

***Voluntary Guidelines on the Responsible Governance of Tenure of Land,
Fisheries and Forests in the Context of National Food Security***

KEY ELEMENTS TO ASSURE GOOD OUTCOME

January 2012



ABSTRACT

Due to the unquestionable importance and urgency in addressing the problem of equitable and fair access to land and other natural resources, an International policy framework is badly needed is required. In this sense, *Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security* (onwards referred as the *Guidelines on Tenure Governance*) are under preparation since 2005 through the development of a universally applicable framework which can assist States in constructing their own national strategies, policies and programmes, and effectively respect, protect and fulfill the rights to use, manage and control over land, fisheries and forests.

This working document aims to provide CSOs with background information on negotiations and content for advocacy and lobby work as well as suggestions on how to operationalize the right to land and strengthen Responsible Governance of Tenure of Land, Fisheries and Forests.

This working document was prepared by **ACTUAR** with contributions from **IFSN** partners from the Portuguese-speaking African countries (**REDSAN-PALOP**) and the consultants Magdalena Anna Kropiwnicka and Joana Rocha Dias.



ACTUAR is a plural, independent and no-profit organisation, based in Coimbra, Portugal. The Food and Nutrition Security and the Right to Food themes are a top priority of its intervention.

C O N T A C T S

Quinta do Bispo, Bencanta, 3040-316 Coimbra, PORTUGAL

Telf: +351. 961585638 / E-mail: geral@actuar-acd.org / URL: www.actuar-acd.org



REDSAN-PALOP is a space for articulation of civil society organizations that work together aiming at strengthening policy dialogue with governments and international organisations in order to influence the FNS and the Right to Food policy agenda within the Portuguese-speaking Countries. REDSAN-PALOP was launched in 2007 and has representations in Angola, Cape Verde, Guinea-Bissau, Mozambique, Sao Tome and Principe and Portugal.

C O N T A C T S

REDSAN-PALOP Secretariat works in ACTUAR

URL: www.redsan-palop.org



IFSN is a European Commission (EC) financed project that mobilises more than 1,400 local and national civil society organisations with the main purpose of creating and strengthening national food security networks for influencing the implementation of the human right to food in southern countries at national, regional, and international level.

C O N T A C T S

Rua Morais e Vale, 111 / 3º floor, Rio de Janeiro, CEP: 20021-260 Brazil

Phone: +55 21 21 894636 / E-mail: ifsncommunication@actionaid.org / URL: www.ifsn-actionaid.net

Disclaimer

“This publication has been written prior to the finalization of the negotiations of the text of the Voluntary Guidelines in March 2012 and their adoption in May 2012. This publication references paragraphs of the Voluntary Guidelines that have already been agreed to in the Plenary of the CFS Working Group on Voluntary Guidelines in October 2011. The authors are not responsible for any discrepancies that may result post final adoption of the text in May 2012. Therefore, please consult the final text of the Voluntary Guidelines in order to avoid any possible inconsistencies in numbering of the paragraphs and the final language to be approved in May 2012”.

1. WHAT ARE THE “VOLUNTARY GUIDELINES ON THE RESPONSIBLE GOVERNANCE OF TENURE OF LAND, FISHERIES AND FORESTS IN THE CONTEXT OF NATIONAL FOOD SECURITY”?

The *Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security* (onwards referred as the *Guidelines on Tenure Governance*) aim to “**improve tenure governance by providing guidance and information on internationally accepted practices for systems that deal with the rights to use, manage and control land, fisheries and forests**” (Guidelines on Tenure Governance, part 1, 1.2.1). By providing a **framework which can be used by States to develop their own national strategies, policies and programmes**, the *Guidelines on Tenure Governance* should also constitute a baseline of acceptable practices that can be used by all stakeholders and governments to evaluate proposed and existing policies and programmes.

It is important to note that the *Guidelines on Tenure Governance* will constitute a policy framework that is **not legally binding**; however, they are expected to make reference to existing international binding human rights obligations as they relate to land and other natural resources, as well as to include descriptions of how these obligations can be implemented.

The *Guidelines on Tenure Governance* are motivated by the belief that *responsible governance of tenure ensures that relevant policies and rules lead to sustainable, beneficial results, and that related services are delivered efficiently, effectively and equitably* (FAO, NRLA, 2009). Responsible governance here recognizes not only **statutory tenure** (private and public ownership) but also **customary and common property tenure**. This is fundamental as many cultures do not share western understandings and laws around property and are consequently very vulnerable when such approaches are used to analyse land use, ownership and access. Furthermore, good governance practices that ensure equitable and secure access to land and other natural resources are likely to promote environmental sustainability as farmers are more likely to invest in their land and protect their soil and other resources.

It is also important to note that the *Guidelines on Tenure Governance* are not a reaction to land grabbing, nor are they a defence against it. Although the issue of investment in land and suggestions of potential safeguards is part of the un-going negotiations of the text of the *Guidelines on Tenure Governance* (Chapter 12), most governments and international institutions consider that other responses are more directly linked to addressing large scale land acquisitions. It is the case of the *Principles for Responsible Agricultural Investment that Respects Rights, Livelihoods and Resources (RAI)*, which is being proposed by the World Bank and other partners (FAO, IFAD, and UNCTAD), since January 2010. RAI intends to be a voluntary and self-regulatory framework for the private sector. However, it does not include any reference to international human rights law and does not follow any standard in terms of participation by affected communities and civil society in host countries. Clearly, the ***Guidelines on Tenure Governance* intend to have a broader and systemic normative scope**, translating right to land and other natural resources into concrete legislative, institutional and policy recommendations¹.

