Technical Committee on "Land Tenure and Development"

Review of normative frameworks and voluntary guidelines for tenure rights

October 2014

AGENCE FRANÇAISE DE DÉVELOPPEMENT

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RÉPUBLIQUE FRANÇAISE
MINISTÈRE DES AFFAIRES ÉTRANGÈRES ET DU DÉVELOPPEMENT INTERNATIONAL

Technical Committee
LandTenure&Development

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FOREWORD

The international community has launched numerous initiatives to respond to land grabbing since the huge scale of this phenomenon became evident in 2008. The greatest progress so far has been made with voluntary guidelines, which require new procedures to ensure that they function effectively. The French Cooperation is now putting in place analytical tools and internal procedures to ensure that all activities supported by the Ministry of Foreign Affairs and the French Development Agency (including its subsidiary Proparco, which supports the private sector) follow these guidelines and, more broadly, that they are respected by French actors involved in agricultural investments that affect landholdings.

This task was assigned to the 'Land Tenure and Development' Technical Committee, a body that provides a forum to debate ideas and build on research findings and project experiences, co-chaired by the Ministry of Foreign Affairs and AFD. The Gret-IIED-Agter consortium that the committee appointed to lead this collective reflection has mobilized committee members and about ten AFD and Proparco project officers around the process. In 2013 and 2014 the team used an iterative approach and a series of group and one-to-one meetings to review existing voluntary frameworks and produce an analytical framework and guide that each institution can now use to change their internal project appraisal procedures.

This document is an analytical review of existing international voluntary frameworks. It was produced by Michel Merlet (Agter), in conjunction with Amel Benkahla (Gret), Lorenzo Cotula (IIED), Thierry Berger (IIED) and Mathieu Perdriault (Agter).

Other members of the 'Land Tenure and Development' Technical Committee also contributed to this paper, which reflects the dominant position of members of the working group, but does not necessarily represent the position of their respective institutions.

This document and related papers (most notably the *Guide to due diligence of Agribusiness projects that affect land and property rights*) can be downloaded from the Land Tenure and Development website (www.foncier-developpement.fr).

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INTRODUCTION

Land management and tenure are regulated by many, very different normative frameworks. Public, private, national and international, their scale and scope vary according to when and where they have been implemented and whether they are binding or voluntary. While much of the current debate on this issue centres around the Voluntary Guidelines on the Responsible Governance of Land Tenure regimes[1] approved in 2012 by the Committee on World Food Security, it is important to remember that this is by no means the first or only initiative regarding the regulation of land governance. In order to better understand the range and application of these Voluntary Guidelines, we also need to consider the context in which they are expected to operate.

Every country has its own normative frameworks established under formally recognised laws and 'customary' mechanisms. However, this is not the place to examine the various normative mechanisms associated with land tenure in each country. This paper will focus exclusively on international mechanisms involving at least two countries.

We will start with a brief review of the different types of international normative frameworks that have had direct implications for land management, and then look at initiatives taken in response to the escalation of large-scale land appropriation and concentration, which has been widely reported since 2008. The next section provides a more detailed analysis of the Voluntary Guidelines on the Responsible Governance of Land Tenure regimes, highlighting their strengths and weaknesses and exploring the expected effects of national policies that take account of these Guidelines. Finally, we consider the implications of this review for the work done by the 'Land Tenure and Development' Technical Committee on transparency and contract negotiations.

BRIEF OUTLINE OF THE DIFFERENT MECHANISMS

1. Existing normative frameworks

■ International law: 'soft law' for human rights, 'hard law' for businesses and investors

International law applies to different countries, which all have their own legal systems. In order for international law to function, States need to establish common arrangements, incorporate them into their national legislation and agree on common standards that will be binding upon all parties that sign up to them.

International human rights law was put in place after the Second World War. It applies to States, not business enterprises, and deals with relations to land and resources at different levels, usually in general terms. The **United Nations Universal Declaration of Human Rights** (1948) was supplemented by two international covenants, the **International Covenant on Civil and Political Rights** (ICCPR) and the **International Covenant on Economic and Social Rights** (ICSER - 1996). It was then suggested that countries could sign optional protocols that would make them answerable to

[1] In this paper we will refer to them as the 'Voluntary Guidelines' or VGs.

an international authority with the power to pursue individual or collective complaints about a signatory's failure to respect or guarantee the rights defined in these covenants. France signed the optional ICCPR covenant in 1984, and the ICSER covenant (which was not submitted for signature until 2008) in 2012.[2] However, these commitments can hardly be regarded as binding since there is no designated international authority to enforce the covenants or sanction signatories for non-compliance – hence the term '*soft*' or nonjusticiable law.

