



Tenure rights in large-scale and artisanal mining: Implications of the Tenure Guidelines



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The ***Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests*** (VGGT) are an authoritative global soft-law instrument with broad-based socio-political support. This support was built through a participatory process of developing the guidance and their subsequent appropriation by wide-ranging actors working to strengthen land and natural resource governance.

In taking a comprehensive approach to issues of tenure, the VGGT offer an opportunity to promote systemic governance reform and respect for land and resource rights, while clarifying the different roles of States, businesses and social actors. The VGGT do not directly cover mineral resources but they clarify that States may wish to consider the governance of mineral resources in their efforts to implement the VGGT. They also provide guidance on tenure rights to land, fisheries and forests, which are often affected by mining operations. Yet, the VGGT's relevance to the mining sector has often been overlooked.

This legal brief explores how implementing the VGGT could help address recurring challenges affecting the mining sector.



Why the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests are relevant to mining

The VGGT are a seminal international instrument that link resource governance to food security and provide guidance on wide-ranging tenure issues. While issues affecting the governance of mineral resources – from mineral resource ownership to taxation of mining activities – are outside the scope of the guidelines, the VGGT provide insight relevant to the mining sector, such as the recognition and protection of legitimate tenure rights in large-scale mining (LSM), and the rights of artisanal and small-scale miners (ASM).

The preface of the VGGT emphasizes that the “governance of tenure of land, fisheries and forests is inextricably linked with access to and management of other natural resources, such as water and mineral resources.” Although the preface recognizes that governance of these resources may differ from models applicable to land, fisheries and forests, it clarifies that “States may wish to take the governance of these associated natural resources into account in their implementation of these Guidelines, as appropriate.” Therefore States may draw on VGGT guidance to review and reform policies, laws and arrangements governing tenure rights over mineral resources.

Mining also has a complex footprint affecting tenure rights to above-ground resources that are covered by the VGGT, including land, fisheries, forests and other environmental considerations. This footprint is evident throughout the sector – whether in artisanal, small scale or large-scale mining activities, across the mining life cycle, including potential negative legacy issues, and in related and necessary infrastructure investments. Mining activities at diverse stages and scales often raise complex resource tenure issues, with overlapping formal statutory laws and customary rules within unique and diverse local socio-cultural and political contexts. The VGGT provide extensive guidance on addressing these issues, calling on States to recognize, respect and protect all legitimate tenure rights.

While the VGGT’s institutional affiliation with the Committee on World Food Security (CFS) means discussions have often focused on the agricultural sector, mining activities can have far-reaching reverberations for food security. The VGGT recognize that there is no international definition of “land” within the context of tenure, and they clarify that the word may be defined within the national context (footnote to para. 1.1). While most national laws establish a clear separation between tenure rights to land and to subsoil resources, in others strong linkages exist and broader definitions of land might be appropriate. In addition, VGGT guidance on, for example, social and environmental issues in land-based investments (e.g. para. 3.2

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and Section 12) and on expropriation and compensation (Section 16) is highly relevant to the mining sector. Some of these provisions specifically refer to agricultural investments (e.g. para. 12.2), but many do not. From a policy and rights perspective there is no clear rationale for regulating these issues differently depending on the specific sector of investment. This aligns with internationally recognized human rights relevant to the protection of tenure rights, such as the rights to food and to housing, and Indigenous Peoples' rights over their ancestral territories. Many of these rights are also recognized in national and regional contexts. It also aligns with international instruments on forced evictions – relevant to a broad scope of investments beyond agriculture (e.g. UN Basic Principles and Guidelines on Development-Based Evictions and Displacement, para. 8), and on environmental protection (e.g. Convention on Biological Diversity).



Artisanal mining's impact on land in the Democratic Republic of Congo
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Compared to existing instruments such as the International Finance Corporation (IFC) Performance Standards, the VGGT offer a more holistic framework and explicitly rights-based approach to addressing land and natural resource tenure issues (for comparative analysis of IFC standards and the VGGT, see Windfuhr, 2017; Cotula, 2019). The VGGT's comprehensive approach can promote systemic governance reform, respect for and protection of land and resource rights within the mining sector, while clarifying the roles of States, businesses and social actors. The implementation of the VGGT could offer greater protections to holders of legitimate tenure rights in mining areas. Indirectly, VGGT guidance also provides pointers on how States should approach the tenure rights of ASM miners. In a similar way to small-scale farmers, fisherfolk or pastoralists, ASM producers and communities are often overlooked by policy-makers.