¹ While the elaboration of these two international policy instruments (*Guidelines on Tenure Governance* and RAI) had a dramatically different background and processes, both instruments have been linked to the reformed Committee on World Food Security (CFS) through the decisions made at the 36th CFS Plenary Session

For all these reasons, the approval of the *Guidelines on Tenure Governance* is the first step in a long journey to achieve tenure rights. The progress to date of the negotiations is presented below, as well as the main achievements so far and the main burning issues to be discussed in March 2012.

2. PROGRESS TO DATE OF THE NEGOTIATIONS OF THE GUIDELINES ON TENURE GOVERNANCE

The political process for elaboration of *Guidelines on Tenure Governance* began at the International Conference on Agrarian Reform and Rural Development, held in Brazil in 2006, where in its Final Declaration², 92 FAO member countries reaffirmed the importance of Objective 1.2(b) of the 1996 World Food Summit Plan of Action, which states that in order to ensure *stable economic conditions and implement development strategies* governments will: “Establish legal and other mechanisms, as appropriate, that advance land reform, recognize and protect property, water, and user rights, to enhance access for the poor and women to resources. Such mechanisms should also promote conservation and sustainable use of natural resources (such as land, water and forests), lower risks, and encourage investment”.³

From there, FAO undertook a series of thematic studies and arranged expert group meetings. In 2008, an expert group meeting took place in Rome, launching the work on the Guidelines on Tenure Governance, with IFAD⁴ and Germany and Finland governments' financial support. The development of the Draft Zero of the Voluntary Guidelines was based on an inclusive process of thematic and regional consultations (in Brazil, Burkina Faso, Ethiopia, Jordan, Namibia, Panama, Romania, The Russian Federation, Samoa and Viet Nam), bringing together public and private sectors, civil society and academia representatives from 133 countries. The first draft of the *Guidelines on Tenure Governance* incorporates, thus, the outcomes of the electronic consultation on the zero draft, and of the regional and sub-regional meetings. Four consultations were held specifically for civil society in Africa, Asia, Europe and Latin America in addition to a private sector consultation⁵.

in October 2010 – further information at paragraph 26 of the Final Report of the CFS 36th Session: http://www.fao.org/fileadmin/templates/cfs/Docs0910/CFS36Docs/Final_Report/CFS36_Final_Report_K9551_E.pdf

² Declaration of the International Conference on Agrarian Reform and Rural Development at <http://www.icarrd.org/sito.html>

³ FAO. Governance of Tenure: Finding Common Ground. ND. Page 4. http://www.fao.org/fileadmin/user_upload/nr/land_tenure/images/LandtenureENGpagebypage.pdf

⁴ IFAD - International Fund for Agricultural Development (www.ifad.org/).

⁵ See preface of the Consolidated Changes to the First Draft of the Guidelines at http://www.fao.org/fileadmin/user_upload/nr/land_tenure/pdf/First_Draft_VG_with_changes_October_2011_English.pdf

- **The Negotiations under the reformed *Committee on World Food Security* in 2011**

The real political push for the *Guidelines on Tenure Governance* arrived through the first session of the reformed Committee on World Food Security (CFS) which, in October 2010, called for an establishment of an Open Ended Working Group to review its First Draft with the view of adoption within a year. The key feature of the reformed CFS is that it strives to become the foremost inclusive international and intergovernmental platform dealing with food security and nutrition and that through its wide ranging reform it has established a multi-stakeholder process of participation in its work inclusive of civil society and the private sector. The emerging political importance of the CFS as well as its still not finalized reform have posed a number of challenges in devising an inclusive negotiation process in 2011⁶. The CFS Working Groups had to be led by the countries that are members of the CFS Bureau i.e. its executive body. The **Open Ended Working Group (OEWG)** on the *Guidelines on Tenure Governance* was established **under leadership of the United States based USAID expert on land and property rights, Dr. Gregory Myers.**

In the meantime, the results of an inclusive electronic consultation on **Draft Zero of the Guidelines have been consolidated into the Draft One.** Only two sessions of negotiations, one in June and another in July, were originally previewed. The June session consisted of public reading of Draft One and gathering of comments from all stakeholders. The resulting bracketed version consisted of over 300 comments for improvement or deletion of paragraphs from all stakeholders: governments, civil society, private sector and international organization (such as IFAD, ILC, World Bank and other organizations). It was clear that despite the long process of consultations preceding the elaboration of the *Guidelines on Tenure Governance*, the political process was to include burdensome redrafting and negotiation of entire sections and each paragraph of the document in the Plenary of the OEWG. For example, there was no agreement on such critical issues such as whether the guidelines should also cover “water resources” with Africa Region, civil society and North America (particularly Canada) and Australia holding dramatically different views. Still, many were hopeful that the well crafted negotiations in July, taking place often in parallel working groups, will be able to finalize the negotiations so as to assure adoption by October session.