The situation is very different for **International trade and investment law**, which covers States and business enterprises. States that signed the treaties establishing this law can be held to account for their business dealings, as parties that fail to fulfil their commitments can be sanctioned by special arbitration tribunals – the World Trade Organisation (WTO) Dispute Settlement Body (DSB) and the International Centre for Settlement of Investment Disputes (ICSID), which is often called upon for investment agreements. A very large number of bilateral and multilateral investment agreements have been signed since the Organisation for Economic Cooperation and Development (OECD) failed in its attempt to establish a Multilateral Agreement on Investment (MAI) to supplement the WTO rules on trade. These agreements, which are also known as 'Investment promotion and protection agreements', follow the basic principles of the two previous OECD codes, particularly the clauses on *national treatment* and *most favoured nation treatment*. They also protect 'investors' by providing them with a stable and favourable legal environment and possible recourse to investor/State arbitration mechanisms. In doing so, they often allow investors to take land away from local people who rarely have access to any binding mechanisms that can help them ensure their rights are respected.[3]

In addition to these general frameworks, several other initiatives have been taken to ensure that business enterprises respect people's human rights and follow best social and environmental practices. These include:

- The **United Nations Guiding Principles on human rights and transational corporations and other business enterprises.** Adopted in June 2011 by the United Nations Human Rights Council, these principles specify that States are responsible for ensuring that businesses respect human rights, should put in place sanctions and legal procedures that will enable them to punish enterprises and make reparation for failings in this respect, and should encourage businesses to disclose how they manage the effects of their activity on human rights. The text proposes a 'Human rights due diligence process' that should apply to internal company procedures, external independent entities, and consultations with actors who are likely to be affected by their operations.

- The **United Nations Global Compact**, which was launched in July 2000 by the UN Secretary General Mr. Kofi Annan, calls on transational businesses to make a voluntary commitment to follow ten principles based on respect for human rights, labour and environmental standards and anti-corruption measures. However, this initiative does not fit into any clear legal framework, nor does it state what measures will be taken or what powers are envisaged to ensure that transational corporations fulfil their voluntary

[2] This commitment still needs to be ratified by Parliament to become effective.

[3] However, it should be noted that efforts have been made to ensure that arbitration procedures relating to certain investment treaties are more transparent. Under certain conditions, ICSID, NAFTA and, more recently, UNCITRAL now allow NGOs to intervene in arbitration procedures as *Amicus curiae*.

commitments.[4] The ten principles of the Global Pact are based on the Universal Declaration of Human Rights, the International Labour Organisation Declaration on Fundamental Principles and Rights at Work, the Rio Declaration on Environment and Development, and the United Nations Convention against Corruption. The tenth principle, which relates to corruption, was added in 2014. A total of 930 French businesses and organisations signed up to the Global Compact on 1st July 2013, making France the country with the second most signatories to the Compact.

- The **OECD**, which is mainly composed of developed countries and has played a central role in liberalising trade, setting up GATT and establishing the WTO, has produced its own **Guidelines for Multinational Enterprises**. These were revised in 2011, and now include the United Nations framework. They state that business enterprises should put in place human rights due diligence procedures, and that governments of States that have signed up to the Guiding Principles should ensure that all parties' rights and obligations are respected in accordance with international law and any contracts that have been signed. This means that the State is responsible for encouraging stakeholder consultation and participation and including local communities in the process, working on the assumption that all participants are acting in good faith. National contact points (NCP) could provide the basis for a mechanism to resolve conflicts, but they have no binding powers over companies that contravene any of the Guiding Principles. The General Principles list everything that companies are supposed to do, and encourage them to support initiatives to improve freedom of expression and association and social dialogue … Although the OECD has considerable experience putting in place binding trade laws and was behind the project to extend them through MAIs, its guidelines do not include any binding mechanisms for multinationals that relate to social questions (through references to international human rights law) or environmental issues.

In recent decades the increasing affirmation of indigenous peoples' and women's rights in the framework of 'soft law' has made it harder for States and companies to justify their failure to take account of such rights. However, this has not led to the creation of mechanisms that can oblige them to change their practices or legislation.

Finally, we come to regional initiatives such as the **Framework and Guidelines on Land Policy in Africa** developed by the African Union Commission (AUC), the UN Economic Commission for Africa (ECA) and the African Development Bank (AfDB). The aim of this document, which reflects upon and analyses land policies in Africa, is to create a certain consensus among the different countries across the continent, not to provide a binding framework or blueprint for land policies in individual States. It is worth noting that groups of countries can take joint initiatives to encourage States to start reform processes that are presented as being helpful in achieving the desired objectives of these normative frameworks. Thus, the 'New Alliance for Food Security and Nutrition', an initiative taken by the G8 in May 2012, has been portrayed as wanting to strengthen the role of the African Union, even though its primary purpose is to facilitate private investments.

[4] The businesses concerned provide the report confirming that they follow best practices, and although they pay an annual fee to secure the 'Global Compact' label, there is no external mechanism to verify the accuracy of the information in these reports.

This brief presentation shows that none of these initiatives challenge the current system in which human rights are covered by 'soft law', while companies are protected by 'hard law' that operates at the international level, outside national legal frameworks. With no plans for any binding supra-State mechanism, even for States that have voluntarily signed up to different pacts and principles, the responsibility for ensuring that human rights laws are respected is systematically left to individual States.[5]

2. Criteria and conditionalities for funding allocations, and investors' own codes of good conduct

We will now shift our focus from international law to a completely different field: the conditions that companies have to meet in order to obtain subsidised loans from public and private financial institutions, and codes of good conduct that investors have voluntarily put in place and agreed to respect.

