



Responsible governance of tenure and the law

A guide for lawyers and other legal service providers



The FAO Governance of Tenure Technical Guides are part of FAO's initiative to help develop capacities to improve tenure governance and thereby assist countries in applying the *Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security*. The FAO Governance of Tenure Technical Guides are prepared by technical specialists and can be used by a range of actors. They:

- translate principles of the Guidelines into practical mechanisms, processes and actions;
- give examples of good practice – what has worked, where, why and how;
- provide useful tools for activities such as the design of policy and reform processes, for the design of investment projects and for guiding interventions.

For more information on the Guidelines and FAO's activities on governance of tenure visit: www.fao.org/nr/tenure

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This publication is intended to support the use of the *Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security*. It is not intended to contradict the language of the Guidelines as endorsed by the Committee on World Food Security on 11 May 2012 nor the role of States in their implementation.

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Foreword

Responsible governance of tenure promotes and supports the progressive realization of the right to adequate food, which is one of the objectives of the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security (VGGT; hereafter the Guidelines). The Guidelines also aim to foster sustainable social and economic development, the eradication of poverty and responsible investment.

Voluntary and non-legally binding, the Guidelines were endorsed by the Committee on World Food Security (CFS) on 12 May 2012. They build on international law – in particular, human rights law – and set out principles and internationally accepted standards for responsible practices. They are primarily addressed to states, but they also have provisions directly addressed at private sector actors, such as lawyers, surveyors and investors. They can also be used by implementing agencies, judicial authorities, local governments, organizations of farmers and small-scale producers, of fishers, and of forest users, by pastoralists, indigenous peoples and other communities, civil society, academia and all persons concerned to assess tenure governance and identify improvements and apply them.

The Food and Agriculture Organization of the United Nations (FAO) has developed a series of technical guides to provide more detailed guidance on particular issues or for particular groups. This technical guide, Responsible governance of tenure and the law: a technical guide for lawyers and other legal service providers is aimed at legal professionals working with governments, civil society, the private sector or development agencies as well as law societies, notaries, judges and all those who are interested in understanding the role of law in giving effect to the provisions of the Guidelines. National law is crucial for the responsible governance of tenure for all, with a particular focus on more vulnerable segments of society. The Guidelines provide important elements for shaping a well-functioning legal framework to facilitate their effective implementation at the national level. The technical guide reviews the legal implications of the Guidelines and provides guidance on assessing national legislation, legal reform and improved implementation as well as the settlement of disputes. It covers legal issues related to land, fisheries and forests, complementing other technical guides that focus on particular resources, situations and issues.

The other technical guides also contain references to legal issues and are, thus, complementary to this guide. Readers interested in the specific aspects of implementation of the Guidelines, such as gender, free, prior and informed consent (FPIC), investments, registration, the commons, pastoralism, forestry or fisheries, should also refer to these guides.

It is hoped that this technical guide will contribute to strengthening the rule of law as a principle of responsible governance and as a key human rights principle.

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Table 2.1 Types of legitimate tenure rights

Acronyms

ADR	alternative dispute resolution
AFD	French Development Agency/Agence Française de Développement
CCRF	Code of Conduct for Responsible Fisheries
CEDAW	Convention on the Elimination of all forms of Discrimination Against Women
CESCR	Committee on Economic, Social and Cultural Rights
CFS	Committee on World Food Security
CFUG	Community Forest User Group
COFI	Committee on Fisheries of the FAO
EU	European Union
FAO	Food and Agriculture Organization of the United Nations
FLEGT	Forest Law Enforcement, Governance and Trade
FPIC	free, prior and informed consent
GIZ	German Agency for International Cooperation/Deutsche Gesellschaft für Internationale Zusammenarbeit
ICESCR	International Covenant on Economic, Social and Cultural Rights
IBA	International Bar Association
IIED	International Institute for Environment and Development
ILO	International Labor Organization
LAT	Legal Assessment Tool
LGAF	Land Governance Assessment Framework

LSP	Livelihood Support Programme
MAEE	Ministère des Affaires étrangères et européennes
NGO	non-governmental organization
OECD	Organisation for Economic Co-operation and Development
SSFG	Voluntary Guidelines for Securing Sustainable Small-Scale Fisheries in the Context of Food Security and Poverty Eradication
UN	United Nations
USAID	United States Agency for International Development
VGGT	Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security
VPA	Voluntary Partnership Agreement

1

Introduction

1. Introduction

The Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security (VGGT, hereafter the Guidelines) are the most comprehensive global instrument that provides guidance to states and non-state actors on how to promote responsible governance of tenure of land, fisheries and forests. The top United Nations (UN) body in matters of food security, the Committee on World Food Security (CFS) unanimously endorsed the Guidelines on 11 May 2012. That CFS endorsement followed two years of extensive consultations and one year of intergovernmental negotiations leading to the final text of the Guidelines.

With the endorsement of the Guidelines, there is now widespread consensus on the elements of desirable action to improve the governance of tenure of land, fisheries and forests. The challenge is to translate the guidance contained in the Guidelines into actual improvements in the governance of tenure of land, fisheries and forests.

This technical guide aims to assist implementation of the Guidelines. It provides guidance on how to use the law to promote responsible governance of tenure of land, fisheries and forests. There is recognition in the Guidelines that the law is an important vehicle for translating international standards into real change. For example, the Guidelines provide guidance on features of legal frameworks, on lawmaking processes and on legal assistance for vulnerable groups (see Box 1.1 for a few examples).

Building on these provisions, this technical guide provides more specific guidance in four areas:

- i)* how to appraise legal frameworks to assess the extent to which they are in line with the Guidelines;
- ii)* how to prepare or revise legislation where needed;
- iii)* how to ensure that legislation is duly implemented; and
- iv)* how to use the Guidelines in the context of dispute settlement.

BOX 1.1.
The law in the
Guidelines –
a few examples

5.1 “States should provide and maintain policy, legal and organizational frameworks that promote responsible governance of tenure of land, fisheries and forests.”

5.5 “States should develop relevant policies, laws and procedures through participatory processes involving all affected parties, ensuring that both men and women are included from the outset. Policies, laws and procedures should take into account the capacity to implement.”

6.6. “States and other parties should consider additional measures to support vulnerable or marginalized groups who could not otherwise access administrative and judicial services. These measures should include legal support, such as affordable legal aid, and may also include the provision of services of paralegals or parasurveyors, and mobile services for remote communities and mobile indigenous peoples.”

1.1 Law and the governance of tenure

The role of law in the governance of tenure tends to spark lively debates. Some people are optimistic about the usefulness of the law in promoting social change; others dismiss law as largely irrelevant, marred by problems of implementation and enforcement. In some contexts and situations, the law provides avenues for the pursuit of justice; in others, it protects the interests of the rich and powerful.

There are complex interactions between law and society, and these contrasting perceptions all have a place in assessing strategies involving use of the law to improve the governance of tenure. Throughout history, the law has been a vehicle for the rich and powerful to legitimize their tenure claims, but it has also assisted marginalized groups to claim rights and seek redress.

Irrespective of the positions taken, it is clear that more is needed than just “good” law; that is, law that is consistent with the Guidelines. The adoption of a new tenure law can send a strong political signal, and it can be an important step in recognizing previously marginalized tenure claims. However, the way in which a law is interpreted, applied and enforced is ultimately what shapes practical outcomes. Corruption, dysfunctional judiciaries and ineffective administrations can all get in the way of a law achieving its desired objectives. As a result, many good laws remain dead letter. The adoption of a new piece of legislation is only a part of the process of using law to improve the governance of tenure.

Overall, there is widespread recognition that the law is an essential, albeit not sufficient, part of implementing the Guidelines. The importance of law is recognized in the Guidelines, which devote several provisions to legal frameworks, legal capacity support and dispute settlement, and which include the rule of law among the key “principles of implementation” of the Guidelines (par. 3B.7).

A realistic understanding of the limits of “good law” calls for guidance on the range of actors and processes necessary to enable the law to operate and make a difference in practice – including courts and administrative machineries, state and non-state agencies providing capacity support, advisory services or representation, through to the role of citizens and companies as norm users. And while good law alone does not necessarily achieve its stated goals, there is little doubt that bad law constrains the implementation of the principles reflected in the Guidelines all over the world. This situation calls for guidance on how to assess and reform legal frameworks to promote responsible governance of tenure of land, fisheries and forests.

1.2 Scope and limitations of this guide

The concept of tenure – and law itself – is embedded within a country’s political, economic, cultural and social relations. While recognizing these important dimensions, however, this guide focuses on technical legal aspects.

The focus on legal aspects of tenure in no way suggests that more “formalized” tenure systems are necessarily superior to “informal” ones. Customary systems with varying degrees of formalization can work well and the Guidelines explicitly call for states to promote, among other things, laws that provide recognition of informal tenure (see Chapter 2). In addition, this guide does not assume that the law is the only or even the main vehicle through which the Guidelines can be implemented. Complementary strategies may be needed, particularly where weak rule of law undermines the effectiveness of the law as a source of regulation.

The Guidelines provide comprehensive guidance on multiple key issues relating to the governance of tenure of land, fisheries and forests. Space constraints do not allow this guide to cover all these issues. Rather, the guide covers selected themes to illustrate the opportunities and challenges involved in using the law to improve the governance of tenure.

This guide aims to be broadly relevant to the wide range of contexts worldwide where governance of tenure issues arise, yet legal arrangements inevitably vary from society to society. There is great diversity in the laws of different jurisdictions. As a result, the guide can only provide basic guidance on aspects that are potentially of general relevance. Its use in specific contexts may need to be complemented by tailored technical assistance; for instance, to appraise applicable legal frameworks, adopt legal reforms or strengthen judicial or administrative processes.

The range of legal instruments relevant to the governance of tenure of land, fisheries and forests is very broad, going well beyond legislation that explicitly refers to these resources in its title. For example, family and succession law as well as sectoral legislation may shape the tenure rights of women and youth. This guide takes an integrated approach and considers multiple laws affecting the governance of tenure, but it focuses on laws primarily framed in tenure terms.

The governance of tenure is intrinsically linked to a wide range of (sectoral and cross-sectoral) legal instruments at national and international levels. Internationally recognized human rights are at stake, and international treaties may affect the governance of tenure – for example, with regard to fisheries management and legality in timber trade. While recognizing the importance of these international law dimensions, however, the guide focuses on national law.

Readers of this guide may also wish to refer to other technical guides produced by the Food and Agriculture Organization of the United Nations (FAO) and other stakeholders. FAO has published specific guides on gender and land (*Governing land for women and men. A technical guide to support the achievement of responsible gender-equitable governance of land tenure*, 2013a), on indigenous peoples (*Respecting free, prior and informed consent. Practical guidance for governments, companies, NGOs, indigenous peoples and local communities in relation to land acquisition*, 2013e), on

fisheries (*Implementing improved tenure governance in fisheries. A technical guide to support the implementation of the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security*, 2013b) and on forestry (*Improving governance of forest tenure: a practical guide*, 2013c). Most recently, a guide on agricultural investments has been prepared (*Safeguarding land tenure rights in the context of agricultural investment. A technical guide on safeguarding land tenure rights in line with the Voluntary Guidelines for the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security, for government authorities involved in the promotion, approval and monitoring of agricultural investments*, 2015e). FAO is also working on technical guides for investors, on the commons, on pastoralists, on registration of tenure rights, on the use of information technology and on valuation.

Many of these guides touch upon legal issues, considering in depth those that are relevant to the topic at hand.

1.3 Who is this guide for and how should it be used?

This guide is written for legal professionals assisting a wide range of stakeholder groups including: governments, parliaments, dispute settlement bodies, non-governmental organizations (NGOs), organizations of farmers and small-scale producers, of fishers, of pastoralists and of forest users (i.e. “rural producer organizations”), indigenous peoples and community groups, the private sector and all persons concerned. This audience would include government advisors, legislative drafters, judges, lawyers in private practice, notaries, legal service organizations working with rural producer organizations and local communities, and in-house counsels. This guide may also be of interest to academics.

BOX 1.2

The role of lawyers and legal service providers in the Guidelines

All these target groups may engage, in different ways and at different stages, with the law relating to the governance of tenure of land, fisheries and forests. The Guidelines call on all providers of legal services to undertake due diligence to the best of their ability when providing services, and on professional associations to promote high levels of ethical behaviour in legal service provision (see Box 1.2). Arguably, taking due account of the Guidelines in providing legal services constitutes an important part of that due diligence and ethical behaviour (see Chapter 2).

These multiple target groups perform different roles and have the potential to advance the implementation of the Guidelines in different ways. However, they may also support different, and possibly competing, tenure claimants, and have different and, at times, conflicting perspectives on applying the Guidelines. These potential tensions need to be factored into the development of strategies to harness the law for the implementation of the Guidelines, including by ensuring that such implementation is informed and based on a solid understanding of the legal principles underlying the Guidelines.

6.8 “Relevant professional associations for services related to tenure should develop, publicize and monitor the implementation of high levels of ethical behaviour. Public and private sector parties should adhere to applicable ethical standards, and be subject to disciplinary action in case of violations. Where such associations do not exist, States should ensure an environment conducive to their establishment.”

12.13 “Professionals who provide services to States, investors and holders of tenure rights to land, fisheries and forests should undertake due diligence to the best of their ability when providing their services, irrespective of whether it is specifically requested.”

Legal professionals working for or with states. As much guidance contained in the Guidelines is addressed to states, legal professionals advising states can make a real difference to ensure that the standards embodied in the Guidelines are upheld. There are several reasons why they should do so. The Guidelines reflect a global consensus on international best practice. In most cases, implementing the Guidelines is likely to help implement legal obligations under national or international law, including human rights treaties. In fact, several provisions of the Guidelines reflect international human rights law, which constitutes binding international law.

More generally, governments have an interest in ensuring that the Guidelines are upheld. Decision-making in line with the Guidelines is arguably more likely to receive broad-based support. Also, ensuring that legitimate tenure rights are adequately protected can increase equity and peaceful coexistence within society, and the perceived legitimacy of legislation. It can also help to create a more conducive climate for the private sector because of the increased security of tenure and the reduced disputes.

Governments, and the legal professionals advising them, can undertake thorough reviews to assess whether existing legal frameworks meet the standards established by the Guidelines, and can design and implement law reforms to meet those standards if they do not. Developing and adopting legislation is normally a prerogative of parliaments.

The state that has jurisdiction on the land, forest or waters is the most directly relevant state for the purpose of implementing the Guidelines. Other states may also be relevant. For example, where foreign investment is involved, the country of origin of investors can play an important role in ensuring that investments uphold the Guidelines (par. 3.2 and 12.15). The management of fisheries commonly involves international agreements among multiple states.

Public-interest legal service organizations. Legal service organizations play an important role in advancing the implementation of the Guidelines in their work with indigenous peoples, local communities and small-scale rural producers such as farmers, pastoralists, forest dwellers and fisherfolk, including associations and federations of these, as well as with non-governmental organizations (NGOs) and cooperatives.

Where the provisions in the Guidelines go beyond existing national law requirements, they provide a useful benchmark for advocacy and public scrutiny, and for promoting law reform as well as better implementation of existing laws. On the ground, legal service organizations can use the Guidelines to help stakeholders to better exercise their rights in such contexts as: tenure rights redistribution or restitution, efforts to secure tenure rights as a basis for livelihood opportunities, or in their partnerships with the private sector.

Business lawyers. The Guidelines provide an important reference for lawyers advising companies or investors on business activities that could have a bearing on tenure rights. Lawyers representing these clients, including both foreign and domestic investors, may find the Guidelines a useful tool for determining whether gaps in national law exist, for designing and drafting contracts to mitigate risks associated with gaps or inconsistencies in domestic law and for the undertaking of due diligence. The United Nations Guiding Principles on Business and Human Rights, and the concept of human rights due diligence they embody, have increased awareness among business

lawyers about the importance of integrating social responsibility considerations in commercial law practice, including in connection with due diligence processes.

Tenure risk can affect businesses in important ways, including in the form of financial risk, reputational risk, political risk (i.e. contract renegotiation), and the risk of sabotage for business ventures that are perceived to trump legitimate tenure rights (The Munden Project, 2012 and 2014). As contestation on “land grabbing” shows, compliance with national law alone does not shelter companies from criticism. Lawyers may play a role in advising clients on actions that may reduce reputational risks or advance social responsibilities. Compliance with international standards has become a key part of the “social license to operate”; meaning that more responsible investment is more likely to enjoy greater support from external stakeholders.

While the Guidelines are primarily directed at states, they also reaffirm the responsibility of business enterprises to respect human rights and legitimate tenure rights, and some provisions apply to investments directly (see par. 3.2 and 12.12). A number of companies have voluntarily agreed to adhere to the Guidelines both in their own operations and in their supply chain management. For example, two large beverage corporations announced commitments to encourage their suppliers to meet the standards embodied in the Guidelines (FAO, 2014a).

Law societies, lawyers, notaries, judges and legal professionals, more generally.

In addition to the specific groups of legal professionals listed above, the guide targets the wider range of legal professionals that, in any given national legal system, enable the law to operate in practice. This includes:

- i)* lawyers and notaries, who can help promote the implementation of the Guidelines through their regular provision of legal services to members of the general public;
- ii)* law societies, which can play a key role in mainstreaming the Guidelines into legal practice through awareness raising, continuing professional development and dissemination of best practice; and
- iii)* judges, who consider the Guidelines in dispute-settlement processes; for instance, as an aid to interpretation or as evidence of international best practice.

Lawyers working with or for international development agencies. Bilateral and multilateral development agencies can help promote responsible governance of tenure through law-related projects. These may involve assessing legal frameworks, providing technical assistance in law reform processes or supporting the implementation of existing law. Legal officers or advisors with development agencies can play an important role in supporting well-thought-out project design and implementation that consider the complexities of the law affecting the governance of tenure.

This guide does not directly target community groups who use the law to improve their tenure rights. However, those groups are a constituency of the Guidelines principles and this guide aims to reach them indirectly through the work of the various categories of legal professionals previously identified. The material included in this guide could be adapted and re-elaborated for direct use by community groups; for example, through the production of simplified and context-specific training manuals.

Through the use of non-technical language, this guide also hopes to be accessible to anyone interested in the legal implications of the Guidelines.

1.4 Outline of the guide

This guide discusses diverse law-related activities, which together illustrate the multiple ways in which the law can intervene in the governance of tenure. It consists of four substantive chapters, in addition to this introduction and a brief conclusion. Each substantive chapter tackles a specific aspect of the interface between law and the responsible governance of tenure. Each chapter logically follows on the previous one. All the chapters emphasize practical aspects, drawing as much as possible on real-life examples illustrated through use of boxes and lists of key recommendations.

Chapter 2 first elaborates on the nature and legal value of the Guidelines and considers their relationship to international law and voluntary instruments. It then discusses how the principles underpinning the Guidelines are in line with basic principles of professional responsibility applicable to legal professions in many jurisdictions, particularly commitments to upholding the rule of law. Finally, the chapter discusses how the Guidelines broaden the range of “legitimate” tenure rights to include rights that are not recognized by national law. Given the far-reaching implications of this approach, the chapter discusses in greater depth the concept of “legitimate tenure rights”.

Chapter 3 discusses how to draft or revise laws to promote responsible governance of tenure, providing guidance both on the content of legislation and on the lawmaking process itself. The chapter first discusses how to assess national law to determine levels of adherence to the Guidelines and provides guidance on ways to conduct assessments of national law in light of the Guidelines. It defines key concepts concerning lawmaking. It then provides illustrative examples of legislative design that advances aspects of the Guidelines, focusing on selected topics covered in the Guidelines. Finally, the chapter discusses guidance concerning public participation and transparency in lawmaking processes.

Chapter 4 discusses how to ensure that law is duly implemented. It explores the role of different actors in making law work in practice, including government administration, legal service providers supporting local holders of tenure rights and business lawyers. The chapter reviews multiple approaches to strengthen government administration to implement law and the Guidelines as well as tenure right-holder capacity to exercise rights and navigate procedures.

Chapter 5 discusses how to use the Guidelines in the context of the resolution of tenure-related disputes. It discusses access to justice for perceived violations of tenure rights, Guidelines’ direction on dispute settlement processes, and opportunities for judges and decision-makers to consider the Guidelines in the performance of their duties.

Chapter 6 outlines key action points for the legal professions to play an important role in promoting implementation of the Guidelines.

Legislation on land, fisheries and forests is available from FAO’s legislative database at <http://faolex.fao.org/>

2

The legal significance of the Guidelines

2. The legal significance of the Guidelines

This chapter discusses the nature and legal value of the Guidelines, and considers their relationship to other international obligations and voluntary instruments. It then discusses how the principles underpinning the Guidelines are in line with basic principles of professional responsibility applicable to legal professions in many jurisdictions, particularly commitments to upholding the rule of law. Finally, the chapter discusses how the Guidelines broaden the range of “legitimate” tenure rights to include rights that are not recognized by national law. Given the far-reaching implications of this approach, the chapter discusses in greater depth the concept of “legitimate tenure rights”.

2.1 What is the legal value of the Guidelines?

The Guidelines are an international instrument unanimously endorsed by the CFS (2012). The CFS is the top UN body responsible for global food security issues. The Guidelines have also received multiple expressions of support after their endorsement by the CFS, in such forums as the FAO Council (FAO, 2012) and Conference (FAO, 2013d), the United Nations General Assembly (UNGA, 2012), the Rio+20 Conference (Rio+20, 2012), the G20 (G20, 2012), and the Francophone Assembly of Parliamentarians (APF, 2012). As a result, the Guidelines enjoy considerable political authority.

In addition, the negotiation of the Guidelines at the CFS was preceded by two years of extensive consultations in different regions and with diverse stakeholder groups. This effort involved the organization of ten regional, one private sector and four civil society consultation workshops, reaching almost 1 000 people from over 130 countries. The participants represented government institutions, civil society, the private sector, academic institutions and UN agencies (FAO, n.d.). Non-state actors were also actively involved during negotiations with the CFS. As a result, the Guidelines enjoy considerable and widespread perceived social legitimacy, not only among governments, but also in civil society and among informed private sector actors.

Although the Guidelines were drafted to be compatible with international law (par. 2.2), they do not in themselves create legal obligations under international law.

Of the sources of international law recognized by the Statute of the International Court of Justice (ICJ), the Guidelines bear the greatest similarity to treaties, as they were concluded through a process of intergovernmental negotiation and have been reduced to a clear text and instrument. However, they clearly are not a treaty. The Guidelines do not refer to themselves as an “agreement,” but instead as guidelines. Their title, wording and circumstances of endorsement make it clear that the guidelines are voluntary. Accordingly, the Guidelines lack the requisite intent needed to create a legally binding treaty (Aust, 2007).

The Guidelines are best described as a soft-law instrument, designed to provide guidance to states (and in several respects, non-state actors) wishing to align the governance of tenure of land, fisheries and forests with international best practice.

Beyond issues of political authority and social legitimacy, however, lawyers are also likely to ask additional questions: How do the Guidelines affect the legal rights and obligations of the people I advise, and how do they affect the objectives that these people are pursuing? Do the Guidelines create binding legal obligations? Are they a soft-law instrument designed to provide guidance to states wishing to improve their governance of tenure? If the Guidelines are not binding, might they constitute a persuasive authority that shapes understanding of binding international law?

The Guidelines are not a legally binding document, as is evident from the word “voluntary” in their full title. In addition, the language of the Guidelines communicates their normative elements in terms of “should”, not “shall”. The Guidelines recognize that states will interpret and apply its provisions in accordance with their domestic legal systems and their institutions (par. 2.5). When endorsing the Guidelines in the CFS, states made it clear that the Guidelines were to be considered voluntary; paragraph 2.1 of the Guidelines states this explicitly (see

BOX 2.1
The Guidelines and
international law

Box 2.1). The decision to bring national law into line with Guidelines’ guidance is, from a legal point of view, a matter of choice for states.

The voluntary nature of the Guidelines does not mean that they are of no legal significance. Parts of the Guidelines reflect existing international law. Examples include the Guidelines’ recognition of the rights of indigenous peoples, which is consistent with treaties such as: the International Labour Organization’s (ILO’s) Convention No. 169 Concerning Indigenous and Tribal Peoples and the Convention on Biological Diversity; provisions on compensation, consultation and free, prior and informed consent (FPIC), which are broadly in line with international human rights jurisprudence; provisions concerning gender equity, which are consistent with the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW); respect for international humanitarian law in conflict situations (par. 25.1); and standards of transparency and government integrity that are broadly in line with the United Nations Convention Against Corruption (UNCAC).

Given the close interrelationship between tenure rights and human rights (Office of UN High Commissioner for Human Rights, OHCHR 2014), implementation of the Guidelines can constitute an important step towards the realization of human rights – including the right to adequate food, which is recognized by Article 11 of the International Covenant on Economic, Social and Cultural Rights (ICESCR). More generally, the Guidelines affirm “principles of implementation” (par. 3B) that are broadly in line with the provisions of international human rights law; namely, human dignity, human rights, equity and justice, gender equality, rule of law, transparency and accountability.

And while the Guidelines are not binding, they are unequivocal that “States have the responsibility for their implementation, monitoring, and evaluation” (par. 26.1). States’ efforts to act upon the provisions of the Guidelines will often involve legal instruments

such as where they enact or reform legislation. In those cases, the Guidelines provide an authoritative point of reference for states amending or adopting laws on the tenure of land, fisheries and forests.

The Guidelines may also have significance in the implementation of existing law. For example, judges and administrators could use the Guidelines to interpret national law, particularly where language is ambiguous (see Chapter 5). Developments such as the UN Guiding Principles on Business and Human Rights (see Box 2.2) are making business lawyers increasingly aware of the importance of considering soft-law instruments in commercial law practice

The UN Human Rights Council unanimously endorsed the UN Guiding Principles on Business and Human Rights in 2011. They are intended to clarify the human rights duties of states and the responsibilities of companies in the context of business activities. The principles were developed through an international consultation process led by the then Special Representative of the Secretary General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie.

The Guiding Principles rest on three pillars: protect, respect and remedy. States have a duty to protect human rights against third-party interference, including interference from business actors (“protect”). Businesses have a corporate responsibility to act with due diligence to avoid infringing on human rights and to address adverse impacts that may arise from their activities (“respect”). Finally, there needs to be effective remedies, including judicial fora and non-judicial grievance mechanisms (“remedy”).

The responsibility of business to respect human rights requires that enterprises:

- “(a) Avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur;
- (b) Seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts” (Principle 13).

Annexes accompany the Guiding Principles, including the “Principles for responsible contracts: integrating the management of human rights risks into state-investor contract negotiations”. While not legally binding, the Guiding Principles have received wide acceptance and support, and some of their main implications are now reflected in other international instruments, including paragraph 3.2 of the Guidelines.

BOX 2.2 The UN Guiding Principles on Business and Human Rights

Source: Cotula, 2014a and OHCHR, 2011.

