

# **Excerpt from “Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security”**

## **Explanatory Notes**

This document identifies the text for which negotiations are still to be completed.

It contains the following extracts from the document “Consolidated Changes to the First Draft of the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security (12-15 July and 10-15 October 2011)”.

- a) Text proposed by thematic groups or friend of the chair groups but not discussed by the Plenary is shown in brackets and identified by the thematic group or friend of the chair group that made the proposal.
- b) Text discussed but for which consensus was not found, either by the Plenary or by thematic groups or friend of the chair groups, is highlighted.
- c) Text not bracketed, highlighted or marked with asterisks has not yet been reviewed by a thematic group, friend of the chair group or the Plenary.
- d) In some paragraphs, consensus has been found. These sentences are marked by asterisks.

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## **Part 2 \* General matters \***

### 4. \* Rights and responsibilities related to tenure \*

4.9 [States should provide access through impartial and competent judicial and administrative bodies to timely, affordable, and effective means of resolving disputes over tenure rights, including alternative means of resolving such disputes, and should provide effective remedies and a right to appeal. Such remedies should be promptly enforced and may include restitution, indemnity, compensation and reparation. States should ensure that any person whose human rights are violated in the context of tenure also has access to such means of dispute resolution and remedies.] *(This paragraph was requested to be reviewed by the Plenary after review of paragraphs 21.1 and 21.6; the Plenary has now found consensus on those paragraphs.)*

## **Part 3 \* Legal recognition and allocation of tenure rights and duties \***

### **8. \* Public land, fisheries and forests \***

8.2 Where States own or control land, fisheries and forests, they should respect existing [holders of legitimate tenure rights] [~~tenure right holders~~] [~~and their rights~~]. States should [recognise and respect, in accordance with national law] [~~provide legal recognition~~], in a non-discriminatory and gender-sensitive way, [~~to~~] [legitimate] tenure rights of individuals and communities [with customary tenure systems] [~~, including legitimate customary tenure rights, that are considered legitimate but are not currently protected by law.~~] States should define through widely publicized rules the categories of [legitimate tenure] rights [~~that are considered legitimate.~~] *(proposed in plenary discussions)*

**OR**

[Where States own or control land, fisheries and forests they should operate in line with paragraph 4.5.] *(alternative version of 8.2 proposed in plenary discussions)*

8.3 Noting that there are [many] publicly-owned lands, fisheries and forests that are collectively used and managed, States should, where applicable, recognize and protect [such] commons, and the related systems of collective governance, [including in processes of allocation of publicly-owned lands, fisheries and forests.] *(new paragraph proposed and discussed in plenary)*

8.10 [To the extent that resources permit, States should ensure that implementing agencies] responsible for land, fisheries and forests have the human, physical, financial and other forms of capacity. [~~Where necessary, those who are allocated tenure rights should be provided with support so they can enjoy their rights.~~] *(already in 8.8)* Where responsibilities for tenure governance are delegated, the recipients should receive training and other support so they can perform those responsibilities.

## **9. Indigenous peoples and other communities with customary tenure systems**

- 9.4 [States should provide legal recognition and safeguarding of tenure rights and tenure governance systems of indigenous peoples and other communities with customary tenure systems [as appropriate] [, consistent with their existing obligations under national and international law and with due regard to their [voluntary] commitments to respect, protect and fulfil human rights under applicable regional and international instruments.] Legal recognition of the legitimate tenure rights of indigenous peoples and other customary communities should cover the land, fisheries and forests, including those belonging exclusively to such communities. [Those which are shared amongst different communities should also be acknowledged.] Information of such recognition should be accessible and done through [appropriate media and] notices in official government and other publications in applicable languages that everyone, including indigenous peoples, can understand. [States shall respect and maintain the tenure of indigenous peoples over their ancestral lands and give legal recognition and protection. States should abstain from proceeding of forceful evictions of indigenous peoples from their ancestral lands.] *(proposed by a Friend of the Chair Group)*

## **Part 4 \* Transfers and other changes to tenure rights and duties \***

This part addresses the governance of tenure of land, fisheries and forests when existing rights and associated duties are transferred or reallocated through voluntary and involuntary ways through markets, investments and concessions, land consolidation and other readjustment approaches, restitution, redistributive reforms or expropriation.