Large-scale mining and legitimate tenure rights

Recognizing, respecting and protecting all legitimate tenure rights that may be affected by large-scale land-based investments is a central pillar of the VGGT (Cotula *et al.*, 2016). Legitimate tenure rights include not only those protected by law but also rights that have broad social acceptance even if not legally recognized, such as rights based on customary tenure systems (e.g. VGGT paras. 4.4 and 5.3). The VGGT are primarily oriented towards States but they provide guidance for businesses as well. Paragraph 3.2 of the VGGT directly connects tenure rights to human rights, and the responsibility of businesses to respect legitimate tenure rights along with the wider responsibility of businesses to respect human rights (further affirmed in the United Nations Guiding Principles on Business and Human Rights).

The VGGT clarify, for example, that businesses should:

- “act with due diligence to avoid infringing on the human rights and legitimate tenure rights of others”;
- “include appropriate risk management systems to prevent and address adverse impacts on human rights and legitimate tenure rights”; and
- “provide for and cooperate in non-judicial mechanisms to provide remedy, including effective operational-level grievance mechanisms, where appropriate, where they have caused or contributed to adverse impacts on human rights and legitimate tenure rights” (para. 3.2).

Further, Section 12 of the VGGT covers a broad range of investment-related issues, including respecting the “do no harm” principle as regards both environmental protection and human rights; supporting smallholder-led human and economic development; upholding principles of consultation and, where relevant, free, prior and informed consent; conducting prior environmental and social impact assessments; ensuring transparency in tenure transactions; and applying “safeguards to protect legitimate tenure rights, human rights, livelihoods, food security and the environment from risks that could arise from large-scale transactions in tenure rights” (paras. 12.6 and 12.10). While the large-scale mining industry is generally aware of land rights, human rights and environmental protection issues, full and wide application of these principles is often limited by inadequate policy design, industry standards and lending/investment arrangements.

In most countries, the State is the custodian of all mineral resources and is able to grant mineral licences and permits for mineral rights in all areas, subject to limited restrictions (e.g. Bastida 2020; Oshionebo 2021; FAO and UNEP, 2020). Many national laws explicitly enable authorities to expropriate land and surface tenure rights in order to pave the way for mining projects (e.g. Burkina Faso’s Mining Code of 2015, Article 127; Botswana’s Mines and Minerals Act of 1999, Section 64; Guinea’s Mining Code of 2013, Article 125).

This approach reflects a policy preference of facilitating large-scale mining investment. Early phase mining exploration activities have a relatively small and/or temporary impact on land

tenure rights but often carry an expectation to extract minerals in the future. Exploration rights are often granted prior to significant consultations with legitimate land tenure holders. In most cases, mining companies only conduct full-scale environmental and social impact assessments in the run-up to mine development. Thus, safeguarding tenure rights, protecting critical ecosystems and securing the economic livelihoods of communities are processes most often dealt with through the narrow lens of specific mineral extraction applications, but rarely built into the architecture of territorial governance.

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Globally, much mining exploration is conducted by “junior” mining companies. These relatively small companies often secure a number of large-scale mining exploration licenses and are bought by larger companies after advancing geological exploration and regulatory approval processes. While diverse, these companies typically have fewer resources to engage with land tenure issues – along with a range of social and environmental issues – in part because of their transitory nature within the “exploration” phase of a mine. Often nimble and risk tolerant, these companies may operate in environments where the laws or law enforcement institutions fail to fully recognize legitimate tenure rights. Though the mining industry has developed detailed guidance on community engagement, biodiversity and water management (e.g. ICMM, 2020a), for example, its application is uneven across companies and geographies. At the other end of the mine life cycle – in mine closure – land tenure issues may come into play in considering land remediation and/or “repurposing”, including in “adapting post-closure landscapes for forestry, agriculture or wildlife habitat, or use of land as recreational areas” (ICMM, 2020b). The VGGT may offer guidance on allocating tenure rights, for example via transactions (Section 11), readjustment and consolidation (Section 13) or restitution (Section 14). References to addressing wider social and environmental aspects (e.g. paras. 12.1, 12.4, 12.6 and 12.10) would also be relevant to mine closure.