> In the first case, it is the bank rather than the court or political authorities that determines what is fair and desirable, using its own principles and criteria to set conditions that clients must fulfil in order to qualify for a loan.
> In the second case, companies make a voluntary commitment to respect certain principles, which they incorporate into their marketing policy and communicate to their clients and the authorities that support them.

We will use the World Bank International Finance Corporation (IFC) performance standards to illustrate the first type of practice; and consider the Equator Principles, which have been adopted by a number of large private banks, as a benchmark for the second. The internal policies of public and private French banks that finance agricultural investments follow a similar logic in the sense that their funding is subject to certain specific conditions.

International Finance Corporation (IFC) performance standards

The International Finance Corporation describes its Environmental and social sustainability policy as "an integral part of IFC's approach to *risk management*". In order to establish '*transparency and good governance within the framework of its operations*' it has developed a Sustainability Framework that includes the IFC Policy and Performance Standards on Environmental and Social Sustainability, and its policy on access to information. "*The Performance Standards are directed towards clients, providing guidance on how to identify risks and impacts, and are designed to help avoid, mitigate, and manage risks and impacts as a way of doing business in a sustainable way, including stakeholder engagement and disclosure obligations of the client in relation to project-level activities*" … "*In the case of its direct investments (including project and corporate finance provided through financial intermediaries), IFC requires its clients to apply the Performance Standards to manage environmental and social risks and impacts so that development opportunities are enhanced*" throughout the whole cycle of an IFC investment. There are eight standards, which relate to the assessment and management of environmental and social risks and impacts; labour and working conditions; resource efficiency and

[5] A final opportunity for international intervention, which is worth noting but will not be examined in this paper, would be for nation states to develop a binding framework for transnational enterprises and their subsidiaries whose headquarters are located on the host nation's soil. If the legislator wishes, national law can include 'extraterritorial' provisions that make the parent companies of transnationals based in their territory legally responsible for the actions of their overseas subsidiaries.

pollution prevention; community health, safety and security; land acquisition and involuntary resettlement; biodiversity conservation and sustainable management of living natural resources; indigenous peoples; cultural heritage.

Many other development finance institutions have adopted these criteria and some, such as Proparco, have added to them.

The Equator Principles, codes of good practice for private financial institutions

The Equator Principles were first adopted in 2003, when about ten banks voluntarily agreed to ensure that any investment over $US10 million that they intend to finance respects the principles of sustainable development. There are now around 80 signatories. The ten Equator Principles follow the IFC criteria for a mandatory preliminary impact assessment, which affects the way a project is evaluated and the rigour with which it is monitored. If the preliminary impact assessment identifies any social or environmental risks, the borrower has to propose an action plan of corrective or compensatory measures, which will be monitored. National laws must be respected, and wherever possible affected communities should be consulted before the project is implemented. Project plans should include a mechanism for conflict resolution, and an independent social or environmental expert should review the evaluation, action plan and documentation of the process to ensure that they comply with the Equator Principles. Project documents should set out the borrowers' commitments, and financial entities that have signed up to the principles are expected to publish annual reports on their procedures and implementation, while maintaining an 'appropriate' level of confidentiality.

Codes of good conduct and different types of certification developed by businesses

Many other mechanisms are based on voluntary undertakings that businesses have made to recognise certain principles and/or adopt practices that are regarded as desirable or virtuous. These mechanisms, which are not necessarily financial, include the Roundtable on Sustainable Palm Oil (RSPO) to promote sustainable palm oil, and the Roundtable on Sustainable Biomaterials (RSB).[6]

Some of these mechanisms lead to certification and labelling. As with the Equator Principles, companies that are awarded a label should be monitored by an independent agency to ensure that they continue to fulfil their voluntary commitments. At the moment we do not know of any similar formal mechanisms that directly apply to land, although the idea is often discussed in research on responsible agricultural investments (see below).[7]

[6] One of the case studies undertaken in the context of this work for the 'Land Tenure and Development' Technical Committee concerns a company linked with the Roundtable on Sustainable Biomaterials.

[7] One of the key proposals in the 2010 Centre for Strategic Analysis report on the transfer of national agricultural assets in developing countries was for the European Union and France to "create a *Responsible agro-investment* label that the EU or FAO would award industrial businesses that respect the aforementioned principles of responsible investment. Compliance with this procedure should reduce the long-term risks associated with the project and enable them to borrow at better rates; while consumer awareness of the label could also help increase sales of the produce concerned."

■ Implications and limitations of these mechanisms for corporate social and environmental responsibility

We have seen that the corporate social responsibility (CSR) approach may be embraced by companies that have voluntarily decided to adopt a code of good conduct, or imposed upon clients who have to meet performance standards set by the financial institution that provides their capital.

