

The Guidelines on the Responsible Governance of Tenure at a Crossroads

International Statement

10/12/2015

The Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests (*Tenure Guidelines*, also referred to as VGGT), adopted by the UN Committee on World Food Security (CFS) in 2012, are a major step towards a human rights based governance of natural resources. The Tenure Guidelines are situated in a context of decades of struggles for peoples' access to and control over natural resources and territories. Since their adoption social movements, civil society organizations and communities have been using them in many ways to support their struggles to attain food and peoples' sovereignty.

More than three years after the adoption of the Tenure Guidelines land and natural resource grabs in all forms continue unabated around the world, visiting their devastating impacts on local communities, environments with related human rights violations. The implementation and application of the Tenure Guidelines, therefore, remains a matter of extreme urgency.

Helping the corporate sector to implement the Tenure Guidelines

The Tenure Guidelines are primarily addressed to states. By adopting the Tenure Guidelines, states have committed to apply them according to their paramount objective: to contribute to the realization of the human right to adequate food by improving the governance of tenure for the benefit of vulnerable and marginalized people and communities.

We, social movements, grassroots organizations and their allies, observe with concern that some states – together with some UN institutions and non-governmental organizations (NGOs) – are not focusing on the rights and needs of the most marginalized, but are concentrating their efforts on helping companies and private investors to use the Guidelines for their business interests.

A series of guides aimed at providing guidance to companies and private investors on how to use the Tenure Guidelines in their business operations have recently been developed by the US development agency USAID, the G7 New Alliance for Food Security and Nutrition in Africa and the so-called Interlaken Group (a group of several companies, banks, the World Bank's International Finance Corporation – IFC, the UK's development cooperation agency DFID and some International NGOs, namely Oxfam, Global Witness, Rights and Resources Initiative, The Forest Trust, Landesa and Forest Peoples Programme).¹ Food and Agriculture Organization of the United Nations (FAO) also has published a guide for government authorities on how to promote agricultural investments by private actors.²

¹ USAID, "Operational Guidelines for Responsible Land-Based Investment," March 2015, available at <http://usaidlandtenure.net/documents/operational-guidelines-responsible-land-based-investment>; New Alliance for Food Security and Nutrition in Africa, "Analytical Framework for Investors under the New Alliance: Due Diligence and Risk Management for Land-Based Investments in Agriculture," August 2015, available at <https://www.growafrica.com/sites/default/files/Analytical-framework-for-investors-under-the-new-alliance-2015-08-01.pdf>; The Interlaken Group and the Rights and Resources Initiative (RRI), *Respecting Land and Forest Rights: A Guide for Companies*, August 2015, available at <http://www.interlaken.org>. The French Ministry of Foreign Affairs and the French Development Agency (AFD) have also produced a "Guide to due diligence of agribusiness projects that affect land and property rights. Operational Guide," October 2014, available at <http://www.foncier-developpement.fr/publication/guide-to-due-diligence-of-agribusiness-projects-that-affect-land-and-property-rights>. This document is different from the others in as much it is not directly addressed to investors but at AFD officers evaluating private investment projects that affect land tenure. While some of the problems outlined in this statement are also reflected in the MOFA/AFD guide, the comments contained in this statement refer mainly to the guides that are addressed directly to companies and private investors.

² FAO, *Safeguarding land tenure rights in the context of agricultural investment. A technical guide on safeguarding land tenure rights in line with the Voluntary Guidelines for the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security*, for government authorities involved in the promotion, approval and monitoring of agricultural investments, October 2015, <http://www.fao.org/3/a-i4998e.pdf>. FAO is currently also finalizing a technical guide on the Tenure Guidelines for private investors, working title "Operationalizing the Voluntary Guidelines on the Responsible Governance of Tenure: A Technical Guide for Investors."

These guides lead to a proliferation of interpretations of the Tenure Guidelines that creates confusion and diverts them from their true objectives. We see serious and fundamental problems with these guides:

1. Natural resources are transformed from a human rights issue into a matter of business

The Tenure Guidelines clearly recognize that the access to, and control over natural resources and their governance is a human rights issue. Improving the governance of tenure is a complex process, in which the core issue is finding ways to resolve social, political and economic conflicts. The Tenure Guidelines provide states with crucial guidance about how to deal with these complex issues in accordance with their international human rights obligations. The above-mentioned guides, on the other hand, start from the wrong premise: they are built around the risks that private and corporate investors encounter in acquiring land, fisheries and forests. Companies and private investors are invited to use the Guidelines in order to manage and reduce economic, financial and reputational risks; to ensure a smooth flow for their business activities; and to get a “competitive advantage” by improving their “overall supply-chain efficiency, reliability and market share” (Quotes from Interlaken Group Guide/Brochure)