Many investors, lenders and mining companies – both “junior” and larger-scale – rely largely on the International Finance Corporation’s Performance Standards (IFC-PS) to manage the environmental and social impacts of their investments, including their tenure impacts. Yet the IFC-PS have not prevented projects from becoming embroiled in difficult disputes over their land rights impacts (Cotula, 2019). Though the IFC-PS include project-level guidance on land rights, this often fails to account for the cumulative impacts of multiple forms of investment, land use and rapidly shifting land dynamics caused by climate change or “legacy” disputes rooted in historical dispossession. This is one reason why conflicts over land and resource tenure remain recurrent issues in the mining sector and one of the greatest risks facing mining companies (Leon *et al.*, 2013).

The VGGT’s holistic and rights-based approach can help governments, companies and social actors to safeguard local tenure rights in investment processes, and promote investment models that are premised on partnership with legitimate holders of land and resource tenure (e.g. VGGT, Section 12). The VGGT’s focus on livelihoods and food security, emphasis on

spatial planning and territorial development, and integrated approach to land and resource governance can support efforts to rethink the architecture of mineral regulations – from licensing to obtaining consent from legitimate land tenure holders.

Artisanal and small-scale miners' legitimate tenure rights

Artisanal and small-scale miners (ASM) often claim rights to the land and mineral resources their livelihoods depend on. These rights may operate within relatively effective customary or informal systems, but often have no legal recognition or protection under national law. This legal precariousness makes them vulnerable to displacement, particularly if large-scale miners are attracted to the site.

The LSM often come into contact with ASM operating in or near their concession area. In some cases, the presence of LSM in the area can draw ASM to the site. At other times, ASM miners, or “barefoot geologists”, draw LSM to areas with interesting mineral potential. The incidence of ASM-LSM conflict is high (see e.g. World Bank, 2009). A well-documented “LSM bias” in national policy and legislative frameworks and decision-making means that ASM are often neglected in favour of LSM (e.g. Hilson, 2019; Radley and Geenan, 2021). And while a mining company often holds legal rights based on a licence from the government, many artisanal miners operate on the basis of rights that are not legally recognized, leaving artisans with few protections or limited legal redress within an already asymmetric power relation.

Many policies for ASM at national and international levels tend to focus on addressing specific challenges such as conflict minerals, mercury use, child labour and environmental impacts. These policies and laws are often framed in ways that implicitly stigmatize and discipline artisanal miners and their communities. Decades of focus on top-down formalization policies as the panacea of the ASM sector have met many obstacles. The more comprehensive guidance the VGGT provides on legally recognizing, respecting and protecting all legitimate tenure rights, including those not currently protected by law (paras. 4.4 and 5.3), and their emphasis on production models inclusive of small-scale actors could offer the ASM sector an opportunity for empowerment and a pathway towards legitimacy.

The VGGT clarify that customary tenure rights can constitute legitimate tenure rights (e.g. paras. 5.3, 7.3, 8.2 and Section 9). While much of ASM is informal – operating outside an appropriate or accessible legal framework – the sector is often well governed by systems of customary rules and practices. These customary systems often intersect with traditional arrangements for the

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governance of other resources such as farmland, with “mining farmers” or “farming miners” providing the foundations for local livelihoods and food security (e.g. Pijpers, 2014). In providing guidance on how to recognize and respect “legitimate customary tenure rights that are not currently protected by law” (para. 5.3), the VGGT call for providing “appropriate and reliable recording systems, such as [...] registries” (para. 11.5), and “simplify[ing] administrative procedures in order to avoid discouragement of market participation by the poor and the most vulnerable” (para. 11.3). Implementing this guidance could help address barriers to formalizing ASM and securing their legal protection.