The Guidelines are part of a growing body of interrelated and mutually supportive international guidance on matters concerning food and agriculture. Relevant instruments include:

- The Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food in the Context of National Food Security (FAO, 2004b), adopted by the CFS and subsequently by the FAO Council in 2004 (FAO, 2004a);
- The Voluntary Guidelines for Securing Sustainable Small-Scale Fisheries in the Context of Food Security and Poverty Eradication (SSF) (FAO, 2015f), endorsed in 2014 by the FAO Committee on Fisheries (COFI, 2014) and the FAO Council (FAO, 2014d) (see Box 2.3);
- The Principles for Responsible Investment in Agriculture and Food Systems, endorsed in 2014 by the CFS (CFS, 2014) and the FAO Council (2014d);
- The Rome Declaration on Nutrition (FAO & WHO, 2014b) and its companion Framework for Action (FAO & WHO, 2014a), adopted by the Second International Conference on Nutrition in 2014.

BOX 2.3

The Small-Scale Fisheries Guidelines and the Guidelines

In June 2014, the 31st Session of the FAO Committee on Fisheries (COFI) endorsed the Voluntary Guidelines for Securing Sustainable Small-Scale Fisheries in the Context of Food Security and Poverty Eradication (SSFG), the first-ever international instrument specifically dedicated to small-scale fisheries. The SSFG build on the Code of Conduct for Responsible Fisheries (CCRF), adopted by the FAO Conference in October 1995.

- Recognizing the importance of small-scale fisheries to employment, income and food security, Article 6.18 of the CCRF calls for the appropriate protection of rights of fishers and fishworkers, particularly those engaged in subsistence, small-scale and artisanal fisheries, to a secure and just livelihood. In addition, the CCRF provides that they should enjoy preferential access, where appropriate, to traditional fishing grounds and resources in the waters under their national jurisdiction.
- The SSFG were developed after the Guidelines and build on them. The SSFG include sector-specific provisions on issues that are addressed at a cross-sectoral level in the Guidelines, dedicating a specific section to the responsible governance of tenure (section 5A).

The SSFG provide that, when necessary, in order to protect various forms of legitimate tenure rights, legislation should be developed (par. 5.4). They provide that states should determine the use and tenure rights of these resources, taking into consideration social, economic and environmental objectives (par. 5.6) and should adopt measures to facilitate equitable access to fishery resources for small-scale fishing communities, taking into account the provisions of the Guidelines (par. 5.7).

In addition, the SSFG contain guiding principles that are largely in line with the “principles of implementation” provided in the Guidelines although specific reference is made to additional principles: “respect of cultures” and “economic, social and environmental sustainability” as well as “social responsibility” and “feasibility and social and economic viability”. Sections dedicated to social development, employment and decent work support the social-economic aspects reflected in the guiding principles of the SSFG.

A technical guide to support the implementation of the Guidelines in the fisheries sector is currently under development. A preliminary version was published in 2013 (FAO, 2013b).

By addressing issues of governance of tenure in a holistic way, the Guidelines provide guidance that can help to advance the implementation of these multiple instruments. In fact, in their Principle 5 (“Respect tenure of land, fisheries and forests, and access to water”), the Principles for Responsible Investment in Agriculture and Food Systems specifically refer to the Guidelines. It is, therefore, important that lawyers working on issues covered by these soft-law instruments (agribusiness investments, small-scale fisheries, the right to food) are familiar with, and make good use of, the Guidelines.

BOX 2.4

The Framework and Guidelines on Land Policy in Africa

In some contexts, international guidance has emerged at the regional level, too, such as the Framework and Guidelines on Land Policy in Africa. In these situations, lawyers and legal service organizations should consider both global and regional guidance (see Box 2.4).

The Framework and Guidelines on Land Policy in Africa were developed by the African Union Commission, the UN Economic Commission for Africa and the African Development Bank (2010) to promote socio-economic development through, among other things, agricultural transformation and modernization.

The Framework and Guidelines identify land as a valuable natural resource and its potential role in economic development and poverty reduction. They promote the development of a shared vision of national development among all stakeholders. They also encourage governments to focus on land administration systems, including land rights delivery systems and land governance structures and institutions. Finally, the Framework and Guidelines call on states to ensure adequate budgetary allocations for land policy development and implementation.

The Framework and Guidelines were endorsed by the Joint Conference of Ministers on Agriculture, Land and Livestock in 2009 and the African Union Heads of State and Government in 2009. The Framework and Guidelines do not create binding obligations on states; rather, they constitute a set of principles that should inform the development, content and implementation of land policies in African states.

The Guidelines cover a wide range of issues making it likely that states wishing to implement them will need time to do so. In some contexts, the scope of changes to national law, regulations and institutions spanning the multiple sectors that would be involved is simply too large to allow countries to implement the Guidelines overnight. A key first step in implementing the Guidelines involves a rigorous assessment of current levels of alignment across a range of issues, so as to identify areas needing reform.

Key recommendations 2.1

- ✓ Take seriously the guidance contained in the Guidelines: while not legally binding per se, the Guidelines are an authoritative instrument that has received widespread expressions of support.
- ✓ Determine whether relevant provisions of the Guidelines cover matters regulated by any international agreements to which the state is a party.
- ✓ In promoting implementation of the Guidelines, consider other relevant international legal instruments and norms developed at regional or global levels, as well as other voluntary guidelines such as the Voluntary Guidelines for Securing Sustainable Small-Scale Fisheries (SSFG) in relation to tenure of fisheries, or the Framework and Guidelines on Land Policy in Africa in relation to tenure of land in Africa.

2.2 Professional responsibility, rule of law and the Guidelines

Although the Guidelines are not binding law, several of the provisions of the Guidelines reflect standards of professional responsibility usually applicable to legal professionals. In several countries, for example, lawyers have a basic duty to uphold the rule of law and further the administration of justice. In addition, lawyers have duties of fairness, honesty and integrity as well as the duty to avoid conflicts of interest, as reflected in the International Bar Association's (IBA's) 2011 International Principles on Conduct for the Legal Profession. These obligations are owed to clients as well as to third parties and the general public.

In recent years, the UN has developed guidance on the notion of rule of law. Among other things, the UN definition of rule of law requires laws to be consistent with the norms and standards of international human rights. The UN definition also emphasizes accountability to the law, fairness in the application of law, avoidance of arbitrariness, and procedural and legal transparency (see Box 2.5).

The Guidelines explicitly affirm the rule of law as a "principle of implementation"; that is, an essential principle to be followed in implementing the Guidelines (par. 3B.7). The rule of law also shapes other Guidelines' principles of implementation. For example, it is closely linked to transparency (par. 3B.8), and it is explicitly referred to in relation to accountability (par. 3B.9).

BOX 2.5 UN definition of rule of law

Source: United Nations Security Council, 2004.

The UN defines the rule of law as "a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency."

The Guidelines also refer to respect for the rule of law in relation to specific issues, such as: delivery of tenure services (par. 6.9), land-based investments (par.12.12) and redistributive reforms (par. 15.4). Further, the Guidelines refer to several other concepts that are closely related to the rule of law and to standards of professional ethics, including provisions dealing with corruption and conflicts of interest (par. 6.9).

The Guidelines embody a concept of rule of law that is in line with the UN definition. According to the Guidelines, the rule of law requires laws to be “widely publicized in applicable languages, applicable to all, equally enforced and independently adjudicated”, and also “consistent with [...] existing obligations under national and international law, and with due regard to voluntary commitments under applicable regional and international instruments” (par. 3B.7).

In line with the core elements of the UN definition of rule of law, the Guidelines include provisions on ensuring access to justice and effective means of dispute resolution (par. 3.1.4 and 4.9), providing for access to effective remedies (par. 3.2, 4.9, 14.2), holding people accountable for breaches of tenure rights (par. 3.B.9) and ensuring participation of affected tenure holders (par. 4.10, 5.5, 7.3, 13.6, 16.2). Many Guidelines’ provisions refer to ensuring transparency in legal rules and tenure transactions (par. 11.3, 11.4 12.3, 12.5).

The understanding that the rule of law requires adherence to international human rights norms and standards, accountability to the law and fair and transparent procedures means that the provisions of the Guidelines that embody these standards may constitute an essential element of the professional responsibility of lawyers to uphold the rule of law.

In addition, the duty of lawyers to avoid conflicts of interest may affect the ways in which the Guidelines are applied. For example, in carrying out consultations with affected communities in the context of proposed investment projects (Guidelines, section 12), lawyers need to exercise due diligence to avoid conflicts of interest that could occur when private investors pay the costs of the communities’ legal counsel (see Chapter 4).

The Guidelines call for professional associations to “develop, publicize and monitor the implementation of high levels of ethical behaviour”, and for tenure professionals to “adhere to applicable ethical standards, and be subject to disciplinary action in case of violations” (par. 6.8). The Guidelines also call on professionals to exercise due diligence in relation to tenure matters (par. 12.13). Guidance on specific approaches to due diligence, particularly for lawyers representing private sector actors, is provided in Chapter 4.

Key recommendations 2.2

- ✓ In considering the application of the Guidelines, lawyers should recognize the substantial overlap between their professional responsibility duties and the provisions of the Guidelines.
- ✓ In many jurisdictions, lawyers have a duty to uphold the rule of law. The UN defines the rule of law as requiring adherence to international human rights norms and standards, and to equality, fairness and accountability. Thus defined, the rule of law underpins many Guidelines’ provisions. Therefore, promoting adherence with these provisions may constitute an essential element of the professional responsibility of lawyers.
- ✓ Depending on the jurisdiction, lawyers also have professional responsibilities to act with fairness, honesty and integrity and to avoid conflicts of interest. These responsibilities condition the ways in which many provisions of the Guidelines may be applied.
- ✓ To ensure that lawyers uphold their professional responsibilities, the Guidelines provide guidance on the contexts in which lawyers should exercise due diligence in relation to tenure governance.

2.3 Social and legal legitimacy: understanding “legitimate tenure rights”

2.3.1 Social and legal legitimacy

The Guidelines promote responsible governance of tenure of land, fisheries and forests. “Tenure” is the way that land, fisheries and forests are held or owned by individuals, families, companies or groups. Tenure can encompass diverse “bundles of rights”; for example, the rights to occupy, use, develop, enjoy and withdraw benefits from the natural resources in question; the right to restrict others’ access to these resources; and/or the right to manage, sell or bequeath the resources.

Many lawyers are accustomed to defining tenure rights in terms of positive law; that is, law created by relevant lawmaking authorities under national constitutions. The Guidelines depart from this approach. The Guidelines explicitly consider as “legitimate” not only those tenure rights formally recognized by national law, but also those rights that, while not currently protected by law are considered to be socially legitimate in local societies (see par. 4.4. and, 5.3 and 7.1 and Table 2.1).

Legal legitimacy

(legitimate through the law; legally recognized)

- Ownership rights recognized by law including rights of individuals, families and groups, and customary rights recognized by the law;
- Use rights recognized by law including leases, sharecropping and license agreements;
- Servitudes/easements.

Social legitimacy

(legitimate through broad social acceptance even without legal recognition)

- Customary and indigenous rights to resources vested in the state in trust for the citizens;
 - Customary rights on state land, e.g. forest communities;
 - Informal settlements on private and public land where the state has accepted that it is not possible to relocate the people;
 - Squatters on private and public land who have almost fulfilled the requirements for acquiring the land through prescription or adverse possession.
 - Not formally recognized traditional fishing grounds.
-

TABLE 2.1
Types of legitimate tenure rights

Source: adapted from FAO, 2009d.

Recognizing and respecting all legitimate tenure rights is the first of several “general principles” of the Guidelines, followed by: safeguarding all legitimate tenure rights against threats and infringement; promoting and facilitating the enjoyment of legitimate tenure rights; and providing access to justice to deal with infringements of legitimate tenure rights (par. 3A). Recognition, respect and protection of legitimate tenure rights are also referred to in numerous other provisions of the Guidelines (par. 4.4, 4.5, 5.3, 7.1, 8.2, 8.4, 8.7, 9.4, 9.5, 11.6, 12.4, 12.6, 12.10, 12.15, 14.1, 16.1). The Guidelines pay special attention to the legitimate

tenure rights of the most vulnerable (par. 7.1, 16.1), which, depending on context, may also be the least protected under national law.

The concept of “legitimate tenure rights” implicitly calls for lawyers to broaden the range of the tenure rights they take into account when analysing tenure claims. Given the prominence of the concept of legitimate tenure rights in the Guidelines and its far-reaching implications, the remainder of this chapter explains in greater detail what this notion means.

BOX 2.6
How to
identify
legitimate
tenure rights
according
to the
Guidelines

3A.1 “States should recognize and respect all legitimate tenure right holders and their rights. They should take reasonable measures to identify, record and respect legitimate tenure right holders and their rights, whether formally recorded or not; to refrain from infringement of tenure rights of others; and to meet the duties associated with tenure rights.”

4.4 “Based on an examination of tenure rights in line with national law, States should provide legal recognition for legitimate tenure rights not currently protected by law. Policies and laws that ensure tenure rights should be non-discriminatory and gender sensitive. Consistent with the principles of consultation and participation of these Guidelines, States should define through widely publicized rules the categories of rights that are considered legitimate. All forms of tenure should provide all persons with a degree of tenure security which guarantees legal protection against forced evictions that are inconsistent with States’ existing obligations under national and international law, and against harassment and other threats.”

5.3 “States should ensure that policy, legal and organizational frameworks for tenure governance recognize 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. Frameworks should reflect the social, cultural, economic and environmental significance of land, fisheries and forests. States should provide frameworks that are non-discriminatory and promote social equity and gender equality. Frameworks should reflect the interconnected relationships between land, fisheries and forests and their uses, and establish an integrated approach to their administration.”

9.4 “States should provide appropriate recognition and protection of the legitimate tenure rights of indigenous peoples and other communities with customary tenure systems, consistent with existing obligations under national and international law, and with due regard to voluntary commitments under applicable regional and international instruments. Such recognition should take into account the land, fisheries and forests that are used exclusively by a community and those that are shared, and respect the general principles of responsible governance. Information on any such recognition should be publicized in an accessible location, in an appropriate form which is understandable and in applicable languages.”

2.3.2 What are legitimate tenure rights?

The Guidelines do not provide a definition of legitimate tenure rights. Rather, they generally recognize both statutory and customary, formal and informal tenure rights as legitimate, and encourage states to acknowledge, document and respect all legitimate tenure rights in national law, policy and practice. The Guidelines suggest that states arrive at their own non-discriminatory definitions of legitimate tenure rights after a careful catalogue of all existing tenure governance systems currently operative in their country. The provisions of the Guidelines that provide guidance on the process for determining what is legitimate are presented in Box 2.6.

Several challenges affect the identification of all legitimate tenure rights. Land, fisheries and forests are more than just assets to be traded on the market. In many cultures and societies, land, fisheries and

forests are at the heart of individual and community identity, culture, history and spirituality, as well as the basis of food security and livelihoods. As a result, tenure systems are often very complex and vary considerably, even within the same country, according to local terrain, culture, environment and the dominant livelihoods practiced. Defining socially legitimate tenure rights can pose real challenges when it comes to operationalization, as there may be, and often are, competing visions of legitimacy in a given society.

Analysis of what rights to count as “legitimate” is further complicated by the national or local political economy: prevailing perceptions about legitimate tenure rights may be influenced by the power structures and economic interests of the society in which one’s tenure claims are situated. In addition, “society” may be defined in multiple, overlapping ways – from a community practising and abiding by local rules, norms and practices, through to the country as a whole. Perceptions of legitimate tenure rights may differ in these local and national contexts. Also, which tenure rights are considered “legitimate” in a given context is a function of perceptions and policy decisions often shaped by powerful groups.

In addition to the procedural guidance that the Guidelines provide on how to identify legitimate tenure rights (Box 2.6), it is possible to elaborate a few points on the types of tenure rights that can be considered as legitimate based on the substantive provisions of the Guidelines.

2.3.3 Customary and indigenous rights are legitimate tenure rights

More than two billion people worldwide access resources through customary tenure regimes (United States Agency for International Development (USAID), 2011b). An estimated 90 percent of all land in Africa is held under customary tenure regimes, while almost 90 percent of the estimated 40 million indigenous peoples in Latin American hold land under customary tenure systems (Colchester et al., 2001). Customary tenure systems also apply to lands in Western Europe, such as rural commons in Spain, Portugal, Italy and Switzerland. Indigenous minorities in Europe, North America and Oceania also govern their lands, fisheries and/or forests according to custom (Alden Wily, 2012). Although the specificity of the tenure rules different countries or communities apply may diverge, the phenomenon of customary tenure is prevalent across a range of different legal systems.

In many contexts, communities administer, manage and transact their tenure rights primarily within the bounds of local, customary paradigms. In areas where state administration and infrastructures are absent or inaccessible, customary tenure systems are often the primary means of enforcing rights and resolving tenure disputes.

BOX 2.7

Protection for customary and indigenous tenure rights in the Guidelines: selected provisions

9.5 “Where indigenous peoples and other communities with customary tenure systems have legitimate tenure rights to the ancestral lands on which they live, States should recognize and protect these rights. Indigenous peoples and other communities with customary tenure systems should not be forcibly evicted from such ancestral lands.”

9.6 “States should consider adapting their policy, legal and organizational frameworks to recognize tenure systems of indigenous peoples and other communities with customary tenure systems. Where constitutional or legal reforms strengthen the rights of women and place them in conflict with custom, all parties should cooperate to accommodate such changes in the customary tenure systems.”

9.7 “States should, in drafting tenure policies and laws, take into account the social, cultural, spiritual, economic and environmental values of land, fisheries and forests held under tenure systems of indigenous peoples and other communities with customary tenure systems. There should be full and effective participation of all members or representatives of affected communities, including vulnerable and vulnerable members, when developing policies and laws related to tenure systems of indigenous peoples and other communities with customary tenure systems.”

9.8 “States should protect indigenous peoples and other communities with customary tenure systems against the unauthorized use of their land, fisheries and forests by others. Where a community does not object, States should assist to formally document and publicize information on the nature and location of land, fisheries and forests used and controlled by the community. Where tenure rights of indigenous peoples and other communities with customary tenure systems are formally documented, they should be recorded with other public, private and communal tenure rights to prevent competing claims.”

9.11 “States should respect and promote customary approaches used by indigenous peoples and other communities with customary tenure systems to resolving tenure conflicts within communities consistent with their existing obligations under national and international law, and with due regard to voluntary commitments under applicable regional and international instruments. For land, fisheries and forests that are used by more than one community, means of resolving conflict between communities should be strengthened or developed.”

Customary tenure may be defined as the local rules, institutions and practices governing land, fisheries and forests that have, over time and use, gained social legitimacy and become embedded in the fabric of a society. Although customary rules are not often written down, they may enjoy widespread social sanction and may be generally adhered to by members of a local population.

Customary tenure systems are extremely diverse, reflecting different ecosystems, economies, cultures and social relations. However, they tend to embed tenure rights in social relationships and to place considerable emphasis on collective rights, vesting tenure rights with often multiple, overlapping and, therefore, “nested” social units (i.e. individual rights within households, households within kinship networks, kinship networks within wider “communities”; see Cousins, 2007, writing about trends in sub-Saharan Africa). Customary tenure systems may be associated with indigenous systems of shifting cultivation (e.g. USAID, 2011a, on Cambodia; and USAID, 2013, on upland Myanmar), but also pastoral resource use, communal forests and sacred or burial sites (see Alden Wily, 2005). Customary tenure regimes can also support highly intensified farming systems, such as those in parts of Ghana.

The Guidelines explicitly state that customary tenure rights can constitute legitimate rights. They call on states to recognize and respect “legitimate customary tenure rights that are not currently protected by law” (par. 5.3). They also provide guidance on how to recognize customary tenure rights (see Box 2.7).

Recognizing customary tenure rights as legitimate is relevant to fisheries as well as to land and forests. Some countries have enacted legislation that protects customary fishing rights (see Box 2.8).

The Fiji Fisheries Act of 1941 (as amended) protects the fishing rights of customary users in Fiji. For example, although regulation 11 of the Fisheries Regulations of 1965 (as amended) made under the Fisheries Act provides that fishing in “restricted areas” is prohibited, it exempts from this prohibition fishing by hand net, wading net, spear, or line and hook. The Fisheries Regulations also exempt certain subsistence activities in relation to which traditional fishing rights are exercised (regulation 28).

Section 13 of the Fisheries Act prohibits fishing without a permit on fishing grounds in respect of which rights have been registered by the Native Fisheries Commission in the Register of Native Customary Fishing Rights for anyone but members of the customary peoples recognized as right holders. Permits are not required for those fishing for subsistence with hook and line, spear or portable fish trap that can be handled by one person. Permits can only be granted after consultation with those whose rights may be affected.

BOX 2.8
Fishing restricted areas and customary rights in Fiji

2.3.4 Common property rights, use rights, tenancy rights, and overlapping and shared rights are legitimate tenure rights

Within both customary and statutory tenure systems, multiple and overlapping rights may govern the use of the same resource. For example, multiple rights to the same piece of land could include: the right to use the land for pasture or agriculture, possibly in different seasons; the right to use trees or collect firewood in the forest; the right to travel across the land or waters; or the right to drive cattle across an area to obtain water from a river. In certain circumstances and at particular times, a given piece of land may cater for multiple resource uses (i.e. pastoralism, farming, fishing) and users (i.e. farmers, pastoralists, herders), which may succeed one another over different seasons (Cotula, 2007; FAO, 2015e).

Tenure rights over common property resources (e.g. rangelands, fishing ponds, traditional forests), seasonal and otherwise temporary rights of access and use as well as tenancy and sharecropping rights can all be legitimate tenure rights for the purposes of the Guidelines (par. 7.1, 8.7, 8.8, 9.4, 10.3, 20.3; see also FAO, 2015e). It is often poorer and more vulnerable groups that hold these rights and, as discussed, the Guidelines pay special attention to the tenure rights of these groups.

Although there may be divergence in terms of the specificity of the tenure rules different countries or communities apply, the phenomenon of customary tenure is prevalent across a range of different legal systems. For example, paragraph 10.3 of the Guidelines reads as follows: “Whenever States provide legal recognition to informal tenure, this should be done through participatory, gender-sensitive processes, having particular regard to tenants. In doing so, States should pay special attention to farmers and small-scale food producers.” Some countries have enacted legislation to protect the tenure rights of tenants (see Box 2.9).

BOX 2.9
**Tenants' rights in Nepal
 and Sierra Leone**

Source: Suresh, 2011 and the
 Community Self-Reliance
 Centre's (CSRC'S) CSO land
 reform monitoring report
 2013/2014

Source: FAO, 2006a.

In Nepal, an estimated 5 percent of the population holds 37 percent of the arable land, with 52.7 percent of farmers who are functionally landless, working as bonded labourers or sharecroppers on the lands of elite landowners. Despite living and working on land for generations, their tenure rights are insecure. Meanwhile, approximately 20 to 25 percent of land is considered fallow, with landlords leaving their land idle for fear of tenancy claims by landless families.

Recent government policy has prioritized making use of unused land, ending the feudal land ownership system, and ensuring the participation of landless people in land policy formulation. For example, every year the government gives land titles to one hundred landless families. However, the land given is often so small, and of such poor quality and location that a high percentage of these families immediately sell it.

In Sierra Leone, a complex system of land-owning families (those who arrived first to a territory, clearing the forest to found a settlement) and "strangers" (migrants not born into the area) contributes to rural poverty and food insecurity. "Strangers" are expected to "beg" (ask) for land from the local chief or a landowning family, who then "loan" the land in accordance with customary principles, usually for the payment of an agreed annual rent. Yet landowning families' tenure insecurity results in an extreme reluctance to allocate lands to others in a secure manner, due to fear that tenants may make claims to ownership of the rented land at a later date.

As a result, landowners prohibit "stranger" tenants from planting trees, irrigating their farmland and making other permanent or semi-permanent improvements to the land. They also may limit tenants' leases to a one-year time frame, at which point stranger tenants are required to "beg" for land again. Fear of tenure insecurity also causes landowning families to capriciously use the excuse of an "offense" or a lack of "good behaviour" to evict the tenant and reclaim use of the land.

2.3.5 Women's rights are legitimate tenure rights

In many cultural contexts, women's tenure claims may hinge on their relationships with male relatives: in patrilineal systems, wives are expected to move onto their husband's family's lands after marriage and are, therefore, not usually allocated land by their own parents. Meanwhile, wives are generally not permitted to inherit their husband's land, as the land is traditionally considered to belong to the husband's family, clan or tribe and is, therefore, passed through the male bloodline from fathers to sons (Giovarelli, 2006). In matrilineal systems as well, women's tenure claims hinge on their relationships to men as land inheritance passes from uncles to brothers through the female line.

Although many rural women have rights to access and use land, they are generally less likely than men to have control over it. In practical terms, this lack of control places many women in insecure and precarious situations: women who have only conditional access to land may lose it when their husbands die or when male family members unilaterally decide to sell it (Budlender and Alma, 2011). Such culturally ingrained marriage and inheritance rules can lead to the perpetuation of gender inequalities in tenure relations across generations (Guyer, 1987).

The Guidelines directly address gender inequities (see FAO, 2013a). For example, paragraph 3B.4 establishes gender equality as one of the principles for implementation, with the mandate to "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.”

When it comes to the tenure rights of women, there may, indeed, be a clash between different sources of legitimacy: if, on the one hand, legitimacy is to be determined through social acceptability and processes, these same processes and societal norms may not fully recognize gender equality when it comes to land. In practice, therefore, determining legitimate tenure rights while also respecting principles of non-discrimination, can pose important dilemmas. The Guidelines acknowledge the challenge and state in paragraph 9.6 that “where constitutional or legal reforms strengthen the rights of women and place them in conflict with custom, all parties should cooperate to accommodate such changes in the customary tenure systems”. In paragraph 9.2 the Guidelines exhort indigenous peoples and other communities with customary tenure systems that exercise self-governance of land, fisheries and forests to promote and provide equitable, secure and sustainable rights to those resources, with special attention to the provision of equitable access for women.

Key recommendations 2.3

- ✓ Understand that land, fisheries and forests are more than just assets to be traded on the market; they are at the heart of individual and community identity, culture, history and spirituality, as well as the basis of food security and livelihoods.
- ✓ Be aware that the Guidelines generally recognize both statutory and customary, formal and informal tenure rights as legitimate, and encourage states to acknowledge, document and respect all legitimate tenure rights in national law, policy and practice.
- ✓ Bear in mind that the Guidelines recognize a range of tenure rights as legitimate – not only those formally recognized by national law, but also those considered to be socially legitimate in local societies.
- ✓ Remember that customary and indigenous rights, common property rights, use rights, tenancy rights, overlapping and shared rights, and women’s rights are legitimate tenure rights.

3

**Using the Guidelines
in lawmaking**

3. Using the Guidelines in lawmaking

This chapter discusses how to assess national law in light of the Guidelines, and how to draft or revise laws to promote responsible governance of tenure. It provides guidance both on the lawmaking process and the content of the legislation itself. The first section describes how to undertake a legal assessment of national legislation to determine how best to align national laws with the Guidelines and ensure harmonization within the overarching legal framework. The chapter then describes various strategies to ensure that national lawmaking processes are comprehensive and participatory. The final section concludes by providing illustrative examples of existing legislation that advances aspects of the Guidelines, including: recognition of customary tenure rights; tenure restitution and redistribution; transparency, consultation and FPIC; environmental and social impact assessments; and expropriation and compensation.