The July negotiations have not managed to cover even half of the document despite midnight sessions and innovative negotiation techniques with the use of the Friends of the Chair and establishment of the Language Harmonization Group. It is important to note here the uniquely inclusive process of negotiations where **representatives of the civil society participated in the Friends of the Chair Group and where the Language Harmonization Group was led by a member of civil society, Michael Windfuhr**, from Germany. Civil society organizations are participating in negotiations under the umbrella of the Civil Society Mechanism representation to the CFS⁷. As a result of the July session, **the treatment of water has been largely removed** from the *Guidelines on Tenure Governance* which now bear a new name *Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security*. It was clear in July that an

⁶ The CFS has only approved its Rules of Procedure at the 37th Session in October 2011 after the negotiations of the Guidelines on Tenure Governance, in 2011.

⁷ Yet, this innovative process where the voices of all could be heard in the Plenary had also posed a problem for the Chair to realize at which point there a consensus is emerging among governments and when the paragraph could be put to a close despite objections from other participants.

increased level of discipline and coordination will be needed from Regional Groups and other participants and not just increased political will due to the simply the enormous task at hand in finalizing political negotiation of the exhaustive Draft One .

Another round of negotiations was called one week before the start of the 37th Plenary Session in October 2011 with the hope to achieve political momentum to adopt the Guidelines. Again, despite mid-night sessions and an additional session on Saturday, only about 170 out of 230 paragraphs were approved in the Plenary of the Open Ended Working Group in October. Number of regions sited problems with translation of the text and there was clear lack of regional organization and thorough preparation among some key Regional Groups (i.e. Latin America and Asia). In addition, there were some changes in the representation by government's technical experts with some who had not participated in the July session. The work of the Language Harmonization Group has been key in suggesting deletions of repetitions, streamlining the language throughout entire sections of the document and assuring proper referencing of existing international obligations. Still, a number of countries raised issues pertaining to annexes and glossary which could not be resolved in October.

Although the achieved approval of some critical issues (to be explored below in this working paper), it was not possible yet to conclude the negotiations due to the complexity of issues and due to the strong resistance and delaying tactics on the part of several governments. One of the key issues raised at the October 2011 37th CFS Session was the ability of Member States to reopen paragraphs that have been already closed and negotiated in the Plenary of the OEWG on *Guidelines on Tenure Governance*. The precedence of **introducing new paragraphs in already closed sections** was initiated by Argentina's introduction of a new paragraph referring to the scope of the document⁸ despite the fact that this section has already been closed in July. Whereas a number of Regions including Europe and United States held that for the sake of discipline and spirit of collaboration reopening of agreed paragraphs must be avoided, a number of countries in Latin America and the Middle East hold that *"nothing is agreed until finally adopted at the CFS Plenary Session."* Whereas from the procedural perspective, each Member State has a right to reopen any paragraph, such practice would not be conducive to respecting the spirit of compromise and cooperation needed to finalize the *Guidelines on Tenure Governance*.

Some of the most contentious chapters have not yet been finalized including Chapter 12 on **Investments**, Chapter 15 on Redistributive Reforms or Chapter 16 on Expropriation and Compensation. Some chapters, including Transboundary Matters, Climate Change, Natural Disasters, Violent Conflicts or **Implementation, Monitoring and Evaluation**, had not yet had a chance to be discussed in Plenary of the OEWG although some work has already been initiated through hard work of the Friends of the Chair. **Despite the setback of not finalizing the Guidelines, the CFS Member States were satisfied with the good progress made during the negotiations** of the CFS Opened Ended Working Group (OEWG) on Voluntary Guidelines in October 2011.

⁸ After a long debate about the process of allowing introduction to the sections already closed in the Plenary of the OEWG in July, Argentina has managed to introduce an additional paragraph relating to the scope of the guidelines which as slightly limited its application i.e. Para 2.5 *"These Voluntary Guidelines should be interpreted and applied in accordance with national legal systems and their institutions."* In principle, however, the introduction of this paragraph can help ease future controversies pertaining to some country's fears with regard to application of the *Guidelines on Tenure Governance* vis-a-vis existing national legislation.

- **Preparing for the Final Negotiation Round in March 2012 and Adoption in May 2012**

The CFS 37th Session has given a clear message that the finalization of the *Guidelines on Tenure Governance* negotiations and their adoption should be among main priorities in the programme of work of the CFS in 2012. The CFS Bureau reconvened the Open Ended Working Group on *Guidelines on Tenure Governance* under the continued chairmanship of Dr. Gergory Myers. The issue of funding could have initially been problematic as all negotiations under the OEWG have been funded from the extra-budgetary resources of the CFS and the 2011 sessions were financed by donations from Germany and Switzerland in addition to limited CFS budget. **The European Union** announced in late December 2011 that **it will give 3 million Euro to the CFS over the course of three year period with part of the funds earmark to finance the upcoming *Guidelines on Tenure Governance* negotiations scheduled for 5-9 March 2012.**