By focusing on the interests of companies and private investors, and not on the rights of the most vulnerable and marginalized (as explicitly stated by paragraph 1.1 of the Tenure Guidelines), these guides transform the Tenure Guidelines into a tool for business and corporate social responsibility (CSR). Land and resource grabs are legitimized by the exclusive focus on private and corporate investments in the form of land acquisitions (buy or lease) and the interpretation of paragraph 12.4 of the Tenure Guidelines about responsible investments according to a corporate-centered agenda.

Fostering such an understanding and use of the Tenure Guidelines will most probably lead to their misuse by the corporate sector in order to whitewash their business activities. A number of big agrifood transnational corporations (TNCs), such as Coca Cola, PepsiCo, Cargill, Nestlé, Unilever and Illovo have already started to use the Tenure Guidelines for their public relations and CSR purposes by publicly endorsing them and announcing that they will “implement” them through their business operations.

2. “Multi-Stakeholderism” mixes up the role of states and companies

The guides assume that all actors (states, individuals and communities, companies, CSOs etc.) are “stakeholders” at the same level. Accordingly, they wrongly act as though the Tenure Guidelines address states and business in the same way. Moreover, they are largely silent about what the Guidelines have to say regarding states’ obligations vis-à-vis companies. This approach ignores the fundamental differences in the nature, and consequently the roles and responsibilities, of states and companies. States draw their legitimacy from the people who confer on them a mandate to serve the public interest based on the principle of human dignity and human rights. States are accountable to the people. Companies, on the contrary, have no legitimate public governance functions, because they represent solely particular interests and are only accountable to their shareholders or owners. Companies and private investors, first and foremost, have to respect and act in accordance with the law.

The guides implicitly transfer state prerogatives and duties to companies and private investors, especially regarding highly sensitive issues in the context of natural resource governance. One example is the process of identifying and recognizing legitimate tenure rights not currently protected by law, which the Tenure Guidelines strongly call for. The guides suggest that this is something that can be done by investors through “participatory stakeholder mapping” (New Alliance Guide) However, this is one of the most contentious processes in society and is charged with power asymmetries and conflicts. Private investors and companies do not have the necessary legitimacy to carry out such a process. It is part of the mandate given to the state by the people, for which it is accountable to the people. Private investors and companies pursue their own particular economic interests and will try to maximize their profits whenever they are supposed to identify and recognize legitimate tenure rights. Nothing would be more harmful to the recognition and protection of the legitimate tenure rights of marginalized groups than entrusting the very investors that are seeking to get control over their lands, fisheries and forests with such a task, as the guides suggest. It is a clear case of

conflicting interests. This also applies to processes to assess the impacts of business activities (of which para. 12.10 of the Tenure Guidelines clearly says that states have to ensure that these are independent), conducting consultations and negotiations as well as compensating people for losses.

Another example is the resolution of conflicts related to land, fisheries and forests in the context of business operations. The guides assume that this is something that private investors or companies should handle by putting in place “grievance or dispute resolution procedures.” It is true that, in many countries, the formal judicial system does not work very well, especially regarding rural areas. However, the Tenure Guidelines would be rendered meaningless and even harmful by relinquishing the obligation of the state to provide (a) access through impartial and competent judicial and administrative bodies to timely, affordable and effective means of resolving disputes over tenure rights; and (b) effective and promptly enforced remedies that may include restitution, indemnity, compensation and reparation. The guides entrust business with these tasks, yet private investors and companies cannot “resolve land conflicts” (New Alliance Guide), replace the state in providing access to justice, nor can they “supplement more formal [judicial] processes,” as the guides suggest. Reality shows that powerful investors are often involved in serious abuses against human rights such as forced and violent evictions, killings, arbitrary detention and harassment of communities and people. It is obvious, then, that entrusting the very parties involved in directly or indirectly committing such human rights offences will never provide justice. Also, allowing this to happen formalises the capture of the state by capital and vested interests. Investors and businesses cannot be enjoined to “support and supplement the activities of government” (New Alliance Guide).