3.1 Assessing national law based on the Guidelines

3.1.1 Why undertake an assessment of national law?

A legal assessment is an analysis of national law using the Guidelines as a benchmark. Assessing a country's national legal framework in light of the Guidelines is an important step towards implementing the Guidelines. An assessment allows stakeholders to identify the strengths, weaknesses, gaps and challenges in existing legal frameworks (see Box 3.1). After completing an assessment, lawmakers may then draft or amend laws to ensure alignment with the Guidelines' principles.

Assessments of national law are a key component of the Guidelines' practical application. For example, a critical assessment of national law in light of the Guidelines can help:

- legal professionals working for or with states to identify necessary legal reforms or strategies to ensure more effective implementation of existing laws;
- public-interest legal service organizations to identify avenues for advocacy to strengthen tenure security and promote effective, transparent and equitable enforcement of existing legal protections for tenure rights;

- business lawyers to meet due diligence standards when representing clients in transactions with governments, legitimate tenure right holders and all relevant stakeholders.

BOX 3.1
**The Guidelines
on conducting
assessments**

5.1 “States should provide and maintain policy, legal and organizational frameworks that promote responsible governance of tenure of land, fisheries and forests. These frameworks are dependent on, and are supported by, broader reforms to the legal system, public service and judicial authorities.”

5.2 “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.”

5.3 “States should ensure that policy, legal and organizational frameworks for tenure governance recognize 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. Frameworks should reflect the social, cultural, economic and environmental significance of land, fisheries and forests. States should provide frameworks that are non-discriminatory and promote social equity and gender equality. Frameworks should reflect the interconnected relationships between land, fisheries and forests and their uses, and establish an integrated approach to their administration.”

In addition to promoting alignment between the Guidelines and the substantive provisions of national law, legislative assessments may lead to wider improvements in legal frameworks. For example, assessments may help to identify laws that are obsolete, ambiguous, complicated or inconsistent. Ambiguity in laws may allow actors to exploit opportunities for conflicts of interest or corruption, or lead to the marginalization of social groups. An assessment may also help to identify aspects of the legal framework that are not being properly implemented, provide an

opportunity for understanding impediments to implementation and pave the way to administrative as well as legislative reform. In facilitating the identification and remedy of such weaknesses, the assessments may help to improve governance of tenure overall.

Lawyers advising businesses should conduct more focused forms of a legal assessment as part of their due diligence process. According to the UN Guiding Principles on Business and Human Rights (see Box 2.2), business enterprises should carry out human rights due diligence, which should involve “assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed” (OHCHR, 2011; see also De Schutter et al., 2012). The Guidelines emphasize the important connections that exist between tenure rights and human rights (e.g. par. 3.2) and assessments pertaining to the Guidelines may expose areas of human rights concern as well as other relevant matters in the governance of tenure of land, fisheries and forests.

3.1.2 What laws should be assessed?

The range of laws relevant to the governance of tenure of land, fisheries and forests is very broad, going well beyond legislation that is aimed at the regulation of these resources. National law typically consists of diverse legal instruments. Most countries have adopted a written constitution and have passed “primary” and “secondary” legislation. A constitution establishes ground rules and fundamental rights with which all legislation (primary and secondary) must comply. The legislative branch

of government usually passes “primary” legislation (Statutes or Acts of Parliament) while government agencies in the executive branch often have the power to adopt “secondary” legislation, such as regulations necessary for the implementation of primary laws. Secondary legislation must comply not only with the constitution, but also with primary legislation. Government agencies may also develop circulars, manuals and other internal documents. These provide guidance to officials on how to interpret and apply primary and secondary legislation (FAO, 2013a). Depending on the jurisdiction, judicial decisions can also create law or establish authoritative interpretations of legislation.

The full set of legal instruments in this hierarchy should be considered during an assessment, and some types of legal instruments may provide a firmer legal basis for protection than others. While constitutional provisions protecting legitimate tenure rights are ideal, as they are more difficult to reverse than those from ordinary legislation, protections for tenure rights can be found in a wide range of legal instruments. For example, strong protections for women’s land rights may be found in national inheritance laws, or family laws. Protections provided by secondary legislation alone are easier to repeal, and as such they tend to be less secure than safeguards entrenched in the constitution or in primary laws. Actors undertaking legal assessments should consider all potentially relevant legislation.

BOX 3.2

The Guidelines’ general principles

3.1 States should:

- “1. Recognize and respect all legitimate tenure right holders and their rights. They should take reasonable measures to identify, record and respect legitimate tenure right holders and their rights, whether formally recorded or not; to refrain from infringement of tenure rights of others; and to meet the duties associated with tenure rights.
2. Safeguard legitimate tenure rights against threats and infringements. They should protect tenure right holders against the arbitrary loss of their tenure rights, including forced evictions that are inconsistent with their existing obligations under national and international law.
3. Promote and facilitate the enjoyment of legitimate tenure rights. They should take active measures to promote and facilitate the full realization of tenure rights or the making of transactions with the rights, such as ensuring that services are accessible to all.
4. Provide access to justice to deal with infringements of legitimate tenure rights. They should provide effective and accessible means to everyone, through judicial authorities or other approaches, to resolve disputes over tenure rights; and to provide affordable and prompt enforcement of outcomes. States should provide prompt, just compensation where tenure rights are taken for public purposes.
5. Prevent tenure disputes, violent conflicts and corruption. They should take active measures to prevent tenure disputes from arising and from escalating into violent conflicts. They should endeavour to prevent corruption in all forms, at all levels, and in all settings.”

3.1.3 How do we undertake an assessment?

The Guidelines provide a basis for conducting assessments of laws relating to the governance of tenure. These assessments provide the basis upon which states can operationalize core elements of the Guidelines. The methodology used may differ depending on who is carrying out the assessment (e.g. legal professionals working for or with states, public-interest legal service organizations or business lawyers). The focus here is on legal assessments led by legal professionals working for or with states. However, there are commonalities across various approaches and diverse settings, and legal assessments led by public-interest legal service organizations or business lawyers are also touched upon. Broadly speaking, there are two main ways

to assess whether national laws adhere to the Guidelines:

- **Assess the alignment of relevant national law with the Guidelines’ general principles (par. 3A) (see Box 3.2) and principles of implementation (par. 3B).** Although general, these principles have formed the object of much normative and assistance work by international development agencies promoting responsible governance. An assessment based on these normative principles may help to identify overarching challenges and gaps in national legal frameworks, as well as assets and opportunities that could be built upon. Specific indicators based on the different sections of the Guidelines can then be selected to provide further substance to the principles.
- **Assess alignment with each of the Guidelines’ specific provisions.** Assessing alignment with the Guidelines’ broad principles is an important step, yet to ensure a complete and rigorous assessment, actors should also assess national laws’ adherence to the substantive tenure-specific provisions of the Guidelines. One example of this approach is the work of an NGO coalition in the Philippines (see Box 3.3).

BOX 3.3
Tenure governance
assessment in the
Philippines

Source: Quizon and Pagsanghan, 2014.

In 2014, a coalition of NGOs in the Philippines assessed national laws on the governance of tenure in light of the Guidelines. The assessment covered the Constitution, the Indigenous People's Rights Act of 1997, the Fisheries Code of 1988 and the Comprehensive Agrarian Reform Program of 1988. It also reviewed laws governing natural resource use and management as well as laws relating to climate change adaptation and mitigation.

The assessment began by mapping out the ways in which each law complied with, ran contrary to or was silent concerning the Guidelines’ implementation principles. It then examined the philosophical and operational differences between each law and the Guidelines, and identified areas of convergence and divergence. An expert group meeting, three regional consultations and one national consultation reviewed the findings. Input from these forums was integrated into the final report. The assessment provides a comprehensive basis for approaching improvements in the law on tenure matters.

These two approaches can be complementary. For example, whenever the Guidelines provide limited detail, guidance can be derived from applying the general principles and the principles of implementation. In addition, both general and specific assessments are possible. A general assessment would examine adherence of the national legal system as a whole. It may help to identify priorities for further analysis and for reform. Specific assessments focus on identified parts of the legal framework; for example, in terms of sector (land, fisheries, forestry) or topics (such as land registration, women’s land rights, expropriation or land-based investments).

Specific assessments can help where stakeholders have already identified particularly pressing problems and are looking for possible ways forward. Compared to general assessments, which would need to cover a wide range of topics, specific assessments create opportunities for more fine-grained analysis and detailed recommendations. General assessments are also likely to be costly and time-consuming, so specific assessments are likely to prove more realistic in many contexts. Being clear on the specific purpose of the assessment can help to align methods and stakeholder engagement strategies.

To be effective, an assessment should be comprehensive and thorough, which may entail significant investments of time and resources. On the positive side, there is much experience that may be built upon, including pilot projects designed to test legal assessment methodologies such as the FAO Legal Assessment Tool (LAT) (formerly known as Legislation Assessment Tool) for gender-equitable land tenure and other legal assessment tools (see Box 3.4). The World Bank-led Land Governance Assessment Framework (LGAF), which includes a legal component (World Bank, n.d.) is another example of an assessment tool that may be used as a vehicle for assessing alignment with the Guidelines. FAO research suggests that the LGAF covers many of the key issues in the Guidelines and could thus be a useful tool for assessing land and forestry governance and, to some extent, alignment with the Guidelines (Tonchovska and Egiashvili, 2014). It should be noted, however, that LGAF follows its own processes and purposes and predates the Guidelines.

Sierra Leone was one of the first countries to commit itself to implementing the Guidelines and is part of a G7 Sierra Leone-Germany-FAO tripartite Land Partnership supporting the implementation of the Guidelines.

FAO and a team of international and national lawyers used the Guidelines to carry out a comprehensive assessment of the legal frameworks relating to land, fisheries and forestry in Sierra Leone. The assessment built on the Legal Assessment Tool (LAT) for gender-equitable land tenure, developed by FAO (Kenney and Dela O Campos, 2014), with further indicators on land, fisheries and forests developed by the team based on the principles of the Guidelines (par. 3A) and a number of substantive provisions selected on the basis of country context. Additional indicators for the fisheries assessment were drawn from the Voluntary Guidelines for Securing Small-Scale Fisheries in the Context of Food Security and Poverty Eradication (SSFSG).

The methodology of the assessment involved filling in matrices on whether and how each indicator was reflected in the legal and policy frameworks in the country, scoring the status of development (capturing draft policies and bills as well as adopted legislation and accompanying regulations) and formulating appropriate recommendations. Analytical assessment reports were then drafted and discussed by experts at validation workshops for each sectoral report. The Technical Working Group and the Steering Committee of the National Multistakeholder Platform for implementing the Guidelines in Sierra Leone were closely involved in the process and the final reports were submitted to the relevant ministries represented in the Inter-Ministerial Task Force for the Guidelines implementation, and presented to participants at the 2nd National Multistakeholder Platform Meeting held in Freetown on 28-29 September 2015.

The LAT for gender-equitable land tenure and Sierra Leone assessment reports are published by the FAO Legal Office (see FAO, 2016 and 2015 a, b, c and d).

BOX 3.4
Piloting a
comprehensive
legal and policy
assessment in
Sierra Leone

Sources: FAO, 2016 and 2015 a, b, c and d

When conducting assessments for a given country and sector, sector-specific legal instruments pertaining to or affecting tenure should be considered. For an assessment of the legal framework for fisheries, for example, the SSFG, discussed in Chapter 2, should be used alongside the Guidelines as they provide context-specific references that are only generally addressed in the Guidelines. A complete assessment of national laws concerning fisheries tenure should also consider relevant treaties ratified by the state concerning the management of fisheries resources.

In the context of law reform, it can be very useful to assess individual acts or bills against relevant sections of the Guidelines. This assessment has been done, for instance, in the Philippines regarding the National Land Use and Management Bill (Lopez and Demaisip, 2014) and in Sierra Leone where FAO provided comments in 2015 regarding the draft National Land Policy.

3.1.4 Who should take part in the assessment?

To ensure the effective use of any assessment, efforts should be made to develop a sense of national ownership over the resulting analysis. When public authorities undertake a legal assessment, they should have respected national professionals lead it and include members of all relevant stakeholder groups in the process. Depending on the context, those involved may include diverse government agencies, NGOs, rural producer organizations, associations of indigenous peoples and rural communities, business lawyers, academics, experts and concerned citizens. Public authorities should also make special efforts to ensure the participation of women, youth, elders, members of minority groups and marginalized communities. These groups may have important insights into how national laws may be strengthened to ensure that the legitimate tenure rights of all are protected.

Promoting public participation in state-led legal assessments will ensure that the assessment and all resulting changes to the national legal framework will more accurately and effectively recognize, respect and protect legitimate tenure rights. Establishing what tenure rights are considered legitimate in a given society is a precondition for assessing whether national law adheres to the Guidelines, and requires participatory engagement with organizations representing the interests of tenure right holders.

3.1.5 How to use the outcomes of an assessment?

Once a legal assessment is complete, depending on its focus, it may be used to support a range of activities and processes. Governments may use an assessment as a basis for legislative or regulatory drafting or to develop priorities for national development and sectoral planning. Law reform commissions may use an assessment to review existing legislation and develop proposals for modifying existing law. An assessment might also be used to devise practice guides or standards for lawyers working in tenure registries or other state administrative bodies.

Legal professionals working for or with the state, and business lawyers, might use the outcomes of a legislative assessment when negotiating investment deals (par. 12). They can use the assessment proactively to mitigate gaps in national laws and regulations, and, in so doing, to address potential risks. For example, states may negotiate with companies robust contractual provisions requiring rigorous impact assessments (par. 12.10) in places where effective environmental legislation is yet to be enacted or is still in the process of being adopted.

Public-interest legal service organizations may use the legal assessments as the basis for advocacy campaigns, calling for legal reform to bring national law into alignment with the Guidelines. They may also proactively shape their on-the-ground interventions in such a way as to pilot practices included in the Guidelines but missing from national law, creating an evidence base that can show national policy-makers the benefits of adherence to the Guidelines' principles.

Lawyers working with or for international development agencies may use the legal assessments to shape their financial and technical support programmes. For example, an

assessment may help donors establish funding priorities relevant to tenure governance in a given nation: after analysing a legislative assessment, donors may strategically fund efforts to align national policy with the Guidelines, or support grassroots efforts to pilot interventions that create an evidence base for policy changes that strengthen legitimate tenure rights.

Key recommendations 3.1

- ✓ The Guidelines provide an internationally-agreed benchmark for assessing national law.
- ✓ Legal assessments using the Guidelines can address broad principles or particular provisions. They can cover specific issues or laws, or the national legal system as a whole.
- ✓ These assessments are best conducted with broad-based participation of all relevant stakeholders.
- ✓ The assessments can provide a useful basis for law reform, identifying reform needs and possible ways forward.

3.2 Lawmaking: concepts, actors, instruments and processes

Once an assessment has been completed, policy-makers and relevant government agencies should take steps to amend existing legislation or draft new laws in alignment with the Guidelines (see Box 3.5 for examples of provisions in the Guidelines which are relevant to lawmaking). Such efforts should not only include primary legislation, but also implementing regulations, decrees, manuals and clear guidance on how to apply the new and amended laws (FAO, 2013a). This section addresses questions of how best to undertake lawmaking processes.

BOX 3.5 National lawmaking in the Guidelines: a few examples

3.2.1 Ensure quality lawmaking

The quality of the lawmaking process matters significantly, as the process of how a law or policy is drafted will impact the quality of the final legislation. Even a well-written law might undermine good governance of tenure if it was drafted without sufficient public participation. While it may take more time and resources up front, drafters who undertake extensive research and conduct citizen consultations on tenure issues in the country will create more effective legislation, better suited to various real-life contexts and tenure situations. Such well-researched laws will be more cost-effective and practical to implement over the long term.

5.1 “States should provide and maintain policy, legal and organizational frameworks that promote responsible governance of tenure of land, fisheries and forests.”

5.3 “States should ensure that policy, legal and organizational frameworks for tenure governance recognize 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. Frameworks should reflect the social, cultural, economic and environmental significance of land, fisheries and forests. States should provide frameworks that are non-discriminatory and promote social equity and gender equality.”

5.5 “States should develop relevant policies, laws and procedures through participatory processes involving all affected parties, ensuring that both men and women are included from the outset. Policies, laws and procedures should take into account the capacity to implement.” (Emphasis added).

Poorly drafted or researched laws may negatively affect the governance of tenure in important ways. Laws that are unclear, ambiguous or inconsistent with other legal provisions can make it more difficult for tenure holders to exercise and protect their tenure rights. Poor legal drafting may also create excessive room for administrative discretion that provides opportunities for corruption and makes even formally recognized tenure rights vulnerable. For example, where concepts such as “public purpose” or “national interest” are defined too broadly or unclearly in national expropriation laws, public authorities may compulsorily acquire land in ways that unjustly undermine citizens’ tenure rights (FAO, 2009a).

In other cases, clearly written legislation may be at odds with administrative agencies’ capacity to implement its provisions. If a ministry of a government department does not have the technical, financial or human resources to properly implement tenure laws and regulations, then the law may go unimplemented, or be implemented improperly, creating opportunities for corruption and rent-seeking. Well-drafted, but poorly implemented, laws may undermine faith in the national legal system and respect for the rule of law.

To address these challenges, the Guidelines call for states to develop laws that are clearly written and take into account the capacity of national agencies to implement them (par. 5.5). To promote consistency in drafting processes and approaches, handbooks on legislative drafting might be developed to provide guidance to officials working to draft laws or regulations. Field piloting of draft laws and regulations (as was done in Samoa and Burkina Faso; see Box 3.6) can help to tailor interventions to local contexts and to test approaches before formally enshrining them in the statute books (FAO, 2013a). It is also important to create feedback loops between law reform and implementation: once legislation is passed, monitoring implementation and impacts can provide important insights for future legislative processes.

BOX 3.6
Legislative drafting
handbooks and field
piloting of laws in
Burkina Faso and
Samoa

Source: Office of the
 Attorney General –
 Samoa, 2008.

Source: FAO, 2005;
 Comité Technique
 “Foncier et
 développement”,
 2010 and 2014a.

In Samoa, the Legislative drafting handbook of 2008 identifies key roles for all relevant stakeholders in legislative processes. It also sets out the practical steps that should be undertaken before law reforms are carried out, including the drafting of laws and regulations.

The handbook states that the “drafting of every major law should involve broad consultation with all relevant government and community stakeholders.” A draft law should be accompanied by a consultation report setting out who was consulted and how the matters raised during consultations have been reflected in the relevant draft.

Stakeholder engagement is not the only ingredient of a good lawmaking process. To ensure any proposed law fits within the existing legal framework in Samoa, the drafting handbook requires a review of relevant Samoan legislation. Such review also aims to facilitate the harmonization of laws in Samoa.

In Burkina Faso, the Plan Foncier Rural (Rural Land Tenure Plan, PFR) was a pilot project implemented in a province characterized by conflicts between local customary right holders and ‘migrants’. The project gathered comprehensive land tenure information, developed local maps with the participation of tenure holders and explored options for issuing titles.

The lessons learned through the PFR pilot fed into Burkina Faso’s new rural land tenure security policy and Law No. 034 of 2009 on rural land tenure. This law recognizes customary land rights and provides for the issuance of rural land tenure certificates.

3.2.2 Considering the legal system as a whole

Legal instruments usually form part of a complex network of legislative and regulatory instruments, sometimes referred to as the national legal framework. International treaties may also establish obligations that have a bearing on law reform. In preparing new legislation, legal drafters should consider existing national laws that may need to be amended or repealed, along with ratified international agreements that must be complied with.

Indeed, given the linkages among different legal instruments within a country's legal framework, understanding the implications of one legal instrument may require analysis of a much wider range of laws (see Box 3.7). Also, amending one tenure law may necessitate corresponding amendments to a number of other, related national laws. These laws may include contract law, environmental laws, water laws, inheritance laws or local government laws, for example.

Given this situation, the Guidelines are clear that tenure reform exercises cannot occur in isolation from the rest of the national legal system. When preparing a new law, authorities should consider how new or amended legislation would interface with both other relevant national laws as well as the country's international obligations. While the Guidelines call for states to "provide and maintain policy, legal and organizational frameworks that promote responsible governance of tenure of land, fisheries and forests", they make clear that such reforms "are dependent on, and are supported by, broader reforms to the legal system" (par. 5.1) and should be "consistent with their existing obligations under national and international law, and with due regard to voluntary commitments under applicable regional and international instruments" (par. 5.2).

Because of the complexity of a country's legal framework and the intrinsic context-specific nature of tenure issues, the importation of another country's tenure laws without extensive adaptation to the national legal framework – and local context – is inadvisable (Bruce et al., 2006; Byamugisha, 2013).

Furthermore, a proper lawmaking process will not only amend relevant related laws, but also repeal obsolete laws and specific provisions within otherwise good laws.

When developing aquaculture legislation in Suriname, policy-makers found it necessary to analyse fisheries legislation (regarding capture of wild species for grow-out purposes in aquaculture facilities) as well as land, water and environmental legislation. In addition, given the risk of animal diseases associated with aquaculture activities, legislation related to animal health, use of pharmaceuticals and feed production was also reviewed. Legislation regulating food safety needed assessment, relative to its impact on aquaculture. Trade-related legal instruments relative to the import and export of living aquatic animals – as well as to animal products – also formed part of the analysis.

Policy-makers' analysis of these various laws led to the identification of a number of aquaculture-related issues that were insufficiently addressed in existing legal instruments. Some of these gaps were addressed directly within the text of Suriname's draft aquaculture law. But additional recommendations for amendments to other legal instruments were compiled, and, at ministerial level, an agreement was reached between relevant authorities and a plan was made to ensure that remaining harmonization takes place.

BOX 3.7 Suriname's aquaculture law

Source: Draft Aquaculture Law of Suriname, forthcoming; Peter Deupmann, FAO Legal Office, personal communication.

Failure to repeal obsolete laws may give rise to legal uncertainty and conflicts of law, which may undermine the drafters' intent and allow opportunities for corruption, rent-seeking, inconsistent application and bureaucratic obstacles.

It is good practice for a new law to identify the laws or provisions that must be repealed to ensure a consistent, well-harmonized legal framework for the governance of tenure. To simply state that a law repeals "all prior legislation inconsistent with the new law" can be problematic because such blanket statements require implementers to have the technical expertise to identify inconsistent pre-existing laws during some unspecified future process (Bruce et al., 2006). Ideally, the legal assessment undertaken before the legal drafting process will have already identified all necessary repeals and modifications and can feed directly into the "Repeals" sections of any new or amended tenure laws.

Finally, any legal drafting process must consider a country's international obligations, such as those under treaties the country has ratified, and ensure that the new law is aligned with these obligations (FAO, 2007). Failure to consider existing international obligations when preparing new tenure legislation risks putting the state in breach of these obligations. A breach may expose a state to legal action before international courts, such as the International Court of Justice (ICJ) or the International Tribunal for the Law of the Sea (ITLOS).

Furthermore, breach of certain treaties might expose states to significant liabilities. For example, many international investment treaties allow companies to bring claims against governments for alleged breaches (Cotula, 2014a and 2015), so redistributive reform that expropriates tenure rights held by foreign investors covered by an investment treaty would need to consider the standards of treatment established by the treaty (Peterson and Garland, 2010; Cotula, 2015). Where newly proposed national law standards are inconsistent with existing international treaties, states can seek to renegotiate the terms of the treaty or attempt to terminate it, although this is often more difficult for states to do than changing national law.

Effective coordination of various simultaneous legislative drafting processes is also important. When various ministries draft laws related to tenure governance without coordination and careful efforts to ensure harmonization, the resulting laws may include inconsistencies and ambiguities. To avoid these problems, lawmaking processes should establish mechanisms for effective interministerial and donor coordination as well as timely cross-agency lesson-sharing opportunities.

3.2.3 Promoting participatory lawmaking processes

Public participation in lawmaking is essential. Beyond the technical aspects of legislative drafting, lawmaking on the governance of tenure is a highly political endeavour influenced by vested interests and characterized by power imbalances based on gender, generation, status, income, wealth and socio-economic interests. To ensure that tenure governance laws protect all legitimate tenure rights, lawmakers should create opportunities for citizens from a broad spectrum of society to have their voice heard throughout lawmaking processes.

Public participation will also improve the quality of law, as the involvement of diverse stakeholders can help to ensure that legislation is tailored to local contexts. Public participation can also increase the legitimacy of a new law: if a citizenry has been consulted and their interests and needs appropriately factored into the final text of the law, the resulting sense of ownership by broad sectors of society may make it easier for governments to implement and enforce the law's mandates effectively. Conversely, if citizens feel that the law does not adequately reflect their needs, they are more likely to ignore the law or to operate in black or grey markets, ultimately frustrating the achievements of the objectives pursued by the law.

The Guidelines call on states to “develop relevant policies, laws and procedures through participatory processes involving all affected parties, ensuring that both men and women are included from the outset” (par. 5.5). The Guidelines also encourage both state and non-state actors “to provide technical and legal assistance to affected communities to participate in the development of tenure policies, laws and projects” (par. 9.10).

There is growing experience with promoting public participation in lawmaking processes. Lessons learned from good practice (see Box 3.8) highlight a few important considerations. To ensure effective, meaningful stakeholder participation in lawmaking processes:

- Consultations with national stakeholders and diverse groups of citizens should be held at the beginning of a lawmaking process and then continue throughout, all the way to legislative debate on the parliamentary floor. Early consultations can help to gather data about what kinds of reforms are necessary and allow for proactive, rather than reactive, contributions that can help to strengthen the resulting legislation.
- Use of clear and accessible language in legislative drafting is critical; if stakeholders cannot understand a draft law because of the overly technical, legalistic way it has been written, they will not be able to comment appropriately.
- Drafts and related documents should be released in a timely manner and in forms that facilitate meaningful consultation. Multiple communication channels – such as national newspapers, radio, the internet and television – should be used.
- Sufficient time should be given for the stakeholders to examine the proposals and submit comments; if few comments are received, deadlines should be extended.
- Consultations should be held at the local level; consultations held only in the capital city are less likely to include the voices of the most poor and marginalized rural stakeholders.
- States should not impose overly stringent requirements for public participation in lawmaking efforts. Formal requirements will likely create obstacles to the broadest possible participation and impede the inclusion of the most vulnerable groups, whose resource constraints should be considered when framing any formality requirements.
- Capacity-development efforts may be necessary to ensure that the national citizenry is equipped to understand the proposed legislation – such as the potential positive and negative ramifications of each section or article – and to comment, accordingly.
- If only local and regional leaders of various stakeholder groups are convened, mechanisms should be established to ensure that these leaders represent the interests of their stakeholder group and are accountable to their constituents.

