addition, for persons whose livelihoods are reliant on natural resources, the “implementation of measures will be made to either allow continued access to affected resources or provide access to alternative resources with equivalent

livelihood-earning potential and accessibility (IFC PS 5.28)”. The overall reference to income from livelihoods is not contained in a similar connotation in the VGGT. This livelihood approach is also present in paragraph IFC 5.7 which addresses project impacts beyond land acquisition or land use restrictions: “Where project impacts on land, assets or access to assets become significantly adverse at any stage of the project, the client should consider applying requirements of this Performance Standards, even where no land acquisition or land use restriction is involved”. This is a favourable provision, sensitive to a wide range of project impacts. Clients are requested to conduct an effective risk assessment including all relevant human rights risks.

## 3.2 Comparison with the World Bank ESF

The study also compares the VGGT with the new Environmental and Social Safeguards of the World Bank (WB ESF), which were under discussion in recent years.<sup>51</sup> The new framework was adopted in August 2016 by the executive directors of the World Bank.<sup>52</sup> The study’s conclusion in respect to the WB ESF will partially differ from the IFC PS.

The new framework guides Bank-financed investment projects. In general, the new framework delegates more responsibility to borrowers’ own national systems for (land-) governance. Human rights obligations are not mentioned explicitly in the framework. Under these circumstances, projects and investments with a substantive land component might face additional risks and, hence, require greater attention than in the IFC PS framework.

The review of the ESF was done by the World Bank’s<sup>53</sup> management with the objective of finding the difficult balance between effectively addressing environmental and social risks of Bank-supported projects and minimising unnecessary

50 Those assets include, e.g., crops, irrigation infrastructure and other improvements made for the land.

51 The overall assessment is based on the new Environmental and Social Framework of the World Bank.

52 The decision was taken on 4 August 2016. Cf.: <http://www.worldbank.org/en/news/press-release/2016/08/04/world-bank-board-approves-new-environmental-and-social-framework> (last accessed: 07.02.2017)

53 Further referred to as the Bank.

burdens or costs for borrower governments. The Bank is trying to respond “to client countries’ request for increased flexibility through: (i) adaptive management of project risks and impacts; (ii) increased use of borrowers’ own national systems of risk assessment; and (iii) a risk based system allowing for a more proportionate and efficient use of Bank and borrower resources”.<sup>54</sup> The study highlights three major aspects relevant for comparison with the VGGT.

- (1) While the IFC PS have a clear recognition of the relevance of human rights (cf. IFC PS 1, 3), the new WB ESF has not adopted a similar approach. The WB ESF lacks any recognition that the Bank has its own responsibility independently of governments, to ensure that bank projects do not negatively impact communities or individuals, particularly poor and vulnerable groups. Moreover, the Bank also needs to prove that it conducted human rights due diligence to ensure its own projects do not infringe on human rights. Development finance institutions (DFIs) should be aware of any potential human rights risks of their operations. They should apply human rights due diligence as required of any other business. States guide these institutions and control the DFIs, and must therefore ensure that these institutions do not contribute to any infringements or violations of human rights.
- (2) A core goal of such a new and changed role of the World Bank is to make use of country systems, including national legislative frameworks, institutions administrative capacities, etc. The design proposes the use of national legislative regulations for resettlement plans in reference to indigenous peoples’ affairs. The use of provisions related to national land policy and relevant national institutions could potentially be a positive matter because it might strengthen capacities of national institutions to regulate these issues. In addition, it highlights the relevance of a proper human rights-based lending policy. On the other hand, it might become problematic when national institutions

are inadequately staffed and/or badly governed, corrupt or inefficient. The DFIs should retain their ability to identify these types of risks related to dysfunctional national systems. For projects that include high risks of human rights transgressions, a separate risk assessment should be conducted and necessary resources made available to cope with these risks and their mitigation.

- (3) A third problem relates to the intention of the WB ESF to increase flexibility in the management of investment lending projects. The absence of binding timelines for borrowers’ compliance with environmental and social standards is a severe issue. It refers, for example, to changes in resettlement plans or provisions for indigenous peoples, during the implementation as well as partially after the board project approval. Increasing the flexibility of project lending could be a useful tool to realistically recognise relevant problems as well as the time needed to address such problems adequately. Any utilisation of increased flexibility by DFIs requires careful awareness of which issue areas are likely to need clarification in advance, and which could be dealt with while the project is already implemented. Indigenous land issues constitute a minimum of issues that need to be clarified in advance, but the careful recognition of other legitimate tenure rights is an area that could hardly be postponed or identified while the project is already in progress. After the adoption of the WB ESF, German DFIs need to ensure that, in situations involving high risk of human rights infringements, the necessary preconditions for robust human rights due diligence are met and not overlooked.

The new WB ESF – if not embedded in a careful process of risk management and human rights due diligence – increases the risk that substantive human rights violations or other project risks will be overseen or ignored. German development aid will need to continuously ensure that project co-financing does not lead to infringements of human rights, and that it also complies with its

<sup>54</sup> Quotation from the minutes of a meeting of the World Banks Development Committee 24 June 2015.

own human rights concept and obligations. If the WB ESF creates additional risks through the use of national systems or increased flexibility, these risks need to be assessed and identified in future, in order to ensure that the WB's own (also co-financed) projects do not harm or do not contribute to infringements of human rights. In theory, the support for functioning national systems is a positive step, as it increases functioning national accountability systems. In this context, it can be in future a task for development policies to support and enable national systems to fulfil its tasks adequately. The better national systems function, the less the necessity to monitor and track all decisions. To sum up: Greater reliance on the borrower's quality of governance requires better knowledge of the governance system, including its imperfections and loopholes.

### 3.2.1 Category I issues: Issues where the standards and norms in the VGGT go beyond the IFC PS and the WB ESF

As with the IFC PS, the WB ESF was not developed in order to identify broader impacts on larger societal developments. Thus, the instrument was developed to identify project-related impacts and risks. DFIs are particularly obliged to do no harm throughout their operations. In order to understand those broader societal impacts that might go beyond the potential impact of a single project, and might consequently lead to infringements of human rights, DFIs should pursue separate due diligence checks on human rights for land-related projects classified as high risk. Thereby, the focus should be on those issues identified in the VGGT. As recommended in the IFC PS, such a risk assessment should involve a two-step approach: (1) identify whether one of the issues is of relevance for the project at all. If yes, (2) a more detailed risk assessment should be conducted. Such an assessment fulfils the objective to identify potentially greater societal impacts due to project activities that could create larger problems if neglected.