The process for negotiations is to follow the established rules in the round of October negotiations with the continued reliance on the Friends of the Chair and Language Harmonization Group. Due to the massive task of streamlining the language and references in the annexes and the glossary, as number of countries particularly in Latin America raised this issue, the Chair of the OEWG has began that work ahead of the time *on-line* through the Language Harmonization Group and the *Guidelines on Tenure Governance* Secretariat in close collaboration and input from the Office of the High Commission on Human Rights. The redrafted annexes and glossary will be then presented for the approval by the OEWG Plenary in March.⁹

The expected process after the finalization and closure of the negotiations within the OEWG in March, is to then adopt the Voluntary Guidelines at the **special one-day Session of the CFS to take place sometime during the week of May 14-19, 2012**. No other agenda item with exception of the “*adoption of the Voluntary Guidelines on the Responsible Governance of Tenure of land, Fisheries and Forests in the Context of National Food Security*” is expected in May and the extra session of the CFS is only to be called if the negotiations within the OEWG of CFS will be finalized in March. The time lapse between the closure of negotiations and final adoption of the document is to be used for translation purposes. **It is fundamental to assure that all Member States prepare well for the March negotiations, demonstrating discipline and spirit of collaboration as well as capacity to fully integrate their positions within the representations of their Regional Groups.**

- **Which are the main achievements so far?**

The outcome of the negotiations held throughout 2011 can be so far considered as positive. . This is clearly the consequence of the presence and active participation of CSOs and social movements during the consultation period and the negotiations themselves. In fact, the draft is consistent with international and regional instruments, which address human and tenure rights. At this moment, almost three quarters of the full text of the *Guidelines on Tenure Governance* was approved in the Plenary of the OEWG, including some critical issues

⁹ For precise outline of the upcoming process and the work of the Language Harmonization Group, consult the letter from the Chair of the OEWG, Gregory Myers: http://www.fao.org/fileadmin/user_upload/nr/land_tenure/pdf/Process_letter_CFS_negotiations_E_edited.pdf

indicated by CSOs during the consultation period. Some of the main CSO's requirements for the *Guidelines on Tenure Governance* are summarized below and compared with the already negotiated text (in colour) as an outcome of the July and October sessions:

- **ACCESS TO DATA AND INFORMATION:** Information should be accessible and available to all in an adequate, timely, legitimate, accessible, and useful manner. Relevant information systems should be developed to provide data, statistics and other information on the availability of resources and on the governance of tenure. Available information and studies should support decision-making processes at all levels and stages. The *Guidelines on Tenure Governance* states that *“States should establish appropriate and reliable recording systems, such as land registries, that provide accessible information on tenure rights and duties in order to increase tenure security and to reduce the costs and risks of transactions”* (Part 4 - 11.5). Also, the principle of transparency is considered as essential to contribute to responsible tenure governance, as stressed in Part 2 – 3B8): *“Transparency: clearly defining and widely publicizing policies, laws and procedures in applicable languages, and widely publicizing decisions in applicable languages and in formats accessible to all”*.
- **MONITORING SYSTEM:** A comprehensive, integrated, and clear monitoring system should be established to monitor policies, actions and accountability of governments and other bilateral, regional and international institutions. Juridical instances for control, monitoring and sanctioning should be created and instances such as observatories, rapporteurs and citizens’ courts should be promoted. The monitoring systems should ensure that viable mechanisms are available for communities to seek solutions, especially when their tenure of land, territories and natural wealth are threatened or violated. Until the moment, it was already agreed that *“States should improve mechanisms for monitoring and analysis of tenure governance in order to develop evidence based programmes and secure on-going improvements”* (*Guidelines on Tenure Governance*, Part 2 – 3B10). Although, the Part 7 of the *Guidelines on Tenure Governance* (Implementation, Monitoring and Evaluation) was not yet approved , as it will be developed . This is one of the most important items to be discussed and approved, since the effective implementation of the Guidelines on Tenure Governance is crucial to guarantee a secure and equitable access to and control over natural resources. Thus, CSOs must be particularly attentive to the negotiations of this item.
- **INTERNATIONAL INSTRUMENTS:** The *Guidelines on Tenure Governance* should reflect the commitment to the international instruments including those on human rights for women, children and indigenous peoples, and the 2006 International Conference on Agrarian Reform and Rural Development (ICARRD). The *Guidelines on Tenure Governance* stress that *“States should ensure that policy, legal and organizational frameworks for tenure governance are consistent with their existing obligations under national and international law, and with due regard to voluntary commitments under applicable regional and international instruments”* (Part 2 – 5.2). The Preface also underlines that the initiative of designing the *Guidelines on Tenure Governance* *“builds on and supports the Voluntary Guidelines to Support the Progressive*

Realization of the Right to Adequate Food in the Context of National Food Security (Voluntary Guidelines on the Right to Food), which were adopted by the FAO Council at its Hundred and Twenty-seventh Session in November 2004, and the 2006 International Conference on Agrarian Reform and Rural Development (ICARRD)".