### **11. \* Markets \***

- 11.2 [States should facilitate the operations of efficient and transparent markets to promote participation under equal conditions and opportunities for mutually beneficial transfers of tenure rights which lessen conflict and instability, create incentives for sustainable use of land, fisheries and forests and conservation of the environment, expand economic opportunities and increase participation by the poor. States should provide safeguards to protect local communities, indigenous peoples and vulnerable groups, and to prevent undesirable impacts from, inter alia, excessive land speculation, concentration, abuse of customary forms of tenure and exploitation of native species. States and other parties should recognize that non-market values, such as social, cultural and environmental values, are not always well served by unregulated markets. States should protect the wider interests of societies through policies and laws, and through means such as taxation and regulated spatial planning.] *(proposed by a Friend of the Chair Group)*

## 12. \* Investments \*

- 12.4 \* Responsible investments should do no harm, safeguard against dispossession of legitimate tenure rights holders and environmental damage, and should respect human rights. Such investments should be made working in partnership with relevant levels of government and local land, fisheries and forest tenure right holders, respecting their legitimate tenure rights. \* They **[should further]** contribute to objectives including: poverty alleviation, food security and sustainable use of land, fisheries and forests; support local communities, contribute to rural development, promote ~~[and secure]~~ local food production systems, enhance social and economic development, create employment, diversify livelihoods, provide benefits to the country and its people, including the poor and most vulnerable and ~~[Such investments should]~~ comply with ~~[applicable]~~ [national [laws] [and international core labour standards and ILO standards when applicable] ~~[and International Labour Organisation standards.]~~ *(proposed in plenary discussions)*
- 12.5 ~~[States should [consider] [prevent] risks posed to human rights, livelihoods, food security and the environment due to large-scale [land acquisitions, concessions and leases] [transactions] that involve conversion of land used by local communities, families and individuals [to commercial activities]. In that sense, States should provide for additional safeguards. [such as by limiting the scale of tenure rights to be transferred as a result of [acquisitions, concessions, or leases] or [transactions] (such as by introducing ceilings on permissible land transactions) or by providing for additional safeguards in case of proposals of tenure rights transfers exceeding certain scale (such as by parliamentary consultation).]~~ States **[should] or [may]** encourage alternative production and investment models to the full acquisitions of land. ~~[and to large-scale concessions and leases.]~~ *(proposed in plenary discussions)*
- 12.7 States should determine through active, free, effective, meaningful and informed consultation and participation with all affected parties the conditions under which responsible investments ~~[and concessions]~~ should be promoted, and then should develop and publicize policies and laws **[that encourage responsible investments [and concessions]**, respect human rights, and promote food security and sustainable use of the environment. **[Laws should require agreements for investments [and concessions] to clearly define the acquired rights and duties of the investors.]** ~~[Agreements should be periodically reviewable, and sanctions should be clear and enforceable.]~~ *(proposed by Thematic Group 3)*
- 12.8 States should ensure that proposals for investments ~~[and concessions]~~ involving the acquisition of tenure rights are subject to **[negotiations] or [active, free, effective, meaningful and informed consultation]** with **[those affected] or [the affected men and women, families and communities, including indigenous peoples]** [, supported by legal professionals where necessary]. States and civil society should inform individuals, families and communities of their tenure rights, and assist to develop their capacity in **[negotiations] or [consultations]** and

implementation, and provide professional assistance. (*proposed by Thematic Group 3*)