#### 3.2.1.1 Forced evictions

The WB ESF regulations and provisions concerning forced evictions and involuntary resettlement are comparable to those mentioned in the IFC

PS. They are also sensitive to particularly vulnerable groups. Borrowers are asked to improve the living conditions of poor and vulnerable people when they are physically displaced, by means of providing services, adequate housing and security of tenure. Involuntary resettlement should be avoided whenever possible. Impacts should either be minimised or project alternatives should be explored. Both the IFC PS and the WB ESF act accordingly, and try to mitigate avoidable adverse social and economic impacts from land acquisition or restrictions on land use. In reference to the WB ESF, borrowers are asked to improve the living conditions of poor and vulnerable people who are physically displaced, by providing compensatory services, adequate housing and security of tenure as compensation. The IFC PS differentiate forced eviction from involuntary resettlement. Forced eviction is defined (para 31) as "the permanent or temporary removal against the will of individuals, families and all communities from homes and all land which they occupy without the provision of and access to appropriate forms of legal and other protections including all applicable procedures and principles in the ESS". In comparison, the WB ESF terms forced eviction as the exercise of eminent domain; however, compulsory acquisition or similar powers exercised by the borrower are not considered as forced eviction. The borrower is also requested to plan alternatives to displacement wherever possible.

What the ESF lacks compared to the VGGT is the prohibition of forced evictions beyond those conducted in the course of public purpose. The VGGT demands that states should not undertake forced evictions other than for public purposes. Moreover, the VGGT define clear human rights based minimum standards for which actions should be allowed or prohibited, concerning land transfers. As already stated above, the VGGT formulation is clear: Eviction is not lawful and should not proceed if it would lead to any human rights violation of affected individuals or communities. This clarifies the extent to which evictions and relocations are still considered to be justified. The Voluntary Guidelines clearly state that "evictions and relocations should not result in individuals being rendered homeless or vulnerable to the violation of

## Table 6: World Bank ESF – Category I

### Issues where the standards and norms in the VGGT go beyond the WB ESF

In projects involving large transfers of land as well as a high-risk land component, the overall impact of project and investment finance may go beyond the scope of a specific project:

- Forced eviction due to public purpose. National regulations following the VGGT might go further than the IFC PS and should be respected.
- Corruption in relation to land policies needs particular attention beyond the overall anti-corruption policy of DFI. When the land policies of a country are affected by a corruptive environment, the overall governance performance is affected around land transfers and acquisitions.
- Other issues are those where a project might impact the following areas linked to general policy developments, where the project is part of – or where the cumulative impacts of similar projects in one region cause – substantive impacts in the following areas:
  - Food security
  - Rural development
  - Smallholder farmers
  - Restriction by size
  - Rule of law

#### Recommendations

When the proposed pre-check identifies substantive problems in one of these areas, an individual, land-related impact assessment should be conducted (this can be in conjunction with all other impact assessments during project preparation). Checks could be based on the analytical grid developed by the New Alliance (2015).

- As the new World Bank framework does not relate directly to the human rights obligations of states and human rights responsibilities of private actors, it might lead to considerable risks for the respect of human rights in land transactions and the governance of land tenure.

#### Recommendations

For projects with a larger land component, DFIs need to follow national developments with respect to the quality of governance and the borrowers' capacity for stronger enforcement in order to adjust their own measures, when the duty bearer no longer functions as needed.

human rights".<sup>55</sup> This reference to individual claims to human rights, narrows the scope of what can be considered acceptable involuntary resettlement or avoidable involuntary resettlement.

#### 3.2.1.2 Corruption

Like the IFC PS, the WB ESF does not address the issue of corruption, as DFIs generally have their own policies and regulations in place. The document therefore does not fully address situations where corruption affects the development of projects or policies related to land or legislative requirements. In particularly sensitive

environments, it is recommended that an additional human rights risk assessment is conducted.

#### 3.2.1.3 Other issues

Similarly to the IFC PS, the WB draft on safeguards concentrates on directly affected persons, while the broader discussion of societal impact on issues such as rural development or food security in general are not taken into consideration. Annex 1 to ESS 1 on "Environmental and Social assessment" mentions food security as one of the potential project impacts that needs to be assessed when evaluating social risks. The list of potential

<sup>55</sup> Quotation from VGGT 16.9.



project impacts expressed in paragraph 15, E, (b) (v) could be amended in order to assess potential project impacts on those seven “other issues” mentioned in the VGGT. Such an assessment fulfils the objective to identify potentially greater societal impacts than the direct project activities can have.

#### 3.2.1.4 Importance of human rights

At this point, the findings of the policy analysis confirm the assumption that the same fundamental conclusion and recommendation as that given previously, in relation to the IFC PS, could also be applied to the WB ESF. The main difference is that the WB ESF is directed to a large extent to state borrowers who are themselves directly bound by human rights obligations. State borrowers have clear human rights obligations and could potentially address most issues easily, due to fact they are formally within their sphere of control. Hence, the recommendations will differ from those referring to the IFC PS. Firstly, the role for DFIs is to consider how they can lobby to improve the quality of the WB ESF. By this means, the appropriate application of human rights could be guaranteed. Secondly, they must develop their own policies for responding to new situations wherein certain risks might be more difficult to predict due to increased flexibility of rules or the use of national systems of monitoring.

In addition, the WB ESF lacks any recognition of the Bank’s own responsibility, independently of governments, to ensure that Bank projects do not negatively impact communities or individuals, particularly poor and vulnerable groups. On the contrary, the Bank should distribute/share/pay/hand over proportionate benefits to such parties. Moreover, the Bank also needs to prove that it has conducted human rights due diligence in order to ensure its own projects do not infringe on human rights. DFIs should be aware of any potential human rights risks of their operations. They should apply human rights due diligence, as required of any other business. States guide these institutions and control DFIs, and must therefore ensure that these institutions do not contribute to any infringements or violations of human rights.