As social movements and CSOs, we know how difficult it can be to engage with governments and state authorities at all levels. In some cases states are promoting resource grabs (often justified with the need to create an “enabling environment for investments”), or are even acting as grabbers themselves. These are human rights violations for which they have to be held accountable. However, it is the states and their public institutions that have the mandate to serve the public interest and the obligation to protect the people from human rights abuses by companies and private investors through appropriate legal frameworks. This includes the obligation to regulate companies and investors at national and international levels and to sanction them when they commit crimes or impair the human rights of individuals or communities, ensure redress for damages and prevent repetition. This obligation also applies to the home state of companies and private investors when these infringe human rights abroad (extraterritorial human rights obligations). Investment contracts cannot replace laws and it is certainly not the first task of state authorities to “guide” and “shepherd investors,” in order to facilitate land acquisitions by them, or to “solve the problems faced by existing or potential investors” (quotes from FAO Guide for state authorities). We do not believe a word of the commitments to responsible behaviour by the corporate sector and the self-regulation of business.

3. Imposing a non-existent “partnership” between corporations and communities

All the above mentioned guides call upon private investors and companies to seek strong engagement with communities that are affected by their business operations. The underlying assumption is that land acquisition is potentially good for both companies and communities. All that is needed is for private investors do the correct things and engage with affected communities, taking into account their “needs, desires and concerns” (USAID Guide). What is more, the guides suggest that “responsible investments” in the form of land acquisitions by businesses will “bring important benefits to local communities”, “open opportunities” for them and improve their food security (quotes from USAID Guide and Interlaken Group Guide respectively). This line of reasoning follows a corporate-led strategy of considering companies and private investors as main actors for development and food security, thus positioning them as “part of the solution,” rather than the actual problem.

A community and a company or a private investor planning to buy up or lease land, forest or water resources are not the same and cannot be treated as such. This is at the core of the human rights approach of the Tenure Guidelines, which demands a special emphasis on vulnerable and marginalized people. Business enterprises of any kind, including corporations, have as their primary purpose to obtain profit. Investment projects that entail the acquisition of land, fisheries and forests utterly disrupt the daily lives of peasant, indigenous, fishing, pastoralist or urban communities. In all parts of the world, communities are asserting

their rights and resisting corporate resource grabbers. The generalization of companies and private investors, on the one hand, and communities, on the other, as “stakeholders” that negotiate on equal terms on as crucial an issue as the control over natural resources is unfounded and will generate injustice. It also ignores the power asymmetries that exist between the groups. Therefore, it is wrong and dangerous to assume that communities automatically will engage in private or corporate investment projects, if only private investors do the right things and that, as a result, local tenure will not be compromised, affected or undermined. The same applies to an approach that sees state authorities’ role primarily in “facilitating dialogues” between investors and communities. (FAO guide for state authorities)

Companies and private investors planning to buy or lease land also cannot ensure appropriate consultations with affected communities. They are obviously not neutral actors and there are usually huge power imbalances between them and communities. Again, it is the state that has the authority and responsibility to guarantee that the consultations conform to regulations and the standard set by the Tenure Guidelines (paragraphs 3B6 and 9.9). This includes the right of communities and people to withhold their consent if they deem that an investment project is not in their interests.

The putative “partnership” between private investors and communities that the guides construct and try to impose ultimately means that communities are to be included in corporate value and supply chains. Contract farming, out-grower schemes and management contracts figure prominently in the guides as a means to ensure “mutual benefits” of investment projects and “greater returns on investments for all parties involved” (FAO Guide for state authorities). This ignores the real experiences of many communities around the world, who have seen themselves trapped in a situation of complete dependence on powerful companies. While every community has to decide whether or not to engage in contract farming, out-grower schemes or management contracts, it is utterly wrong to stipulate that these are best practices that automatically improve communities’ livelihoods and food security. Small-scale food producers produce most of the food consumed in the world and need to be supported through public investments, as recognized in the Tenure Guidelines (paragraph 12.2). Reducing them to providing a cheap work force at the bottom of corporate-controlled value and supply chains is a crude misinterpretation of paragraph 12.6 of the Tenure Guidelines, which calls for state support for “production and investment models that do not result in the large-scale transfer of tenure rights to investors.”

We do not accept the corporate capture of our natural wealth, resources, human rights and public policies, and will oppose all attempts to establish money- and market-driven governance of natural resources, food and nutrition. We will continue to oppose all forms of land, water, ocean and seeds grabbing, to assert our rights to our resources and territories and to strengthen our struggle for food and peoples’ sovereignty.

We, therefore, call upon:

States, UN agencies, research institutions and NGOs

- to withdraw and refrain from all initiatives that aim at abetting the corporate sector and private investors to use the Tenure Guidelines for the pursuit of business interests, thus supporting the corporate capture of resources, public policy spaces and human rights.