- **RESPECTING AND ADJUSTING NATIONAL AND LOCAL LEGISLATIONS:** Responsible tenure governance should be incorporated in the policy framework at national level. Legislation should be prepared in ways which allow new, appropriate and accepted methodologies and technologies to be introduced without requiring laws to be amended. Standardized definitions for words and terminologies should be prepared for use within countries. Public authorities should recognize the plurality of existing tenure and mechanisms to ensure consistency between the statutory and customary laws regarding land and natural resources management should be established. Relevant policies, legislations and organizations should take into account local policies, practices as well as traditional knowledge on natural resources. The Part 1 – 5.3 of the *Guidelines on Tenure Governance* states that *"States should ensure that policy, legal and organizational frameworks for tenure governance recognise and respect, in accordance with national laws, legitimate tenure rights including legitimate customary tenure rights that are not currently protected by law; and facilitate, promote, and protect the exercise of tenure rights"*.
- **HOLISTIC APPROACH:** Relevant policies and legislation should be designed in a holistic approach. They should take into consideration the social, economic and environmental functions of land and other natural resources and consider the linkages between poverty and tenure rights. Food sovereignty should be prioritized. Policies should balance public and private interests and strive for balanced investment among different sectors. As stated in the *Guidelines on Tenure Governance* (Part 2 – 5.3), *"Frameworks should reflect the interconnected relationships between land, fisheries and forests and their uses, and establish an integrated approach to their administration"*. Also, Holistic and sustainable approach is one of the principles of implementation considered in Part 2 – 3B5, characterized by *"recognizing that natural resources and their uses are interconnected, and adopting an integrated and sustainable approach to their administration"*.
- **GENDER SENSITIVE APPROACH:** Women often do not have control over land and other natural resources, which means that, in some of these cases, they are excluded from social security programmes. Evidence from OXFAM research on land grabs in Africa suggests that women's land rights are less secure, since they also depend more on secondary uses of land, which tend to be ignored in the context of large-scale land acquisitions and commercialization of land pressures. Furthermore, although women comprise the majority of farmers, men often effectively control the land and the income derived from it (OXFAM INTERNATIONAL, 2011). To overcome these obstacles, States should take steps to legislate or maintain existing laws against gender discrimination in access to land and other natural resources, ensuring an equitable access to registration and credit markets for secured loans.. Women's rights are primarily defined in two interconnected areas: general civil law (property, family and

successions law) and agrarian and natural resources law. These legislations are often an obstacle to women to exercise their property rights (this is the case of land ownership legislations and family law and inheritance procedures)¹⁰. Gender equality and non-discrimination are currently firmly established as human rights principles in numerous declarations and conventions¹¹. The *Guidelines on Tenure Governance* are a significant contribution to these legal standards, making frequent reference to women as potential vulnerable groups and thus as beneficiaries of policies as well as active claimants of their rights. Gender equality is one of the main principles of implementation expressed in the *Guidelines on Tenure Governance* (Part 2 – 3B4): "*Gender equality: Ensure the equal right of women and men to the enjoyment of all human rights, while acknowledging differences between women and men and taking specific measures aimed at accelerating de facto equality when necessary. States should ensure that women and girls have equal tenure rights and access to land, fisheries and forests independent of their civil and marital status*". Some further examples which attest this principle and concern are expressed in the following paragraphs: "*States should ensure equal tenure rights for women and men*" (Part 2 – 4.6); "*States should provide frameworks that are non-discriminatory and promote social equity and gender equality*" (Part 2 – 5.3); "*States should ensure that women can legally enter into contracts concerning tenure rights on basis of equality with men and should strive to provide legal services and other assistance to enable women to defend their tenure interests*" (Part 2 - 5.4); "*Dispute resolution services should be accessible to all, women and men, in terms of location, language and procedures*" (Part 5 - 21.1).

- **COSTUMARY TENURE SYSTEMS:** States should recognize the role of indigenous peoples in preserving natural resources and consequently national legislation should protect indigenous territories and rights to land in the context of large investment projects. In this sense, it is fundamental to: **respect the principle of Free, Informed and Prior Consent** (as provided under the United Nations Declaration on the Rights of Indigenous People and as stated in ILO Convention 169), by ensuring that rights-holders take part in negotiations and are informed and empowered by laws and institutions; to **strengthen customary institutions** to administer common property rights, removing possible tensions when dual tenure systems coexist (customary and statutory tenure); and to **respect and protect traditional systems of using and**

¹⁰ Although, there are some interesting exceptions, stressed by ACTUAR (2010): "*Family Laws in some countries also enshrine the principle of equality. The Family Law in Angola (1988) establishes equality of couples in all aspects of family life (Article 3), children's education, including issues of property (Articles 54 et seq.); if a marriage is dissolved by death, the right of the surviving spouse (regardless of gender) to the marriage benefits is guaranteed (art. 75). Mozambican Family Law (Law # 10/2004) also advocates equality between men and women in marriage and family relations, stating that the administration of marital assets lies with spouses on an equal footing (art. 102)*".