In either case, none of the local communities, indigenous peoples or small-scale farmers, herders and fishermen in the project zone are involved in defining the rules for these mechanisms. Worse still, they are excluded from the group of actors who drive the development dynamic, and are merely regarded as *potential beneficiaries* or *parties affected* by the projects promoted by 'investors' – who will inevitably be large-scale operators as these are the only actors with access to substantial amounts of credit. This means that any decisions about what constitutes 'good conduct' and socially and environmentally 'responsible behaviour' are made by the companies concerned, whose actions are not sanctioned by the law or affected by political considerations. Nowadays it is consumers who impose sanctions, hence the new term 'ConsumActors'.[8]

Even if we set aside the issue of people's democratic aspiration to decide on their own future, the mechanisms and principles described above have severe intrinsic limitations. In order to recover their capital, banks need clients who can repay the principal loan and corresponding interest. They can certainly ensure that their clients meet various conditions and ethical requirements when the loan is agreed, but are unlikely to impose conditions that will make the project less profitable for their client, apply penalties or interrupt funding if these sanctions could jeopardise the loan repayments. Just as we cannot talk about 'risks' and 'development' without clarifying what we mean by these terms, it is crucial to differentiate between the interests of investors and the banks that support them, and the interests of existing and future populations – and to bear in mind that CSR mechanisms can generally do little to challenge or change financially profitable projects whose interventions do not serve the general interest.

3. Responses to land grabbing since 2009

In recent years, various international organisations and countries have moved quickly to develop guidelines on agricultural investments. These are seen as an essential tool in addressing concerns raised by the soaring cost of basic foodstuffs and media coverage of increasingly globalised land grabbing. In September 2009 around 30 States (including France) pledged to support an initiative undertaken by Japan in association with IFAD and FAO, and the World Bank subsequently drew up a set of principles for responsible agricultural investment known as the RAI. According to these seven key principles, investments should respect existing rights to land and natural resources; strengthen food security; be transparent, follow good governance procedures and create a favourable business environment; ensure that affected communities are involved in prior consultations and participate in agreement procedures; respect the investors' commitment to act responsibly; be socially sustainable; and be environmentally sustainable.

The RAI have been strongly criticised by various social movements (Via Campesina in particular), many civil society organisations, and the United Nations special rapporteur on the Right to Food,

[8] Some NGOs use wordplay to advance the idea that corporate responsibility (CSR) should above all be legal. It is unfortunate that the term 'legal responsibility' can be used in two very different ways, as the fact that companies have to be legally accountable for their actions is quite the opposite of what is usually understood by CSR.

Olivier de Schutter. In June 2010, he stated that *"It is regrettable that, instead of rising to the challenge of developing agriculture in a way that is more socially and environmentally sustainable, we act as if accelerating the destruction of the global peasantry could be accomplished responsibly"*.[9] In February 2011 a large number of organisations attending the World Social Forum in Dakar signed a call for an end to land grabbing, and invited the Committee on World Food Security (CFS) to reject the RAI and strengthen the FAO-led process to develop Voluntary Guidelines on responsible land governance.

VOLUNTARY GUIDELINES ON THE RESPONSIBLE GOVERNANCE OF LAND TENURE REGIMES

1. General characteristics and content of the Voluntary Guidelines

At the end of an innovative formulation process involving State representatives and a wide range of other actors, the '*Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security*' were officially approved on 11th May 2012 at the 38th (special) session of the Committee on World Food Security.[10] Unsurprisingly, these Guidelines are something of a compromise as they were negotiated between different governments. There are also some contradictions between the different points addressed by the Guidelines, although this is not a real problem as they are voluntary and States are not obliged to apply the principles upon which they agreed. These contradictions would be much more of an issue if the VGs were binding.

The first two sections, 'Preliminary observations' and 'General matters' present the objectives, discuss the nature and scope of the document, and set out the general guidelines. The four main sections cover *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 seventh section explores the promotion, implementation, monitoring and evaluation of the guidelines.

Although this document represents advances in many areas, it also has limitations that will need to be addressed when the Guidelines are implemented in different countries.

Status of the Voluntary Guidelines

A VOLUNTARY, OPTIONAL INSTRUMENT

The Guidelines are a "*voluntary, non-binding instrument*" designed to "*provide frameworks that can be used when developing strategies, policies, laws, programmes and activities.*" They have legal implications insofar as they are presented as a source of inspiration for national legislators; but are also available to help anyone seeking to "evaluate the land governance situation, determine how it might be improved and implement these improvements."

The key question now is how to enforce them.

[9] http://www.project-syndicate.org/commentary/responsibly-destroying-the-world-s-peasantry

[10] This included a long consultation process that began in September 2009 and involved representatives of government institutions, academia, UN agencies and civil society organisations from over 130 countries.

THE VOLUNTARY GUIDELINES DO NOT CHALLENGE STATES' INTERNATIONAL LEGAL OBLIGATIONS, AND SHOULD BE INTERPRETED AND APPLIED IN ACCORDANCE WITH NATIONAL INSTITUTIONS AND LAWS

"*These Guidelines should be interpreted and applied in accordance with existing obligations under national and international law, and with due regard to voluntary commitments under applicable regional and international instruments. They are complementary to, and support, national, regional and international initiatives that address human rights and provide secure tenure rights to land, fisheries and forests, and also initiatives to improve governance. Nothing in these Guidelines should be read as limiting or undermining any legal obligations to which a State may be subject under international law*." They "*should be interpreted and applied in accordance with national legal systems and their institutions*" (Part 1, section 2: Nature and scope).