BOX 3.8

**Public participation in
lawmaking in Indonesia,
Mali, Mozambique and
the United Republic of
Tanzania**

Source: FAO, 2009c; Djiré, Keita and Diawara, 2012; GRET/ RéDév, 2005.

Source: Negrao, 1999; FAO, 2010.

Source: FAO, 2010.

Source: EU, 2011; EU FLEGT Web site, 2014; FERN, 2014; Bollen and Ozinga, 2013.

In Mali, the adoption in 2006 of the Agricultural Policy Act (Loi d'Orientation Agricole) was accompanied by extensive participation by national federations of rural producer organizations. The policy covers wide-ranging issues including important tenure issues. The Coordination Nationale des Organisations Paysannes (CNOP) led a process to consult farmers at both local and national levels and fed input into the legislative process. The process ended with a three-day national workshop to enable diverse stakeholders to discuss proposals, including those originating from CNOP's consultation. The final version of the law reflects several of the concerns raised by rural producers during the consultation.

In preparation for Mozambique's 1997 Land Law (Lei de Terras), the national Law Commission organized a National Land Conference to which it invited people from across Mozambican society, including deputies from all political parties, religious groups, the private sector, academic institutions, traditional authorities and a range of Mozambican NGOs, as well as UN and other international donor agencies. For three days, over 200 representatives debated the central tenets of the new land law and worked to shape its parameters. The Commission incorporated these changes into a final land law bill, which then went to the National Assembly. A substantial effort was made to involve the public in the debate over the bill: a full copy of the land law bill was printed in the national daily newspaper, and the text of the bill was read on national radio. Full copies of the bill were made publicly available at the Assembly and, during breaks in legislative debate, members of civil society mingled with representatives to discuss the various points of the law. When the bill finally passed into law, it maintained many of the tenets lobbied for by civil society.

In the United Republic of Tanzania, the Government established a "Commission of Inquiry into Land Matters" (The Shivji Commission) in 1991. The Commission's mandate was to travel throughout the United Republic of Tanzania, to meet with a diverse array of citizens, and record their expressed land-related needs, interests, concerns and grievances. The Commission visited all twenty regions of the United Republic of Tanzania, holding 277 public meetings at which an estimated 83 000 people were present. In total, the Commission collected 4 000 pages of evidence and public comment, and collected case studies of all major land disputes throughout the nation. Domestic and international experts were commissioned to undertake studies, and a national workshop was held, during which stakeholders were invited to voice their needs, concerns and interests.

In 2013, Indonesia and the European Union (EU) signed a Voluntary Partnership Agreement (VPA) – a type of bilateral treaty whose objectives are to improve forest sector governance and ensure that timber exported to the EU is produced in compliance with the EU law. The negotiations of the VPA with Indonesia were accompanied by multistakeholder consultations including representatives from NGOs and forest and timber industry associations in Indonesia. The public was informed about the treaty process via a series of programmes on national radio and the Government of Indonesia organized public consultations to solicit comments. After the treaty was enacted, new multistakeholder consultations were held in February and March 2014 to discuss revised draft regulations concerning mechanisms to determine the legality of timber products. The new draft regulations were also made accessible to the public for comment before enactment in June and July 2014.

The ministry or agency driving the law-drafting process often has primary responsibility for identifying and facilitating the involvement of relevant stakeholders at the local, regional and national levels. Public-interest legal service organizations can play an important role in facilitating grassroots participation in consultative processes, including: disseminating information within communities living in remote areas; involving groups that are often more difficult to reach,

including women, youth, and traditionally marginalized people; improving awareness about the rights and procedures outlined in the new law (to ensure that stakeholders are well-informed); convening discussion groups to ensure that stakeholders are prepared to speak about their interests at public consultations; and ensuring that stakeholders' logistical needs are met (for example, guaranteeing that they have transportation to arrive at a local consultation on time).

Failure to carry out consultations could have serious consequences resulting, for instance, in a law being struck down by a constitutional court (Constitutional Court of Colombia. Decision C-030/08, 23 January 2008). Once consultations have taken place, a report should be provided to lawmakers and made publically available. The report should record the consultation outcomes and how the consultations have affected the draft law; that is, what provisions have been inserted or altered further to the consultations (Office of the Attorney General – Samoa, 2008).

Key recommendations 3.2

- ✓ The quality of the lawmaking process matters significantly, as the manner in which a law is designed can impact the quality of the final legislation.
- ✓ Field piloting of draft laws and regulations can help to test administrative procedures before formally enshrining them in law, allowing time for adjustments to local contexts and resource and capacity constraints.
- ✓ In preparing new legislation, drafters should ensure overall consistency of the legal framework, considering laws that may need to be amended or repealed, and compliance with international treaties.
- ✓ To ensure that tenure governance laws protect the interests of all legitimate tenure right holders, lawmakers should create opportunities for citizens from a broad spectrum of society to have their voices heard throughout lawmaking processes.
- ✓ Public-interest legal service organizations can play an important role by encouraging government authorities to convene consultations and by facilitating meaningful, broad-based participation.

3.3 Reflecting the Guidelines into law

Since the CFS endorsement of the Guidelines in 2012, several countries have begun to review their legislation in light of the Guidelines (FAO, 2014b), while others are in the process of drafting legislation that is in alignment with the Guidelines. As those laws are drafted and reviewed, it is useful to turn to various countries' existing tenure laws for positive examples of how to translate the Guidelines into law.

This section will explore seven specific areas of law, prioritizing topics that have formed the object of particularly lively policy debates in recent years including:

- recognition of customary tenure rights;
- tenure restitution and redistribution;
- transparency;
- consultation and FPIC;
- environmental and social impact assessments; and
- expropriation and compensation.

3.3.1 Recognition of legitimate tenure rights, including customary rights

BOX 3.9
Recognition of all legitimate tenure rights – examples of Guidelines’ provisions

3A.1.1 “States should [r]ecognize and respect all legitimate tenure right holders and their rights. They should take reasonable measures to identify, record and respect legitimate tenure right holders and their rights, whether formally recorded or not; to refrain from infringement of tenure rights of others; and to meet the duties associated with tenure rights.”

3.2 “Non-state actors including business enterprises have a responsibility to respect human rights and legitimate tenure rights. 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.”

4.4 “Based on an examination of tenure rights in line with national law, States should provide legal recognition for legitimate tenure rights not currently protected by law.”

4.5 “States should protect legitimate tenure rights, and ensure that people are not arbitrarily evicted and that their legitimate tenure rights are not otherwise extinguished or infringed.”

As discussed in Chapter 2, the Guidelines call for the legal recognition of all legitimate tenure rights. Examples of relevant Guidelines’ provisions are provided in Box 3.9. The governance of tenure of land, fisheries and forests is often influenced by local, customary or indigenous tenure systems. While tenure rights based on customary systems are often considered to be legitimate at local and national levels, their degree of legal recognition varies depending on the jurisdiction.

The Guidelines call for states to “ensure that policy, legal and organizational frameworks for tenure governance recognize 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” (par. 5.3). As such, implementing the Guidelines requires ensuring that national law recognizes, respects and protects legitimate customary tenure rights.

In order to recognize, respect and protect customary tenure rights, national legislation should:

1. **Recognize and protect the full range of tenure rights.** National law should define customary tenure rights in ways that allow for evolution, flexibility and adaptability over time, according to local needs. A law should allow for the full range of local customary tenure paradigms to be expressed and practised (i.e. not only that of the dominant tribal, ethnic or religious group), while also setting out restrictions that impose basic human rights standards on customary practices; protect against intracommunity discrimination; and ensure alignment with the national constitution (par. 5.3, 8.2, 9.5, 9.6).
2. **Make all legitimate land rights equal in weight and stature to “formal”, certified tenure rights.** A law should recognize that customary and indigenous tenure rights are equal in validity and weight to any rights that have been granted by state agencies, whether or not they have been registered (FAO, 2010).
3. **Establish administrative processes that are simple, clear, streamlined, local, and easy for rural communities to use to claim and defend their tenure rights.** To ensure usability, laws should create governance structures and processes that are: low cost both to the state and for users, highly accessible and leverage local individuals’ intimate knowledge of local conditions (par. 6.6, 10.4, 11.3).
4. **Explicitly protect women’s tenure rights and establish women’s right to hold tenure rights.** A law that seeks to integrate customary and statutory tenure systems should clarify that women (married, unmarried, divorced, widowed) may hold and own tenure rights. Lawmakers should also reform other relevant laws to ensure consistency across legislation; and women’s independent tenure rights should be enshrined in inheritance and family laws and ideally in national constitutions. Laws should require that the name of all spouses and dependents be put on any formal registration of family property. Laws can also place an affirmative duty on local administrators overseeing a tenure transaction to ensure that the transaction does not undermine women’s tenure rights. To ensure women have a role in community-wide decision-making concerning tenure rights, laws can also require that women hold a certain percentage of the positions on local resource governance bodies (par. 3B.4, 4.6, 5.4, 7.1, 7.4; and FAO, 2006b)
5. **Where tenure is shared or held in common, vest ultimate tenure rights in all community members as a coherent group.** This may involve issuing registration certificates, titles or deeds in the name of the community (rather than the names of individual community members), and creating an enforceable fiduciary duty between tenure management bodies and community members (par. 9.2, 9.4, 9.7, 9.8; see also the forthcoming FAO technical guide on the commons).
6. **Explicitly protect communal areas, customary rights of way and other shared use and access rights** (par. 8.3). As competition for scarce land and natural resources intensifies, it is important that the range of tenure rights protected by law include communal rights and customary rights of access and rights of way – especially to shared water points like springs and rivers, community forests, grazing lands and other natural resources that are rapidly increasing in value.

Law reforms adopted in a number of countries provide examples of efforts to reform legislation in these directions (see Box 3.10). For example, land legislation in Mozambique, Uganda and the United Republic of Tanzania recognizes customary rights and grants them legal status irrespective of whether or not they have been formally registered.

The Guidelines indicate that protections for customary and indigenous tenure rights must be balanced with provisions for gender equality (par. 3B.4, 5.3, 5.5 and 10.1) and respect for human rights (par. 2.2, 3.2, 3B.4, 4.1 and 4.8). For example, in the Philippines, the Indigenous Peoples Rights Act of 1997 protects the rights of indigenous peoples but only “within the framework” of that country’s Constitution. The Act requires the state to guarantee that indigenous peoples will “equally enjoy the full measure of human rights and freedoms without distinction or discrimination” (Section 2), but requires non-discrimination on grounds of gender in accordance with international human rights instruments and the Constitution (Section 21).

BOX 3.10
Examples of legal
recognition of
customary land rights

Source: Ortega, 2004.

- Bolivia (Plurinational State of), Brazil, Colombia, Costa Rica, Panama, Paraguay and Peru all have high-level legal instruments (constitutions or international agreements) recognizing indigenous land rights, as well as some national legal and regulatory frameworks operationalizing the high-level instruments.
- In Papua New Guinea, the Land Group Incorporation Act of 1974 lets customary groups incorporate as a formal legal entity with the right to hold, manage and deal with land transactions with outsiders. The Act spells out the conditions of incorporation, the mechanisms for dispute settlement through village courts, and any restrictions on the sale of land to outsiders.
- Cambodia’s Land Law of 2001 has a chapter on indigenous peoples’ collective land titling. Regulations set out procedures for communities to gain collective title.
- Kenya’s Constitution mandates that “community land shall vest in and be held by communities identified on the basis of ethnicity, culture or similar community of interest” and defines community lands as including: “land lawfully registered in the name of group representatives under the provisions of any law; land lawfully transferred to a specific community by any process of law; any other land declared to be community land by an Act of Parliament; and land that is lawfully held, managed or used by specific communities as community forests, grazing areas or shrines; ancestral lands and lands traditionally occupied by hunter-gatherer communities; or lawfully held as trust land by the county governments, but not including any public land held in trust by the county government” (Article 63).
- Under Mozambique’s Land Law of 1997, land rights can be attained: 1) through “occupancy by individual persons and by local communities, in accordance with customary norms and practices which do not contravene the Constitution” (Article 12(a)); or 2) by “occupancy by individual national persons who have been using the land in good faith for at least ten years” (Article 12(b)). Proof of occupancy can be established by the good faith verbal testimony of neighbours (Article 21). Under Mozambique’s land law, “local communities shall participate in: the management of natural resources; the resolution of conflicts; the process of titling...and the identification and definition of boundaries of the land that the communities occupy.” To exercise these competencies, the Land Law states that “local communities shall use, among others, customary norms and practices” (Article 24).
- Under the United Republic of Tanzania’s Land Act of 1999, “Customary Rights of Occupancy ... stem from customary law and pre-existing land holdings; may or may not be backed by a certificate or written document; [and] carry the same weight and validity as Granted Rights of Occupancy” (Section 4(3)).

According to Guidelines paragraph 5.3, national laws should not only recognize, but also protect, legitimate tenure rights. Effective protection would require, among other things:

- clearly defining and publicizing all categories of legitimate tenure rights (par. 8.2);
- formally recognizing all legitimate tenure rights and providing legal documentation of those rights (par. 8.2, 9.4, 10.1);
- ensuring that state administrative systems are equipped to process applications for the formalization of all legitimate tenure rights;
- keeping records of all legitimate tenure rights together in one recording system, or in several systems linked by a common framework (par. 8.4);
- ensuring the availability and accessibilities of bodies providing remedies to ensure that tenure rights are respected (par. 4.9 and 21.1);
- providing access to justice to holders of all legitimate tenure rights who believe that their tenure rights are not being recognized (par. 3.1.4, 7.3);
- protecting legitimate tenure rights against forced evictions and unlawful dispossession (par. 3.1.2, 4.5, 9.5);
- ensuring that business enterprises respect all legitimate tenure rights, and that large-scale transactions of tenure rights do not compromise legitimate tenure rights (par. 3.2, 12.10);
- recognizing the legitimate tenure rights of refugees and displaced persons; and
- granting tenure right holders the right to fair prior compensation if tenure rights are forcibly taken (par.16.1).

3.3.2 Tenure rights system reform: redistribution and restitution

The Guidelines also provide guidance on lawmaking related to redistributive tenure reform and the restitution of tenure rights that were dispossessed in the past. For example, the Guidelines provide that, where states choose to implement redistributive reforms, they should define the objectives of the reform programme and its intended beneficiaries and “develop policies and laws, through participatory processes, to make them sustainable” (par. 15.5). Redistribution programmes should “ensure that policies and laws assist beneficiaries, whether communities, families or individuals, to earn an adequate standard of living from the land, fisheries and forests they acquire”. They should also “ensure equal treatment of men and women in redistributive reforms” and “revise policies that might inhibit the achievement and sustainability of the intended effects of the redistributive reforms” (par.15.6).

Land redistribution should “follow the rule of law”, and those who lose tenure rights to redistributive reform “should receive equivalent payments without undue delay”

(par. 15.4). The Guidelines also call for transparent and accountable reform processes, and for “due process and just compensation according to national law” (par.15.9; see also par.16.1 and 16.3).

In relation to the restitution of tenure rights, the Guidelines provide that national legislation should establish clear, transparent processes and that restitution can be delivered in two possible forms: whenever possible, the original parcels or holdings should be returned to those who suffered the loss; where this is not possible, states should “provide prompt and just compensation” (par. 14.2). Compensation may be monetary or “in kind” through the allocation of alternative parcels or holdings and should ensure “equitable treatment of all affected people” (par. 14.4). In addition, the provisions of the Guidelines concerning redistribution and restitution emphasize the need for states to act consistently with their obligations under applicable national and international law (par. 14.1 and 15.4).

Over the years, many countries have enacted legislation aimed at redistributing or restituting tenure rights, particularly with regard to land. From the 1930s to the 1970s, land reform efforts like Mexico’s ejido programme transformed parts of the Latin American countryside, though implementation often fell short of expectations. More recently, Latin American countries such as Colombia have enacted legislation on land restitution, and former Soviet Republics such as Azerbaijan have legislated to privatize former state and collective farms, and allocate land to farmers. In South Africa, constitutional provisions and implementing legislation were adopted to return land to black farmers who were dispossessed during apartheid, and to redistribute land to poorer groups. Reform programmes are not limited to land, however. In New Zealand, for example, the formal restitution of fishing rights aimed to redress the government’s abrogation of an 1840 treaty that reserved fishing rights to the Māori over local fisheries (see Box 3.11).

BOX 3.11

Tenure reforms in Azerbaijan, Colombia, New Zealand and South Africa

Source: Summers, 2012; Velásquez-Ruiz, 2015; and Tribunal Superior (Distrito Judicial de Antioquia), Judgment No. 007, 23 September 2014.

Source: Ntsebeza and Hall, 2007.

In Colombia, the Victims and Land Restitution Law of 2011 provides the legal basis for land restitution, as part of the national process to facilitate the return of the many displaced during the armed conflict and to consolidate peace through transitional justice. Based on this legislation, a 2014 judgment of a high court in Medellín ordered the restitution of land to the Embera Katio, an indigenous community displaced by the armed conflict.

In South Africa, the country’s post-apartheid land reform programme has relied on three “pillars”: land restitution, land redistribution and security of tenure reform. The restitution programme seeks to address the historical injustices suffered by people dispossessed of their lands during the apartheid era. South Africa’s Restitution of Land Rights Act of 1994 established a Commission on Restitution of Land Rights to investigate the merits of restitution claims, and a court to rule on those claims. Overall, progress has been affected by the complexity of the procedures and by available funds. A deadline for the submission of restitution claims has been extended until 2019 to allow dealing with outstanding claims.

In Azerbaijan, an agrarian reform resulting in the dissolution of former state and collective farms was initiated pursuant to the 1996 Land Reform Law and to presidential decrees issued to accelerate the process. Households who had received land in the programme reported that the process was fairly conducted and has resulted to date in a substantial increase in agricultural productivity.

Source: Dudwick, Fock and Sedik, 2007.

In New Zealand, the Treaty of Waitangi signed between Māori representatives and the Crown in 1840 entitled the Māori to retain “full exclusive and undisturbed possession of their ... fisheries and other possessions”; yet, over time, these rights have been encroached upon. To remedy this violation, the 1992 Treaty of Waitangi (Fisheries Claims) Settlement Act provides for the final settlement of Māori claims in respect of commercial fishing arising out of rights based on common law (including customary law and aboriginal title), the Treaty of Waitangi and other statutes. The Act provides for the payment of 150 million New Zealand Dollars to the Treaty of Waitangi Fisheries Commission in compensation for loss of opportunities for engaging in certain small-scale commercial fishing activities, to be used for the development and involvement of Māori in the New Zealand fishing industry.

Source: Government of New Zealand, 2008.

3.3.3 Transparency

Transparency features prominently in the Guidelines as an essential principle of implementation (par. 3B.8). Transparency applies to multiple issues, including transparency of policies, laws and procedures as well as all transactions in tenure rights (par. 3B.8, 5.5, 12.3, 12.5). The enactment of legislation mandating transparent administration and transactions of tenure rights can support efforts to reduce rent-seeking, corruption and mismanagement.

Such legislation may be useful for business lawyers who, seeking to reduce their clients’ risk, can expect transparent transactions and negotiations with government actors. Transparency laws may also be essential for public-interest legal service organizations working to protect community or individual land rights. Examples of transparency legislation can be found in Box 3.12.

Some countries have enacted legislation that increases transparency in specific aspects of the governance of tenure. For example, in Liberia, the Liberia Extractive Industries Transparency Initiative (LEITI) Act of 2009 requires public disclosure of investors-state contracts not only in the mining and petroleum sectors, but also in agribusiness and forestry (Articles 5.3-5.4). Liberia’s 2010 Fisheries Regulations also introduce measures that render administrative decision-making more transparent. The regulations provide that in rejecting license applications, the authority must provide details of the reasons for returning the application and allow the applicant to submit a revised application (Section 20(3)).

In France, anyone is entitled to consult land registry maps, according to Article 2 of Law No. 78-753 of 1978, as amended in 2009. This provision deals with freedom of access to administrative documents and requires administrative bodies to provide such documents to any person who requests them, subject to exceptions (e.g. when national security is involved). Further, Law No. 2012-1460 of 27 December 2012 provides that all draft public decisions (e.g. decrees) that affect the environment must be published online.

BOX 3.12 Transparency legislation in Cameroon, France and Liberia

Source: Ministère de l’écologie, du développement durable et de l’énergie, n.d.

Source: Bollen and Ozinga, 2013 and VPA between the EU and Cameroon (see EU FLEGT Web site, 2014).

Cameroon, the Central African Republic, Ghana, Indonesia, Liberia and the Republic of the Congo have all signed Voluntary Partnership Agreements (VPAs) with the European Union (EU). These VPAs govern the export of timber to the EU. They include provisions for a “legality assurance system” that works to identify, monitor and license legally produced timber and to ensure that only legal timber is exported. VPAs often include the verification of forest operations, as well as the control of timber transport and processing as it passes from one owner to the next, from harvesting through to the point of export. By introducing transparency and controls over the forest sector, VPAs are meant to reduce illegal logging. VPAs also contain provisions for access to information by the public, including the annual report from the body set up by the parties to implement the VPA, the texts of all laws and amendments applicable to the forestry sector, and details about forestry concessions (e.g. Article 21 and Annex VII of the VPA between the EU and Cameroon).

3.3.4 Consultation and free, prior and informed consent (FPIC)

The Guidelines contain multiple provisions calling for consultation with legitimate tenure right holders and, where indigenous peoples are involved, their FPIC in instances of public allocation of tenure rights and transactions with investors.

The Guidelines define consultation as follows: “Engaging with and seeking the support of those who, having legitimate tenure rights, could be affected by decisions, prior to decisions being taken, and responding to their contributions; taking into consideration existing power imbalances between different parties and ensuring active, free, effective, meaningful and informed participation of individuals and groups in associated decision-making processes” (par. 3B.6).

Where indigenous peoples are involved, the Guidelines provide that “States and other parties 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 under the United Nations Declaration of Rights of Indigenous Peoples and with due regard for particular positions and understandings of individual States” (par. 9.9).

In relation to proposed investments, for example, the Guidelines call for states to ensure that investments are consistent with the principles of consultation and participation (par.12.5, 12.9). Where proposed investments affect indigenous peoples, consultations should aim to obtain their FPIC (par. 9.9, 12.7). To give effect to this guidance lawmakers should include provisions in tenure laws that require that affected populations (including, for example, women, youths and those holding hunting and fishing rights) be consulted before the state allocates land, fisheries or forest tenure rights to investment ventures, infrastructure projects or conservation efforts.

The concept of FPIC has a continuous, rather than one-off, character, and indigenous peoples can have the right to say no to a project. Conducting FPIC-type processes can constitute a best practice that can usefully be followed by all community consultations. The process can involve negotiation between communities and outsiders resulting in mutual agreements. (See FAO, 2013e).

Experience shows that in contexts characterized by vested interests and power asymmetries, implementation of consultation or FPIC requirements may fall short of expectations. Legislation can help to address these issues, for example through mechanisms to ensure that consultations:

- are participatory, including a significant majority (e.g. at least 70 percent) of a community's residents;
- occur in the local language and allow all community members to ask as many questions as they would like;
- include a full presentation about the planned investment or project, the anticipated financial profits and the benefits to be paid or provided to the community in exchange for use of local lands, fisheries and forests;
- allow communities an authentic opportunity to reject the proposed project;
- are duly documented, the consultation outcomes recorded and result in a binding agreement between indigenous peoples or local communities, the investor and, if appropriate, the relevant government (FAO, 2013e).

To ensure that community consultations are properly conducted and that authentic FPIC is attained, lawmakers can also include legal provisions in relevant legislation that:

- require that investors or government agencies seeking lands, fisheries and forests establish an independent grievance mechanism where stakeholders can raise concerns that emerge throughout the project's lifetime;
- create conflict-resolution procedures that provide access to an independent mediator and appropriate remedies, including return of tenure rights and payment of compensation (FAO, 2013e); and
- render void any investment plan or community-investor contract that was signed in bad faith and without proper consultation as required by law.

Examples of legislation dealing with consultation and/or FPIC in Ecuador, Mozambique and the Philippines can be found in Box 3.13 below.

The Constitution of the Republic of the Philippines and the Indigenous Peoples Rights Act of 1997 recognize indigenous peoples' right to self-determination (Section 13 of the Act), and protect their rights to "ancestral domains" and to their lands and natural resources (Section 7 of the Act). The Indigenous Peoples' Rights Act recognizes the right of indigenous peoples to FPIC for all proposed development projects (sections 71 and 59). The Act defines FPIC as "the consensus of all members of the [Indigenous People] to be determined in accordance with their respective customary laws and practices, free from any external manipulation, interference and coercion, and obtained after fully disclosing the intent and scope of the activity, in a language and process understandable to the community" (Article 3(g)).

BOX 3.13
Consultation and
FPIC in Ecuador,
Mozambique and
the Philippines

In Mozambique, investors may acquire land rights from government authorities. Before the land rights are granted, investors must consult with the local communities “for the purpose of confirming that the area is free and has no occupants” (Section 13.3 of the Land Law). If the land is not “free”, then “a joint operation” must be carried out “involving the Cadastre Services, the District Administrator or his representative, and the local communities”. The outcome must be “written up and signed by a minimum of three and a maximum of nine representatives of the local community, as well as by the owners or occupiers of neighbouring land” (Land Law Regulations, Section 27.2). This consultation provides an opportunity for the communities to negotiate for benefits or payments in exchange for the use of their lands and natural resources. Upon completion of the consultation the District Administrator prepares a statement setting out “the terms under which the partnership between the applicant and the holders of the right of land use and benefit acquired by occupancy shall be governed” (Land Law Regulations, par. 27.3).

In Ecuador, the 2008 Constitution (Article 57 (4-7)) recognizes indigenous peoples’ right to their lands and grants them the rights to be consulted before the adoption of a legislative measure that might affect any of their collective rights. It states that “indigenous communes, communities, peoples and nations are recognized and guaranteed, in conformity with the Constitution and human rights agreements, conventions, declarations and other international instruments, the following collective rights: ... To keep ownership, without subject to a statute of limitations, of their community lands, which shall be unalienable, immune from seizure and indivisible ... To keep ownership of ancestral lands and territories and to obtain free awarding of these lands; To participate in the use, usufruct, administration and conservation of natural renewable resources located on their lands; [and] To free prior informed consultation, within a reasonable period of time, on the plans and programs for prospecting, producing and marketing nonrenewable resources located on their lands and which could have an environmental or cultural impact on them; to participate in the profits earned from these projects and to receive compensation for social, cultural and environmental damages caused to them. The consultation that must be conducted by the competent authorities shall be mandatory and in due time. If consent of the consulted community is not obtained, steps provided for by the Constitution and the law shall be taken.”

3.3.5 Environmental and social impact assessments

The Guidelines recommend that environmental and social impact assessments be carried out for all proposed tenure concessions and investment ventures: “When investments involving large-scale transactions of tenure rights, including acquisitions and partnership agreements, are being considered, States should strive to make provisions for different parties to conduct prior independent assessments on the potential positive and negative impacts that those investments could have on tenure rights, food security and the progressive realization of the right to adequate food, livelihoods and the environment” (par. 12.10).