Thus, any use of increased flexibility by DFIs requires sensitive understanding and awareness

of issue areas. It is recommended to clarify these areas in advance, to be able to cope with these issues even after the project implementation phase has already begun. Thus, any use of increased flexibility by DFIs requires a sensitive understanding of which issue areas likely require prior clarification, and which can be dealt with while the project is already implemented. Indigenous land issues constitute a minimum baseline for issues that needs to be respected; however, the careful recognition of other legitimate tenure rights is an area that can hardly be postponed or identified while the project is already in progress. Borrowers, particularly state borrowers, are not requested to respect, protect or guarantee the full realisation of human rights. Consequently, the second draft of the ESF should be amended to include human rights. DFIs should consider how, and in what form, they can require borrowers and clients to grant the necessary respect to human rights.

#### 3.2.2 Category II Issues: Issues covered, but which would benefit from improved interpretation

In general, the following eight issues are all covered in the WB ESF. The VGGT have specific concerns related to these issues, which are not fully covered in the Bank’s second draft. Therefore, recommendations are formulated on how to incorporate these specific concerns or dimensions into normal environmental and social action plans, or how to place them on borrowers’ agendas. These concerns should be communicated to borrowers prior to any impact assessments. Existing environmental and social impact assessments could be applied to specific VGGT concerns or sensitivities regarding land-related projects.

The WB ESF faces the same problem of non-prohibition of forced evictions for private purpose as the IFC PS. The VGGT are the only framework that explicitly opposes this activity. Development finance actors should discuss this issue with borrowers, who often hold direct power to determine what forms of involuntary resettlements are allowed and which are not. The provision presents a VGGT recommendation directed to states, but goes beyond the scope of development finance agents.



**Table 7: World Bank ESF - Category II**

**Issues that are covered in the WB framework, but which are given greater attention and importance, and are described differently, in the VGGT, and would therefore benefit from improved interpretation**

- Definition of legitimate tenure rights
- Attention to particularly vulnerable groups
- Gender issues
- Meaningful participation
- Transparency of project information
- Relevance of grievance mechanism Indigenous peoples' issues

Forced evictions/involuntary resettlements. This issue is a crucial matter since the borrower is often the state itself who applies the World Bank framework. Hence, the state is able to determine which type of eminent domain, or compulsory acquisition is allowed and which not. Consequently, the link to human rights obligations is essential in order to restrict borrowers' policy choices to do harm.

#### **Recommendations**

- DFIs might need an overview of the quality of the participatory system organised for affected persons and communities. If existing overviews prove insufficient, then it is recommended to conduct one's own primary, participatory research.
- Greater dependency on the decisions, policies and enforcement mechanism of borrowers necessitates greater transparency. The World Bank itself already publishes many project-related documents. The same level of transparency should be required of other DFIs using the World Bank framework.

#### **3.2.2.1 Legitimate tenure rights**

The VGGT's core understanding of the recognition of all legitimate tenure rights is integrated into both the IFC PS and the WB ESF.

In direct comparison with the WB ESF, the IFC PS 5 gives more recognition to the individual's or group's income depending on access to land use or natural resources. The compensation for land-related impacts in the WB ESF is also more restricted than in the IFC PS 5, where the "scope of application" is broader: "Where project impacts on land, assets, or access to assets becomes significantly adverse at any stage of the project, the client should consider applying requirements of this performance standard even where no land acquisition or land-use restriction is involved (IFC PS 5.7, 2012)." The WB ESF formulations do not reflect here the standards of the IFC PS. Therefore, it is recommended that borrowers should be required by DFIs to comply with the understanding of the IFC PS 5.

#### **3.2.2.2 Attention to particularly vulnerable groups**

As in IFC PS 5, the content of the WB Environmental and Social Safeguard 5 (ESS 5) does not contain a detailed list of vulnerable people or groups. ESS 5.33 recognises that any compensation plan for economic displacement should pay particular attention to the needs of vulnerable segments of communities. These are not further specified, in contrast to the VGGT, which contain lists of specific groups that might suffer from particular disadvantages due to their regular discrimination as a group, for example pastoralists or smallholder farmers, etc. Therefore, the following is recommended: Borrowers should be required to pay attention, in advance, to potential impacts on particularly vulnerable groups, including smallholder farmers.

#### **3.2.2.3 Gender issues**

Unlike IFC PS 5, the ESF has two provisions recognising the importance of the female perspective.

Environmental and social standard 5.18 (ESS 5.18) formulates that any consultation process should “ensure that women’s perspectives are obtained and their interests factored into all aspects of resettlement planning and implementation”. Recommendation: Despite its relatively good recognition of gender issues, ESF 5 is still lacking compared to the VGGT. Hence, the ESF would benefit from revisions to further integrate gender perspectives into all aspects of land policies, starting with land registration and administration up to land transfers.

#### 3.2.2.4 Meaningful participation

The issues of stakeholder engagement and information disclosure are expressed in the WB ESF (ESS 10) in an appropriate and comprehensive manner. Compared to the VGGT, the WB ESF still requires improvements, since the VGGT participation clause highlights potential power imbalances between different parties and requires from borrowers the active, free, effective, meaningful and informed participation of individuals and groups in associated decision-making processes. It is therefore recommended to initiate communication with borrowers in advance, and also to highlight the well-regulated participation clause in the World Bank framework.

#### 3.2.2.5 Transparency of project information

ESS 10 contains an extra provision (para 19) regarding information disclosure in order to enable all stakeholders to participate meaningfully in stakeholder engagement processes. The recommendations are similar to those in the IFC PS, which demand the need for affected communities to understand the project’s risks, impacts and opportunities. In comparison, the VGGT contain stronger provisions concerning the transparency of land-based investments. Relevant information should be published in an accessible format at all stages of an investment, except those subject to legitimate business confidentiality. As a recommendation, borrowers should be requested to comply with the VGGT impetus concerning transparency of land-based investments.

Annex 1, “Informal resettlement instruments”, demands in paragraph 11 “community participation”, the participation of displaced persons

during the design and implementation of resettlement activities. This covers institutionalised arrangements by which displaced people could communicate their concerns to project authorities throughout the planning and implementation processes. Only in these ex-post participation arrangements, when people are already displaced, the ESS enumerates specific vulnerable groups. In contrast, the VGGT demand the participation of these groups much earlier in the process, particularly prior to any decision-making stage.