A short information document produced by FAO refers to the VGs as "*a voluntary legal instrument*".[11] They constitute a set of 'desirable principles' that many countries signed up to because they are not legally binding. The next step is to *facilitate consensus within each country*, with the objective of getting signatory countries to incorporate the VGs into their national legislation. "*FAO's experience with its soft law instruments is that they have a positive impact in guiding national policies and legislation in many countries. When a country enacts all or part of an international soft law instrument, that soft law becomes 'hard law' within that country.*"[12]

THE VOLUNTARY GUIDELINES ARE PRIMARILY AIMED AT STATES

The Voluntary Guidelines are primarily directed at States. They contain over 160 articles setting out what States 'should' do to ensure responsible governance of land regimes, and only 30 indicating what non-State actors should do.

The general guidelines for responsible land governance are generally in line with the principles promoted by the World Bank in the RAI

The general guidelines for responsible land governance are divided into two sections, one focusing on what States are supposed to do, and the other on what is expected of non-State actors, including business enterprises.

These guidelines can be summarised as follows: 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*" (VG, op. cit., paragraph 3.1).

Paragraph 3.2 of the Voluntary Guidelines begins by stating that non-State actors are "*expected to respect human rights and the legitimate tenure rights of others*", but the rest of the paragraph, which focuses on businesses, contradicts this by specifying that their commitments are entirely voluntary. *"Business enterprises should act with due diligence to avoid infringing on the human rights and legitimate tenure rights of others. They should include appropriate risk management systems to prevent and address adverse impacts on human rights and legitimate tenure rights. Business enterprises should provide for and cooperate in non-judicial mechanisms to provide remedy, including effective operational-level grievance mechanisms, where appropriate, where they*

[11] Voluntary Guidelines on the Governance of Tenure: At a Glance. FAO, Rome, 2012.

[12] Op.cit., page 8.

have caused or contributed to adverse impacts on human rights and legitimate tenure rights. Business enterprises should identify and assess any actual or potential impacts on human rights and legitimate tenure rights in which they may be involved."

States should "in accordance with their international obligations […] provide access to effective judicial remedies for negative impacts on human rights and legitimate tenure rights by business enterprises. Where transnational corporations are involved, their home States have roles to play in assisting both those corporations and host States to ensure that businesses are not involved in abuse of human rights and legitimate tenure rights." It is not a question of putting in place binding preventive measures, but of simply seeking ex-post compensation. The only explicitly mentioned exception is State enterprises or companies that receive substantial support or services from State agencies. Yet we know that the States' aforementioned international obligations are not justiciable at the moment, even if the State in question signed the treaties putting them in place.

The Voluntary Guidelines make no binding provisions for business enterprises and affirm that it is entirely up to them to ensure that they 'behave properly'. As such, they are essentially a set of proposed self-regulatory mechanisms that do little to contradict the vision behind the principles for responsible agricultural investment (RAI).

■ Significant advances in recognising what States should do …

The Voluntary Guidelines set out many important points, some of which are summarised below.

THERE ARE NO ABSOLUTE TENURE RIGHTS

The Voluntary Guidelines state that there are no absolute tenure rights. "*All parties should recognize that no tenure right, including private ownership, is absolute. All tenure rights are limited by the rights of others and by the measures taken by States necessary for public purposes. Such measures should be determined by law, solely for the purpose of promoting general welfare including environmental protection and consistent with States' human rights obligations. Tenure rights are also balanced by duties. All should respect the long-term protection and sustainable use of land, fisheries and forests*" (VG, Article 3.4). Article 17.4 recognises the possibility of overlapping rights, differentiates between overlapping and competing rights, and calls for registers with a dual indexing system based on both spatial units and rights holders. Article 17.1 specifies that "*States should provide systems (such as registration, cadastre and licensing systems) to record individual and collective tenure rights in order to improve security of tenure rights* […]."

RECOGNITION OF INFORMAL RIGHTS

Several articles in the Voluntary Guidelines affirm that States should take account of rights that have not been formally registered (VG, Article 3.1.1), 'secondary' rights, such as gathering rights held by women and vulnerable groups (VG, Article 7.1), subsidiary rights (VG, Article 12.9) and "*existing legitimate tenure rights and claims, including those of customary and informal tenure*" (VG, Article 12.10).

RECOGNITION OF 'COMMON' RIGHTS

"*Noting that there are publicly-owned land, fisheries and forests that are collectively used and managed (in some national contexts referred to as commons), States should, where applicable, recognize and protect such publicly-owned land, fisheries and forests and their related systems of collective use and management, including in processes of allocation by the State*" (VG, Article 8.3).

SUPPORT FOR SMALLHOLDER INVESTMENTS

"*Considering that smallholder producers and their organizations in developing countries provide a major share of agricultural investments* […], *States should support investments by smallholders as well as public and private smallholder-sensitive investments*." (VG, Article 12.2). The positions presented on this point clearly differ from those behind the principles for Responsible Agricultural Investment and the performance standards adopted by financial institutions.

OTHER RARELY-MENTIONED THEMES OF INTEREST ADDRESSED BY THE VOLUNTARY GUIDELINES

There are too many interesting themes to mention all of them here, so we will highlight those that we feel are most striking. The Voluntary Guidelines attach considerable importance to gender issues, and contain constant reminders of the need to recognise and respect the rights of women and indigenous populations and peoples.