- 12.9 States should ensure that existing tenure rights and claims, including those of customary and informal tenure, are identified as part of investigatory research and analysis in areas where investments [~~and concessions~~] involving large-scale acquisition of tenure rights are being considered. This process should be conducted in active, free, effective, meaningful and informed consultation with local communities and holders of tenure rights.
- 12.10 Investors should ensure that all relevant persons are engaged and informed in the negotiations, and the agreements are documented and understood by all. The negotiation process should be non-discriminatory and gender sensitive. Investors should recognise and respect tenure rights of others and the rule of law, and they should not contribute to food insecurity and environmental degradation.
- 12.11 Professionals who provide services to States and investors should undertake due diligence to the best of their ability when providing their services, irrespective of whether it is specifically requested.
- 12.12 States should provide timely, affordable and effective means of dispute resolution to enforce contractual terms and obligations of parties to investment [~~and concession~~] agreements.
- 12.13 States and civil society should contribute to the effective monitoring of the implementation and impacts of agreements involving large-scale acquisition of tenure rights. States should take corrective action where necessary to enforce agreements and protect tenure rights.
- 12.14 States should promote the development of independent and voluntary quality certification schemes for internationally accepted practices for investment [~~and concessions~~] in land, fisheries and forests.

#### **14. \* Restitution \***

- 14.2 Where possible, the original parcels or holdings should be returned to those who suffered the loss, or their heirs. Where the original parcel or holding cannot be returned, States should provide prompt, adequate compensation in the form of money or alternative parcels or holdings, ensuring equitable treatment of all affected people. [Where tenure rights of indigenous peoples were unjustly taken, those peoples affected have the right to redress by means that can include restitution or, when this is not possible, just, fair and equitable compensation for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent. Unless otherwise freely agreed upon by the peoples concerned, compensation should take the form of lands, territories and resources equal in quality, size and legal status or of

monetary compensation or other appropriate redress. The principles of consultation and participation as set out in paragraph 3B.6 should be applied in the case of other communities with customary tenure systems.] *(Note: In the document of July, this paragraph was incorrectly marked as showing the Plenary had found consensus. Instead, the paragraph was referred to the Language Harmonization Group for a review which has been completed, and the paragraph is to be further discussed in plenary)*

**15. \* Redistributive reforms \***

15.2 [Redistributive reforms may be considered for social and environmental reasons, among others, where a high degree of ownership concentration is combined with a significant level of rural poverty attributable to lack of access to land, fisheries and forests in national contexts.] *(proposed in plenary discussions)*

15.4 Where States choose to implement redistributive reforms, States should clearly define the objectives of reform programmes and exempted land and intended beneficiaries. Exempted land and the intended beneficiaries should also be clearly defined, such as families including those seeking homegardens, women, informal settlement residents, pastoralists, historically disadvantaged groups, marginalized groups, youth, indigenous groups, extractivists, and small-scale food producers. [In designing reform programmes, States may also consider [the use of policy tools such as land ceilings and also the removal of distortions that increase costs of transactions.] *or* [making use of land ceiling laws.]] *(proposed in plenary discussions)*

15.5 States should develop policies and laws for redistributive reform, through participatory processes, to make the reforms sustainable. States should ensure that policies and laws assist beneficiaries, whether communities, families or individuals, to earn a living from the resources they acquire. [States should revise policies encouraging inequitable concentration of ownership and other tenure rights, consistent with Section 11.] *(proposed in plenary discussions)*

**16. \* Expropriation and compensation \***

16.1 Subject to their national law and legislations and in accordance with national context, States should expropriate only where rights to land, fisheries or forests are required for a public purpose: [in no way should expropriation or forced eviction be made for private purposes]. States should clearly define the concept of public purpose. States should ensure that all actions are consistent with their national law as well as their existing obligations under national and international law, and with due regard to voluntary commitments under applicable regional and international instruments. They should respect all legitimate tenure right holders, including lessees, women and vulnerable groups, by acquiring the minimum resources necessary, and promptly providing just compensation in accordance with national law. Whenever possible, States [should] *or* [may wish

to] acquire the resources through open markets as an alternative to expropriation.  
(*proposed in plenary discussions*)