#### 3.2.2.6 Relevance of grievance mechanisms

ESS 10 and ESS 5 require borrowers to implement a grievance mechanism to receive and facilitate resolution of concerns as well as grievances. The content is basically identical to that of IFC PS 1. The grievance mechanism should be proportionate to the potential risks and impacts of the project, and should be both accessible and inclusive. The VGGT, however, require that a grievance mechanism is available even before final project decisions are taken, and is positioned toward ex ante checks. IFC PS and the WB ESF pay great attention to minimising the negative impact of projects that are already underway. Thus, it is recommended that DFIs should require borrowers to provide access to an effective ex ante mechanism for dispute resolution.

#### 3.2.2.7 Indigenous peoples’ issues

In comparison to the first draft, the content of the Bank’s ESS 7 has been substantively improved. The safeguard on indigenous peoples is the only part of the ESF where human rights are mentioned. Both frameworks guarantee substantive protection as formulated in the VGGT: that “indigenous peoples and other communities with customary tenure systems should not be forcibly evicted from ancestral land (VGGT 9.5)”. The respective formulation in ESS 7 is much weaker: “When the FPIC of the affected Indigenous Peoples cannot be ascertained by the Bank, the aspects of the project relevant to those Indigenous Peoples will not be processed further. Where the Bank has made the decision to continue processing the project other than the aspects for which the FPIC of the affected Indigenous Peoples cannot be ascertained, the Borrower will ensure that no adverse impacts results on such Indigenous Peoples during the implementation of the

project”.<sup>56</sup> It is obvious that the ESF’s demand for greater flexibility often allows the continuation with certain less risky aspects of a project. In the longer term this might lead to a “fait accompli”, a situation wherein a de-investment decision will no longer be taken, because facts are created and it is too late to initiate change. In order to clarify that the continuation of certain project activities shall not negatively impact the core rights of indigenous peoples, it is recommended that communication between the Bank and the borrower takes place in advance.

### 3.2.2.8 Forced eviction/involuntary resettlements

The IFC PS and WB ESF both start from a similar formulation and recommendation, to “avoid forced evictions” (ESS 5, second objective). The following detailed recommendations are also comparable: While IFC PS 5.24 clearly determines that forced evictions will not be carried out except in accordance with law and the requirements of the IFC PS, the World Bank’s content (ESS 5.31) uses the formulation: “the Borrower will not resort to forced evictions of affected persons”. The main differences are that an IFC client is not able to influence national legislation; the borrower is often the state, and thus able to determine what is possible under national law and what is not. ESS 5.31 states: “The exercise of eminent domain, compulsory acquisition or similar powers to a Borrower will not be considered forced eviction”; therefore, the link to human rights obligations is exactly the limitation needed in order to restrict borrowers’ policy choices to those that do no harm. As a recommendation, borrowers should be requested in advance to respect their human rights obligations.

### 3.2.3 Category III: Issues that are dealt with appropriately in the World Bank ESF

The third category refers to regulations in the WB ESF that are fully in line with the core concerns of the VGGT. The following issues mentioned here are therefore adequately covered by the new WB ESF. As the WB ESF provisions are comparable with the same provisions in the IFC PS, the findings are identical:

#### Table 8: World Bank ESF - Category III

##### Issues that are dealt with sufficiently in the WB ESF

- Comprehensive system to assess and manage all relevant environmental and social issues
- Protection of land rights
- Integration into management systems
- “Meaningful participation” during design and project implementation

### 3.2.3.1 Comprehensive system to assess and manage all relevant environmental and social issues

As with the IFC PS, the WB ESF asks all borrowers to conduct a systematic assessment of environmental and social impacts. ESS 1 offers instruction on how to properly conduct the “Assessment and Management of Environmental and Social Impacts”. Its Annex 1 additionally provides the methodology for Environmental and Social Assessments, and the role and function of an Environmental and Social Commitment Plan is expressed in Annex 2. These tools are described in detail and cover most of the relevant aspects in respect to environmental and social issues. The IFC PS (in PS1.7) require an additional human rights assessment where specific, high rights circumstances cannot be excluded; a provision missing in the World Bank Framework. The major challenges of the WB ESF remain those described above. In summary, the major challenges of the current draft are: (1) the possibility for borrowers to use their own assessment frameworks, and (2) the high flexibility of conditions for initiating a project even when impacts are only partially assessed or not every risk is understood properly. The Environmental and Social Action Plan can also be amended at a later stage. The VGGT demand that assessments are conducted as early as possible in order to consider substantive project alternatives, if necessary.

<sup>56</sup> Quotation from ESS 7, 19 (The World Bank 2015).

### 3.2.3.2 Protection of land rights

The VGGT require states to protect all legitimate tenure rights. This protection is part of the overall human rights due diligence expected of private actors. The two sets of guidelines provided by the IFC and the World Bank, are both in a similar way related to the issue of protecting land rights. The IFC PS are clear in the requirement to avoid involuntary restrictions on land use or access to natural resources. Displacement should be minimised by exploring alternative project designs. The World Bank safeguards are both similar in content but also differ, while addressing to a large extent the actions of states as borrowers. Borrowers are invited to be particularly sensitive to avoid involuntary resettlements. In cases where avoidance is not possible, displacement should be minimised by exploring alternative project designs.

While IFC PS require investors to exercise utmost care when land tenure governance is weak, the World Bank safeguards are also sensitive to measure the capacity of governments or institutions to act as expected. The VGGT require governmental protection of human rights as the state's obligation, which advantageously allows directly addressing scenarios of governance and lack of accountability.

### 3.2.3.3 Integration into management systems

The IFC PS require clients and private actors to have adequate management systems in place (see above) and to follow the call from the United Nations Guidelines on Business and Human Rights. The WB ESF requires borrowers to have a sensitive policy framework available. The ESS 1 describes in detail how borrowers should assess their risks and impacts. Along with Annex 2, it elaborates a potential environmental and social commitment plan. The ESS requires the development of a good governance system related to land issues. The overall recommendation on utilising the Borrower's Environmental and Social Framework results in a problem: While the utilisation or creation of government's ownership to its land policies sounds favourable, it might concurrently lead to problems due to the neglect of a human rights reference in the overall framework for good governance.