Artisanal cobalt miners washing ore in the DRC © Afreewatch and IIED 2020

There is a dearth of publicly available research about the ways in which customary governance and land tenure arrangements for ASM are structured, emerge and evolve, and the ways in which they are embedded in broader societal relations and discourses that reflect entrenched power relations. Applying VGGT principles to the governance of mineral resources could help bridge gaps between national laws and local practices, and legally recognize and protect the legitimate tenure rights ASM miners claim not only to land and surface resources but to subsoil resources as well (often considered ‘one and the same’ within customary systems). Evidence from some countries show ASM tenure arrangements intersect with, and often need to adapt to, changing governance environments (Verbrugge, 2015). Negotiations between miners and landowners in these spaces can lead to stable and predictable benefit-sharing arrangements. But where State institutions are weak or absent, diverse private actors – from mining cooperatives and NGOs, to private security and armed militias – can end up acting as the de facto authority. A better understanding of ASM customary arrangements within complex and multi-layered spaces is needed, including the foundations for their legitimacy within the framework of the VGGT.

The more holistic approach reflected in the VGGT could also help ASM communities address specific tenure-related challenges, such as the frequent influxes of migrant workers which can

drive social and resource conflict, including in connection with land and resource scarcity, while also advancing discussion of ASM's environmental impacts. Improving understanding and governance of complex, overlapping systems for natural resource use may further the "progressive realization" of sustainable development objectives, including food security, rural development, human rights and environmental protection (VGGT, para. 1.1).

There is growing case study evidence that ASM offers women an independent source of income that can help overcome discriminatory aspects of patrilineal and patrilocal tenure practices (Hilson, 2018; Brottem, 2018). Estimates suggest that, in some countries, women constitute up to 50 percent of the ASM workforce (IGF, 2018). The VGGT guidance could help map the relationship between tenure and women in ASM, and the resulting impacts on children and food security, in contexts where ASM is the dominant opportunity for income. Further, the extensive VGGT guidance on addressing gender in tenure relations can have a bearing on concrete actions to protect legitimate tenure rights in ASM communities. This includes the VGGT's framing of gender equality as an overarching "principle of implementation" (para. 3B.4). It also includes their calling for gender-sensitive policies and laws that recognize legitimate tenure rights (paras. 4.4 and 5.3) and record the rights of spouses in any recording of rights (para. 11.6), for gender-sensitive assistance in acquiring or sustaining tenure rights (para. 4.7), and for gender-sensitive efforts to promote public participation in policy making (para. 5.5).

The extensive VGGT guidance on addressing gender in tenure relations can have a bearing on concrete actions to protect legitimate tenure rights in ASM communities

Conclusion

This briefing note has outlined where and how the VGGT could add value to improving the governance of the mining sector, and to protecting local communities and actors impacted by or engaged in mining activities. The VGGT could provide a framework for States to review and reform their legislation related to mineral resources as well as better understand the complex interactions within rural livelihoods and across surface and sub-surface resources for both artisanal and large scale mining; for companies to upgrade their operating systems to better respond to difficult tenure challenges; and for civil society to include the voices of marginalized communities of artisanal miners, especially women, into critical policy debates.

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Key messages

- Mining – large scale, small-scale and artisanal, across the mining life cycle – raises complex issues about tenure rights to mineral resources. In addition, mining activities can have a substantial footprint, affecting tenure rights to land, fisheries and forests.
- While the VGGT do not provide direct guidance on mineral resources, they provide pointers on recognizing, respecting and protecting tenure rights that may be affected by mining activities, and they closely link tenure issues to food security. The VGGT also invite States to consider the governance of mineral resources as they implement the VGGT.
- Applying the VGGT to the mining sector can help States and mining companies reduce and resolve conflicts with legitimate tenure holders.
- In calling on States to recognize, respect and protect all legitimate tenure rights, the VGGT provide an avenue for artisanal miners to assert their tenure rights as small-scale producers, in relation to both surface and subsoil resources. By emphasizing the place of small-scale producers in investment processes, the VGGT can also provide a basis for addressing biases in mining laws that favour large-scale mining over artisanal miners.