

to improve our understanding and ability to ask the right questions and take effective action on land matters in West Africa

# Strengths and Weaknesses of International Normative Frameworks for Tenure Rights

by Mathieu Perdriault, December 2015

The international normative frameworks that aim to regulate land management by States, individuals and private transnational actors vary greatly. Some are compulsory, others are voluntary, and the basis for protecting different land-related interests shifts accordingly.

Much of the current international thinking on land issues centres around the Voluntary Guidelines on the Responsible Governance of Land Tenure regimes adopted in 2012 by the Committee on World Food Security.

To help consider the scope, advantages and limitations of these Guidelines, this paper describes the international regulatory setting in which they operate and highlights areas where further analysis is needed to develop global strategies for better governance of land and natural resources.

## Existing Normative Frameworks

### ● International Law: “Soft Law” for Human Rights, “Hard Law” for Transnational Investors

The *International Covenant on Social, Economic and Cultural Rights* states that local people have the right to access and use the natural resources they need for their livelihoods. However, international law does not provide any instruments to sanction violations of individual or community land rights, except in very specific situations that fall under the jurisdiction of the United Nations Security Council or the International Criminal Court.

The situation is different for investors, as “Investment promotion and protection treaties” give them recourse to international tribunals that can sanction signatories and order them to make reparations for non-compliance. Thus, if a government decides that it is in the national interest to reclaim a piece of land that has been allocated to a foreign investor, the investor can invoke the clause on expropriation and sue for substantial damages.

### ● International Initiatives Calling for Businesses to Respect Human Rights

The *United Nations Guiding Principles on Businesses and Human Rights* provide protocols for transnational corporations and other companies to monitor their impacts on human rights. However, these Guiding Principles are voluntary and entirely reliant on the goodwill of the businesses concerned.

The *United Nations Global Compact* brings together businesses that promise to apply ten principles based on respect for human rights and labour and environmental standards.

The Organisation for Economic Cooperation and Development (OECD) produced its own set of *Guidelines for Multinational Enterprises*. These Guidelines include national contact points to enable civil society to inform the OECD of any violations of these principles, but provide no mechanism for systematic monitoring. These initiatives rely on the deterrent effect of reputational risk.

### ● Mechanisms to Ensure that Private Enterprises Follow “Best Practices”

Other mechanisms include certification and labelling procedures, such as the Roundtable on Sustainable Palm Oil

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to promote sustainable production of palm oil, and the Roundtable on Sustainable Biomaterials.

The problem here is that it is the companies concerned that determine what constitutes “best practice”. Compliance is monitored by supposedly independent private bodies.

### ● Financial Incentives for “Best Practices”

Some public and private financial institutions make their business loans conditional upon compliance with best practices. The International Finance Corporation (World Bank Group) requires its clients to respect IFC *Performance Standards* in order to “avoid, mitigate and manage the risks and impacts of their activities.” Other public development finance institutions (such as Proparco in France) have adopted and occasionally added to these standards.

The same logic applies to the *Equator Principles*, which are now used by scores of private banks for proposed investments of over \$US10 million.

One of the drawbacks of this kind of approach is that it can be difficult for public banks that support private sector initiatives to impose conditions that serve the general interest if they are likely to jeopardise the viability of these projects (and thus endanger their loan repayments).

### ● International Procedures to Promote “Responsible Land Governance”

Many States have contributed to past and present efforts to develop measures to improve land governance and management. These include the *Framework and Guidelines on Land Policy in Africa* and the *Guiding Princi-*

*ples on Large Scale Land Based Investments in Africa*, which were developed by the African Union Land Policy Initiative in order to create a certain level of consensus across the African continent and guide land policies at the national level.

At the global level, a set of *Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests* were formulated after more than four years of international discussions and wide-ranging consultations with civil society groups. Endorsed by the CSA in 2012, these Guidelines now constitute an international standard for governance of tenure.

## Voluntary Guidelines on the Responsible Governance of Land Tenure Regimes (VGGT)

### ● General Characteristics and Content

According to the general guiding principles of the VGGT, States should “recognize and respect all legitimate rights holders and their rights, even if they have not been formally recorded; they should protect legitimate rights against threats and violations; promote and facilitate the exercise of legitimate tenure rights (realisation and transactions); ensure that everyone has access to affordable and prompt justice to deal with infringements of legitimate tenure rights; provide fair compensation where tenure rights are taken for public purposes, and prevent tenure disputes, violent conflicts and corruption”. Although they are primarily directed at States, the VGGT are also intended to ensure that non-State actors “respect human rights and the legitimate tenure rights of others”.

As their name suggests, the Guidelines are a “voluntary instrument” that is available to help anyone seeking to “evaluate the land governance situation, determine how it might be improved and implement these improvements.” Their application should be “in accordance with national institutions and legal provisions” and each country’s international obligations.

The first section of the text sets out the objectives of the Guidelines. The next four sections cover the legal recognition and allocation of tenure rights and duties; transfers and other changes to tenure rights and duties; administration of land tenure regimes; and responses to climate change and emergencies. The final section discusses how the objectives of the Guidelines can be achieved.