In addition, the Guidelines state that “non-state actors including business enterprises ... should include appropriate risk management systems to prevent and address adverse impacts on human rights and legitimate tenure rights” (par. 3.2).

Lawmakers seeking to ensure against potential future negative impacts of investment projects may include clear legal requirements for environmental and social impact assessments in relevant national legislation. Such legislation can: regulate the process,

modalities, timing and consequences of such assessments, requiring that impact assessments are carried out at an early stage of any investment project; consider alternative options and plans that may reduce risk and negative impacts; and include provisions for transparency and stakeholder participation in the process (Cotula, 2014a).

To ensure that impact assessments are independent – that is, not influenced by the party covering its costs – legislation might require that investors put funds for assessments into an independently-run account, and that a neutral committee comprised of relevant stakeholders hires and supervises the social scientists undertaking the assessments. Finally, legislation can require that the results of any environmental and social impact assessment are published widely in a form easily understandable to the local public, including in low-literacy local and regional languages, and publicized over the radio and various other forms of non-written media.

Countries such as Guinea-Bissau and India have adopted legislation requiring social and environmental impact assessments (see Box 3.14).

In Guinea-Bissau, the Law on Environmental Impact Assessment Regulation No. 10/2010 approves the Environmental Impact Assessment Regulation, establishes the legal framework and regime to be satisfied by research, environmental and social impact assessments, as well as the requirements to be satisfied for obtaining natural resources use licenses.

In India, the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act of 2013 mandates a social impact assessment prior to land acquisition by a government body for a public purpose. Government agencies must consult the appropriate local government. The law also provides for public information to be provided in local languages.

BOX 3.14
National legislation requiring social and environmental impact assessments in Guinea-Bissau and India

3.3.6 Expropriation and compensation

Expropriation is the act whereby government agencies acquire tenure rights for a public purpose without the willing consent of relevant tenure right holders. The power to expropriate tenure rights is often necessary for social and economic development and the protection of the natural environment. For example, land may be needed for roads, railways, harbours and airports; for hospitals and schools; for electricity, water and sewage facilities; for redistributive reform, as provided by the Guidelines (section 15); and for the protection against flooding and the protection of water courses and environmentally fragile areas. The Guidelines provide extensive guidance on expropriation and compensation, including such issues as:

- public purpose requirements;
- fair valuation and prompt compensation;
- transparency and participation in expropriation processes;
- options for appeal and judicial review; and
- compliance with human rights law.

“States should expropriate only where rights to land, fisheries or forests are required for a public purpose. States should clearly define the concept of public purpose in law, in order to allow for judicial review” (par. 16.1).

“[States] ... should respect all legitimate tenure right holders, especially vulnerable and marginalized groups, by acquiring the minimum resources necessary and promptly providing just compensation in accordance with national law” (par. 16.1).

“Where evictions are considered to be justified for a public purpose as a result of expropriation of land, fisheries and forests, States should conduct such evictions and treat all affected parties in a manner consistent with their relevant obligations to respect, protect, and fulfil human rights” (par. 16.7).

Examples of Guidelines’ provisions relevant to lawmaking are provided in Box 3.15.

Clear, well-drafted expropriation legislation has the potential to reduce conflict related to compulsory acquisition proceedings, and to ensure that affected stakeholders are left in a good or better position than they were in before the expropriation. Lawmakers can help to enact the Guidelines’ suggestions by drafting legislation that does the following (see FAO, 2009a):

BOX 3.15
Selected Guidelines’
provisions on
expropriation and
compensation

- It clearly defines the public purposes for which the government may acquire tenure rights on a compulsory basis.
- It sets out transparent, fair procedures for acquiring tenure rights and for providing equitable compensation.
- It establishes mechanisms to ensure that livelihoods are restored or enhanced, which may well involve going beyond payment of compensation, as expropriation may have impacts beyond the lost value of the asset taken.
- It establishes measures to guarantee that affected stakeholders are given voice throughout the process, including during the planning phase. Stakeholder participation will help the acquiring agency to consider fully the cultural, social and environmental concerns of local communities, and to identify measures to prevent or mitigate negative aspects of the project.
- It mandates that advance notice of an anticipated project is given to all potentially impacted persons. To ensure that all affected people are aware of the project, notice should be publicized as widely as possible. Information should be disseminated through popular publications, and radio and television programs. The information should be comprehensible: a legal notice does not mean genuine notice if people cannot understand what is being said. The information should be presented in local languages, and in both written and oral form in areas with high rates of illiteracy.
- It makes public hearings mandatory at which affected stakeholders may challenge aspects of the planned project and demand downward accountability from planners and government officials. Public hearings should be held at times and places that are convenient for both men and women, and should be held in the local language.
- It requires that compensation is granted for both registered and unregistered legitimate tenure rights. Communities with legitimate rights based on custom or indigenous tenure systems should be compensated not only for the land and improvements to the land, but also for the replacement costs of all resources gathered from the land that they rely on for their daily survival.
- It provides all stakeholders the right to appeal expropriation decisions. Legislation should ensure that the appeals procedures are comprehensible and simple, with prompt, unrestricted rights to appeal to an independent body, including for the

delay of payment without good cause. Legislation should mandate that the court or reviewing body adjudicate matters in a public and transparent manner, and that procedures be conducted at low or no cost to indigent claimants.

International standards provide guidance on the wide range of assets that should be compensated as part of expropriation processes, including assets held under customary tenure systems (see Box 3.16).

The Asian Development Bank's *Summary of the handbook on resettlement: a guide to good practice* (1998) identifies the following losses for which compensation may be required:

- agricultural land;
- residential plot (owned or occupied);
- business premises (owned or occupied);
- access to forest land;
- traditional use rights;
- community or pasture land;
- access to fishponds and fishing places;
- houses or living quarters and other physical structures;
- structures used in commercial/industrial activity;
- displacement from rented or occupied commercial premises;
- income from standing crops;
- income from rent or sharecropping;
- income from wage earnings;
- income from affected business;
- income from tree or perennial crops;
- income from forest products;
- income from fishponds and fishing places;
- income from grazing land;
- subsistence from any of these sources;
- schools, community centres, markets, health centres;
- shrines, religious sites, places of worship and sacred grounds;
- cemeteries and other burial sites;
- access to food, medicines and natural resources gathered from the land expropriated.

BOX 3.16
Compensation for
customary tenure
rights

National legislation adopted in some countries also provides pointers on how lawmakers might regulate expropriation processes (Box 3.17).

In India, the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act of 2013 regulates land acquisitions, including in connection with public-private partnership projects and provides for compensation, rehabilitation and resettlement for affected persons. One key aspect of the Act is the transparent and participatory nature of the process. There is a requirement to seek the consent of at least 80 percent of "affected families" whose land is acquired for private projects and of 70 percent of such families in the case of public-private partnership projects (Section 2). The process to obtain the consent must be conducted at the same time as a social impact assessment (SIA), undertaken in consultation with local municipalities (Section 4). There must be a public hearing (Section 5) and the SIA must be made available to the public (Section 6). The SIA must consider issues such as whether land acquisition elsewhere has been considered and found not feasible, as well as the impact that the project is likely to have on the livelihoods of local communities. The Act also includes detailed provisions setting out how compensation will be calculated (sections 26–30 and Schedule 1).

On 24 February 2015 a Bill was posted by the Ministry of Rural Development to amend the Act (see <http://www.prsindia.org/billtrack/the-right-to-fair-compensation-and-transparency-in-land-acquisition-rehabilitation-and-resettlement-amendment-bill-2015-3649/>).

BOX 3.17
Expropriation
legislation in India

Key recommendations 3.3

- ✓ The Guidelines call for states to recognize and respect legitimate customary tenure rights that are not currently protected by law. To do this, national legislation should:
 - recognize and protect the full range of legitimate tenure rights within a country;
 - make legitimate tenure rights equal in weight and stature to “formal”, certified rights;
 - establish administrative processes that are simple, clear, streamlined, local and easy for rural communities to use to claim and defend their tenure rights;
 - explicitly protect women’s tenure rights and establish women’s right to hold or own tenure rights;
 - where tenure is shared or held in common, vest formal tenure rights in all community members as a coherent group;
 - explicitly protect communal areas, customary rights of way and other shared resource use and access rights; and
 - balance protections for customary and indigenous tenure rights with provisions for gender equality and respect for human rights.
- ✓ Where states choose to implement redistributive reforms, national legislation should establish mechanisms to enable beneficiaries to earn an adequate standard of living from the land, fisheries and forests they acquire.
- ✓ Legislation mandating transparent administration of tenure rights can support efforts to reduce rent-seeking, corruption and mismanagement. Effective transparency norms affect all aspects of land administration, including appropriate disclosure of tenure contracts.
- ✓ The Guidelines call for states to ensure that investments are consistent with the principles of consultation and participation, as well as the FPIC for indigenous peoples. Legislation should require that all affected populations be consulted before the state allocates tenure rights to investment ventures, infrastructure projects or conservation efforts. This process should include mechanisms to ensure that consultations:
 - are participatory and include a significant majority of a community’s residents;
 - occur in the local language and allow all community members to ask as many questions as they would like;
 - involve disclosure of all relevant information about the planned investment or project;
 - allow communities an authentic opportunity to reject the proposed project;
 - are duly documented, the consultation outcomes recorded and result in a binding agreement between indigenous peoples or local communities, the investor and, if appropriate, the relevant government.
- ✓ Legislation should also include clear and specific legal requirements for environmental and social impact assessments, and require that the results are published widely in a form easily understandable to the local public.
- ✓ Clear, well-drafted expropriation legislation can help to reduce conflict related to compulsory acquisition, and to ensure that affected stakeholders are left in a position that is as good as or better than their position before the acquisition. Lawmakers can help to enact the Guidelines’ suggestions by drafting legislation that:

- clearly defines the public purposes for which the government may acquire tenure rights on a compulsory basis;
- sets out transparent, fair procedures for acquiring tenure rights and for providing equitable compensation;
- establishes measures to guarantee that affected stakeholders are given voice throughout the process, including during the planning phase;
- mandates that notice is given to all potentially impacted persons well in advance of an anticipated project;
- makes mandatory public hearings at which affected stakeholders may challenge aspects of the planned project and demand downward accountability from planners and government officials;
- requires that compensation is granted for both registered and unregistered legitimate tenure rights;
- provides all stakeholders with the right to appeal expropriation decisions.

4

**Making law work
in practice**

4. Making law work in practice

This chapter provides guidance on approaches to ensure that national laws promoting the Guidelines are implemented successfully. It outlines the various actions and tactics that legal professionals can take to support responsible governance of tenure. While recognizing the wide range of positions that legal professionals can hold in the governance of tenure, the chapter focuses on the role of legal professionals working for or with government, public-interest legal service organizations and business lawyers. The role of judges is discussed in Chapter 5, which deals with dispute settlement.

In recent years, several states have adopted legislation that significantly strengthens the tenure rights of vulnerable and marginalized groups, including by formalizing customary and indigenous tenure rights and governance systems. Yet, in many instances implementation of these laws has been limited. This is partly due to constrained resources and capacity. Also, some states have focused more on attracting commercial investment than on protecting the tenure rights of the poor and vulnerable.

To ensure that laws promoting responsible governance of tenure are duly implemented, the institutional, political and social factors that contribute to weak tenure security and poor governance need to be addressed. Such positive change requires fair, well-functioning and impartial administrative and justice systems, and citizens able to use these systems to protect their tenure rights.

In addition, lawyers advising business can play an important role by integrating Guidelines' standards in their institutional policies and processes, and by demanding that states adhere to those standards in the governance of investment processes. In so doing, the business community can not only reduce the tenure risk associated with resource-based investments, but can also contribute to strengthening tenure security more broadly.

The following sections detail how legal professionals working for or with states, public-interest legal service organizations and business lawyers can work to promote responsible governance of land, fisheries and forests. The successful implementation of national laws that promote good tenure governance will only be accomplished by the interconnected efforts of all of these groups; positive action by one sector alone may prove to be ineffective.

4.1 The role of the state

Responsible governance of tenure is the primary responsibility of states. States are responsible for ensuring adherence with the Guidelines, and have a duty to ensure compliance with international law, including international human rights law, in the governance of tenure. This responsibility often involves the direct exercise of government powers; for instance, in the context of resource-use planning exercises, of the management of publicly-owned lands, fisheries and forests, and of expropriations of tenure rights. It also concerns the regulation and supervision of third-party activities, in order to protect legitimate tenure rights as well as human rights from infringement by individuals, businesses or groups.

Ensuring proper implementation of laws that promote responsible governance of tenure is a key part of fulfilling this responsibility. States – the central actors in lawmaking (see Chapter 3) – also play a particularly important role in implementation. In the best situations, officials dedicated to public service consistently work to strengthen governance by improving governance systems and institutions. However, governance of tenure systems can also be rife with bureaucratic obstacles and structural inequities, and even those in power often face significant constraints when seeking to introduce or change governance protocols.

Given these complexities, efforts to reorganize state institutions to improve governance of tenure of land, fisheries and forests need to be pursued simultaneously at every level of a state, and across multiple ministries, agencies and departments. These efforts may involve leveling power asymmetries, streamlining procedures to ensure use and accessibility by all citizens, harmonizing mandates and procedures, and addressing systemic bottlenecks. Success requires determination, commitment and political will at all levels, including the highest level of government. Depending on context, external pressure and engagement from citizen groups can support the emergence or consolidation of that political will.

State efforts to implement legislation for improving governance of tenure can involve a variety of actions, including:

- allocating adequate public resources to the implementation of laws;
- raising awareness both in the general public and among state officials about laws that promote responsible governance of tenure;
- considering the relevance of any extraterritorial dimensions and obligations;
- harmonizing legislation and streamlining legal and administrative procedures;
- establishing and rigorously pursuing anti-corruption mechanisms, such as criminal sanctions, complaints procedures and ombudsmen's offices;
- paying special attention to the needs of poor and marginalized groups; and
- ensuring that the national judiciary and officials responsible for adjudicating tenure disputes properly apply national laws that promote responsible governance of tenure (see Chapter 5).

The following sections discuss some of these actions in detail. While state action to implement legislation may involve interventions in a wide range of areas, the focus of this guide is on the legal dimensions.

4.1.1 Allocating adequate resources to ensure implementation

The adoption of new legislation is the beginning, not the end, of a governance-enhancing process. For good laws to make a difference, they must be properly implemented. Implementation can have significant resource implications when, for example, laws establish new governing bodies, procedures and technologies necessary for the registration, management and protection of tenure claims. Rigorous financial analyses of the costs of implementing proposed legislation can facilitate informed design of “implementable” legislation. As discussed in Chapter 3, piloting new legislation can help tailor design of its implementation to local contexts, including by factoring in cost considerations.

Once laws are adopted, it is essential that adequate financial resources are allocated to support the implementation of the new law. This may encompass the processes to develop the necessary implementing instruments (e.g. government regulations, ministerial circulars, guidelines). It may also involve supporting the establishment and functioning of the administrative structures responsible for implementing the law.

Responsibility for resourcing implementation of laws lies first and foremost with the government and the public budget. Where relevant, development assistance can also provide support; in which case, it is essential to ensure effective coordination among the multiple initiatives to support or pilot the implementation of a new law.

4.1.2 Raising awareness about laws that promote responsible governance of tenure

For a law to be properly implemented, citizens and officials need to be aware of the law, its content and how to use it in practice. In this regard, the Guidelines call for states to ensure that people whose tenure rights are recognized or who are allocated new tenure rights have full knowledge of their rights and also their duties (see Box 4.1).

Making information available to citizens requires, at a minimum, publishing legislation, for instance, in official gazettes. But where adult literacy is limited and access to official documentation constrained, public authorities can take more proactive steps to ensure that information reaches poor and vulnerable groups. This may involve translating the law into the different languages spoken in the country; creating low-literacy explanations of the law in local languages; and running large-scale awareness-raising campaigns that use radio and television programmes, posters, billboards, comic strips, tee-shirts, community theatre, the internet and other communication materials accessible to a non-literate audience.

Similarly, public officials need to be aware of what laws and regulations govern the performance of their jobs, what rights citizens have, what special protections exist for certain vulnerable groups, and what responsibilities they have to ensure that citizens’

BOX 4.1
Guidelines’ provision concerning legal education of citizens

7.5 “States should ensure that people whose tenure rights are recognized or who are allocated new tenure rights have full knowledge of their rights and also their duties. Where necessary, States should provide support to such people so that they can enjoy their tenure rights and fulfil their duties.”

rights are protected. This requires providing government officials with rigorous and ongoing legal training designed to ensure awareness of laws and regulations and of the tenure challenges faced by holders of tenure rights, particularly women and marginalized groups. There are interesting experiences that show the advantages of bringing state and non-state actors together in joint capacity-building programmes (see Box 4.2).

BOX 4.2
Twin-track approach to legal empowerment: providing legal training to government officials and NGO staff together in Mozambique

Source: FAO, 2014e.

FAO supported the Centre for Juridical and Judicial Training (CFJJ) of the Ministry of Justice in Mozambique in the construction of a legal education programme around new land and natural resources legislation in the country. Training packages were prepared for judges, national level officials, district level officials and paralegals. Local government officials participated in the paralegal courses along with participants from NGOs. This model ensured that the training was delivered to the various audiences by an authoritative state institution. The joint training of NGOs and local government officials (the so-called twin-track approach) provided space for the two – often antagonistic – sides to debate and discuss the course material, which, in turn, helped to build trust between them. Local government officials who have gone through this training often call on the NGO-sponsored paralegals to help solve local issues and disputes. FAO received funding from the Kingdom of the Netherlands for several years for the programme, which was later supplemented by the Kingdom of Norway.

This intervention followed an extensive educational campaign to publicize the Land Law of 1997 after its adoption, called Campanha Terra. The campaign trained 15 000 volunteers (e.g. young people, priests, pastors, evangelists, teachers, rural extension workers and NGO staff) and sent them out into rural communities to teach smallholder farmers about their new land rights. Campanha Terra created and disseminated 120 000 copies of comic strips depicting the central themes of the law and how to solve land disputes within the law's parameters, 3 000 audiocassettes with dramatized texts of those comic scripts, 10 000 copies of a low-literacy, explanatory manual to accompany the text of the land law and 500 posters with pictorial representations of the law's central tenets. All materials were produced in Portuguese and over 20 local dialects.

Where non-state authorities perform public functions, such as when customary leaders play a role in the management of tenure rights, it is important that capacity-building efforts reach out to these authorities as well (see Box 4.3).

BOX 4.3
Training local leaders to ensure just legal outcomes in Kenya

Source: Landesa, Tetra Tech ARD and USAID, 2013.

Landesa's Kenya Justice Project included legal literacy and skills training for local leaders responsible for adjudicating land disputes. Groups of elders and leaders were trained in themes including: justice, rule of law and governance; the Kenyan justice system and the role of customary justice institutions; and government and citizens' constitutional rights and responsibilities relative to land and forests, with particular attention to women and children's land rights. Some participants had the opportunity to observe land-related cases at a nearby magistrate court to experience firsthand, and then reflect on, the similarities and differences between the formal and informal justice systems.

The results of the project evaluation indicate that the elders and leaders who oversee customary justice proved willing to recognize and enforce Kenya's new constitutional rights, including women's land rights. This included emphasis on gender equality in community by-laws, election of women elders responsible for resolving land disputes alongside male elders, and the more common requirement of written spousal consent before approving the sale or lease of land.

4.1.3 Streamlining legal and administrative procedures

Cumbersome tenure administration processes can make it more difficult for tenure right holders to exercise their rights. They can also constrain the implementation of tenure laws. For example, tenure registration procedures may require filling out multiple forms, seeking the signatures of multiple state officials from a variety of offices, paying fees and providing very specific written proof of one's tenure claims, among other processes. As a result, tenure registration may progress haphazardly, take years to complete and allow opportunities for rent-seeking and mismanagement.

Other obstacles that may undermine access to recording of tenure claims include: the high costs of legal fees associated with each step of administrative processes; language barriers related to legal forms and processes only being available in the official state language; illiteracy challenges that render vulnerable and marginalized unable to fill out necessary forms and gather required documents; and inaccessible state offices located in urban centres far from where vulnerable or marginalized groups live. Addressing these issues requires action at multiple levels.

Laws and implementing regulations should establish straightforward and unambiguous procedures and clearly set out the rights and responsibilities of all key actors. They should also omit any unnecessary requirements and minimize administrative hurdles, establishing procedures that are streamlined, affordable and easily navigated by all tenure right holders, including poor and vulnerable people.

Where appropriate, states should decentralize powers and responsibilities to increase accessibility. Decentralized state administration can bring the legal system closer to the poor. This process may involve devolving powers to local government bodies or supporting co-management arrangements to promote implementation of national law (see Box 4.4).

With the adoption of the Fisheries Law No. 3/NA of 2009, the Lao People's Democratic Republic moved away from an open and free access regime for fisheries. However, the central Government did not have the capacity to manage all fisheries centrally. The law introduces legal provisions that formalize co-management initiatives by providing the basis for establishing fisheries management committees for certain waters, including rivers, streams and reservoirs. The law provides for the establishment and for the powers of such fisheries management committees and determines that the membership must comprise representatives of fishermen, social organizations, fisheries organizations and local government. The law provides the basis for the adoption of village fisheries regulations by the village authority, and determines that these are to be developed in consultation with the fisheries management committees.

BOX 4.4
Fisheries Law of
the Lao People's
Democratic
Republic

Source: FAO, 2009b.

If not done properly, however, decentralization can enable elite capture, provide opportunities for corruption and raise significant capacity challenges. A clear legal framework should establish distribution of responsibilities, funds and authority at the different levels of a state. Precautions should also be taken to ensure that decentralization does not increase local corruption and elite capture.

Responsible governance of tenure hinges on the ability of the public to access information about state action and policies. The Guidelines call for states to provide

BOX 4.5
Guidelines' provisions
concerning tenure rights
records

systems to record tenure rights in order to improve their security and to ensure that everyone is able to record their tenure rights and obtain information without discrimination on any basis (see Box 4.5 and note that an FAO technical guide on recording tenure rights and parcels is under preparation).

17.1 "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, including those held by the State and public sector, private sector, and indigenous peoples and other communities with customary tenure systems; and for the functioning of local societies and of markets. Such systems should record, maintain and publicize tenure rights and duties, including who holds those rights and duties, and the parcels or holdings of land, fisheries or forests to which the rights and duties relate."

17.3 "States should strive to ensure that everyone is able to record their tenure rights and obtain information without discrimination on any basis. Where appropriate, implementing agencies, such as land registries, should establish service centres or mobile offices, having regard to accessibility by women, the poor and vulnerable groups. States should consider using locally-based professionals, such as lawyers, notaries, surveyors and social scientists to deliver information on tenure rights to the public."

Laws should, therefore, state that, in principle, tenure administration records should be open to the public without any discrimination, subject only to privacy considerations. The public should also be permitted to access written copies of laws and regulations, review files, request information about how local tenure decisions were made, read transcripts of relevant hearings and official meetings, and otherwise examine state decision-making processes; again, subject only to the need to protect privacy.

States should be committed to supporting and providing assistance to poor and marginalized people to help them exercise their tenure rights. States can further help vulnerable groups successfully navigate formal legal systems by providing support services for the poor such as legal advice centres or training sessions for claimants at state offices. They can establish rules that all lawyers must volunteer a certain number of hours each year to pro bono legal services for poor and marginalized groups, and individuals, or provide financial support to NGOs that offer free legal services (see Box 4.6).

BOX 4.6
Mandatory pro
bono legal work
in South Africa

The Cape Law Society is the statutory body in charge of the administration of the Attorneys' Profession in the Western, Eastern and Northern Cape regions of South Africa. Pursuant to Rule 21 of the Rules of the Cape Law Society, all its practicing members (except those who are at least 60 years old and have practiced for at least 40 years) are required to perform at least 24 hours of pro bono legal work per year for the benefit of those who cannot afford to pay for such work.

Source: Penal Reform International and Bluhm Legal Clinic of the Northwestern University School of Law, 2007.

4.1.4 Instituting robust anti-corruption mechanisms

Corruption undermines the quality of the governance of tenure, and the registration and legal protection of legitimate tenure rights. Services that should be available to all as a matter of right may be treated as 'favours' in exchange for advantages of various kinds. This may occur at high levels of decision-making; for instance, in relation to large-scale allocations of tenure rights for commercial projects. But corruption may also be petty; for example, where underpaid low-level administrators demand bribes at every step of an administrative process (Transparency International and FAO, 2011).

Corruption can severely undermine the proper implementation of laws that promote responsible governance of tenure.

The Guidelines pay a great deal of attention to combating corruption. Prevention of corruption features among the ‘general principles’ underpinning the Guidelines. The Guidelines also feature numerous provisions on preventing corruption (see Box 4.7).

To address corruption and rent-seeking, states may take the following steps, among other actions:

- ratifying and implementing international conventions to combat corruption, including the United Nations Convention Against Corruption;
- introducing asset declaration requirements for ministers and high-level officials;
- reforming procedures to eliminate unnecessary hurdles that create opportunities for corruption, and to promote transparency at all levels of decision-making;
- making land administration records accessible to the public, subject to privacy provisions;
- creating expedited complaints procedures, ombudsmen and appeals processes, to allow for immediate reporting of corruption;
- establishing effective criminal sanctions and enforcement mechanisms, and prosecuting corrupt officials.

FAO’s forthcoming technical guide on registration of tenure rights addresses how anti-corruption measures can be built into registration systems and operations.

BOX 4.7
Relevant
Guidelines’
provisions on the
prevention of
corruption

3A.1.5 “[States] should endeavour to prevent corruption in all forms, at all levels, and in all settings.”

6.9 “States and non-state actors should endeavour to prevent corruption with regard to tenure rights. States should do so particularly through consultation and participation, rule of law, transparency and accountability. States should adopt and enforce anti-corruption measures including applying checks and balances, limiting the arbitrary use of power, addressing conflicts of interest and adopting clear rules and regulations. States should provide for the administrative and/or judicial review of decisions of implementing agencies. Staff working on the administration of tenure should be held accountable for their actions. They should be provided with the means of conducting their duties effectively. They should be protected against interference in their duties and from retaliation for reporting acts of corruption.”

See also, paragraphs **8.9, 9.12, 10.5, 11.7, 15.9, 16.6, 17.5, 18.5, 19.3, 20.4** and **21.5**.

4.1.5 Paying special attention to poor and marginalized groups

Responsible governance of land, fisheries and forests involves creating special supports for the tenure rights of poor and marginalized groups, or groups whose tenure claims are particularly vulnerable. Depending on context, this might include low-income people, women, youths, pastoralists or migrants.

Because some groups face harder constraints in their access to legal procedures, neutral laws may not be enough to address the needs of those groups and may, in fact, have unintended discriminatory effects. Legislation can establish safeguards and exceptions to allow vulnerable groups to overcome systemic hurdles. For example, secondary legislation concerning registration of tenure rights might include provisions stipulating that state officials help illiterate applicants complete

forms, or that specific fees are waived when costs would prohibit the completion of an application.

