

**From:** Michael Windfuhr, Deputy Director, German Institute for Human Rights  
**To:** World Bank ESF, Guidance Notes  
**Subject:** Comments on guidance note ESS5, taking into consideration the „Voluntary Guidelines on Responsible Governance of tenure of land...“ (2012)  
**Date:** December 22, 2017

Following the invitation of the World Bank (WB) to comment on the Guidance Notes (GN) of the Environmental and Social Framework I would like to send in five comments / observations / recommendations. While much more could be said in comparison to the „Voluntary Guidelines on Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security“ (VGGT) which were adopted in 2012 by the Committee on World Food Security,<sup>1</sup> I will narrow the comments on five issues:

**1. Related to impacts / effects that are not „directly introduced“ by the project:**

In general environmental and social impacts are measured that are directly linked to a project. GN 4.5 highlights cases where the project impact is not only directly due to the project site but perhaps also at other locations (e.g. if a dam alters downstream water flows etc.). Such impacts would then be followed up by the general impact assessments addressed under Environmental and Social Safeguard (ESS) 1. The Environmental and Social Framework (ESF) and the guidance note are therefore referring to impacts that go beyond the mere location of the project, which is a good approach. What is missing here and thus recommended are two additional dimensions of impact:

- It is important to raise other indirect impacts of projects on subjects which are less direct, such as food security, or the general rural development impacts, particular impacts on smallholders in the regions etc. These concerns are highlighted by the Voluntary Guidelines on Responsible Governance of tenure of land (VGGT) adopted by the Committee on World Food Security in 2012. The VGGT highlight such aspects of **broader societal impacts** of projects, particular concerning larger projects. The Guidance Note should therefore recommend to take the VGGT into consideration, when assessing the broader impacts as required by ESS1.
- Projects are often realized in areas where several projects of a similar type are implemented (e.g. in case of agricultural investments). While the impact of a single project might be limited, the combined impacts of several projects might be larger (e.g. in cases of irrigation in agriculture). While a single assessment might find out that one project impact might lead to an overstretch of the available water resources, an accumulation of several irrigation projects being planned or implemented in the same valley or region, might change water availability substantially. The Guidance Note should mention such potential **cumulative risks**. Even if such an assessment would go beyond the scope of the ESF, Borrowers should be reminded of such potential impacts in the Guidance Note.

GN 4.9 refers to the potential loss of communal property and natural resources as means of livelihood that should be taken into consideration, when projects impacts are assessed. Both aspects mention before (potential broader societal and cumulative impacts) are in particular relevant also for

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<sup>1</sup> For further reading see: Michael Windfuhr (2017): „Safeguarding Human Rights in Land Related Investments“, German Institute for Human Rights. Available from January 2018 under: [www.institut-fuer-menschenrechte.de](http://www.institut-fuer-menschenrechte.de)

the potential impacts on commons, such as communal properties and natural resources. The GN 4.9 should therefore take the issue up and should also make a reference to the VGGT.

## **2. Restrictions on land use and involuntary resettlements**

The ESF formulates the perspective that the Borrower will identify all persons affected by the project, where land acquisition or restrictions of land use are unavoidable. 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. Therefore two potential problems shall be mentioned here that should be reflected in the Guidance Notes:

- 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 have a positive effect because it might strengthen the 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 Guidance Notes shall inform Borrowers that they do have human rights obligations in terms of material rights but also related to due processes (transparency, participation, non-discrimination), which sets limits to what they can plan or implement. Human rights are not mentioned in the ESF, nevertheless they are part of national policy frames and should therefore be complied by Borrowers. Consequently, it would be recommendable when the Guidance Note would address this complexity (in GN 20).
- A second problem relates to the intention of the WB ESF to increase flexibility in the management of investment lending projects. ESS 5, 25 describes the problem. When potential physical or economic displacements are not known already during project planning, they might be identified later. This refers, for example, to changes in resettlement plans or provisions for indigenous peoples during the implementation and partially after board project approval. Increasing the flexibility in 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 Borrowers requires careful awareness of which issue areas are in need for clarification in advance, and which could be dealt with once the project is already started. Indigenous land issues constitute a minimum that need to be clarified in advance. 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, particularly if they are important for vulnerable groups or - if neglected – they can lead to conflicts. At this stage, it might already be too late to develop a project without conflicting with existing human rights obligations that Borrowers might have. The GN 25.1 should therefore alert Borrowers about their own responsibility in making sure that late changes in project design or implementation must not lead to violations of human rights. It is crucial that such important issues are clarified in advance.

### 3. Forced evictions:

In comparison to the VGGT, the ESF differs in its prohibition of forced evictions beyond those conducted in the course of public purpose. The VGGT demand that States do 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. 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 state that “evictions and relocations should not result in individuals being rendered homeless or vulnerable to the violation of human rights (VGGT 16,9).” This reference to individual’s claims to human rights narrows the scope of what can be considered acceptable involuntary resettlement or avoidable involuntary resettlement. The Guidance Notes (in 31) should make a reference to these limits formulated in the VGGT. They can and should help Borrowers in their own decision making concerning the use of eminent domain, compulsory acquisition or similar powers by a Borrower that are not considered forced evictions according to the ESF, but could nevertheless be a human rights violation, if the Borrower does not take their human rights obligations into consideration.

### 4. Legitimate Tenure rights / particular vulnerable groups

The VGGT's core understanding of the need to recognize all legitimate tenure rights is de facto integrated into the WB ESF. It is recommendable that the GN 10 explains the term „legitimate tenure rights“, and refers to the VGGT. The GN 10.1 describes most of the content of VGGT. The reference shows that most Borrowers have accepted the VGGT and the presented broad understanding of affected persons. Nevertheless, in direct comparison with the WB ESF, the Performance Standard 5 on Environmental and Social Sustainability of the International Finance Corporation (IFC PS) credits 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)

**Attention to particularly vulnerable groups:** 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“. They are not further specified, in contrast to the VGGT, which contain several lists of specific groups that might suffer from particular disadvantages owing to their regular discrimination as a group, for example pastoralists or smallholder farmers, etc. The following is hence recommended as a Guidance Note to 33: Borrowers should be required to pay attention to potential impacts on particularly vulnerable groups, including small-holder farmers before a project is planned and implemented.

### 5. Corruption

Due to the fact that corruption is not an issue in the WB ESF, but does have potentially an important role in land registration, land administration and land transfer processes, the Guidance Notes could make - in relevant passages - a reference to the respective parts of the VGGT that deal with avoiding and handling corruption in land policies.

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