Much more unusually in the current context, Articles 15.1 to 15.10 emphasise the benefits of redistributive land policies. The VGs also address another issue that rarely raised nowadays – the need for effective and transparent taxation – and stipulate that this should be seen as one of the main levers for improving land governance.

■ … but there are also gaps and contradictions in the Voluntary Guidelines

PROMOTING EFFECTIVE AND TRANSPARENT LAND MARKETS

The Voluntary Guidelines send very mixed message about markets, one minute saying that "*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*," and the next maintaining that "*States should protect the wider interests of societies and smallholders through appropriate policies and laws on tenure*" (Part 4, Articles 11.1 to 11.8), even though it is common knowledge that land markets favour the strongest actors, and that without regulation they lead to land concentration that works against the general interest.

NOTHING ON ACQUISITIVE PRESCRIPTION

Curiously, the Guidelines say nothing about the delicate issue of prescriptive acquisition, even though this is crucial in preventing the entrenchment of inter-generational land conflicts.

■ Key concepts are not defined

The Voluntary Guidelines do not define what they mean by 'land governance'. In talking about '*poor*' or '*deficient governance*' there is an implicit assumption that '*good governance*' exists, but the term is never explicitly used. References to '*responsible land governance*' in the foreword reflect mainstream thinking in this field, but this is very different from recognising that governance in itself is neither good nor bad: it is modes of governance that can serve the interests of particular groups, and which can further or undermine the future interests of society.

The VGs say that the opportunity to recognise and legalise land rights – which is presented as one of the objectives of implementing these Guidelines in different countries – should be based on the

legitimacy of these rights. The concept is widely used in the text, but what this legitimacy is based on is never made clear.

The introductory section of the paragraph devoted to the rule of law (Article 3B #7) talks about States putting in place laws that "*are consistent with their existing obligations under national and international law*". This idea is systematically repeated in each of the main themes, despite its potential to cause problems further down the line.

Promoting and implementing the Voluntary Guidelines

The seventh and final section of the Guidelines summarises what can be expected of this process. "*In accordance with the voluntary nature of these Guidelines, States have the responsibility for their implementation, monitoring and evaluation*" (Article 26.1). Conversely, Article 26.5 states that "all parties […] are encouraged to use collaborative efforts to promote and implement these Guidelines."

2. Developing the Principles for Responsible Investment in Agriculture and Food Systems

A complementary or rival process to the Voluntary Guidelines?

After the Voluntary Guidelines were officially approved, the Committee on World Food Security (CFS) launched a new initiative to build consensus between States and civil society organisations on a key issue in the debate about land grabbing: agricultural investments. This procedure was prompted by concerns that the process used to formulate the RAI (principles of responsible agricultural investment developed by the World Bank, FAO, IFAD and UNCTAD) was insufficiently inclusive as it did not involve civil society organisations. Between October 2012 and October 2014, a working group composed of diverse actors produced several versions of the new principles that were widely circulated and discussed through electronic consultations and regional-level meetings with the different actors concerned – governments, United Nations agencies, civil society organisations, NGOs, agricultural research institutions, financial bodies, private philanthropic foundations and representatives from the 'private sector' (large private companies). A final version of the resulting text was submitted for signature at the 41st session of the CFS and approved in Rome on 16th October 2014.

The starting point for these principles was recognition of the fact that much more work needs to be done on responsible investment in agriculture and food systems in order to improve food security and realise the right to adequate food as an element of national food security. The text states that a wide range of actors can be involved in responsible investment. These include small producers, and family farmers in particular. The need to take account of existing voluntary frameworks is also noted, with specific mention made of the RAI principles developed by the World Bank, FAO, IFAD and UNCTAD, the Voluntary Guidelines on the Responsible Governance of Land Tenure Regimes (analysed above), and the Voluntary Guidelines for the progressive realization of the right to adequate food.

While the Voluntary Guidelines on the Responsible Governance of Land Tenure were primarily aimed at governments, the new principles seem to be mainly directed at investors.

The document setting out these principles had three objectives: to define the key characteristics of responsible investments, identify the main stakeholders, and propose a framework to guide their

interventions, encourage more responsible investment, and avoid or reduce the risks of endangering food and nutritional security.

The nature and scope of the document was clearly stated: like the Voluntary Guidelines, the principles are voluntary and therefore non-binding. They cannot be used to challenge international commitments made by States, and should be applied in accordance with the laws of each country. The text also specifies that the principles are global and that their universal application should "recognise the role and needs of small producers" – but then states that this should be done "in conjunction with other actors." The ten principles set out in the text broadly repeat the principles (and limitations) of the Voluntary Guidelines. Some points are more fully developed and certain aspects are considered in some detail, but others are barely touched upon. Thus, Principle 5 deals with access to water in an ambiguous phrase which suggests that 'legitimate' land rights (a concept that is not defined, as in the VGs) would include recognition of existing or potential rights to use water, based on two documents that do not address this issue (the VGs on land governance and guidelines on sustainable artisanal fishing).

The formulation of the new text proved highly problematic, despite the marked similarities between the Voluntary Guidelines and the ten new principles. The consensus that seemed to have been reached with the adoption of the Voluntary Guidelines was frequently called into question and had to be substantially renegotiated. The rights-based approach and references to international texts on human rights and the right to work were particularly contentious, as was the principle of free, prior and informed consent of indigenous peoples, which was still under discussion on the eve of the October session of the CFS.