### 3.2.3.4 Meaningful participation during design and project implementation

The VGGT regards participation as the key to responsible investment. Both the IFC PS and WB ESF show similar sensitivity to participation issues as the VGGT. IFC PS 1 contains a paragraph addressing stakeholder engagement (IFC PS 1, 25), and the WB ESF considers the issue particularly in ESS 10. While all three instruments seek to ensure stakeholder participation as early as possible, the VGGT places stronger emphasis on the need to be open for ex ante participation in order to seek project alternatives in the event of problems. In comparison, the two other instruments focus on the assessment and monitoring process once a project has been implemented. Both the WB ESF and VGGT ask for a stakeholder engagement plan combined with the disclosure of relevant project information in order to facilitate meaningful participation.

### 3.2.4 Category IV: Issues that are dealt with better in the WB ESF

There are areas where the WB ESF regulations are more comprehensive than those of the VGGT. This applies to the areas of:

#### Table 9: World Bank ESF - Category IV

##### Issues that are better regulated in the WB ESF than by the VGGT

- Addressing imperfect governance
- Livelihood impacts and compensation for lost assets

#### 3.2.4.1 How to address imperfect governance

The IFC PS assume that governance in the land sector in many countries might be quite weak. Hence, investors are often asked to implement a project in circumstances where governance does not work properly, especially in rural areas or concerning land registration and administration. Starting from this assumption, the document asks for adequate consideration and good treatment of such problems by investors. The VGGT, on the other hand, is a normative document that describes government's duties in order to comply

with human rights obligations. By the very nature of the document, it offers a comprehensive description of governmental responsibilities, but fails to describe tangible steps towards properly functioning governments that fulfil their obligations. The WB ESF provides a very detailed analysis of governmental and institutional capacities to adequately deal with imperfect governmental structures, plans, and institutions. Because it particularly addresses borrowers, which are often states, the framework is less specific than the IFC PS on how to address situations where the state does not function properly. The recognition of the importance of borrowers' frameworks for the assessment and mitigation of potential risks and harms is a chance to move national governance systems. It is a welcome opportunity because it takes borrowers seriously, yet concurrently requests adequate treatment of project implementation and cases. On the other hand, in a scenario where borrowers do not function correctly, or where they do not intent to comply, the WB ESF might become a weak instrument.

### **3.2.4.2 Livelihood impacts and compensation for lost assets**

One of the key qualities of IFC PS 5 is its recognition that project assessments need to cover impacts beyond land acquisition or land-use restrictions: "Where project impacts on land, assets, or access to assets become significantly adverse at any stage of the project, the client should consider applying requirements of this Performance Standard, even where no land acquisition or land use restrictions is involved (IFC PS 5.7)". The WB ESF also incorporates the idea that affected persons or communities must be compensated for lost assets other than land. Both the IFC PS and WB ESF are textually strong on the issues of compensation, mitigation measures, designed policies and programmes that are needed when involuntary resettlement is unavoidable. The WB ESF provides strong programmes to proceed with treatments of mitigation and compensation, and adequately covers the issue of livelihood impacts. The VGGT take a different course, placing strong emphasis on the non-implementation of potentially harmful projects in order to avoid harm from the beginning.



## 4 Conclusions and Recommendations

This chapter summarises the results of the previous comparison. The findings of the VGGT standards and norms have been compared with the IFC PS and the WB ESF in four categories: (1) Issues that are regulated differently in the VGGT or where the VGGT require more attention, particularly when risks are seen in the overall context in which a project is developed; (2) Issues that are covered in the IFC PS and the new WB Framework, but which are given greater attention and importance, and are described differently in the VGGT; (3) Issues that are dealt with comparably in the VGGT, IFC PS and the new WB ESF, and which do not require additional treatment; (4) Issues that are dealt with better in the IFC PS or the WB ESF, with no further treatment needed. While the comparison was done in detail in the last chapter, a summary of the conclusions and recommendations is presented below. A tabular overview (4.1) will complete this chapter.

The comparison examined the contents and provisions of documents that differ from each other with respect to their target groups and objectives. The VGGT focus on the role and importance of states in adequately regulating land-related issues; thus, they focus primarily on obligations of states. The basic idea behind the VGGT is that states need to create an adequate legal and institutional framework for land transfers and administration, otherwise it will be difficult for every other actor/stakeholder group involved to act appropriately or follow best practice. States are obliged to respect and protect human rights, and to devote the maximum available resources to fully implementing these rights. When the national context for land registration, land administration, and land transfer is adequately set up and regulated, fewer people will suffer the consequences of inadequately planned/designed projects and the increasing global demand for land. However, since the national setting is often deficient, the VGGT also address private actors, who are required to

conduct necessary due diligence to ensure their own actions do not infringe human rights. Concerning private actors, the VGGT build upon the most authoritative instrument, the UNGP, which were endorsed by the Human Rights Council in 2011. Therefore, the comparison took the differing natures of all documents into consideration.

### Comparison with IFC PS

The IFC PS versions of 2012 are directed toward clients and private borrowers. They are sensitive to many of the concerns reflected in the VGGT. The comparison showed that the IFC PS deal with many issues in an adequate way (category III and IV of Table 10) and consider most of the core issues of the VGGT. The institutions that apply the IFC PS therefore already cover essential core elements of the VGGT. Nevertheless, the VGGT framework is a helpful tool for identifying potential land-related risks more comprehensively than in the IFC PS, particularly when risks are evaluated within the overall context in which a project is developed. In order to adequately reflect the human rights orientation of the VGGT, a pre-check of human rights risks is therefore recommended for high-risk projects concerning land issues, in order to predict the planned activities may create systematic risks (category I), or other specific risks that may easily be missed. If such ex ante risk assessments identify one or more relevant issues, then a further, more systematic assessment of human rights impacts is recommended.

Those VGGT issues that are not (fully) covered by the IFC PS (category I) particularly highlight the potential impacts of projects that go beyond the scope of a specific project. For example the cumulative impact of several projects of the same type in one region can result in negative consequences for rural development or food security, etc., even if each of the projects individually might initially appear to have positive outcomes. Individual projects on biofuels, for example, could be



assessed positively in their local circumstances while offering advantages such as increased employment or reduced CO<sub>2</sub> emissions. However, the implementation of a large number of similar projects in the same region might have severe cumulative impacts in practice; for example, water availability might be reduced or there might be less land available to produce food. In many rural areas, the increasing demand for land due to a large number of projects might trigger land conflicts with smallholder farmers, or corruption in the land administration, etc. Agencies financing land-based investments need to be sensitive to such cumulative impacts. Even if they finance only one project that is considered unproblematic according to the IFC PS, the overall setting might present substantive risks.