### ● Considerable Progress Has Been Made...

The Voluntary Guidelines state that there are no absolute tenure rights, not even private ownership rights: “All tenure rights are limited by the rights of others and by the measures taken by States necessary for public purposes.” They say that States should take account of rights “arising from customary or informal tenure regimes”, “secondary” rights such as gathering rights held by women and vulnerable groups, and subsidiary rights. They also highlight the need to protect “publicly-owned land, fisheries and forests that are collectively used and managed” – in other words, the “commons” – and to respect the rights of women and indigenous peoples.

In addition to support for small producers, who “provide a major share of agricultural investments”, the Guidelines note the advantages of redistrib-

utive land policies and emphasise the need for effective and transparent tax systems to improve land governance.

Although may not initially be obvious, these Guidelines provide a real opportunity to envisage a form of economic analysis that considers the interests of society as a whole rather than focusing solely on investors' interests.

### ● ... But They Still Need to Be Harmonised and Implemented

The Guidelines call for States to “*protect the wider interests of societies and smallholders through appropriate policies and laws on tenure*”, but also expect them to “*facilitate the operations of efficient and transparent markets*” – without considering the implications the first directive has for the second.

The term “legitimate rights” is widely used without any indication as to how this legitimacy can be verified.

They say nothing about the issue of prescriptive acquisition, which determines the period in which acquired rights can be challenged, even though this is crucial in preventing perpetual inter-generational land conflicts.

Finally, the last section summarises the scope of the VGGT: States are responsible for their implementation, monitoring and evaluation, and all stakeholders are encouraged to promote them.

### The “Principles for Responsible Investment in Agriculture and Food Systems”

In October 2014 the CFS adopted complementary Principles relating to agricultural investment, which have drawn considerable criticism from civil society organisations.



*The International Court of Justice only rules on breaches of the universal right to food or access to land if the State concerned agrees to it.*

The text does not clearly define what is meant by “farmers” (“agriculteurs” in French), and makes no distinction between actors whose logic is driven by maximizing profits and those whose main aim is to remunerate the family workforce.

These principles echo the arguments used by powerful economic actors, affirming that investment necessarily creates jobs while ignoring the fact that they destroy jobs or possible alternatives that would create much more employment.

No consideration is given to development paths based on wealth generation by family farmers – even though this is the route that every developed country in Europe has taken, along with China and even the United States. National governments are expected to support investments by small producers, but to do so by using *market mechanisms* as tendering processes. There is no call for them to focus on

dealing with investments that compete with family farms over access to land and natural resources.

States are clearly told that they “*should not apply the Principles in a manner that may create or disguise barriers to trade or promote protectionist interests, or in a way that imposes their own policies on other nations.*” Yet it is this liberalisation of the global market that has forced producers with very unequal means of production – and thus considerable differences in the productivity of their labour – to compete with each other, creating huge inequalities and leading to the impoverishment of millions of rural producers and family farmers.

Because civil society groups were given a hearing when these Principles were developed, the CFS can claim social acceptance for a set of guidelines that are broadly similar to those that the World Bank tried to launch several years before, amid considerable criticism from various social movements.

## The Need for Further Action

The main difference between the Voluntary Guidelines for Responsible Governance and other similar mechanisms is that numerous States were involved in their formulation and space was made for proposals from civil society groups. In this sense, they have made considerable progress on previous standards.

Nevertheless, there are some notable omissions and contradictions in these guidelines. For example, there are no suggestions for mandatory mechanisms to regulate what businesses do, or for binding supra-national regulatory measures to put in place.

The voluntary nature of the Guidelines is also problematic. It does mean that they have been adopted by 130 States, most of which would not have done so if there had been any external obligation to apply them – but it is also their main weakness, as they will only be implemented if there is a real political will to change national land management rules and practices.

### FOR FURTHER INFORMATION, SEE THREE OTHER PUBLICATIONS by the “Land Tenure and Development” Technical Committee:

>> *Guide to due diligence of agribusiness projects that affect land and property rights, 2014, 70 pages:* <http://www.foncier-developpement.fr/publication/guide-to-due-diligence-of-agribusiness-projects-that-affect-land-and-property-rights/>

>> *Review of normative frameworks and voluntary frameworks for tenure rights, 2014, 22 pages:* <http://www.foncier-developpement.fr/publication/review-of-normative-frameworks-and-voluntary-guidelines-for-tenure-rights/>

>> *Large-scale land appropriations. Analysis of the phenomenon and proposed guidelines for future action, 2010, 56 pages:* <http://www.foncier-developpement.fr/publication/guide-to-due-diligence-of-agribusiness-projects-that-affect-land-and-property-rights-2/>

It would take a major shift in internal and external power relations for States to agree to abide by this set of principles and impose them on the businesses and individuals that operate in their territory. The current balance of international power is also pushing the countries targeted by large-scale land investments into a race towards social and environmental dumping. So what can be done to stimulate productive changes in power relations?

The “Land Tenure and Development” Technical Committee underlines the need to strengthen civil society organisations, promote the application of the Voluntary Guidelines through effective operational measures, and improve international law. Introducing effective supra-national recourse mechanisms to deal with violations of tenure rights by States and companies will be a determining factor in achieving this. ●

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