■ Ambiguities and lack of clarity constitute a significant step backwards on several key points

While the titles of the ten 'principles' reflect their laudable ambitions, the texts that are supposed to clarify their content are deeply contradictory. We did not think it was necessary to analyse the CFS principles for RAI in any great depth due to the strong similarities between their content and that of the Voluntary Guidelines. However, it is important to note that there are several points where they either validate mechanisms that marginalise the sectors in which small rural producers or family farmers operate, or which can be used to accuse them of violating the new principles.

a) The text does not clearly define what is meant by 'farmers' ('*agriculteurs*' in French), a word used to denote family farmers, rural producers, units of production that engage hired labour, and even capitalist entrepreneurs. Paragraph 49 states that "Farmers can be smallholders or business enterprises, and they should respect the roles and responsibilities defined in this section [smallholders] and the following section [commercial enterprises]." Rather than making a clear distinction between actors whose logic focuses on maximizing profits and those whose main aim is to remunerate the family workforce, the text (paragraph 49 onwards) takes a blanket approach that disregards the considerable differences in their socio-economic investments.[13]

[13] It is better to talk about rural producers (or family farmers) rather than small farmers, as they are not defined by the size of their operations. The word 'farmer' can mean different things, and the term 'commercial enterprise' is also very vague. Family production units constitute commercial enterprises as they are integrated into the market; while associative enterprises are not capitalistic. Producers are differentiated by their 'economic logic'. It is more accurate to talk about 'capitalist production' when the objective is clearly to maximize the return on capital, and about 'companies that employ people' when they are heavily reliant on waged labour but have few opportunities to invest capital outside agriculture.

b) The authors of the text seem to have focused solely on the universal human rights of producers, indigenous peoples, women and youth, with a particular emphasis on waged labour. Children all over the world contribute to productive activities on family farms and rural production units without any adverse effects on their education. This typical situation where the 'family' unit and 'production' unit coexist in the same socio-economic framework cannot be compared with labour markets or child exploitation by capitalist enterprises or mafia networks. But because it does not provide a clear definition of child labour, the text suggests that family farms in general could be regarded as flouting the principles of responsible investment (cf. Principle 2)

c) The principles unquestioningly incorporate the arguments used by large-scale investors. Thus, the fact that these investors create employment is regarded as positive, but no consideration is given to the jobs that they destroy or possible alternatives that would enable them to protect or create many more jobs (Principle 2, paragraph 22).

d) Extraordinarily, the text endorses the opening up of markets and the suppression of protective border tariffs. "States 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" (paragraph 34). 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. It is astonishing that the civil society organisations involved in the debates agreed to support this point, which is completely contrary to their stated aim of protecting food sovereignty.

e) Any policies aimed at supporting small producers are effectively nipped in the bud because the principles do not recognise the economic specificity of family farms and rural production systems. States are expected to support investments by small producers, but to do so by using *market mechanisms* as tendering processes (paragraph 41). They are also encouraged to help family farmers become responsible investors, as if they were mainly to blame for the irresponsibility of current large-scale investments whose economic function is never directly questioned in the text.

A significant number of these principles clearly contradict the practices currently followed by large capitalist enterprises and the national laws that endorse them. For example, Principle 7 promotes respect for "traditional knowledge, skills and practices" on the one hand, while on the other encouraging "the application and use of locally adapted and innovative technologies and practices, agricultural and food sciences, research and development and technology transfers".

The terms in which the principles are couched are also problematic as they do not clearly distinguish between different categories of actor, or focus on investments that compete with family farming over access to land and natural resources. The roles and responsibilities of 'commercial enterprises' and 'small producers' are given more or less the same weight in the text, suggesting that they would have a similar bearing on the promotion of irresponsible agricultural investments.

The wording of the text also seems to implicitly confirm the view that a transition towards responsible investment will necessarily involve turning family farmers into 'entrepreneurs', and ensuring that they too follow the principles of responsible agricultural investment. No consideration is given to other development paths where governments support family farms that produce endogenous wealth – even though this was the route taken by all the developed countries in Europe, by China and even the United States, proving the benefits of long-term public and private/family/rural investment over

several generations. This is very different from private/capitalist investment that seeks to maximize short-term profits, exemplified by the predatory finance behind the current land grabs.

In focusing on human rights issues but not calling for them to be made genuinely justiciable at the international level, and by endorsing the total liberalization of the markets, the principles for Responsible Investment in Agriculture and Food Systems simply endorse the RAI principles that were developed several years ago under the auspices of the World Bank, this time in the name of 'global civil society'. They do not address important questions such as the introduction of new measures to monitor compliance with national legislation and contractual commitments and to sanction offenders, which could compensate for gaps or weaknesses in existing national legal mechanisms, or look at tax-related issues.

The text for these principles was validated in October 2014 by the CFS plenary, which is composed of States. The final report on this 41st session notes that delegates from 81 civil society organisations and 73 private sector associations and private philanthropic foundations also attended this session in Rome, but did not have the right to vote. After the meeting, Via Campesina and certain civil society organisations published statements distancing themselves from the approved text. It could be said that the process of formulating these principles ended with the civil society organisations that were involved in the preliminary discussions validating a document that partly contradicts their own long-held and vigorously defended positions.