Gender also requires particular attention (see Box 4.8). Laws could require, and registration forms could enable, both the male and female holders of tenure rights to be officially recorded; and where only one tenure holder is recorded, the form could include appropriate space for an explanation as to why that is so. Hiring more female staff members to land administration and management institutions, as well as creating teams of female officers to work exclusively with women seeking to register their tenure claims, can also make the tenure administration system more responsive to women's concerns and aspirations.

BOX 4.8
Women's community forests in Nepal

Source: Agarwal, 2009; Government of Nepal, 2013.

In Nepal, community forestry initiatives have worked to increase representation of women in decision-making positions in community forest user groups (CFUGs). However, male membership dominates. For example, 80 to 85 percent of members in CFUGs tend to be men (Government of Nepal, 2013). Apart from social prohibitions, participation of women remains low because heads of household usually register as CFUG members. This bias in registration affects women's participation in decision-making, particularly in relation to voting processes where only formal members can participate. Guidelines adopted in 2009 require co-registration of spouses, and this appears to be improving women's participation in decision-making (Government of Nepal, 2013). Also, the new guidelines require 50 percent women representation on executive committees, but evidence suggests that application of these guidelines has not always improved women's participation in decision-making. Some projects began establishing women-only CFUGs. In 2009, there were 839 (6 percent) all-women CFUGs spread throughout 67 districts. Research shows that despite receiving much smaller and more degraded forest areas, all-women CFUGs were outperforming other CFUGs, showing better forest regeneration and improved canopy cover (Agarwal, 2009). This result was attributable to women's contributions to improved forest protection, compliance to guidelines, and development of stricter rules, despite personal hardships. Additional contributing factors are the increased opportunities for women to use their knowledge of plant species and methods of product extraction, as well as the likelihood of greater cooperation among women.

States have a particularly prominent responsibility where poor and marginalized groups come into contact with more powerful actors; for example, where large-scale investors acquire tenure rights for commercial projects. In these contexts, public authorities should support communities during negotiations with investors, and throughout the process. Depending on context, this could involve:

- providing legal assistance for communities during negotiations with investors;
- ensuring that mechanisms are in place to hold investors accountable for delivering agreed-upon benefits to communities; and
- establishing effective sanctions, including termination of investor-state contracts, for investors who fail to fulfill their contractual obligations under community-investor agreements.

4.1.6 Considering the relevance of extraterritorial dimensions and obligations

States should take steps to improve the governance of tenure at home, but there is much that states can do in relation to tenure transactions occurring overseas. The Guidelines state that, 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. Also, states should take additional steps to protect against abuses of human rights and legitimate tenure rights by business enterprises that are owned or controlled by the state, or that receive substantial support and service from state agencies (par. 3.2).

Home country measures aiming to encourage and regulate investment abroad may help to promote responsible agricultural investment in other countries that complies with the Guidelines. An FAO study on selected Organisation for Economic Co-operation and Development (OECD) countries shows that many developed countries have recently strengthened regulatory frameworks and created incentives to promote responsible business conduct. A number of these countries now require compliance with the Guidelines by companies that are owned, controlled or supported by the state (FAO, forthcoming). Box 4.9 highlights some of these measures.

The Norwegian Export Credit Guarantee Agency was one of the first state entities to specifically apply the UN Guiding Principles on Business and Human Rights.

In Denmark, state-owned companies are required to join the UN Global Compact and the Principles for Responsible Investment.

Germany has developed a set of principles for government-controlled investors with an international mission that go beyond international standards related to tenure rights and require the recognition of the human right to water and the mandatory free, prior and informed consent (FPIC) of all affected communities.

The French Development Agency (AFD) uses the Guidelines as safeguards when tenure rights are affected by the investment.

BOX 4.9
Home country
measures in Denmark,
France, Germany and
Norway

Source: FAO, forthcoming.

There has been debate about the extent to which home states have a legal obligation to take action. Global and regional treaties create extraterritorial obligations in relation to combating corruption, and several countries have enacted legislation criminalizing corruption of foreign government officials. With regard to international human rights law, in 2011 legal experts from different parts of the world adopted the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights. The principles aim to restate existing international human rights law on extraterritorial obligations. In addition, the Committee on Economic, Social and Cultural Rights (CESCR), which is the body that monitors implementation of the International Covenant on Economic, Social and Cultural Rights, recently reminded a number of states of their extraterritorial obligations in relation to projects conducted abroad financed by a state pension fund (CESCR, 2013a) and the supervision of national companies operating abroad (CESCR, 2013b).

Key recommendations 4.1

- ✓ When laws are adopted or revised, states should allocate adequate public resources to the implementation of the law reform.
- ✓ States should raise awareness both in the general public and among state officials about laws that promote responsible governance of tenure.
- ✓ States should harmonize legislation and streamline legal and administrative procedures, including through imposing only reasonable procedural burdens and promoting transparency in procedures and tenure records.
- ✓ States should establish and rigorously pursue anti-corruption mechanisms, such as criminal sanctions, complaints procedures and ombudsmen's offices.
- ✓ It is important to pay special attention to the needs of poor and marginalized groups, including by making justice systems and formal rights protections more accessible to them; hiring more female staff members to land administration and management institutions; ensuring that the names of all spouses and dependents are recorded on formal registration of family property; and training authorities in relevant national laws that protect women's tenure rights.

4.2 Role of public-interest legal service organizations

Implementing laws for responsible governance of tenure cannot hinge on state action alone. Citizens must be empowered to claim and defend their tenure rights and demand that state agencies improve administrative procedures and formal requirements. Citizens may have to demand change, apply consistent pressure, struggle to alter the political landscape and proactively pursue recognition of their tenure claims, implementation of laws that protect their rights and adherence to the Guidelines.

Public-interest legal service organizations play an important role in ensuring the responsible governance of lands, fisheries and forests. Lawyers, paralegals, law students, community organizers, policy advocates and other technical experts help support citizens to hold their government accountable to responsible governance, justice and the rule of law (see Boxes 4.10 and 4.11). Because of their understanding of how administrative systems function and their legitimacy as legal advocates, legal service providers can help disadvantaged and vulnerable individuals and communities access and navigate formal legal systems to successfully claim tenure rights.

Public-interest legal service organizations can also ensure that state agencies and actors follow pro-poor legal mandates by reminding them of pro-poor regulations, monitoring administration processes and acting as “watchdogs” to ensure that government officials comply with relevant laws. Their help is particularly necessary to support the tenure rights of vulnerable individuals and communities in situations characterized by power asymmetries and unequal bargaining power.

A paralegal is a layperson with basic training in legal matters, who assists poor and marginalized individuals and groups to make use of the law. There is great diversity in the use of paralegals, as well as regulatory and supervisory systems for them. There are many benefits to using paralegals to support the land rights of the rural poor:

- Paralegals increase access to justice as they bring legal services to communities that would otherwise never access lawyers, often working (and living) within the poor communities they serve.
- Paralegals are often closer to the communities they serve. Because paralegals are often trained community members, they have a personal connection and familiarity with the legal difficulties faced by the rural poor and a deeper understanding of local culture and embedded social dynamics. This familiarity can improve trust and make legal advocacy seem more accessible.
- Paralegals often have a wider set of tools. Because paralegals are not lawyers, they can draw on a broader range of advocacy tools and take on additional tasks that fall outside the bounds of typical legal service activities, such as working collaboratively with customary leaders to resolve land disputes or organizing community members to take collective action.
- Paralegals offer increased labour force at low cost. Legal service organizations can hire several paralegals for less than the cost of one attorney's salary. Providing a cost-effective supplement to expensive legal talent, paralegals greatly increase the capacity of legal service organizations to serve the poor.
- Paralegals bridge formal and customary legal institutions. They may draw on and engage both customary and formal institutions, depending on the needs of a given case. Paralegals' focus on reconciliation through dialogue and mediation resonates with some customary approaches to justice.
- Paralegals' strategies may contribute more to empowerment. Paralegals' use of empowerment-oriented tools like community organizing and education may increase empowerment more than the formal legal work of attorneys. Paralegals are trained to work with clients to solve legal problems together, putting more agency in the hands of clients.

However, paralegals must receive extensive initial and ongoing training and supervision. Lawyers, whose technical and professional training is an integral component of effective legal advocacy, must back up the work of paralegals. Arrangements need to be in place to ensure that paralegals do protect the interests of their communities, including the poor and marginalized, and to address challenges that might arise in the relationship between paralegals and local leaders.

The Centre pour l'Environnement et le Développement (CED) established a community-based paralegal programme in 2001 to support indigenous communities in southern Cameroon to exercise and advocate for their rights to land and forests. However, it became apparent that the paralegals lacked the capacity to deal with the complexity of Cameroon's forestry laws and regulations and other related legislation. In response, CED created a junior lawyers training program – the Community Legal Field Workers project – to train recent law school graduates in rural and indigenous contexts and the practical workings of forestry and natural resources law. After initial training, the recruits are paired with community-based paralegals or placed on mobile teams and supervised by a small number of experienced lawyers. The arrangement is effective because paralegals provide in-depth understanding of the local context, while the junior lawyers can apply their knowledge of Cameroonian law, and leverage their status as lawyers when engaging with local officials and company representatives.

BOX 4.10

Benefits of paralegals

Source: Maru, 2006; FAO, 2014e.

BOX 4.11

Pairing paralegals and young lawyers to support indigenous communities in Cameroon

Source: Nguiffo and Djeukam, 2008; Nguiffo, 2012.

Public-interest legal service organizations provide a wide range of legal services, including:

- providing legal empowerment and legal literacy education, including through paralegals, junior lawyers, legal clinics, legal caravans or other approaches;
- making calls for reform to laws, and formulating appropriate changes, when problems arise or when the law fails to cover an area adequately;
- supporting mapping, documentation and registration of legitimate tenure rights, including the customary and indigenous tenure rights of individuals and communities;
- helping communities to draft, adopt and implement rules and natural resource management plans to ensure responsible governance of their lands, fisheries and forests;
- providing support to communities and families facing dispossession of their tenure rights, including discrimination based on gender, age, minority status and social class;
- mediating and resolving intercommunity tenure conflicts;
- providing legal and technical expertise during negotiations with governments and potential investors for the use of community lands, fisheries and forests;
- helping to establish legal personality for community groups;
- supporting communities and individuals during processes of expropriation for a public purpose or unlawful dispossession; and
- assisting communities in the enforcement of contracts made with investors for the provision of community benefits in conjunction with commercial operations.

Legal strategies should always be community-driven and carefully crafted to be appropriate to the local context or issue at stake.

4.2.1 Legal empowerment and legal literacy education

As explained above in Section 4.1, members of vulnerable groups may have only limited understanding of national and international laws that protect their tenure rights. In addition to government agencies' efforts, public-interest legal service organizations have an important role to play in bringing legal literacy and legal empowerment to vulnerable and marginalized groups.

Efforts to increase legal literacy may start by raising awareness about the basic structure of government, the national constitution, the legal obligations of both citizens and government, and other applicable legal constructs. Awareness raising may also cover the law regulating land, fisheries and forests, as well as the other laws that may affect the governance of tenure (e.g. environmental law, inheritance law, family law). Legal education initiatives may also include training on a range of practical skills related to identifying and claiming tenure rights, including map-making and map reading, local data collection and sustainable resource management.

Such trainings are most effective when they present information in a manner that illustrates how laws are relevant to people's day-to-day realities; and when they cover legal issues in light of real-life community concerns about tenure rights. Such efforts may also need to work to transform people's perceptions of the legal system, persuading people – often in the face of overwhelming evidence to the contrary – that if their rights are abused, legal systems will provide protection.

Making people aware about the substantive content of their legal rights is usually not enough. To ensure responsible governance of tenure, tenure right holders must also understand how to follow legal and administrative procedures to successfully claim, protect and defend their rights. They need to know which agencies are in charge of processing tenure claims, where those agencies' local offices are located, what forms to ask for and what documents to bring as proof of tenure claims.

In relation to these more practical skills, public-interest legal service organizations can advise people to:

- ask for or bring along a translator if they do not understand or speak the national language;
- fill out forms and provide all required documentation or ask for help getting this documentation;
- request receipts as proof of all fees paid and all documents provided;
- request copies of important documents for personal records;
- ask for the names of the officials providing assistance, should there be a future problem and accountability be necessary;
- ask for any assistance or fee waivers that have been included in the governing regulations;
- know when and how to seek legal assistance from accessible legal service providers who can help them to claim or protect their tenure rights when they confront obstacles; and
- obtain basic skills and information related to bringing a case to court, such as what they can present as appropriate evidence of their argument, who they can call as witnesses, the basic rules and etiquette of court and other information.

Imaginative approaches to deliver legal training and information are also needed, particularly where adult literacy rates are low. Role-plays, games, simulations, discussions of real-life problems and other interactive tools can all be used, and questions should be encouraged (see Box 4.12). New technologies can also provide opportunities for capacity building and awareness raising. Training should be inclusive and should specifically target women and marginalized groups. It should also take into account such groups' time, security and resource constraints; if only the village elite can afford to leave their work to participate in training, capacity-building exercises may entrench existing power asymmetries. Creative use of media (e.g. leveraging radio, television and SMS texts) and community theatre can help overcome barriers, as can posting information in places where people frequently go (e.g. commercial centres, wells/boreholes, meeting houses, places of worship and schools).

BOX 4.12

Innovative strategies to promote legal literacy: radio broadcasts, legal caravans and tenure rights information centres in Mali and Uganda

Source: Goïta and Coulibaly, 2012.

Source: Keita, Djiré and Cotula, 2014.

Source: Aciro-Lakor, 2008.

In Mali, the Institute for Research and Promotion of Alternatives in Development in Africa (IRPAD) identified the need for a bridge between agricultural laws and policies and smallholder rural farmers. To increase farmers' capacities to influence policy and participate in decisions about agriculture and natural resources, IRPAD developed a series of short, pre-recorded broadcasts for community radio that explained the provisions of Mali's new Agricultural Orientation Law. The radio pieces were recorded in Bambara, the most widely spoken language in Mali, and were followed by local training workshops and debates in order to encourage participatory discussion and questions. This simple initiative proved highly successful at increasing farmers' understanding of the new law and engagement in its implementation.

In Mali, the Groupe d'Etudes et de Recherche en Sociologie et Droit Appliqué (GERSDA) is a leading force for the legal education and empowerment of rural populations in Mali, where high rates of illiteracy and poverty have stymied efforts to establish an inclusive and participatory legal system. GERSDA uses 'legal caravans' – mobile legal education centres staffed by lecturers, students and legal practitioners – that travel to rural communities to explain laws related to mining and natural resources. Caravan staff use local languages, low-literacy learning materials, community debates and radio programmes, and provide support to networks of community paralegals. The success of the programme stems largely from its mobility, which allows staff to reach remote communities and engage the entire community rather than a few selected representatives. The caravans have also proven highly effective at training students in the practical application of law in rural areas.

In Uganda, the Uganda Land Alliance (ULA) supported district-level Land Rights Information Centres (LRICs) run by trained staff who provide alternative conflict-resolution services and legal advice related to land matters. The LRICs can handle some cases directly and refer other cases to appropriate authorities. The LRICs provide legal information and education programmes, including workshops, songs, dance and drama performances, radio shows and printed materials. Staff also facilitate participatory theatre, plays and village debates in rural communities to encourage discussion of local land issues in engaging, accessible and informative ways.

4.2.2 Supporting claims of tenure rights infringements and discrimination based on gender, age, minority status and social class

"Communities" are not homogenous groups: they may host significant social differentiation along gender, age, income or status, for example. This differentiation should be considered in legal support strategies. Public-interest legal service organizations should pay particular attention to infringements of tenure rights and discrimination based on gender, age, minority status or social class.

Let us consider the case of gender, for example. Even when women's tenure rights are enshrined in law, women face multiple barriers to claiming and protecting their rights. Women may have little decision-making power in their homes and be unable to contest violations of their rights within the family or within customary institutions. They may also lack the economic independence and resources necessary to pursue legal action outside of their villages.

In addition, a woman may be threatened or endangered for seeking to enforce her rights. Should she be able to arrive at a government office to try to claim or defend her tenure rights, she might face discrimination and insensitivity to her situation by government administrators. Legal advocates can play an important role in helping vulnerable women, children and marginalized groups to exercise their tenure rights.

For example, advocates could establish systems to increase women's and marginalized groups' access to legal services. Community members may be trained as paralegals to provide basic legal support for women seeking to enforce their rights. Selecting women paralegals can help women feel at ease with using the services of paralegals.

It is also important that local leaders and the wider "community" are trained in upholding the tenure rights of marginalized groups. For example, legal literacy training may elaborate on gender issues, particularly, in relation to tenure rights. Interventions may also involve supporting communities to draft and adopt community by-laws to protect women's tenure rights, based on participatory discussions.

They may also involve working with customary leaders to mediate family tenure disputes in a gender-equitable manner (see Box 4.13).

In Liberia, Mozambique and Uganda, Namati's process of supporting communities to catalogue, analyse, debate, amend and, finally, to adopt local, customary rules (or by-laws) for community land and other natural resource governance has established local protections for the land rights of women and other vulnerable groups. Namati's drafting process for by-laws includes six discrete parts:

- a "shouting out" of all existing rules, norms and practices in an uncensored, community-wide brainstorming session, which is then captured in writing as the first draft of a community's by-laws;
- legal education on the national constitution, relevant national laws and basic international human rights principles;
- community analysis of their rules in light of evolving community needs and national laws, followed by participatory discussions that lead to amendment, addition or deletion of rules until a second draft is reached;
- a legal or technical expert's "check" of the community's second draft by-laws to ensure compliance with national law and basic human rights;
- finalization of the community's third draft after making all changes necessary to align with national law and formal adoption of their by-laws by full community consensus or super-majority vote.

To ensure women's participation in the by-laws drafting process, Namati and its national implementing partners use the following strategies:

- electing female community mobilizers to ensure that women do attend meetings;
- scheduling project meetings in places and at times that women can more easily attend, such as holding meetings on Sunday afternoons when women might be free from their work;
- sending community leaders and paralegals door-to-door to request that women attend project meetings;
- proactively requesting that husbands bring their wives with them to meetings;
- having a few women cook lunch for the whole community at the meeting venue to ensure other women's attendance;
- reading individual women's names over local radio and asking them to personally attend the next project meeting, among other strategies; and
- holding women-only meetings to proactively address issues related to women's use of the grazing lands and to motivate women to participate actively in the by-laws drafting process.

The women-only meetings have proved to be particularly successful in ensuring women's participation in the by-laws drafting process. At the conclusion of these meetings, women are encouraged to share what they learned with other women, convene community women in groups to discuss their main arguments and create joint-advocacy strategies so that no woman speaks 'alone', and to mobilize women to attend the by-laws drafting meetings in greater numbers. As a result of these strategies, Namati has found that women attend community meetings in larger numbers and their verbal participation equals or exceeds men's. As a result, during debates about the content of the second drafts of their by-laws, women are able to successfully argue against the inclusion of rules that would discriminate against them, and to ensure inclusion of rules that protect their land and other natural resource tenure rights.

BOX 4.13
Leveraging community land protection processes to strengthen women's tenure rights in Liberia, Mozambique and Uganda

Source: Knight et al., 2012.

4.2.3 Supporting documentation and registration of legitimate tenure rights

Public-interest legal service organizations can play an important role in supporting the expedient implementation of clear, simple and easy-to-follow legal processes for the documentation of legitimate tenure rights, including customary and indigenous rights. (Note that an FAO technical guide on recording tenure rights and parcels is under preparation). This role can involve provision of legal assistance to navigate formal procedures for recording tenure rights, and complementary support (e.g. to establish a community as a legal entity, with which tenure rights might then be recorded).

These interventions may include supporting individuals and families to seek documentation of their tenure rights. In urban and peri-urban areas, individual and family tenure registration efforts have proved effective at significantly strengthening tenure security and promoting a range of positive secondary impacts. Individual and family land registration may be a useful strategy in situations where tenure rights have been recently clarified; for example, in cases where customary tenure systems have collapsed, where tenure disputes are widespread, in newly settled areas, and in areas where competition for land and other natural resources is particularly fierce.

Particular care should be taken with regard to the registration of customary tenure rights. Customary tenure generally comprises a complex mesh of overlapping rights that can be held by individuals, families, clans, entire communities, or can be reserved for future generations and changing community needs. For example, some areas may be identified for use by specific individuals or families for residence or crop cultivation, through a form of usufruct rights. However, even in these areas there can be collective and secondary rights to use certain resources such as water points, or to provide for rights of way or the migratory routes of pastoralists and hunter-gatherers. In addition, the use of agricultural parcels by individuals may change over time.

The registration of customary tenure rights is a relatively recent phenomenon and follows the provision of legal recognition to customary tenure rights by an increasing number of countries. Several countries have passed legislation that facilitates registering community tenure rights. In some cases, legislation may require communities to establish themselves as either a private legal entity capable of holding collective tenure rights, or a corporate body that holds resource rights in trust for the members of their community and which can transact with outsiders.

Registering a community's tenure rights in the name of the community (such as a legal entity or corporate body) can help to provide legal protection against unauthorized encroachments or interferences. Neighbouring communities will need to agree on the positions of their common boundaries.

The registration of customary rights within the land of a community can be complex given the nature of customary tenure. Several countries have passed

legislation that enables communities to map, document and register their resources and then administer and manage them according to customary or indigenous rules. The rights can be registered within a registration system operated by the community. Alternatively, some countries provide for usufruct and similar rights to be registered in formal registration systems operated by the states. In such cases, the law should be explicit that any subsidiary customary tenure rights to those usufruct areas are not extinguished when the individual usufruct rights are registered.

Care should be taken to distinguish between proposals to register existing tenure rights from proposals to convert one form of tenure right to another. The act of registration is to provide public notice of a person's tenure rights, as well as protection of those rights, but registration of rights does not change the nature of those rights. Proposals to issue titles that are not designed to take into account pre-existing communal and secondary tenure rights should be treated with caution. Any interventions that change the underlying tenure rights should be addressed through an appropriate policy forum.

In some cases, these laws recognizing customary and common rights and providing for their registration are not being fully or well implemented. Reasons for this failure of implementation include: poor community awareness regarding their tenure rights; insufficient government capacity; overly complex and bureaucratic processes; opposition by government and elites; the prohibitive costs of titling and registration processes; the high level of technical expertise and resources involved in surveying, titling and registration; and inter- and intracommunity tenure disputes that arise during the process of determining community boundaries.

Advocates, thus, have a critical role to play in ensuring that communities' legitimate tenure rights are documented and registered as allowed under national law. Even when national laws do not allow for community tenure documentation, trust law (where applicable) or corporate law constructs may be leveraged to create community legal entities that have the power to hold rights collectively, to sue and be sued, and to transact with outsiders. Further information about the commons can be found in a forthcoming FAO technical guide on the subject.

4.2.4 Supporting communities in negotiations with companies

Commercial investments can present both risks and opportunities for community development and prosperity. Yet even when communities welcome private investment, they may not be properly consulted about the planned endeavour, adequately compensated for their losses or given a meaningful say in how their resources will be managed once the investment is launched. Investments may be undertaken in ways that lead to environmental degradation, human rights violations, loss of access to livelihoods and inequity.

As described in Chapter 3, some laws provide that when outside investors seek tenure rights to land, fisheries or forests located within a community, the investors must ask for and receive the community's FPIC, and negotiate benefit-sharing arrangements with the community. However, due to information and power asymmetries, communities may have little idea of the market value of their resources or the financial returns that can be derived from those resources.

Local leaders – customary or state – may be co-opted by investors or government agents and may negotiate personal side-payments or monthly allowances, rather than community benefits. Communities may not fully understand the proceedings, may feel intimidated or forced into signing agreements and may not be given a copy of the negotiated agreement that they have signed, leaving them without written proof of the contractual arrangement to which they 'agreed'.

To address such power and information asymmetries, public-interest legal service organizations can support communities before, during and after negotiations with investors seeking to lease or purchase community lands. Before negotiations, public-interest lawyers and other legal service providers can inform community members about their legal rights to FPIC, as may be applicable, and about requirements for environmental and social impact assessments as well as international instruments that protect legitimate tenure rights, including the Guidelines.

Public-interest legal service organizations can also help community members develop a shared position on whether to accept or reject the investment, or about the terms they want. They can help the community research whether the investor is operating legally in the country, has met all legal and government requirements, and has the capacity and financial resources to carry out the proposed development.

During negotiations, public-interest legal service organizations can support communities to negotiate over the extent of shared benefits, profits, premiums or rental payments. They can also help communities scrutinize and influence environmental and social impact assessments and other processes related to the design of the investment. This may include making submissions into any public hearings, scrutinizing drafts and seeking judicial review of environmental permits.

After a negotiation is complete and an agreement is reached, legal service providers can ensure that the agreement is written down in the form of a contract that can be enforced or voided according to national contract law. The contracts should include enforcement mechanisms and penalties; for example, for failure to pay rental fees or to provide agreed benefits. Public-interest legal service organizations can help to ensure that these agreements are recorded and registered in relevant government offices and that copies are given to community leaders.

Legal service providers can also help to set up trusts (where applicable) and bank accounts to enable communities to manage rental payments. They can also help establish oversight mechanisms designed to ensure that investors and communities alike are complying with and fulfilling the terms of the negotiated agreement. If an investor is not complying with the terms of the contract, advocates can help communities demand that established penalties are enforced (see Box 4.14).

Namati Sierra Leone uses a network of paralegals, supported by a small team of lawyers and technical experts, to provide legal support to communities involved in land negotiations or attempts to challenge improperly negotiated deals. In one recent case, Namati provided support to the small village of Masethele in a dispute with a bioenergy company that had signed 50-year leases with the leaders of three Chiefdom Councils for 58 000 acres of land. The lease terms ceded the entire land area of Masethele (2 796 acres) to the company, including all farmland, common areas, forests, wetlands, water bodies and house plots. Villagers refused to acknowledge the deal made by their leaders and requested Namati's help to understand the lease terms and represent them in negotiations with the company. After a series of community meetings, the village agreed to lease one-fourth of their land provided that the remaining three-fourths of their land was removed from the lease. With support from Namati's lawyers, the village's proposal was accepted and the company modified the lease.

In the Philippines, the Legal Rights and Natural Resources Center/Kasama sa Kalikasan/Friends of the Earth-Philippines (LRC-KsK/FoE-Philippines) has designed a Community Paralegal Teams (CPLTs) programme to train remote communities on how to gather evidence in order to build a legal case to defend their rights over land and natural resources against large-scale development projects. In this approach, teams of trained community members organize and support the fact-finding and data-gathering required by formal complaints mechanisms. This approach not only helps paralegals and lawyers to collect adequate information and evidence to build strong legal cases, it also trains and empowers community members in how to use the law more effectively to protect their rights. The CPLTs have achieved many successful outcomes to date including the withdrawal of a mining company from community lands.