- 16.7 [Where land, fisheries and forests to be expropriated are used by people and communities who do not have legally recognized tenure rights, and where it is not possible to provide them with legal recognition of tenure rights, States should prevent forced evictions that violate existing obligations under national and international law, and with due regard to voluntary commitments under applicable regional and international instruments. Where evictions are considered to be justified for a public purpose, States should conduct them with due regard to their relevant obligations and voluntary commitments to protect, promote and implement human rights.] (*proposed in plenary discussions*)
- 16.8 [States should ensure, prior to eviction or shift in land use which could result in depriving individuals and communities from access to their productive resources, that all feasible alternatives are explored in active, free, effective, meaningful and informed consultation with the affected parties, with a view to avoiding, or at least minimizing, the need to resort to evictions.] (*proposed in plenary discussions*)
- 16.9 [Evictions should not result in people being rendered homeless or vulnerable to the violation of human rights. Where those affected are unable to provide for themselves, the State should take all appropriate measures to ensure that adequate alternative housing, resettlement or access to productive land, fisheries and forests, as the case may be, is available.] (*proposed in plenary discussions*)

## Part 5 Administration of tenure

This part addresses governance of the administration of tenure, with regard to records of tenure rights, valuation, taxation, regulated spatial planning, resolution of disputes over tenure, and transboundary matters.

### 19. \* Taxation \*

- 19.1 States have the power to [raise revenue through taxation] [~~use such taxes~~] [related to tenure rights so as to contribute to the achievement of [~~and to raise revenue~~]~~and also to~~ achieve [the State's broader] social, [economic, and environmental] [~~environmental and economic~~] objectives. [These objectives may include [~~effective financing for decentralized levels of government and local provision of services and infrastructure,~~] [~~such as~~] encouraging investment, or preventing [~~excessive~~] speculation and [~~inequitable~~] concentration of [~~ownership and other~~] tenure rights]. Taxes should not discourage socially, economically, [or environmentally] desirable behaviour, such as registering transactions or declaring the full sale value. (*referred to a Friend of the Chair Group*)

## **22. Transboundary matters**

- 22.1 Where appropriate, all parties should work together on aspects of tenure of land, fisheries and forests that cross international boundaries. While tenure is a matter of national sovereignty, some aspects of tenure could affect neighbouring countries. \*States should ensure that all actions are consistent with their existing obligations under national and international law, and with due regard to voluntary commitments under applicable regional and international instruments.\* States should refrain from actions that interfere with tenure rights and relevant human rights beyond its boundaries.
- 22.2 All parties should contribute to an improved understanding of transboundary issues of tenure, such as pastoralists whose traditional grazing areas or seasonal migration routes lie across international boundaries, and fishers who traditionally follow fish stocks across international boundaries.
- 22.3 States should cooperate to settle and clearly define international boundaries where this has not been done.
- 22.4 States and regional bodies should harmonize legal standards to create joint systems of tenure governance, which are in accordance with existing obligations under national and international law, and with due regard to voluntary commitments under applicable regional and international instruments. States, regional bodies and tenure right holders should develop and strengthen international measures to administer tenure rights that cross international boundaries.

## **Part 6 Responses to climate change and emergencies**

This part addresses the governance of tenure of land, fisheries and forests during catastrophic events where people could be displaced on a large scale as a result of climate change, natural disasters and violent conflicts.