States

- to apply and implement the Tenure Guidelines in accordance with their existing human rights obligations (territorial and extraterritorial), to which they have committed by endorsing them. This means that all efforts have to start from the rights and needs of communities and the most marginalized, instead of particular corporate interests.

This includes to

- pass and enact new laws and/or effectively enforce existing laws that put effective safeguards to large-scale land transactions, such as ceilings on permissible land transactions or parliamentary approval (paragraph 12.6 of the Tenure Guidelines);
 - pass and enact new laws and/or effectively enforce existing laws that regulate companies and investors, and particularly TNCs, with regard to guaranteeing free prior and informed consent (FPIC) as well as prior and independent impact assessments (including human rights impact assessments);
 - hold companies and investors liable if they do not deliver the commitments they make to create employment, local revenue, etc. in the context of land acquisitions;
 - criminally prosecute the offenses and crimes by companies that impair the realization of human rights and the legitimate tenure rights of people and communities;
 - improve the state's capacities to monitor and prosecute these abuses and crimes;
 - prioritize investment policies that develop the investing capacities of small-scale food producers and communities.
- to promote true accountability and monitoring of the implementation of the Tenure Guidelines and governance of tenure by
 - supporting and accelerating the establishment of a robust and innovative monitoring mechanism within the CFS. The CFS will remain truncated and will fail to fulfill the great expectations behind its reform without a monitoring mechanism that allows for reflection, discussion and assessment of the progress made in the coordination of actions by actors at different levels and that ensures accountability in the application of the Tenure Guidelines and other CFS decisions;
 - contributing in a constructive way to the global monitoring event during the 43rd CFS session in 2016, in order to ensure a comprehensive and thorough assessment of the use and application of the Tenure Guidelines.
 - to support and engage in good faith in the process towards the adoption of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights at the UN Human Rights Council, in order to define clear and obligatory international standards on duties of transnational corporations and other business, including rules on impact assessments, due diligence and liability, and hold them legally accountable for human rights abuses and crimes.

FAO

- to provide technical support to the implementation and application of the Tenure Guidelines according to their true objective and in good faith, building on the Guidelines and the principles of implementation contained in them and not lowering the standard the set. Among others, FAO should initiate an inclusive process in order to develop technical instruments that guide states in mandatory regulation of business according to the obligations identified in the Tenure Guidelines and human rights.

Signed by

International Indian Treaty Council – IITC/CITI

International Federation of Rural Adult Catholic Movements – FIMARC

La Via Campesina

Mouvement International de la Jeunesse Agricole et Rurale Catholique – MIJARC

Urgenci – International Community Supported Agriculture Network

World Alliance of Mobile Indigenous Peoples – WAMIP

World Forum of Fish Harvesters and Fish Workers – WFF

World Forum of Fisher Peoples – WFFP

Centre for Environmental Education and Development – CEED, Nigeria

Centro Internazionale Crocevia

Convergence malienne contre l'accaparement des terres – CMAT, Mali

Conseil citoyen Droit à l'Eau et à l'Assainissement – COCIDEAS, Sénégal

Conseil national de concertation et de coopération des ruraux – CNCR, Sénégal

COPAGEN Sénégal

Enda Pronat, Sénégal

European Coordination Via Campesina – ECVC

Fédération Nationale pour l'Agriculture Biologique (FENAB), Sénégal

FIAN International

FIMARC Afrique

Focus on the Global South

Forum Social Sénégalais

Friends of the Earth International

Housing and Land Rights Network-Habitat International Coalition – HIC-HLRN

International Collective in Support of Fishworkers – ICSF

Land Research Center, Palestine

Masifundise Coastal Links, South Africa

Mouvement de solidarité pour le droit au logement – MSP-DRO.L, Burkina Faso

National Fish Workers' Forum – NFF, India

National Women Peasants Association, Nepal

Nepal Landless Dalit Peasants organization

Nepal Youth Farmers Association

Panafricaine pour l'Education au Développement durable – PAEDD

Plateforme d'Innovations pour l'Emploi des Jeunes et des Adultes (PIEJA), Sénégal

Réseau maghrébin des associations de développement local en milieu rural (REMADEL)

RIAO-RDC, Democratic Republic of Congo

South Asia Farmers Forum

South Asia Food Sovereignty Network

South Asia Peasants Coalition

South Indian Coordination committee of Farmers movements – SICCFM, India

Terra Nuova

Transnational Institute – TNI

Union des groupements paysans de Meckhé (UGPM), Senegal