The VGGT also contain provisions for specific sensitivity or detailed problem analysis that might need greater attention than given in the IFC PS (category II). In these situations, it is recommended to check whether the particular interpretation of the VGGT allows the identification of additional problems or risks that need to be treated (category II). On the basis of the VGGT's strong human rights approach, the Voluntary Guidelines demand particular sensitivity in addressing issues for certain areas. The recognition of the high level of sensitivity can help to mitigate land-related risks of projects. If a project will involve one of these sectors, *prima facie ex ante* analyses should be conducted. If there is a strong probability of additional problems, a systematic human rights impact assessment is recommended. Category II issues cover themes were the context and the interpretation presented in the VGGT can help to sharpen the understanding of problems that are recognised in the IFC PS. Using the VGGT's extended understanding can help to more easily comprehend land issues or

land policy-related risks, and also to deal with or mitigate them.

Will these extra analyses present a new and additional burden for development institutions? Might they become an additional burden to investment in projects involving land issues? Any additional burden will not be large, because such additional risk analyses will be limited to projects that bear such high risks. At this point, particular sensitivity is recommended to these areas during the first phase of initiating projects. These early and sensitive pre-checks for core land-related problems should be integrated into the regular IFC PS checks. Only in cases where a project might trigger high risks should an additional human rights impact assessment be conducted to ensure that land risks are adequately identified. The latest data concerning persons negatively affected by involuntary resettlement associated with World Bank projects show how important it is to take land issues seriously.<sup>57</sup> This will help to minimise land-related problems during project implementation, and will to support rural development based on human rights that also fosters the implementation of the sustainable development goals (SDGs).

### Comparison with WB ESF

The comparison also included the new WB ESF, which was under discussion in recent years<sup>58</sup> and was adopted in August 2016 by the executive directors of the World Bank. The study draws partially different conclusions when comparing the VGGT with the two frameworks, the WB ESF and the IFC PS.<sup>59</sup> The new WB ESF guides World Bank-financed investment projects, which are often directed to state borrowers.

While most of the findings and the structure of the World Bank safeguards result in conclusions

57 The International Consortium of Investigative Journalists published a database (ICIJ, 15.04.2015) summarising that, over the last decade, projects funded by the World Bank have physically or economically displaced an estimated 3.4 million people, forcing them from their homes, taking their land or damaging their livelihoods, while failing to live up to the Bank's own policies to protect people. That publication started a discussion on the quality of all data used in the study, although the general trend was not contested. [www.icij.org](http://www.icij.org)

58 The overall assessment here is based on the second draft of the World Bank Environmental and Social Safeguards (WB ESF), because that was the draft available when the study was written in the first half of 2016. The second draft is very similar to the WB ESF, which was adopted by the executive directors in August 2016 as the new World Bank framework.

59 The decision was taken on 04.08.2016. See: <http://www.worldbank.org/en/news/press-release/2016/08/04/world-bank-board-approves-new-environmental-and-social-framework>

similar to those of the IFC, there are specificities of the new WB ESF that are particularly relevant for land-related projects, yet which are dealt with differently in the IFC PS.

- (1) While the new policy mentions, in a broad vision statement, that “the World Bank’s activities support the realization of human rights”, it does not include human rights protections in the text of its obligations for borrowers. The compliance of any land governance-related standard will be difficult to request from borrowers when human rights are not included in the requirements from the outset.
- (2) Resettlements plans are no longer required prior to project approval. This increases the World Bank’s flexibility in larger infrastructure projects, yet it is often not clear at the beginning of a project which land titles will be affected by streets or new transmission lines. These changes affect the overall project planning process and complicate the process of adequately dealing with land-related risks.
- (3) The responsibility for enforcing the safeguards is shifted away from the World Bank to its borrowers. This might increase the ownership and quality of borrowers’ own mechanisms for implementing safeguards. Conversely, it might substantially increase land-related risks in cases where it is in a government’s own interest to develop land, or where the government formally owns all land.

While the safeguards add new provisions related to labour issues, indigenous peoples and other

communities, the enforcement and project planning process (resettlement plans to be developed after project approval) might increase the human rights risks for land-related projects. Many observers have expressed concern that the replacement of clearer, time-bound requirements through vague language, flexible principles and reliance on borrowers’ own systems will impede the protection of land rights for affected persons or groups.

While it needs to be seen in which way the new framework will be implemented it is recommended for land related projects with involvement of IFIs (International Financial Institutions) and DFI (Development Finance Institutions) including the German development finance to exercise sensitivity to specifically land risks, to take the recommended pre check (see above for IFC PS) seriously, and to require extra human rights impact assessments concerning land governance, when the pre check has identified a high risk projects e.g. by involving larger land transfers, particularly vulnerable persons or groups affected, etc.

The comparison in this study is done focussing only on the IFC PS and the World Bank ESF. German Development Finance Institutions (DEG and KfW) also have – as many other DFIs – additional policies in place that address some of the issues mentioned here as not covered. Such policies were not analysed by this comparison. They might already allow the institution to address some of the potential additional risks identified in this study. The recommendation here is to all IFIs and DFIs to develop adequate regulations or procedures that allow to identify and address the described potential gaps.