## **23. Climate change**

- 23.1 [States should ensure that, consistent with relevant climate change framework agreements, consideration is given to the issue of climate change in the application of tenure rights, without undermining existing legitimate tenure rights. In this regard and where appropriate, policies and laws on tenure should take into account possible strategies and actions to deal with the effects of climate change.] \* States should ensure that all actions are consistent with their existing obligations under national and international law, and with due regard to voluntary commitments under applicable regional and international instruments. \* (*proposed by a Friend of the Chair Group*)
- 23.2 [Where appropriate, States should strive to prepare and implement strategies and actions in consultation and with the participation of all people, women and men,

who may be displaced due to climate change. Any provision of alternative land, fisheries, forests and livelihoods for displaced persons should not jeopardize the livelihoods of others. States may also consider offering special assistance to small island and other developing states.] *(proposed by a Friend of the Chair Group)*

- 23.3 [~~All parties should ensure that tenure aspects of land (including associated buildings and other structures), fisheries and forests are addressed in policies and laws concerning adaptation to climate change and mitigation measures. Where appropriate, policies and laws on tenure should address climate change adaptation and mitigation. \* States should ensure that all actions are consistent with their existing obligations under national and international law, and with due regard to voluntary commitments under applicable regional and international instruments. \*~~] *(original paragraph 23.1; proposed for deletion and replacement by a Friend of the Chair Group)*
- 23.4 [~~Where appropriate, States should prepare and implement adaptation programmes to assist all people, women and men, who may be displaced due to climate change. Provision of secure access to alternative resources and livelihoods for displaced persons should be negotiated with host communities to ensure that the resettlement does not jeopardize the livelihoods of others. Means to resolve disputes over tenure rights should also be provided. Implementing agencies should be strengthened to deal with displacement in collaboration with climate change agencies. International and regional organizations and States may consider offering special assistance to small island developing states.] *(original paragraph 23.2; proposed for deletion and replacement by a Friend of the Chair Group)*~~
- 23.5 [~~Where appropriate, all parties should ensure that tenure aspects are addressed in mitigation programmes, and that all tenure rights, including those held by indigenous peoples and other customary communities, are recognized and protected. Relevant local communities should be closely involved in the negotiations and implementation of mitigation programmes. Effective, transparent and accountable means should be developed and implemented for the distribution of benefits to local communities and for the fair distribution of benefits within the communities. Community participation should provide for gender equality and should not discriminate against the vulnerable and marginalized. Where necessary, professional assistance should be provided to communities so they can participate effectively in the development and implementation of programmes.] *(original paragraph 23.3; proposed for deletion and replacement by a Friend of the Chair Group)*~~
- 23.6 [~~Independent means should be established for the monitoring, reporting and verification of mitigation actions.] *(original paragraph 23.4; proposed for deletion and replacement by a Friend of the Chair Group)*~~

## **24. Natural disasters**

- 24.1 All parties should ensure that tenure aspects of land, fisheries and forests are addressed when preparing for natural disasters and in responses to them. Regulatory frameworks for tenure, including spatial planning, should be designed to minimize or avoid the potential impacts of natural disasters.
- 24.2 \* States should ensure that all actions are consistent with [their] existing obligations under national and international law, and with due regard to voluntary commitments under applicable regional and international instruments.\* All parties should act in accordance with international principles, including as appropriate the United Nations Principles on Housing and Property Restitution for Refugees and Displaced Persons (“Pinheiro Principles”), and the Humanitarian Charter and Minimum Standards in Disaster Responses.
- 24.3 States should address tenure in disaster preparedness programmes. Information on tenure rights should be collected for areas that could be affected. Systems for recording tenure rights should be resilient to natural disasters, including off-site storage of records, to allow right holders to prove their rights and relocate their parcels and other spatial units. Areas should be identified for the temporary resettlement of people who could be displaced by natural disasters, and rules should be established for providing tenure security in such areas.
- 24.4 States and other parties should include tenure in the emergency response phase. Provision of secure access for displaced persons should be negotiated with host communities to ensure that the resettlement does not jeopardize the livelihoods of others. When seeking alternative areas for resettlement, displaced persons should respect the tenure rights of others. Information on tenure rights and unauthorized use should be disseminated to all affected persons.
- 24.5 States and other parties should address tenure during the reconstruction phase. Persons who are temporarily displaced should be assisted in returning to their places of origin. Means to resolve disputes over tenure rights should also be provided. Where boundaries of parcels and other spatial units are to be re-established, this should be done in a participatory manner. Where people are unable to return to their places of origin, they should be permanently resettled. Such resettlement should be negotiated with host communities to ensure that the people who are displaced are provided with secure access to alternative resources and livelihoods in ways that do not jeopardize the livelihoods of others.