BOX 4.14

Supporting communities in interactions with companies: experience from Sierra Leone and the Philippines

Source: Brinkhurst and Knight, 2014.

Source: Rebuta, Gregorio and Hatta, 2012.

4.2.5 Support for individuals and communities facing expropriation of legitimate tenure rights

When governments take on large development projects, the tenure rights of thousands of families may be forcibly expropriated. The Guidelines contain extensive provisions on the implementation of expropriations (see Box 4.15). In addition to the information contained in the Guidelines, international human rights jurisprudence has clarified the implications of international human rights treaties for expropriation processes. Particularly important documents are the CESCR's General comment No. 7: on forced evictions (1997) and the Basic principles and guidelines on development-based evictions and displacement (OHCHR, n.d.; see also FAO, 2009a).

As discussed in Chapter 3, lawmakers can contribute to responsible governance of tenure through properly crafted legislation. There is much that can be done at the implementation stage, as well. Public-interest legal service organizations have an important role to play in these situations. For example, they can:

- inform community members about: their rights during an expropriation process; how to contest unfair procedures; and how to dispute compensation determinations;

BOX 4.15

Examples of Guidelines' provisions on expropriation

16.2: "States should ensure that the planning and process for expropriation are transparent and participatory. Anyone likely to be affected should be identified, and properly informed and consulted at all stages. Consultations, consistent with the principles of these Guidelines, should provide information regarding possible alternative approaches to achieve the public purpose, and should have regard to strategies to minimize disruption of livelihoods. States should be sensitive where proposed expropriations involve areas of particular cultural, religious or environmental significance, or where the land, fisheries and forests in question are particularly important to the livelihoods of the poor or vulnerable."

- organize public meetings where community members can exchange information, voice their concerns, share their experiences and identify potential strategies;
- assist community members to contest the purpose of the expropriation;
- work with community members to identify viable, cost-effective alternatives to the project that avoid or minimize disruption to the community and environment;
- support community members to conduct surveys on community interests, undertake impact assessments of the planned project and assist in relevant data collection;
- help to develop effective communication procedures between the acquiring agency and affected owners and occupants;
- implement mechanisms to redress affected families' grievances and resolve conflicts;
- advocate for transparency and due process during expropriation procedures;
- assist people to advocate effectively for themselves, or act as their advocates, in the appeals process or other dispute-resolution procedures;
- assist vulnerable people, including women, to make effective compensation claims;
- assist people to develop alternative options for compensation, relocation and the restoration of their livelihoods;
- ensure that compensation is paid, and that resettlement efforts provide adequate alternative housing, and access to water, infrastructure and productive land, fisheries and forests; and
- strengthen negotiation skills to argue for equitable compensation or request higher compensation standards on community members' behalf, among other supports.

Public-interest legal service organizations may also play a watchdog role, monitoring the acquiring agency's actions to ensure that it is following the legally prescribed expropriation processes in a transparent and equitable manner. If conciliatory methods are unsuccessful, it may be necessary to organize public meetings, media engagement or other advocacy strategies to challenge abusive or corrupt behaviour and demand that the state comply with its legal obligations and enforce laws protecting legitimate tenure rights.

Key recommendations 4.2

- ✓ Public-interest legal service organizations should support citizens to hold their government accountable to responsible governance, justice and the rule of law. They should also:
- ✓ promote legal awareness about both the substantive content of relevant laws as well as practical and procedural information concerning how to follow legal and administrative processes to successfully claim, protect and defend tenure rights;
- ✓ support documentation and registration of legitimate tenure rights, including individuals' and communities' customary and indigenous tenure rights;
- ✓ support claims of infringements of tenure rights and discrimination based on gender, age, minority status and social class;
- ✓ support communities during negotiations with outside investors, and assist communities to enforce investor fulfilment of contract terms;
- ✓ support individuals and communities facing expropriation of legitimate tenure rights, and ensure that state agencies and actors follow pro-poor legal mandates by reminding them of pro-poor regulations, monitoring administration processes and acting as 'watchdogs' to ensure that government officials comply with relevant laws.

4.3 The role of business lawyers

As mentioned in Chapter 1, lawyers representing business – whether foreign or domestic investors, in law firms or as in-house counsels – can play an important role in ensuring that the standards identified in the Guidelines are upheld. Most of the provisions of the Guidelines are addressed to states, but some provisions are explicitly addressed to businesses (see Box 4.16). How, then, should lawyers representing businesses advise their clients on issues covered by these provisions?

Many of the standards in the Guidelines will be consistent with national law in the relevant jurisdiction. In these cases, providing sound legal advice based on applicable national law will contribute towards promoting implementation of the Guidelines. In other cases, however, national law falls short of the standards in the Guidelines, and determining how to advise clients can raise more difficult issues.

The spread of economic globalization has made it increasingly common for investors to operate in countries where laws or regulations are not fully developed in important areas of environmental and social concern, including many matters dealt with in the Guidelines. Business lawyers may be advised to counsel their clients that it is both prudent and ethical to undertake actions that exceed their minimum legal obligations.

Research highlights the major risks (financial, operational, reputational) that may be at stake if tenure issues are not duly considered, even where national law is formally complied with (The Munden Project, 2013). Even when tenure transactions comply with national law, disputes may arise if the local population does not consider these transactions to be legitimate. A wave of large-scale land transactions for plantation agriculture has seen extensive contestation, and has been negatively characterized as “land grabbing”, even in connection with deals that were broadly in line with national law. Business lawyers that restrict their advice to legal compliance and neglect the Guidelines may leave their clients exposed to disputes and to damage to finances, operations and reputations.

For these reasons, some companies have made public commitments to adhering to the Guidelines in their operations, or across their supply chains (FAO, 2014a), and lawyers advising them should be aware of the importance of their responsibility to encourage that commitment. They should also make clients aware that civil society advocates are likely to closely monitor

3.2 “Non-state actors including business enterprises have a responsibility to respect human rights and legitimate tenure rights. 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 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.”

12.3 “All forms of transactions in tenure rights as a result of investments in land, fisheries and forests should be done transparently in line with relevant national sectoral policies and be consistent with the objectives of social and economic growth and sustainable human development focusing on smallholders.”

12.4 “Responsible investments should do no harm, safeguard against dispossession of legitimate tenure right holders and environmental damage, and should respect human rights. Such investments should be made working in partnership with relevant levels of government and local holders of tenure rights to land, fisheries and forests, respecting their legitimate tenure rights. They should strive to further contribute to policy objectives, such as poverty eradication; food security and sustainable use of land, fisheries and forests; support local communities; contribute to rural development; promote and secure local food production systems; enhance social and economic sustainable development; create employment; diversify livelihoods; provide benefits to the country and its people, including the poor and most vulnerable; and comply with national laws and international core labour standards as well as, when applicable, obligations related to standards of the International Labour Organization.”

12.12 “Investors have the responsibility to respect national law and legislation and recognize and respect tenure rights of others and the rule of law in line with the general principle for non-state actors as contained in these Guidelines. Investments should not contribute to food insecurity and environmental degradation.

BOX 4.16
**Business enterprises in the
Guidelines**

the actions of such companies in light of the Guidelines, and that these advocates can mobilize public opinion where the safeguards in the Guidelines are not being applied.

In addition to corporate choices, there are also other reasons why business lawyers should take the Guidelines seriously. As discussed in Chapter 2, while the Guidelines are not binding per se, some of their provisions are in line with the professional responsibilities and duties commonly held by lawyers, and with international legal norms, for example in relation to human rights law. In addition, many provisions in the Guidelines are in line with other soft-law guidance and standards affecting business, so even where national laws may not be fully consistent with the Guidelines, a range of other international standards reinforce the principles of responsible governance enshrined in the Guidelines.

An important example is the UN Guiding Principles on Business and Human Rights, which were mentioned in Chapter 2. The Guiding Principles enjoy significant private sector support, and have contributed to the growing acceptance in the legal profession that soft-law standards can be an important part of advising companies. For example, bar associations and law firms have been developing guidance for attorneys on business and human rights and corporate social responsibility issues, and practitioners have begun incorporating these considerations into their transactional practices (see Box 4.17).

The Guidelines have much in common with the Guiding Principles, and the Guidelines implicitly refer to the Guiding Principles (par. 3.2). However, there are also important differences, not least because the Guiding Principles focus on human rights, while the Guidelines address human rights, but focus on tenure rights (CFS, 2013).

BOX 4.17
Precedent for lawyers advising clients to adhere to the Guidelines

Source: UNGA, 2011 and UN Global Compact, n.d.

Source: Law Society of England and Wales, 2014.

Source: IBA, 2014, 2015.

The precedent for lawyers advising clients to adhere to soft-law instruments such as the Guidelines can be seen in a range of other initiatives. The development of Principles for Responsible Contracts: Integrating the Management of Human Rights Risks into State-Investor Contract Negotiation: Guidance for Negotiators as an addendum to the UN Guiding Principles on Business and Human Rights set forth a framework for ensuring the consistency of contracting practices with human rights standards. Other examples include the UN Global Compact's "Lawyers as Leaders" initiative. This initiative has produced a series of guides in areas including the environment, anti-corruption and human rights.

The recently adopted recommendations of the Law Society of England and Wales Advisory Group on Business and Human Rights further illustrate this trend (Law Society of England and Wales, 2014). Among the recommendations is recognition that lawyers have a responsibility to protect human rights in accordance with the UN Guiding Principles and that this should be reflected, as appropriate, in advice to clients. The recommendation also identified the professional responsibility of lawyers as trusted advisors and legal professionals. The advisory group called on law firms to adopt human rights policies and due diligence procedures in line with the Guiding Principles to identify, prevent and mitigate human rights risks associated with their activities and to commit to monitoring and evaluation of those efforts.

In addition, the International Bar Association (IBA) approved in 2015 *Business and human rights guidance for bar associations*, and is working on an annex to that guidance document, *Guidance for business lawyers on the UN Guiding Principles on Business and Human Rights*. A working draft version published for comment in 2014 provides guidance on the ways in which the Guiding Principles may be relevant to the advice that business lawyers provide clients, consistent with their professional ethical responsibility as lawyers to uphold the law, to act in their clients' best interests and to preserve client confidences. The draft also reviews the potential implications of the Guiding Principles for law firms as business enterprises with their own responsibility to respect human rights, focusing on services rendered to clients.

According to the Guiding Principles, human rights due diligence is the process through which companies “identify, prevent, mitigate and account for how they address their adverse human rights impacts” (Principle 17). The process “should include assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed” (Principle 17). The human rights due diligence “[w]ill vary in complexity with the size of the business enterprise, the risk of severe human rights impacts, and the nature and context of its operations” (Principle 17). The commentary to the UN Guiding Principles clarifies that human rights due diligence can be included within broader enterprise risk-management systems, including impact-assessment processes.

A combined reading of the Guiding Principles and the Guidelines would call for factoring legitimate tenure rights issues into due diligence processes. The draft *Guidance for business lawyers on the UN Guiding Principles on Business and Human Rights* (see Box 4.17) provide specific guidance on how to conduct human rights due diligence. In addition, lawyers may rely on the Guidelines to advise clients on mitigating impact, avoiding risks or even terminating the relationship under certain circumstances.

Business lawyers can remind their clients that, if a misalignment exists between national law and the Guidelines, national law does not necessarily prohibit the business from applying more stringent standards. More difficult issues may arise where complying with national law would prevent the business from adhering to the Guidelines; for example, when there is a direct contradiction between national law and the Guidelines.

The draft *Guidance for business lawyers on the UN Guiding Principles on Business and Human Rights* (see Box 4.17 and IBA, 2014) discusses how to address these challenges in relation to human rights, calling for lawyers to provide critical advice to clients in order to explore appropriate responses without violating national law. Options may include: assessing whether national law is ambiguous; seeking clarification from the government or even challenging the law before national courts where this is allowed; and developing solutions, including parallel processes, that allow the company to honour human rights without violating national law. Comparable options may be explored in relation to issues affecting legitimate tenure rights.

In addition to international law and standards, business lawyers may also need to consider the relevance of any extraterritorial obligations. As discussed, the Guidelines state that home states have a role to play in ensuring that businesses are not involved in abuse of human rights and legitimate tenure rights (par. 3.2). Section 12 on investments in the Guidelines reinforces this point, stating that, when states invest or promote investments abroad, they should ensure that their conduct is consistent with the protection of legitimate tenure rights, the promotion of food security and their existing obligations under national and international law, and with due regard to voluntary commitments under applicable regional and international instruments (par. 12.15).

In line with this guidance, business lawyers may need to consider applicable provisions of national law in the company’s home state that may have a bearing on investments

in other countries. Examples of such national law include legislation to curb corruption of foreign officials (e.g. the US Foreign Corrupt Practices Act). As discussed above, preventing corruption is a recurring theme in the Guidelines. All OECD and seven non-OECD countries have ratified the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, and many of them have already operationalized the convention. In addition, many home states now require adherence to good practice standards if investors should request state support, for instance, in the form of investment insurances or export credit.

A number of actors have issued further guidance to businesses specifically on land tenure issues and agribusiness investments. A forthcoming FAO technical guide is aimed at the private sector and centres on investment issues. The Interlaken Group (a multistakeholder forum) and the Rights and Resources Initiative (RRI) has prepared further guidance for companies on respecting land and forest rights (The Interlaken Group and RRI, 2015). The French Technical Committee on Land Tenure and Development published the *Guide to due diligence of agribusiness projects that affect land and property rights* (Comité Technique “Foncier et développement”, 2014b) which is explicitly based on the Guidelines. It includes a detailed grid identifying “criteria” and “key questions” for assessing the social, economic and environmental tenure issues associated with the design of proposed investment projects. The criteria and key questions pay significant attention to legal and contractual issues. While the guide is not designed primarily for lawyers, it can be of assistance to them when undertaking tenure due diligence for proposed investment projects.

The *Guide to due diligence of agribusiness projects that affect land and property rights* covers some issues that have received limited attention in international standard-setting efforts. For example, it discusses dealing with historical issues concerning the acquisition of the land (“passifs fonciers” or “tenure liabilities”). These issues may be at stake, for example, where the investor acquires a landholding company that, in turn, acquired the land in circumstances that formed the object of contestation; or, where the investor acquires the land from the state, which, in turn, expropriated it in circumstances that formed the object of contestation. While the transaction directly associated with the investor may be relatively uncontroversial, the taking over of previous “tenure liabilities” may expose the investor to tenure and reputational risks, particularly if contestation is still ongoing or latent. Lawyers should consider these risks in due diligence processes (Comité Technique “Foncier et développement”, 2014b).

Another practical issue that may arise in advising clients on tenure transactions concerns situations where the company negotiates directly with community groups. There may be significant power imbalances compounded by unequal access to legal representation if communities do not have the resources to hire lawyers.

Businesses taking a long-term perspective may wish to help communities obtain legal representation, knowing that a better-negotiated deal is ultimately more advantageous for both parties. This approach could include financial support to pay for the communities’ legal fees and expenses. While this solution may provide communities with legal representation, it also raises questions about conflicts of interest, because the party with whom the community is negotiating would pay the lawyers representing the communities. Technical solutions can help mitigate risks

if, for instance, legal costs are paid through a trust or foundation rather than by the company directly.

Ultimately, however, this situation compounds the need for this type of legal assistance to be eligible for legal aid, and for legal aid to be properly resourced and accessible. It also points to the role that civil society advocates and development agencies can play to make sure communities are in a position to make informed choices and negotiate effectively.

Key recommendations 4.3

- ✓ Business lawyers can play an important role in promoting implementation of the Guidelines, by reflecting on their implications for clients.
- ✓ Both prudential and ethical considerations call for lawyers to take the Guidelines seriously, especially given the significant tenure risks that may be associated with natural resource investments.
- ✓ This attentiveness to the Guidelines may include integrating adherence to them in due diligence processes, and advising clients on mitigating impact, avoiding risks or even terminating the relationship under certain circumstances.
- ✓ Where national law is in direct contradiction with the Guidelines, options may include: assessing whether national law is ambiguous; seeking clarification from the government or even challenging the law before national courts where this is allowed; and developing solutions, including parallel processes, that allow the company to honour legitimate tenure rights without violating national law.
- ✓ Business lawyers may also need to consider the Guidelines in the context of any applicable extraterritorial obligations in relation to such things as corruption, for example.
- ✓ Where businesses cover the legal costs of the communities they negotiate with, effective institutional arrangements need to be in place to minimize conflict-of-interest issues.

5

Resolution of tenure disputes

5. Resolution of tenure disputes

While much of the discussion in previous chapters deals with the advantages of implementing the Guidelines as a means to avoid conflicts, the reality is that disagreements are an inevitable fact of life. To respond to this potential, this chapter discusses how to use the Guidelines in the context of the resolution of disputes. It begins with a discussion as to what tenure disputes are and why they matter to lawyers and other legal service providers. It then examines access to justice for perceived violations of tenure rights, guidance drawn from the Guidelines on dispute-settlement processes, and opportunities for judges and decision-makers to consider the Guidelines in the performance of their duties.

5.1 The resolution of tenure disputes – key concepts

5.1.1 What are tenure disputes?

Competition over land, fisheries and forests can result in disputes over tenure rights to these resources. Disputes can take place within or between families, or between individuals or communities and private companies. They can involve claims against the state. Disputes can arise over a number of issues, such as inheritance, boundaries or transactions (see Box 5.1). Tenure disputes matter because, if left unaddressed, they can escalate into violent conflict. Furthermore, providing effective and legitimate ways to settle disputes is an important factor in protecting legitimate tenure rights, and is one of the key functions of the law (FAO, 2014c).

The Guidelines draw a distinction between “disputes” and “conflicts” (treated in Guidelines sections 21 and 25, respectively). Broadly speaking, the notion of “disputes” used in section 21 (see Box 5.4) is used to refer to competing tenure claims which are limited in nature and can be addressed under existing law. Disputes are discussed in Part 5 of the Guidelines on the administration of tenure alongside tenure records, valuation, taxation and spatial planning.

In contrast, the term “conflicts” in section 25 of the Guidelines is used in relation to societal or large-scale disruption that result in widespread changes to tenure arrangements. The Guidelines also consider those conditions of discrimination caused by laws or policies that can lead to conflict. The discussion of conflicts in section 25 is situated in Part 6 of the Guidelines concerning emergencies, natural disasters and climate change.

The types of tenure conflicts referred to in section 25 involve complex issues linked to public international law topics, including international humanitarian law, international refugee law and the protection of legitimate tenure rights in conflict situations. The emphasis of this guide on national law and policy as well as space constraints place those issues outside the scope of this guide. Instead, this chapter focuses particularly on the implications of the Guidelines for the resolution of tenure-related disputes under national law. Nevertheless, the need for states to remove discriminatory laws and policies discussed in section 25 is a matter that may be identified and addressed in relation to assessments of national law.

BOX 5.1
Examples of
tenure disputes

Intra-household disputes may relate to women’s tenure rights in inheritance-related matters. For example, in-laws may have seized lands or artisanal fishing vessels from widows and pushed them into poverty in breach of local inheritance laws.

An example of an interhousehold dispute could involve two families belonging to the same community disagreeing as to the boundaries of their respective fields. Among communities, pastoralists and farmers may have a dispute in relation to access to water points.

When companies acquire tenure rights in land, fisheries or forests, disputes can arise with local communities. For instance, authorities may have granted logging concessions to commercial operators, leading to forest users being expelled. Similarly, a state may have given planning permission to a private investor for the construction of a tourist resort, as a result of which fishers may have been forcibly displaced. Reallocating fisheries rights from one user group to another (for example, from artisanal to commercial or recreational fishers) could also lead to tenure disputes

5.1.2 Sources of tenure disputes

Tenure disputes can have diverse sources. Lawyers and other legal service providers should pay particular attention to these sources and their specificities. Recurring sources of disputes include tenure insecurity, resource scarcity, “quality” of law (or rather the lack thereof), and historical injustice (FAO, 2014c).

The issue of tenure insecurity is discussed elsewhere in this guide (see Chapters 2 and 3, in particular). In short, insecurity of tenure results from tenure holders fearing they will not continue to be able to enjoy the resources upon which they claim tenure rights. Marginalized groups tend to be the most affected by insecurity of tenure.

Resource scarcity, which is linked to the issue of insecurity of tenure, can be another key driver for tenure disputes. The issue arises when the availability of natural resources is insufficient to meet demand. This scarcity may be due to factors such as demographic growth, rising consumption, commercial pressures or skewed consumption between users, and concentration of land.

The quality of lawmaking is discussed in Chapter 3. Unclear or ambiguous laws can lead to competing claims in relation to the same land or forest, for instance. Lack of clarity on the status of customary tenure rights is a common source of disputes.

Historical injustice can also generate disputes, especially in cases where forced resettlements and tenure dispossession produced impacts that are still being felt by the affected population long after these events.

5.1.3 Providing mechanisms for resolving tenure disputes and protecting legitimate tenure rights

As discussed, providing mechanisms for resolving tenure disputes and protecting legitimate tenure rights is a key function of the law. Lawyers and other legal service providers can play an essential role in resolving tenure disputes. In virtually all countries, national law will have established a formal court system allowing tenure disputes to be formally adjudicated. National law will also have set up rules to determine such matters as: how judges are to be appointed; which court will have jurisdiction to decide what issue(s) (for example, some countries have established specialized courts to deal with land disputes, including Colombia, Ghana, Kenya and Mexico); which law(s) apply; the formalities, if any, necessary to access those courts; the procedure for managing the disputes, including opportunities for appeal; and mechanisms to promote compliance with, and enforcement of, dispute-resolution decisions.

However, formal court systems are often not the only avenue to resolve tenure disputes. As discussed in Chapter 2, multiple tenure systems may coexist in the same territory, including statutory and customary systems. Alongside formal court systems there may be non-state/judicial systems for resolving tenure disputes, including customary systems and alternative dispute resolution (ADR) mechanisms. In fact, many disputes never reach the courts and are resolved in some other way instead, including through ADR mechanisms. Only a very small percentage of disputes that are filed in court go through to the full trial process, as the vast majority are settled out of court.

ADR encompasses a broad range of mechanisms to resolve disputes outside of the court systems, including negotiation, mediation (see Boxes 5.2 and 5.3), conciliation, early neutral evaluation and expert determination (FAO, 2014c). While diverse, ADR mechanisms share a number of characteristics. For instance, they rely upon consent of the parties. In addition, mediation and conciliation aim to find a solution to the dispute, rather than deciding which rights should prevail according to the applicable law.

This approach favours outcomes that are consensual and mutually beneficial for all parties involved (FAO, 2014c). Such outcomes are often more likely to satisfy and be respected by all parties involved compared to, for instance, a judgment rendered by a court which might be difficult to implement and might need to be enforced through a potentially lengthy and costly process. However, imbalances in negotiating power can also result in inequitable deals.

Arbitration is also often listed as a type of ADR. Arbitration consists of parties agreeing: i) to refer their disputes to a tribunal made of usually one or three neutral individuals; and ii) to comply with the tribunal's decision. Unlike the other above-mentioned ADR mechanisms, arbitration is an "adversarial" process leading to a binding outcome for the parties.

Parties cannot be compelled by law to reach an agreement through ADR, but the law sometimes requires the parties to make efforts to attempt ADR processes before bringing a matter to the court system.

In many parts of the world, customary systems provide relatively quick and inexpensive mechanisms to settle disputes over land, fisheries and forests. There is great diversity in customary systems for resolving tenure disputes. Many systems emphasize ADR approaches such as negotiation, mediation and conciliation.

BOX 5.2 Mediation

Source: Open Society Justice Initiative, 2010.

Mediation can be used for disputes that may not be well resolved in court, or when parties are not able to or do not feel comfortable filing a claim in the formal court system. Parties must consent in order to participate in a mediation process, and should be ready to arrive at a resolution through compromise and negotiation facilitated by a neutral third-party mediator.

As compared to court litigation, mediation can be less costly, less time consuming and more conducive to restitution, reconciliation and rehabilitation between the parties. Mediation has fewer procedural rules and greater informality, allowing parties to feel more comfortable speaking freely when presenting their case. Moreover, mediation resonates more with customary practices of compromise and community cohesion rather than punishment or an adversarial process of winners and losers. When community members have to live closely together after the conclusion of a dispute, mediation's focus on win-win solutions can help restore local harmony. Mediation can also play a preventative role in that it can be used at an early stage of a conflict, reducing chances that the dispute will escalate.

Through the Guidelines for Voluntary Resource Sharing process, the Government of Western Australia introduced a system of fisheries management on the basis of mediated negotiation in order to resolve disputes relating to such issues as fishery resources and catch-sharing issues. The process allows users – including the general community and the government management agency, Fisheries Western Australia – to have an enhanced role in cooperative management design, using mediation.

BOX 5.3
Using mediation
to solve fisheries
issues – Western
Australia

Source: Open Society Justice Initiative, 2010.

The coexistence of state and non-state dispute-resolution systems can lead to a practice sometimes called “forum shopping”, whereby a person seeking to resolve a dispute (a claimant) will choose the avenue which is most likely to result in a favourable decision for them. While, in principle, advantageous for the claimant, this practice could be unfair to a defendant, as in cases when the claimant, having initially lost, is allowed to bring the same claim again through another avenue.

It is important to emphasize that court systems are not necessarily superior to customary systems or ADR avenues; the latter can be considerably more accessible than the former, may enjoy considerable legitimacy and can provide an effective way of resolving tenure disputes (Ubink and McInerney, 2011). Many tenure disputes do not go through court proceedings because of geographic, language or cultural barriers, high costs and slow procedures; it may take several years to reach a final decision. However, where customary systems entrench inequalities based on gender or status, for example, the court system might provide a useful option with fewer biases and dominance issues along the lines of gender, age, social class or ethnicity (FAO, 2013a).

Key recommendations 5.1

- ✓ States should pay close attention to tenure disputes. Providing effective and legitimate ways to settle disputes is an important factor in protecting legitimate tenure rights as disputes left unaddressed could escalate into violent conflict. Lawyers and other legal service providers can play a key role in this regard.
- ✓ Tenure disputes can take place in many situations including within or between families, or between individuals or communities and private companies. They can involve claims against the state. They can arise over a number of issues, such as inheritance, boundaries or transactions. Tenure disputes may be rooted in tenure insecurity, resource scarcity, ‘quality’ of law and historical injustice.
- ✓ Legal professionals should consider all dispute-resolution options. Formal court systems are not the only avenue to resolve tenure disputes. There may also be non-state systems for adjudicating tenure disputes, including customary systems and alternative dispute resolution (ADR) mechanisms.
- ✓ Court systems are not necessarily superior to customary systems or ADR avenues. Depending on context, the latter can be more accessible than the former, may enjoy considerable legitimacy and can provide an effective way of resolving tenure disputes.

21.1 "States should provide access through impartial and competent judicial and administrative bodies to timely, affordable and effective means of resolving disputes over tenure rights, including alternative means of resolving such disputes, and should provide effective remedies and a right to appeal. Such remedies should be promptly enforced. States should make available, to all, mechanisms to avoid or resolve potential disputes at the preliminary stage, either within the implementing agency or externally. Dispute resolution services should be accessible to all, women and men, in terms of location, language and procedures."