**Table 10: Comparison of core issues**

Issue Categories	IFC PS	World Bank ESF
<p><b>General remarks</b></p> <p>The new World Bank framework puts more responsibility on borrowers' own national systems for (land-) governance. At the same time, human rights obligations are not mentioned explicitly in the framework. Under these circumstances, projects and investments with a substantive land component might face additional risks and require more attention than under the IFC PS framework.</p>		<p>The final version is stronger on workers' rights, indigenous rights and the rights of other communities than previous drafts.</p> <p>At the same time, it has some limitations:</p> <ul style="list-style-type: none"> <li>- It does not integrate human rights obligations explicitly</li> <li>- Responsibility for enforcing the safeguards is shifted away from the World Bank to the borrower's own control system (with advantages and risks)</li> <li>- Increased flexibility: Resettlement plans are no longer required prior to project approval, and might be amended in later stages of project development. Solutions for land rights conflicts might be considered too late, or might create new land rights conflicts while the project has already started.</li> </ul> <p><b>Recommendations</b></p> <ul style="list-style-type: none"> <li>- Greater dependence on the governance quality of the borrower requires more knowledge of the governance system and of its imperfections and loopholes</li> <li>- Check the possibility of utilising contracts with the borrower to restrict the flexibility of the WB ESF towards the IFC PS standards</li> </ul>

Issue Categories	IFC PS	World Bank ESF
<p><b>Category I:</b>  <b>Issues that are regulated differently in the VGGT or where the VGGT require more attention, particularly when risks are seen in the overall context in which a project is developed</b></p> <p><b>Recommendations</b>                      In order to adequately reflect the human rights approach of the VGGT, it is recommended to conduct a particularly sensitive pre-check of human rights risks upfront in cases of high-risk projects concerning land issues, in order to determine whether the planned activity might potentially create systematic risks (category I), or specific risks that might be easily overlooked.</p> <p>If such cases, a systematic impact assessment is recommended for the land component of a project.</p>	<p>In projects involving large land transfers and a high-risk land component, the overall impacts of project and investment finance can exceed the scope of a specific project:</p> <ul style="list-style-type: none"> <li>- Forced eviction due to public purpose. National regulations following the VGGT might go further than the IFC PS and should be respected.</li> <li>- Corruption in land policies required particular attention beyond the overall anti-corruption policy of development finance institutions. When the land policies of a country are infected by a corruptive environment, the overall governance issues around land transfers and acquisitions change.</li> <li>- Other issues are those where a project might have an impact on the following areas linked to general policy developments, where the project is part of – or were the cumulative impacts of similar projects in one region cause – substantive impacts in the following areas:                             <ul style="list-style-type: none"> <li>- Food security</li> <li>- Rural development</li> <li>- Smallholder farmers</li> <li>- Restriction by size</li> <li>- Rule of law</li> </ul> </li> </ul>	<p>(see explanation in the IFC PS column)</p> <ul style="list-style-type: none"> <li>- Forced eviction due to public purpose</li> <li>- Corruption</li> <li>- Other issues                             <ul style="list-style-type: none"> <li>- Food security</li> <li>- Rural development</li> <li>- Smallholder farmers</li> <li>- Restriction by size</li> <li>- Rule of law</li> </ul> </li> <li>- As the new WB framework does not relate directly to the human rights obligations of states and the human rights responsibilities of private actors, it might lead to considerable risks for the respect for human rights in land transactions and the governance of land tenure.</li> </ul> <p><b>Recommendations</b>                      For projects with a large land component, development finance institutions need to follow national developments with respect to governance quality and the borrower’s capacity for enforcement more closely, in order to adjust their own measures when the duty bearer is not (or no longer) functioning as needed.</p>
	<p><b>Recommendations</b>                      When the proposed pre check identifies substantive problems in one of these areas, a land-related impact assessment should be conducted (this can be in conjunction with all other impact assessments during project preparation). Checks could be based on the analytical grid developed by New Alliance</p>	

Issue Categories	IFC PS	World Bank ESF
<p><b>Category II:</b>  <b>Issues that are covered in IFC PS and the WB Framework, but which are giving greater attention and importance, and are described differently in the VGGT</b></p> <p><b>Recommendations</b>            For projects with a high-risk land component, it is recommended to use the sensitivity, standards and interpretation in relation to risk assessments as applied in the VGGT.</p>	<ul style="list-style-type: none"> <li>- The importance of human rights and quality of governance needs to be understood properly in order to determine potential risks; the importance attached to human rights is higher than in the WB setting.</li> <li>- Definition of legitimate tenure rights</li> <li>- Attention to particularly vulnerable groups</li> <li>- Gender issues</li> <li>- Meaningful participation</li> <li>- Transparency of project information</li> <li>- Relevance of grievance mechanism</li> </ul>	<ul style="list-style-type: none"> <li>- Definition of legitimate tenure rights</li> <li>- Attention to particularly vulnerable groups</li> <li>- Gender issues</li> <li>- Meaningful participation</li> <li>- Transparency of project information</li> <li>- Relevance of grievance mechanism</li> <li>- Indigenous peoples' issues</li> </ul> <p>Forced evictions/involuntary resettlements. This issue needs to receive greater recognition:</p> <ul style="list-style-type: none"> <li>- In cases where the WB Framework is applied, the borrower is often the state, which is therefore in the position to determine the type of eminent domain, such as whether compulsory acquisition is permitted. Therefore, the link to human rights obligations is needed, in order to restrict borrowers' policy choices to those that avoid harm.</li> </ul> <p><b>Recommendations</b></p> <ul style="list-style-type: none"> <li>- It might be helpful for DFIs to have an overview of the method and quality of the participation processes provided for affected persons and communities. If there has not been a properly organised participation procedure, DFIs are encouraged to conduct their own participatory research. Greater dependence on the decisions, policies and enforcement mechanism of borrowers necessitates greater transparency. The World Bank itself already publishes many project-related documents. The same level of transparency should be demanded from other DFIs that use the WB Framework.</li> </ul>

Issue Categories	IFC PS	World Bank ESF
<b>Category III: Issues that are dealt comparably in the VGGT, the IFC PS and the new WB Framework, and which do not require additional treatment</b>	<ul style="list-style-type: none"> <li>- Comprehensive environmental and social standards (ESS) assessments</li> <li>- Indigenous peoples' issues</li> <li>- Protection of land rights</li> <li>- Forced evictions/involuntary resettlements</li> <li>- Integration into management processes</li> <li>- Stakeholder engagement</li> </ul>	<ul style="list-style-type: none"> <li>- Comprehensive ESS assessments</li> <li>- Protection of land rights</li> <li>- Integration into management processes</li> <li>- Stakeholder engagement</li> </ul>
<b>Category IV: Issues that are dealt with better in the IFC PS or the WB Framework, with no further treatment needed</b>	<ul style="list-style-type: none"> <li>- How to address imperfect governance</li> <li>- Livelihood impacts</li> </ul>	<ul style="list-style-type: none"> <li>- How to address imperfect governance</li> <li>- Livelihood impacts</li> </ul>

### To sum up: Conclusion of the comparison

(1) The comparison has shown that the IFC PS already cover most concerns raised by the VGGT. They provide a robust framework for assessing the impacts of land-related projects. The study has identified two types of difference that might require additional responses: (a) issues that are highlighted and particularly considered in the VGGT but not in the IFC and WB frameworks; and (b) issues that are covered by the IFC PS and WB ESF, but where the VGGT provisions go further or provide more detailed descriptions of how the issues should be tackled.