This disappointing outcome highlights the need for a thorough re-examination of the whole mechanism for voluntary guidelines, with a clear assessment of all the key issues.

3. Issues raised by the Voluntary Guidelines on Responsible Governance of Land Tenure Regimes

■ Differences and similarities to previous voluntary mechanisms

In certain respects the vision set out in the Voluntary Guidelines differs considerably from those of previous voluntary mechanisms:

> The logic of the VGs places States at the centre of governance choices. It takes account of local people and small producers and emphasises the importance of recognising and defending their rights, not only as rights holders but also as economic actors who are responsible for a significant proportion of investments in the agricultural sector.

In other respects the Voluntary Guidelines are very similar to previous voluntary mechanisms:

> They make no explicit reference to the possibility of sanctioning business enterprises or parties that do not respect the principles set out in the Guidelines. Most of the proposals relating to business enterprises are non-binding, as it is assumed that they are capable of regulating themselves. Beyond the State, no other mechanism for implementing the Voluntary Guidelines is envisaged, apart from 'support' from development partners.

Many of the principles relating to human rights that the VGs hope to promote are contained in the text of the International Covenant on Economic, Social and Cultural Rights (ICESCR), which provides a more over-arching and synthetic presentation of these principles. Yet the Voluntary Guidelines say

nothing at all about why many of the countries that signed international treaties on human rights over 40 years ago have yet to enforce them.

Should the Voluntary Guidelines be converted into a binding mechanism?

The voluntary nature of the Guidelines is both a strength (as it would have been virtually impossible to get States to sign them without assurances that they were entirely voluntary) and a weakness (they cannot be used to oblige a State to abide by them). They can only be used to persuade States to change their rules and practices and to help change current power relations.

The next stage in ensuring that the Voluntary Guidelines are applied effectively would seem to be to incorporate their principles into the laws of countries that receive Foreign Direct Investments. The problem here is that the Guidelines clearly state that they should be applied in accordance with national laws (which would need to be changed in order to enforce many of the VG's recommendations) and each country's international commitments (which are binding in areas where it would often be necessary to intervene to change investors' practices, and non-binding in areas relating to human rights, which are of particular interest to the VGs). It would take a major shift in power relations at both the local and international level for States to agree to abide by this set of principles and impose them on the businesses and individuals operating in their territory. Given that the current balance of international power has led some States to offer incentives to attract investment rather than require investors to change their ways, what can be done to initiate this dynamic of change in power relations?

While noting that the 'Land Tenure and Development' Technical Committee working group has a particular interest in this domain, we will limit this discussion to possible interventions by institutions responsible for promoting overseas development. These organisations intervene at different levels, from designing and funding projects with public partners, large business enterprises and financial institutions to helping formulate and implement cooperation and foreign policies. France can use its sphere of influence to help change power relations, working through its development banks or as a member of international institutions and global governance structures to encourage the least and most developed countries to change their national laws and modify the international treaties and agreements in which they have a stake.

TAKING A BROADER APPROACH

This paper follows on from a document produced by the 'Land Tenure and Development' Technical Committee analysing the global phenomenon of large-scale land acquisitions and suggesting how it can be addressed, which informed the official French position paper on this issue.[14] Both documents highlighted the need to promote voluntary mechanisms while arguing that it is equally important to recognise the limitations of international law and take immediate action to improve it. This task is more relevant than ever today, and given the huge challenges involved in changing international law, there is no time to be lost in making a concerted effort to address this issue effectively.

[14] *Large-scale land appropriations. Analysis of the phenomenon and proposed guidelines for future action* (June 2010), and *Large-scale land acquisitions and responsible agricultural investment: French position paper* (June 2010). Both documents are available online at http://www.foncier-developpement.fr/

The voluntary procedures described at the beginning of this paper are based on the assumption that there is a clear distinction between the economic and human rights aspects of tenure rights. In our view, the Voluntary Guidelines for responsible governance of land regimes offer much more than a framework for common standards: they are a real opportunity to look beyond the moral issues and envisage a form of economic analysis that considers the interests of society as a whole rather than focusing solely on investors' interests. Much more needs to be done to develop this line of work, since most actors will only regard change as absolutely essential when it is a practicable possibility. Furthermore, this desire for change needs to be driven as much by the material interests of those concerned as by ethical considerations and the rules of best practice.

If we are to safeguard individual and communal rights and establish sustainable practices, it is just as important to look to the future as it is to analyse the present or explore the past. Rather than focusing on land liabilities, we need to think about future generations. Questions about possible alternatives to current proposals and the kind of future societies we want are as valid now as they were in 2010 when they were articulated in the document on large-scale land appropriations.

The analytical frameworks for ex-ante project evaluation that we developed as decision-making aids for operational and political staff in French institutions that support development were designed to take account of these questions. However, addressing them is ultimately a matter of political choice rather than the application of any particular principle.

Other choices will only be possible if there is a change in power relations. And this will only happen if the debate is opened up to a much wider range of actors from different sectors of society, and land governance is made as transparent as possible.