¹¹ The principles of equality, equity in participation and non-discrimination have been increasingly included in international level frameworks, such as: Universal Declaration of Human Rights (art. 2); ICESCR (art. 3 and General Comment 16); Millennium Development Goals (Goal 3); CEDAW - Committee on the Elimination of all Forms of Discrimination against Women. See further information in ACTUAR research "*Mainstreaming gender in water and land resources management – Angola, Cape Verde, Mozambique and East Timor*" (2010).

sharing the natural commons¹². CSOs interventions have resulted in the proposal of a whole chapter devoted to indigenous communities and their tenure rights. As the *Guidelines on Tenure Governance* rule (Part 3 – 9.5), “*States should consider adapting their policy, legal and organizational frameworks to recognize tenure systems of indigenous peoples and other customary communities*”. The *Guidelines on Tenure Governance* express that “*States should meet their relevant obligations and voluntary commitments to protect, promote and implement human rights, including as appropriate from the International Labour Organization Convention (No 169) concerning Indigenous and Tribal Peoples in Independent Countries, the Convention on Biological Diversity and the United Nations Declaration on the Rights of Indigenous Peoples*” (Part 3 – 9.3) and should “*hold good faith consultation with indigenous peoples before initiating any project or before adopting and implementing legislative or administrative measures affecting the resources for which the communities hold rights. Such projects should be based on an effective and meaningful consultation with indigenous peoples, through their own representative institutions in order to obtain their free, prior and informed consent*” (Part 3 – 9.8). The *Guidelines on Tenure Governance* recognize that “*land, fisheries and forests have social, cultural, spiritual, economic, environmental and political value to indigenous peoples and other communities with customary tenure systems*” (Part 3 – 9.1) and stress that “*States should respect and promote customary approaches used by indigenous peoples and other customary communities to resolving tenure conflicts within communities*” (Part 3 – 9.10).

- **TENURE OF FOREST AND FISHERIES:** The adequate inclusion of fisheries and forests in the *Guidelines on Tenure Governance* is coherent with the holistic and sustainable approach to natural resources and their uses that this initiative intends to apply (stated in paragraph 3B5 of Part 3): “*Holistic and sustainable approach: recognizing that natural resources and their uses are interconnected, and adopting an integrated and sustainable approach to their administration*”. This sustainable and holistic approach implies the acknowledgement of natural commons and respective significance for food security and biodiversity conservation. In this sense, the paragraph 8.3 was proposed and discussed in plenary, but was not yet approved¹³.

¹² In the International Land Coalition (2010) synthesis document “Links between Land Tenure Security and Food Security”, a Colombian organization illustrated that “*Common property rights have led (...) to the implementation of cultural processes of food production, as proved by the Indigenous People of Zenú: since their return in 1996, after having been displaced, it was tried to build a community-based proposal, which worked on the lost biodiversity, by starting the recovery of traditional plants (...). When the land was eventually recognised as OGM free, the community worked also for the recovery of traditional local seeds (...) and finally reached community food security*”.

¹³ As indicated in the explanatory notes of the *Guidelines on Tenure Governance*,

“a) Text for which the Plenary found consensus is marked by asterisks.

b) Text proposed by thematic groups or friend of the chair groups but not discussed by the Plenary is shown in brackets and identified by the thematic group or friend of the chair group that made the proposal.

c) Text discussed but for which consensus was not found, either by the Plenary or by thematic groups or friend of the chair groups, is highlighted.

d) Text not bracketed, highlighted or marked with asterisks has not yet been reviewed by a thematic group, friend of the chair group or the Plenary.

The paragraph (not approved yet, as already mentioned) states that “*Noting that there are [many] publicly-owned lands, fisheries and forests that are collectively used and managed, States should, where applicable, recognize and protect [such] commons, and the related systems of collective governance, [including in processes of allocation of publicly-owned lands, fisheries and forests.]*”. Finally, it is important to remind the paragraph 1.2.4 of Part 1 of the *Guidelines on Tenure Governance*, which states the importance of “*strengthen the capacities and operations of (...) organizations of farmers and small-scale producers, of fishers, and of forest users; pastoralists (...)*”, attesting the importance to defend the rights of peasants, farmers, fisherfolks, indigenous peoples, pastoralists and nomadic peoples and to evaluate small scale production having in mind also social dimensions, agricultural and rural employment, impacts on biodiversity and environmental, landscape and cultural conservation.

- **HUMAN RIGHTS PRINCIPLES:** A strong human rights based approach is one of the main requirements of CSOs¹⁴. The *Guidelines on Tenure Governance* are robustly anchored in human rights language and principles, attesting a strong commitment to comply with governments' national and international obligations regarding human rights: “*These Guidelines should be interpreted and applied consistent with existing obligations under national and international law, and with due regard to voluntary commitments under applicable regional and international instruments*” (Part 1 – 2.2). Also, the Preface underlines that “*The draft is consistent with, and draws on, international and regional instruments, including the Millennium Development Goals that address human rights and tenure rights*”.

When the meeting was adjourned on 15 October 2011, the Plenary had found consensus on the sections marked with (*). In addition, the Plenary had found consensus on some paragraphs in the other sections.

At the time preceding the March meeting of the CFS OEWG on Voluntary Guidelines negotiations the Draft Text has the following status:

¹⁴ In order to avoid discussions without strong human rights-based approach, CSOs demand for the *stand-by* of the consultation process on the Responsible Agriculture Investment principles, until the conclusions of the *Guidelines on Tenure Governance* negotiations.