## **25. Violent conflicts**

- 25.1 All parties should take steps to eliminate tenure of land, fisheries and forests as a cause of violent conflicts and should ensure that tenure aspects are addressed before, during and after violent conflicts.

- 25.2 \* States should ensure that all actions are consistent with their existing obligations under national and international law, and with due regard to voluntary commitments under applicable regional and international instruments, \* including as appropriate those of the Convention relating to the Status of Refugees and its Protocol, and the United Nations Principles on Housing and Property Restitution for Refugees and Displaced Persons (“Pinheiro Principles”).
- 25.3 In order that tenure problems do not lead to violent conflicts, all parties should take steps to resolve such problems through peaceful means. States should revise relevant policies and laws to eliminate discrimination and other factors that can be a cause of violent conflicts. Where appropriate, States should also support and strengthen customary or religious means that provide fair, reliable, accessible and non-discriminatory ways of promptly resolving disputes over tenure rights.
- 25.4 When violent conflicts arise, States and other parties should try to protect tenure rights. Displaced persons should be settled in safe areas in ways that protect the tenure rights of the host communities. Violations of tenure rights should be documented. Official records of tenure rights should be protected against destruction in order to provide evidence for subsequent restitution processes, and in areas where such records do not exist, the existing tenure rights should be documented as best possible.
- 25.5 When violent conflicts cease, States and other parties should ensure that tenure problems are addressed in ways that contribute to the peace process and support durable solutions for those affected, including through consideration of the injustices and displacements. Where restitution is possible, refugees and displaced persons should be assisted in returning safely, voluntarily and with dignity to their place of origin. Procedures for restitution should be non-discriminatory and gender-sensitive and widely publicized, and claims for restitution should be processed promptly. Procedures for restitution of tenure rights of indigenous peoples and other customary communities should provide for the use of traditional sources of information.
- 25.6 Where restitution is not possible, the provision of secure access to alternative resources and livelihoods for displaced persons should be negotiated with host communities to ensure that the resettlement does not jeopardize the livelihoods of others. Special procedures should provide the vulnerable, including widows and orphans, with access to resources.
- 25.7 Where required, policies and laws should be revised to eliminate pre-existing discrimination as well as discrimination introduced during the conflicts. Relevant agencies should be re-established to deliver services necessary for responsible tenure governance.

## **Part 7 Implementation, monitoring and evaluation**

- 26.1 All parties are encouraged to use collaborative efforts to promote and implement these Voluntary Guidelines in accordance with national priorities and circumstances. All parties are encouraged to disseminate information on responsible tenure governance in order to influence and improve practices.
- 26.2 All parties are encouraged to monitor and evaluate the implementation of these Voluntary Guidelines through participatory approaches that include States, implementing agencies; judicial authorities; local governments; organizations of farmers and small-scale producers, of fishers, and of forest users; indigenous peoples and other communities; the private sector; civil society and academia. All parties are encouraged to cooperate to establish means for monitoring and evaluation, and to develop disaggregated indicators to assess the impact of policies, laws, programmes and projects on the governance of tenure, including their impacts on both men and women and on the most vulnerable. Based on the outcome of monitoring and evaluation, all parties are encouraged to introduce improvements to tenure governance with clearly established timeframes. Monitoring bodies that address human rights, governance, business and corruption are encouraged to include tenure governance in their periodic reviews. All parties are encouraged to share experiences with others through regional and global networks.
- 26.3 International bodies should periodically monitor the implementation, and review the relevance and effectiveness of these Voluntary Guidelines. As required, these Voluntary Guidelines should be brought up to date, taking into account social, economic and environmental technological changes.