21.2 "States may consider introducing specialized tribunals or bodies that deal solely with disputes over tenure rights, and creating expert positions within the judicial authorities to deal with technical matters. States may also consider special tribunals to deal with disputes over regulated spatial planning, surveys and valuation."

21.3 "States should strengthen and develop alternative forms of dispute resolution, especially at the local level. Where customary or other established forms of dispute settlement exist they should provide for fair, reliable, accessible and non-discriminatory ways of promptly resolving disputes over tenure rights."

21.4 "States may consider using implementing agencies to resolve disputes within their technical expertise, such as those responsible for surveying to resolve boundary disputes between individual parcels within national contexts. Decisions should be delivered in writing and based on objective reasoning, and there should be a right to appeal to the judicial authorities."

21.5 "States should endeavour to prevent corruption in dispute resolution processes."

21.6 "In providing dispute resolution mechanisms, States should strive to provide legal assistance to vulnerable and vulnerable persons to ensure safe access for all to justice without discrimination. Judicial authorities and other bodies should ensure that their staff have the necessary skills and competencies to provide such services."

In addition, there are many other references to dispute resolution in the VGGT, including paragraphs **3A.1.4** and **5, 4.7, 4.9, 6.1, 6.3, 6.6, 15.9** and **16.1**.

BOX 5.4

Section 21 of the Guidelines: Resolution of disputes over tenure rights

5.2 Dispute resolution in the Guidelines

The Guidelines recognize the value of ADR (par. 4.9), and they provide extensive guidance on dispute resolution (section 21, as well as several other provisions; see Box 5.4).

In many ways, tenure disputes are similar to all other disputes. They suffer from the same or similar challenges as non-tenure disputes. These challenges include, for instance, lack of rule of law in some national contexts (see Chapter 2), which can undermine fairness of the judicial system, can favour corruption and, ultimately, erode public trust in the court system and the perceived legitimacy of this system.

An issue linked to the lack of rule of law is the lack of independence of judges from political and economic interests, which will, again, affect the perceived legitimacy of court systems. Other challenges include insufficient funding for court systems, which can create backlogs and, therefore, considerable delays for decisions to be rendered. Difficulties may also arise in connection with the enforcement of judicial decisions, particularly in the face of obstruction from the losing party.

The Guidelines address these fundamental issues. They call on states to provide "effective and accessible means to everyone, through judicial authorities or other approaches, to resolve disputes over tenure rights", as well as "affordable and prompt enforcement of outcomes" (par. 3A.1.4). They also call for judicial bodies to be "impartial and competent" and for remedies to be "effective" and "promptly enforced" (par. 4.9). The impartiality and independence of the justice system require appropriate measures on the recruitment, progression, salaries and tenure of judges, as well as measures to combat corruption.

But tenure disputes also present important specificities. For instance, producing evidence can be difficult when customary tenure rights are at stake, especially since such rights tend to be unrecorded. Tenure disputes are often associated with very unequal playing fields and imbalances of power; for instance, where tenure disputes pit women against male elders, or indigenous peoples against large investors. The Guidelines pay a great deal of attention to these dispute-resolution issues, recognizing the importance of such things as: access to justice, an impartial judiciary, alternative dispute-resolution mechanisms and prompt enforcement, for the recognition of legitimate tenure rights.

The Guidelines call for states to provide prompt, accessible services to citizens to protect their tenure rights and facilitate the enjoyment of those rights, and to resolve disputes (par. 6.3). To do this, the Guidelines provide guidance to states as to the steps they can take to both:

- improve the formal state justice system, including making it more accessible, especially for vulnerable groups and to ensure remedies are promptly enforced (par. 21.1, 21.6); and
- strengthen and develop alternative forms of dispute resolution, including customary dispute settlement systems (par. 21.3).

5.2.1 Improving access to courts

The Guidelines call for dispute-resolution services to be accessible to all in terms of location, and for states to take measures to support vulnerable or marginalized groups to access judicial services, including through affordable legal aid and the provision of mobile services for remote communities and mobile indigenous peoples (par. 6.6, 21.1, 21.6).

To do this, the justice system may need to be brought socially and geographically closer to the vulnerable or marginalized groups. Depending on context, dispute-resolution mechanisms may be devolved to the local level so that tenure disputes can be settled quickly. Courts may need to be decentralized, special legal bodies and/or mobile dispute-resolution services established at the local level. Judges may set up rotating tribunals or mobile courts, visiting remote areas periodically to hear disputes locally.

Justices of the peace or local small claims tribunals may be set up in rural areas or local leaders can be trained and certified to act as village representatives of national justice systems, with clear lines of oversight and appeal. Various countries, including Botswana and Brazil, have already established such systems (see Box 5.5).

To ensure that all citizens can use the courts, the ability of the parties to pay should be factored into the structure of court fees. Affordable aid may be provided and the very poor could be offered free legal representation (see Box 4.7 on the issue of free legal advice).

In Botswana, one of the functions of the Land Boards established under the 1968 Tribal Land Act was to hear and rule on disputes relating to customary land grants and rights within the area for which they have jurisdiction. However, many local residents lived far from the Land Boards and could not, therefore, access them. Accordingly, in 1973 the country enacted the Establishment of Subordinate Land Boards Order, which set up a network of more local, “subordinate” Land Boards located closer to the communities.

In Brazil, a system of local “special tribunals” or “small claims courts” has existed since the 1980s to hear minor civil and criminal cases. The objective was to promote access to justice for poor people, in particular, by setting up faster and cheaper procedures, focusing on mediation. The procedure was formally set out in Federal Law No. 9.099/95. One innovation is the attempt to limit referrals to a formal court through a compulsory mediation process as a means of reaching agreement.

BOX 5.5 Improving access to courts in Botswana and Brazil

Source: FAO, 2010.

Source: Ferraz, 2010.

5.2.2 Eliminating unnecessary legal and procedural requirements and making court procedures less cumbersome

The Guidelines provide that states should eliminate unnecessary legal and procedural requirements and strive to overcome barriers related to tenure rights (par. 6.3). They recommend that dispute-resolution services be accessible to all in terms of language and procedures, among other things (par. 21.1).

To this end, and depending on the context, the rules of court proceedings may need to be relaxed to accommodate the needs and capacities of the rural poor and marginalized groups and individuals. For example, poor claimants may be allowed to represent

BOX 5.6
Formalizing
“landscape-based”
evidence and allowing
oral testimony as proof
of land rights in Eastern
and Southern Africa

Source: FAO, 2010.

Under the laws of Botswana, Mozambique and the United Republic of Tanzania, customary rules of evidence or “landscape-based evidence” are considered at all levels of the judicial system to be equivalent in weight to formal rules of evidence.

In Mozambique, the oral testimony of neighbours is sufficient to establish a valid and enforceable land claim. The legal weight of collective verbal testimony made publicly in front of the whole community – often much more difficult to falsify than a piece of paper or an individual declaration – is made equivalent to the legal weight given to testimony made under oath on the witness stand. In making group oral testimony valid proof of a land claim, Mozambique has created a way around both the high rates of illiteracy in rural villages and the need for written evidence of customary land rights.

themselves in their native language, particularly in disputes involving low monetary stakes, and representation by individuals other than qualified lawyers could be permitted. Courts could accept a wider range of evidence as legitimate such as oral evidence (see Box 5.6), including in relation to proof of tenure rights.

Whenever the law allows it, judges could make efforts to speak in plain language comprehensible to lay people and take care to make sure that the poor understand court proceedings. Courts may also provide court translators so that the poor can speak in their own language and can understand the proceedings.

Similarly, rules of standing may be relaxed in appropriate circumstances so that a wider range of claimants can file lawsuits, such as allowing organizations to represent individuals and accepting collective claims. Statutes of limitations need to be thought through in light of the time that it can take to file lawsuits, particularly for marginalized groups.

5.2.3 Selecting and training a diverse judiciary

The Guidelines call for states to ensure that judicial authorities have the human, physical, financial and other forms of capacity to implement policies and laws in a timely, effective and gender-sensitive manner. They recommend that staff at all organizational levels receive continuous training and be recruited with due regard to ensuring gender and social equality (par. 6.1). To ensure responsible governance that reflects the range of gender, racial, ethnic, social and religious diversity, states may make deliberate efforts

to hire judges from a variety of backgrounds. Efforts could also be made to ensure that women and indigenous peoples are encouraged to seek judicial office, while legislation should prohibit discrimination in judicial selection processes.

Judges may also need to be trained to ensure the poor and marginalized groups and individuals are given the same opportunity to exercise their rights and to be heard as other litigants, including by conducting their courtrooms in a manner that is less intimidating or penalizing to a range of litigants. Such training may include: strengthening the capacity of judges to protect human rights and enforce the rights provided for in national law and international instruments such as the Guidelines; emphasizing the role of judges as protectors of rights and as impartial adjudicators; supporting judges to confront and address personal biases; and reviewing relevant national judicial codes of conduct that emphasize judicial integrity, impartiality, independence and accountability. FAO's experience in Mozambique in the late 1990s and early 2000s suggests that many judges were still lacking in knowledge of the country's 1997 Land Law, and did not fully grasp the new principles and implications of the law. Some had continued to refer to colonial era law and were not familiar with the constitutional principles of the country (personal communication from Christopher Tanner, former Chief Technical Advisor of FAO's legal education programme).

5.2.4 Strengthening customary justice systems by integrating them with statutory systems

The Guidelines recommend that states strengthen and develop alternative forms of dispute resolution, including customary justice systems (par. 21.3). As mentioned above, such systems often can settle local tenure disputes quickly and inexpensively. Collaborative relationships between formal and informal justice institutions can help both to improve access to and use of the courts and to reduce judicial caseloads.

Government-led training programmes to strengthen the capacity of customary leaders to understand national laws and human rights (including gender equity) are important steps in this direction. Judicial authorities could also provide ongoing support to customary leaders and supervise their decisions to ensure compatibility with the relevant constitutional and international human rights principles. In turn, customary leaders could support judges in areas such as customary rules, so that judges can understand the rationale behind local conceptions of justice and fairness (FAO, 2010).

5.2.5 Establishing a clear and accessible system of judicial appeal

The Guidelines call for states to provide a right to appeal (par. 21.1). Clear and simple appeal processes may be established as a check against judicial error and corruption, and as a way of ensuring consistency across judicial decisions. Clear and expedited

appeals procedures would also allow the parties to contest what they feel are unjust court or customary decisions. It is important that at least the lowest tiers of appeal are easily accessible to poor and vulnerable groups. There is scope for innovation, including magistrates and judges travelling according to a set schedule throughout their areas of jurisdiction to bring the court system directly into villages.

5.2.6 Strengthening judicial oversight and accountability mechanisms

In line with their promotion of the rule of law (see Chapter 2), the Guidelines expect judicial authorities to be impartial. They also call for States to prevent corruption in dispute-resolution processes (par. 21.1 and 21.5).

The impartiality and independence of the justice system is the cornerstone of responsible governance; the courts are the last mechanism for holding other branches of government and other stakeholders accountable to enforcing tenure rights. Addressing the potential for judicial corruption is, thus, critical to protecting the tenure rights of the poor and vulnerable groups.

Ensuring commensurate salaries and maintaining high ethical standards with strict consequences could, in some cases, help to reduce bribery in the judicial system. Opening trials and hearings to the public, making court transcripts mandatory and publishing all judicial rulings can increase transparency, deter corruption, ensure greater consistency of decisions and create stronger judicial precedent.

Increased access to judicial decisions may also improve appeals processes: when a trial transcript exists and the judge's reasoning is clearly written, a reviewing body can better address the disputed decision and identify if discrimination, errors of fact or law, corruption, subversion of justice or other issues impacted the original ruling. The media can expose instances of judicial corruption and highlight the need for judicial reform.

Depending on contexts, advocacy and sensitization programmes for the executive and legislative branches may be necessary to enhance their commitment to creating a competent, independent and impartial judiciary.

5.2.7 Enforcement of laws and court decisions

One of the Guidelines' principles of implementation refers to the rule of law and recommends that laws be equally enforced (par. 3B.7). The Guidelines also indicate that states should provide effective remedies that should be promptly enforced (par. 4.9 and 21.1). The state may play an active role in enforcing court decisions, establishing effective enforcement procedures, punishing offenders and holding all parties accountable to respecting tenure rights.

Key recommendations 5.2

- ✓ States should ensure that the justice system is impartial and independent, as impartiality and independence are essential to responsible governance. This mandate requires appropriate measures on the recruitment, progression, salaries and tenure of judges, and measures to combat corruption.
- ✓ Dispute-resolution services should be accessible to all in terms of location. Special support should be provided for vulnerable or marginalized groups to access judicial services, including through affordable legal aid and the provision of mobile services for remote communities and mobile indigenous peoples.
- ✓ Judicial authorities should have the human, physical, financial and other forms of capacity to implement policies and laws in a timely, effective and gender-sensitive manner.
- ✓ States should consider training judges to ensure the poor are given the same opportunity to exercise their rights and to be heard as other litigants, including by conducting their courtrooms in a manner that is less intimidating or penalizing to a range of litigants.
- ✓ Facilitating access to justice for the rural poor and marginalized groups and individuals may require rethinking some traditional requirements such as the language of proceedings, weight of oral evidence, rules on standing and statutes of limitations.
- ✓ Efforts should be made to strengthen the links between customary and formal judicial systems and to allow for appeals from customary to formal courts.
- ✓ States should ensure prompt enforcement of judicial decisions, including through the establishment of effective enforcement procedures and the punishment of offenders.

5.3 Using dispute-resolution processes to promote implementation of the Guidelines

As discussed in Chapter 2, the Guidelines invite states to protect legitimate tenure rights (par. 4.5). To this end, they call for states, among other things, to provide access to justice to deal with infringements of legitimate tenure rights (par. 3.1.4). Where tenure disputes cannot be resolved through other dispute-resolution methods, court litigation can provide a powerful strategy to resolve disputes and ensure protection of legitimate tenure rights.

Litigation is the practice of bringing a legal dispute to a court to have the case heard by one or more judges. The threat of litigation can be an important component of legal empowerment initiatives. In instances of grave injustice, stalled dispute resolution, or when the opposing party does not take the issue seriously, both private entities and government officials are more likely to be responsive if there is a potential that the dispute will end up in court.

Lawyers and other legal service providers should strategically and carefully choose the cases they will bring to court as litigation is expensive and time consuming. It can take years and significant financial resources for a case to move through the courts to a final judgment.

Legal service providers may choose to litigate only those cases that have the potential to make a powerful impact. Litigation may not be a good strategy if there is no clear, or realistic, legal remedy, such as restitution or compensation, and no way to ensure that the ruling is promptly enforced and complied with. Public-interest legal service organizations can play an important role in monitoring the implementation of court judgments. As discussed, resolving the dispute out of court through options like mediation might help avoid enforcement issues.

There are many examples of litigation before national courts dealing with alleged infringements of legitimate tenure rights (see Box 5.7).

BOX 5.7

Examples of national court cases in Colombia, Kenya and the United Kingdom of Great Britain and Northern Ireland

Source: <http://kenyalaw.org/caselaw/cases/view/95729/> and contribution from a participant at the February 2015 workshop for this guide.

Source: The Bodo Community and others v. The Shell Petroleum Development Company of Nigeria Limited, Royal Courts of Justice, 20 June 2014 (available at <http://www.hendersonchambers.co.uk/wp-content/uploads/2014/06/Bodo-jment-prelim-issues.pdf>) and "Shell lawsuit (re oil spills & Bodo community in Nigeria)" (available at <http://swarb.co.uk/the-bodo-community-and-others-v-the-shell-petroleum-development-company-of-nigeria-ltd-tcc-20-jun-2014/>).

Source: FIAN, n.d.

In Kenya, the Environmental and Land Court decided a landmark case in 2014. The court found in favour of the claimants who were representatives of a forest dwelling community who were removed from their ancestral forests. The court declared that such removal violated the claimants' rights to life, livelihood, dignity and not to be discriminated against, as well as socio-economic rights. However, the court did not order reparation to the community and, nearly a year after the judgment, no steps have been taken to identify land for settlement.

In 2012, representatives of over 15 000 Nigerian farmers and fishing communities initiated transnational litigation in the Courts of England and Wales seeking compensation against the Nigerian subsidiary of a multinational petroleum company in connection with two oil spills in the Niger Delta in 2008 and 2009. Following a successful mediation, the dispute was settled out of court and the company agreed to make payments to each affected individual as well as a sum of money to be used for the benefit of a community as a whole. The mediation meant that the individuals could be compensated sooner than if the court process had been followed all the way through to final judgment, given uncertainties of outcome and delays over potential appeals and any enforcement steps.

In 2011, the Colombian Constitutional Court found that the forced eviction of people displaced by palm oil companies had been illegal. The court ordered a reassessment of the eviction process, which, if carried out in accordance with the law, is expected to result in the families being able to acquire title deeds and reoccupy the lands.

The Niger Delta case referred to in Box 5.7 is a good illustration of the extraterritorial context in which litigation dealing with alleged infringements of legitimate tenure rights can take place: despite the fact that the claim was made against a Nigerian company, the affected communities sued its parent company in the United Kingdom of Great Britain and Northern Ireland. Where transnational litigation of this type is not possible or appropriate, communities or their legal representatives might still be able to obtain key information from the parent company through the use of a "Section 1782" request in the American Federal Courts, for example. Section 1782 of Title 28 of the American Code is a federal law that enables a party to court proceedings initiated outside the United States of America to apply to the American court to obtain evidence for use in the non-American proceeding. This tool was used in a case before a Tanzanian court, involving a dispute between semi-nomadic communities and the Tanzanian subsidiary of an American company (EarthRights International, 2014).

Litigation can also occur before international bodies, such as regional or international human rights courts. Tenure rights and human rights are distinct but interrelated (OHCHR, 2014; Cotula, 2014b). A number of human rights have

direct relevance to tenure rights, including the rights to food, housing, a healthy environment and property. The use of regional human rights courts, particularly in Africa, Latin America and Europe is growing (Mayagna (Sumo) Awas Tingni Community v. Nicaragua, 2001; Saramaka People v. Suriname, 2007; Centre for Minority Rights Development (Kenya) and Minority Rights Group International v. Kenya; African Commission on Human and Peoples' Rights v. The Republic of Kenya; Papastavrou and Others v. Greece, 2003).

In addition to formal litigation before regional human rights courts, the work of the UN treaty monitoring bodies and Special Rapporteurs can also provide channels to intervene where human rights violations occur in the context of governance of tenure (Special Rapporteur on the situation of human rights in Cambodia, 2012; Special Rapporteur on the situation of human rights in Myanmar, 2013; Special Rapporteur on the right to food, 2012).

Other methods of dispute resolution such as grievance mechanisms can also provide an effective avenue to resolve tenure disputes and ensure protection of legitimate tenure rights. As already mentioned in Chapter 4, the Guidelines call for business enterprises to establish non-judicial mechanisms to provide a remedy (par. 3.2). In addition to these company-led grievance mechanisms, international financial institutions such as the International Finance Corporation (IFC) and commodity-based multistakeholder certification bodies, such as the Roundtable on Sustainable Palm Oil (RSPO), also provide grievance mechanisms. In addition, the OECD has established National Contact Points (NCPs) to ensure the promotion and implementation of its Guidelines for Multinational Enterprises in countries that have adhered to them.

The use of grievance mechanisms is one among many (sometimes transnational) avenues that communities whose tenure rights have been affected can try to pursue, often with support from NGOs.

Whether parties can rely on international law in national courts depends on national law. In many jurisdictions, an international treaty would need to be incorporated into national law before parties can invoke that treaty before national courts. Even where parties cannot rely on the treaty as such, they may be able to argue that, where national law is ambiguous, it should be interpreted in ways that are consistent with international commitments.

As discussed in Chapter 2, the Guidelines are not a legally binding instrument and do not create any legal obligations. However, they have persuasive authority and they could, therefore, still be of use in dispute-resolution processes. Thus, in litigation before national or international courts, parties could refer to the Guidelines where, for instance, the terms of a national law are ambiguous, arguing that such terms should be interpreted in ways that are consistent with the Guidelines. The Guidelines can also provide interpretative guidance on how the rights to food, housing and property should be understood and protected.

Some judicial bodies have made explicit reference to international soft law. For example, the Supreme Court of Belize found that, because the UN Declaration on the Rights of Indigenous Peoples embodied general principles of international law, it needed to be given serious consideration in the case, *Aurelio Cal et al. v. Attorney General of Belize*. Where there is a significant confluence between the principles set forth in binding international law and those contained in a soft-law instrument such as the Guidelines, it is not unimaginable

that judiciaries may draw on the Guidelines to identify or interpret the relevant law.

Tenure disputes can be exceptionally fierce, and the choice to defend one's rights may come with the possibility of great personal risk. Upon initiation of a legal claim, clients and community members might be threatened with or be the victims of violence or harassment. Threats of retribution for taking legal action may come not only from powerful figures who have an interest in maintaining the status quo, but also from within an individual's own family and community.

Public-interest legal service organizations should be sensitive to the fact that legal action may be a dangerous step for an individual or community to take. Legal service providers may need to help communities access the means necessary to protect their lives and interests throughout the course of the legal action and beyond. In this regard, the Guidelines specifically call for states to protect the civil and political rights of defenders of human rights, including the human rights of peasants, indigenous peoples, fishers, pastoralists and rural workers (par. 4.8).

Key recommendations 5.3

- ✓ Lawyers should consider using litigation as an avenue for protecting legitimate tenure rights. But they should choose strategically which cases to bring to court, as litigation is expensive and time consuming.
- ✓ Where extra-legal factors constrain the implementation of court decisions, public-interest legal service organizations can play an important role in monitoring the implementation process. Settling the dispute out of court via mediation, for instance, might also help avoid enforcement issues.
- ✓ Litigation can take place before national courts, or before international bodies, such as regional human rights courts. In addition, the work of the UN treaty monitoring bodies and Special Rapporteurs can also provide channels to amplify local demands.
- ✓ Lawyers should also consider the extraterritorial context in which litigation can sometimes take place. This might allow affected communities to sue a parent company located in a country with well-functioning legal and judicial systems based on the rule of law. Transnational court action might also enable communities to obtain information that could then be used in local courts.
- ✓ Business lawyers should support the establishment of internal grievance mechanisms to provide an effective avenue to resolve tenure disputes and ensure protection of legitimate tenure rights and human rights.
- ✓ Although the Guidelines do not create any legal obligations, judges might be able to consider them in dispute-resolution processes; for example, to help with the interpretation of ambiguous terms in legislation.
- ✓ Legal action may be a dangerous step for an individual or community to take. Lawyers should consider helping communities access the means necessary to protect their lives and interests throughout the course of the legal action and beyond.

6

Ways forward

6. Ways forward

The Guidelines represent an important development with considerable legal significance. Harnessing the law to implement the Guidelines can help improve tenure governance around the world and thus support the progressive realization of the right to an adequate standard of living, including adequate food and housing. FAO has played an important role in the development and dissemination of the Guidelines, including the production of this technical guide and other capacity development material. Yet implementing the Guidelines will ultimately depend on concerted efforts by a much wider range of actors. In fact, the ownership of the Guidelines is not with FAO but with the many organizations, countries and companies that participated in their preparation and have committed to promoting them. Lawyers can play an important role in this process. Using the law to implement the Guidelines calls for contributions involving a variety of actors, processes, tools and drivers.

Actors. The diversity and complexity of the issues addressed in the Guidelines call for action by a wide range of lawyers and other legal service providers – from legal professionals advising governments or parliaments to judges, business lawyers and public-interest legal service organizations. These diverse groups of lawyers tackle governance of tenure issues from different perspectives and in different contexts. But as highlighted throughout this guide, they can all make a real difference in terms of promoting the implementation of the Guidelines in their respective fields. Depending on professional roles and profiles, this role may involve advising or supporting governments, lawmakers, businesses, NGOs, federations of indigenous peoples and rural producers, communities and individuals to take action that advances responsible governance of tenure.

To sustain the interest of these diverse groups of lawyers over time, professionals in legal education can help by raising awareness among law students from the outset of their careers. Bar associations can contribute by disseminating information on the Guidelines through documentation centres, awareness raising, standard setting, training and other opportunities for continuing professional development.

Processes. These diverse groups of legal service providers need to apply the Guidelines in a variety of processes. Many such processes have been discussed throughout this guide. The processes include, for example, assessing and reforming national law, exercising rights through administrative procedures and through

national and international courts, applying the Guidelines in the context of due diligence and corporate compliance exercises, and disseminating information through multiple communication and awareness-raising channels. As experience in using the Guidelines grows and as societal needs evolve, the range of processes in which the Guidelines can be usefully applied may also expand and evolve over time.

Tools. Legal service providers can facilitate the dissemination and use of the Guidelines in legal practice by drawing on a variety of tools. These tools may include training materials and practice guides, a wide range of communication and capacity-building tools, Web-based and other technological applications, legal assessment tools, model laws and contracts, and codes of conduct developed by bar associations or multistakeholder groups.

Drivers. Ultimately, uptake of the Guidelines in legal practice depends on the existence of effective drivers. These drivers will inevitably vary with the diverse professional roles and profiles of lawyers. Policy efforts to harmonize law and practice with the Guidelines is likely to be an important driver, as are greater awareness and sustained public support for implementing the Guidelines. Uptake by donors can encourage use of the Guidelines in legal practice; for example, as part of interventions to support law reform and implementation, or through requiring adherence to the Guidelines as a condition for any financial assistance to investment projects. The framing of applicable professional responsibility duties and opportunities to secure billable work to advise clients on the Guidelines are likely to be important drivers in promoting uptake by lawyers in commercial practice.

These multiple elements – actors, processes, tools and drivers – are dynamic, interdependent and mutually reinforcing. Their activation over time may lead to the emergence of a transnational community of practice, which embodies the collective practical experience gained through using the law to implement the Guidelines. Facilitating ongoing lesson sharing among legal practitioners can help promote uptake, disseminate the know-how generated in diverse settings, and create channels for communication and mutual support.

While not legally binding, the Guidelines build on international law and best practice. If legal service providers work together to put them into practice, they can uphold the rule of law, strengthen the protection of human rights, improve tenure governance and raise standards of legal practice. The centrality of legal aspects in the Guidelines means that lawyers can make a real difference. Promoting responsible governance of tenure is no easy task, but with the dedication of all legal service providers important progress can be made.

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**Food and Agriculture
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National law is crucial for the responsible governance of tenure for all, with a particular focus on more vulnerable segments of society. This technical guide reviews the legal dimensions of the Voluntary Guidelines on Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security and their linkages with binding international law. It provides guidance to legal professionals working with state institutions,

civil society or the private sector on assessing national legislation, supporting legal reform and improving implementation as well as on the settlement of disputes. It is also a useful resource for law societies, notaries, judges, development agencies and all those who are interested in understanding the role of law in giving effect to the provisions of the Guidelines and supporting the legal protection of legitimate tenure rights.



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