Preface (*)

Part 1 Preliminary

1 - Objectives (*)

2 - Nature and scope (*)

Part 2 General matters

3 - Guiding principles of responsible tenure governance (*)

4 - Rights and responsibilities related to tenure

5 - Policy, legal and organizational frameworks related to tenure (*)

6 - Delivery of services (*)

Part 3 Legal recognition and allocation of tenure rights and duties

7 - Safeguards (*)

8 - Public land, fisheries and forests

9 - Indigenous peoples and other communities with customary tenure

10 - Informal tenure (*)

Part 4 Transfers and other changes to tenure rights and duties

11 - Markets

12 - Investments

13 - Land consolidation and other readjustment approaches (*)

14 - Restitution

15 - Redistributive reforms

16 - Expropriation and compensation

Part 5 Administration of tenure

17 - Records of tenure rights (*)

18 - Valuation (*)

19 - Taxation

20 - Regulated spatial planning (*)

21 - Resolution of disputes over tenure rights (*)

22 - Transboundary matters

Part 6 Responses to climate change and emergencies

23 - Climate change

24 - Natural disasters

25 - Violent conflicts

Part 7 Implementation, monitoring and evaluation

- **What are the key elements to assure good outcome *Guidelines on Tenure Governance* document?**

At this moment, **it is absolutely urgent to conclude negotiations in March 2012** and it is **crucial to not reopen the text already agreed both in the October Plenary of the CFS OEWG as well as in the Working Groups of the CFS OEWG in July 2011 so as not to jeopardize the achievement of the delicate compromise language.** Below we list some key areas for concern and attention so as to assure that successful completion of the Guidelines on Tenure Governance in the upcoming negotiations:

a) The *Guidelines on Tenure Governance* need to be seen as a set of universally applicable best practices in the area of land tenure and natural resources (fisheries and forests) administration and management. In order to assure good outcome document and process, negotiators must refrain from tendency already exhibited by some countries to assure that the *Guidelines on Tenure Governance* are in line with their particular domestic legislation. The voluntary nature of the instrument as well as its scope as defined in Part 2 should provide more than enough of safeguards while it remains fundamental to refrain from any over-specification in particular paragraphs.

b) The *Guidelines on Tenure Governance* cannot weaken any existing obligations that governments have through application of any other international treaties and, in particular, international human rights frameworks. In this sense, in order to assure agreement, the work done by the Language Harmonization Group in cooperation with the Office of the High Commission on Human Rights should be quickly approved in the OEWG Plenary in March. The wording of some sections of the *Guidelines on Tenure Governance* appears to sometimes set the bar lower than already accepted human rights commitments. Language must reflect the commitment that state parties have made, and the duties of all actors to respect, protect and promote human rights. **For example, there should be no support for inclusion of “as appropriate” in sentences which describe states’ responsibilities.**

c) As the goal of the CFS is to promote policy coherence and coordination, the *Guidelines on Tenure Governance* cannot afford not to pay attention to the **fundamental aspect of rural and urban linkages in devising successful land tenure policies** that promote food security and respect for human rights. In this sense, the work of the **UN Habitat** is of utmost usefulness, such as its recent resolution from the 23rd Session of the Governing Council of April 2011, Resolution No. GC23-18, entitled ***Resolution on Sustainable Urban Development through Expanding Equitable Access to Land, Housing, Basic Services and Infrastructure***¹⁵.

¹⁵ The 23rd UN HABITAT Governing Council **Resolution No. GC23-18 states that:** “7. Encourages Governments and Habitat Agenda partners, with regard to land issues: (a) To implement **land policy development and regulatory and procedural reform programmes**, if necessary, so as to achieve sustainable urban development and to better manage climate change, ensuring that land interventions are anchored within effective land governance frameworks; (b) To **promote security of tenure for all segments of society** by recognizing and respecting a **plurality of tenure systems, identifying and adopting**, as appropriate to particular situations, **intermediate forms of tenure arrangements, adopting alternative forms of land administration and land records alongside conventional land administration systems**, and intensifying efforts to achieve secure tenure in post-conflict and post-disaster situations; (c) To **review and improve urban land governance mechanisms, including land/spatial planning administration and management, and information systems and land-based tax systems**, so as to strengthen tenure rights and expand secure and sustainable access to land, housing, basic services and infrastructure, particularly for the poor and women; (d) To **create mechanisms for broadening land-based revenue streams**, including by improving the competencies and capacities of local and regional authorities in the field of land and property valuation and taxation, so as to generate additional local revenue for pro-poor policies and to finance infrastructure development.”

d) Only very few paragraphs of one of the most controversial chapters (Chapter 12 on Investments) have been discussed so far in the Plenary of the OEWG October session. This chapter has already been the most time-consuming task during the July meeting where the Working Group created for Chapter 12 has come to a very delicate compromise after hours of excruciating negotiations. In October, when Chapter 12 was discussed again in the Plenary, the first few paragraphs have been re-negotiated in order to improve “positive” language on investments including the new insertion of a progressive paragraph on importance of smallholders’ own investment¹⁶. **To assure a proper balancing of the Chapter 12, language on safeguards in the following paragraphs must AT LEAST retain the delicate balance of the language proposed during the July round of negotiations.**¹⁷ In addition, the removal of the word “Concessions” at the insistence of African Group from the title of the Chapter 12 means that proper language balance must be achieved to assure that this chapter deals with “all forms of transactions in tenure rights as a result of investment in land”¹⁸. Due to the political sensitivity of this Chapter, it would be advisable not only that this Chapter will be discussed well at the beginning of the March session, but also that the Language Harmonization Group as well as the CFS VG Secretariat should be on call to assure that the politically delicate compromise doesn’t produce a legally meaningless or overly confusing outcome.