The comparison has identified issues where the VGGT describe land-related governance concerns that go beyond the scope of a single project. As the VGGT are directed first and foremost to governments, they recommend that policies for land registration, administration and transfer should be embedded within a well-developed spatial planning framework. Those should be linked to regional development plans that consider the impacts of land investments on food security, water flows, the environment and the overall social situation of the potential project region. If such an overall approach to land policy is not employed, potential impacts might easily be overlooked. Therefore, the study recommends performing

additional risk assessment (ex ante) if there is a likelihood of a project leading to one or more of these issues.

(2) If the project is likely to cause such negative impacts, the second recommendation is for a substantive due diligence assessment of risks to human rights, to identify more precisely the potential undesirable/negative impacts. Obviously, the extent of the impacts is influenced by the size of the project, the sector and the type of project. While a single project considered in isolation might not cause larger societal impacts, this assessment might change if several similar projects are planned or realised within the region. In combination, they might have different and substantive impacts on rural development or food security. Hence, the potential contribution of the supported projects should be analysed beforehand. Furthermore, the potential aggregate outcome of these project should be investigated. The final risk assessment should take all these influencing factors into consideration. The IFC PS guides all investors to look basically into the potential impacts of a single project, while the VGGT remind DFIs to keep the broader impacts in view.



- (3) The study has identified several issues that are covered in the IFC PS and the WB Framework, but which are given greater attention and importance, and are described differently in the VGGT. In respect to projects with a high-risk land component, the study recommends utilising the standards and interpretation presented in the VGGT as a role model when assessing the risks, for example on gender-related problems.
- (4) With respect to the new WB ESF, the comparison comes to partially different conclusions. While the WB ESF and IFC PS often use the same structure and identical wording, the context described in the new WB ESF differs from the IFC PS. The new WB Framework places more responsibility on borrowers' own national systems for (land-) governance. At the same time, human rights obligations are not mentioned explicitly in the framework. Under these circumstances, projects and investments with a substantive land component might face additional risks and require greater attention than under the IFC PS framework. Therefore, supported projects and policy advice given in the land sector need to carefully analyse the borrower's capacity to conduct impact assessments. If that capacity is limited or the borrower is unwilling to cooperate, DFIs still should consider obtaining an adequate overview of the potential impacts of projects they are supporting. In order to achieve this, they could check the possibility of limiting the borrower's flexibility and to

guarantee the conduct of a responsible impact assessment that incorporates human rights concerns. In projects with high land-related risks, an additional human rights impact assessment should be foreseen, in order to avoid potential harm.

There is a strong need for additional information and assessments, particularly when: (1) the participation of affected persons and communities is not properly guaranteed; (2) their right to organise or to speak freely is compromised by laws, resulting in restriction of their operations. In such situations, it becomes problematic to assess the potential risks adequately. When the duty bearer is not (or no longer) functioning as needed, for projects with a larger land component, DFIs are recommended to more closely follow national developments with respect to governance quality and the borrower's capacity, in order to adjust their own measures. Greater dependence on borrowers' own decisions, policies and enforcement mechanisms necessitates greater transparency. The World Bank itself already publishes many project-related documents. The same level of transparency should be demanded from other actors (borrowers) as well as other DFIs that use the WB Framework.

Additional recommendations for each of the issues presented and analysed in the comparison are evaluated in Chapter 3 and Table 10. The comparison has also shown that (firstly) many issues are well covered by the IFC PS, and (secondly) some receive greater attention in the IFC PS framework than in the VGGT.

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**African Union, the African Development Bank and the UN Economic Commission for Africa**

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## Abbreviations

BMZ	Bundesministerium für wirtschaftliche Zusammenarbeit und Entwicklung (German Federal Ministry for Economic Cooperation and Development)	IGO	Intergovernmental Organization
CFS	Committee on World Food Security	ILC	International Land Coalition
COFI	FAO Committee on Fisheries	ILO	International Labour Organization
CSM	Civil Society Mechanism	KfW	Kreditanstalt für Wiederaufbau
CSO	Civil Society Organisation	NEPAD	New Partnership for Africa's Development
DEG	Deutsche Investitions- und Entwicklungsgesellschaft	OECD	Organisation for Economic Co-operation and Development
DFI	Development Finance Institutions	PSM	Private Sector Mechanism
ESAP	Environmental and Social Action Plan	SEP	Stakeholder Engagement Plan
ESDD	Environmental and Social Due Diligence	SSF	Voluntary Guidelines for Securing Sustainable Small-Scale Fisheries in the Context of Food Security and Poverty Eradication
FAO	Food and Agriculture Organization of the United Nations	UNCTAC	UN Conference on Trade and Development
FPIC	Free, Prior and Informed Consent	UNGP	UN Guiding Principles on Business and Human Rights
HR	Human Rights	VG-Land	Voluntary Guidelines on Land
HRBA	Human Rights-Based Approach	VGGT	Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security
IFAD	International Fund for Agricultural Development	WB ESF	World Bank Environmental and Social Framework (August 2016)
IFC	International Finance Corporation	WB ESS	World Bank Environmental and Social Standards
IFC PS	IFC Performance Standards on Environmental and Social Sustainability		
IFIs	International Financial Institutions		



## Imprint

### PUBLISHER

German Institute for Human Rights  
Zimmerstrasse 26/27 | 10969 Berlin, Germany  
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info@institut-fuer-menschenrechte.de  
www.institut-fuer-menschenrechte.de

Analysis | July 2017

ISBN 978-3-945139-99-8 (Print)

ISBN 978-3-946499-00-8 (PDF)

### TYPESETTING

Da-TeX, Leipzig

### COVER PHOTO

fotoak80, fotolia.com

### PRINTED BY

Druckteam Berlin

Printed on recycled paper

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IN COOPERATION WITH



SUPPORTED BY



Federal Ministry  
for Economic Cooperation  
and Development

**German Institute  
for Human Rights**

Zimmerstrasse 26/27  
10969 Berlin, Germany

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