e) Some key Chapters still have not been renegotiated in the Plenary including Chapter 22 on Transboundary matters, Chapter 23 on Climate Change, Chapter 24 on Natural Disasters and Chapter 25 on Violent Conflict. In as much as possible, it would be advisable to keep the language of the First Draft which already includes carefully balance and internationally acceptable formulations. The Friends of the Chair and the LHG Group can streamline the language but in cases of reopening any controversies, sticking back to the First Draft proposal as much as possible should be advocated.

f) Chapter 26 on Implementation, monitoring and evaluation is still to be discussed in the OEWG Plenary in March and this chapter needs considerable strengthening and hence considerable time for agreement on the need of possible additional language introductions. As underlined in the CSO Draft Comments on the First Draft of the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests, *“Without a strong system of monitoring and evaluation, the Guidelines will*

¹⁶ See paragraph 12.1 and 12.2 of the outcome document of the October negotiations: http://www.fao.org/fileadmin/user_upload/nr/land_tenure/pdf/First_Draft_VG_with_changes_October_2011_English.pdf

¹⁷ See paragraphs 12.5 up to 12.14 including issues related to safeguards pertaining to large scale land acquisition or other types of land tenure land transactions. The language proposed in July WG on paragraph 12.5 should be retained. http://www.fao.org/fileadmin/user_upload/nr/land_tenure/pdf/First_Draft_VG_with_changes_October_2011_English.pdf

¹⁸ See paragraph 12.3: http://www.fao.org/fileadmin/user_upload/nr/land_tenure/pdf/First_Draft_VG_with_changes_October_2011_English.pdf

not achieve their objectives (...) The establishment of independent national and multi-actor bodies to observe compliance should be encouraged". Currently, while the *Guidelines on Tenure Governance* are being discussed within the format of the CFS, there is no designated UN body or agency to review or monitor their implementation. The paragraph 26.2 speaks about "all parties are encouraged to cooperate to establish means for monitoring and evaluation" whereas the clear role of the CFS or at least a clear process for setting out such monitoring and evaluation practices (which are voluntary as the *Guidelines on Tenure Governance* are voluntary) should be clearly formulated in Chapter 26. The main purpose of the *Guidelines on Tenure Governance* is to help countries improve their land tenure governance and yet any language referring to the role of international cooperation or capacity building is also missing from the current version of Chapter 26. It is advisable that consultations on strengthening this Chapter take place between Regions and civil society ahead of the March negotiations. There is a need to link the need for introduction of strengthened language on monitoring with the strengthened language on capacity building in order to convince developing countries that the changes proposed to this chapter lie in their own interest.

g) Aiming to address historic dispossession of natural resources and unjust and discriminatory tenure patterns, **restitution and redistribution items** must be particular attentive to indigenous peoples, pastoralists and landless.

The implementation of the *Guidelines on Tenure Governance* requires inevitably **political will and adequate financial and human resources**. Thus, governments and agencies responsible for land and other natural resources management should be placed on a stable financial basis. Commitments should not remain at the level of declarations of intent and accountability must be improved, encouraging also the mobilization of action and resources.

FURTHER INFORMATION ON THE *GUIDELINES ON TENURE GOVERNANCE* PROCESS, KEY STAKEHOLDERS AND THEIR POSITIONS

1. The CFS Open Ended Working Group on the Voluntary Guidelines – information for the upcoming March 2012 negotiations: <http://www.fao.org/cfs/cfs-home/cfs-land-tenure/en/>
2. The text of the Voluntary Guidelines outcome of the July and October negotiations used as the basis for the upcoming March 2012 negotiations: [http://www.fao.org/fileadmin/user_upload/nr/land_tenure/pdf/First Draft VG with changes October 2011 English.pdf](http://www.fao.org/fileadmin/user_upload/nr/land_tenure/pdf/First_Draft_VG_with_changes_October_2011_English.pdf)
3. The Civil Society Mechanism to the Committee on World Food Security: <http://cso4cfs.org/csm-working-groups-2/>
4. The Civil Society Mechanism Working Group on the Voluntary Guidelines: <http://cso4cfs.org/csm-working-groups-2/voluntary-guidelines/>
5. The Land Portal Website: www.landportal.info
6. African Union’s Framework and Guidelines on Land Policy: <http://au.int/en/dp/rea/content/framework-and-guidelines-land-policy-africa>
7. The US Aid Land Tenure and Property Rights Program: <http://usaidlandtenure.net/>
8. The European Union Working Group on Land Issues: <http://capacity4dev.ec.europa.eu/eu-working-group-land-issues/info/eu-working-group-land-issues>
9. Private Sector Guide to Food Security Initiatives: <http://www.farmingfirst.org/foodsecurity/>