



INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW
INSTITUT INTERNATIONAL POUR L'UNIFICATION DU DROIT PRIVE

**UNIDROIT Working Group
on agricultural land investment contracts**

Second meeting
Rome, 13-15 September 2017

UNIDROIT 2018
Study 80B – Doc. 3
Original: English
January 2018

**Report of the Second Meeting of the UNIDROIT Working Group
on agricultural land investment contracts**

Rome, 13-15 September 2017

(prepared by the UNIDROIT Secretariat)

1. The Working Group on agricultural land investment contracts (the Working Group) - established pursuant to the Work Programme for the 2017-2019 triennium which included work on such contracts as a high priority item¹ - held its second meeting at UNIDROIT's seat in Rome from 13-15 September 2018.
2. The Working Group was made up of the following members: Mr José Antonio Moreno Rodríguez, and Attorney and Professor, ALTRA Legal and Member of the UNIDROIT Governing Council; Mr Lorenzo Cotula, Principal Researcher in Law and Sustainable Development at the International Institute for Environment and Development (IIED); Mr Daryono, Professor at Universitas Terbuka, Jakarta; Ms Bénédicte Fauvarque-Cosson, Professor at Université Paris 2; Mr James Gathii, Wing-Tat Lee Chair in International Law and Professor of Law at Loyola University Chicago School of Law; Ms Jean Ho, Assistant Professor at the National University of Singapore; Mr Pierre-Etienne Kenfack, Professor at Université Yaoundé 2; and Ms Yuliya Panfil, Associate, Investments at Omidyar Network. The Working Group also included representatives from the Food and Agriculture Organization of the United Nations (FAO), the International Fund for Agricultural Development (IFAD), the International Land Coalition (ILC), the World Farmers' Organisation and the Columbia Center on Sustainable Investment.
3. Consistent with UNIDROIT's practice,² Mr Moreno Rodríguez chaired the meeting.
4. The complete list of participants for the second meeting is included in Annex 1.

1. Opening of the meeting

5. The Chairman opened the meeting, welcomed the members and representatives and thanked them for participating in UNIDROIT's work on agricultural land investment contracts. Pursuant to the Chairman's invitation, the members and representatives proceeded to introduce themselves.

2. Adoption of the agenda and organisation of the meeting

6. For the meeting, the Secretariat had prepared a draft annotated agenda³ and circulated working papers containing initial drafts of some chapters and portions of the future legal guide on agricultural land investment contracts (the guide), as well as proposed revisions to the draft outline of the guide.

7. The Chairman, in referring to the documentation for the meeting, thanked those who had prepared initial drafts and proposed revisions to the outline. He then recommended that the Working Group could review in detail the drafts and proposed revisions to the outline so that all members would have a clear idea of their respective drafting responsibilities and the general structure, format and style of the guide. He said that, in this way, the members would be able to draft and submit their respective contributions so that a complete draft of the guide could be assembled for and reviewed at the Working Group's next meeting.

8. Upon the invitation of the Chairman, Mr Neale Bergman (Legal Officer, UNIDROIT) presented the draft agenda, the working papers and the various resources that had been provided for the meeting. With respect to the working papers, he explained that there were four of them, including (a) an initial

¹ See UNIDROIT Work Programme for the triennial period 2017 – 2019, <http://www.unidroit.org/about-unidroit/work-programme> (adopted by the UNIDROIT General Assembly at its 75th session (Rome, 1 December 2016)).

² Cf. UNIDROIT Statute, art. 13(2).

³ UNIDROIT 2017 - Study 80B – WG2 Inf. 1 rev., <https://www.unidroit.org/english/documents/2017/study80b/wg02/s-80b-wg02-inf01-rev-e.pdf>.

draft of chapter 1 on the legal framework, (b) a partial, initial draft on tenure rights for chapter 3 on obligations and rights of the parties; (c) a detailed outline on development, financial, social and environmental obligations for chapter 3 as well; and (d) an initial draft of chapter 6 on dispute resolution.

9. Following that presentation, the Chairman proposed adoption of the draft agenda, which was adopted and is included in Annex 2.

3. Recent developments and general considerations in relation to the work

10. The Chairman then invited the Secretariat to provide an update on recent developments.

11. Mr Bergman recalled that, following the Working Group's first meeting (Rome, 3-5 May 2017), the initial draft outline of the guide was first circulated for review and comments by the members and representatives of the Working Group. The outline was then circulated to other international Organisations and civil society organisations, in particular the Civil Society Mechanism (CSM) for relations to the UN Committee on World Food Security (CFS), FIAN International and La Via Campesina, for review and comments. Those organisations, which acknowledged receipt of the outline but did not submit comments, were also invited to attend the Working Group's meeting.

12. Mr Bergman then pointed out that an informal meeting would be held at FAO during the CFS' 44th session (Rome, 9-13 October 2017) to raise awareness and seek input on the work from the many experts and stakeholders who would be in Rome for that session, including from civil society, the private sector, and bilateral development agencies. The informal meeting was to build upon the one that was held at FAO on 20 October 2016, during the CFS' 43rd session (Rome, 17-21 October 2016). The input received during the upcoming informal meeting would then be shared with the members and representatives of the Working Group.

13. The Chairman then asked whether the Working Group would like to revisit any of the general considerations in relation to the work, including (a) the notion of agricultural land investment contracts; (b) alignment of the work with existing initiatives; (c) co-operation with the UN agricultural development agencies, non-governmental organisations, civil society, the private sector and other stakeholders; and (d) the objective and target audience of the guide. He recalled that these considerations had been discussed at length during the first meeting and noted that those discussions were reflected in the Report on the Working Group's first meeting.⁴ Seeing no requests for the floor, he suggested that these considerations could be discussed as they arose in the context of the discussions on the various initial chapter drafts and the proposed revisions to the draft outline.

4. Consideration of the draft outline of the future legal guide on agricultural land investment contracts, proposed revisions and initial chapter drafts

14. The Working Group proceeded to review and consider in detail the draft outline of the guide, the proposed revisions to it and the initial chapter drafts. In doing so, the Working Group also revisited and built upon some of the discussions of general considerations for the work from the first meeting and contemplated drafting issues in order to establish some guidelines on the terminology to be used, the framing of the guidance to be offered, the level of detail to be provided, and references to other instruments and sources. The following summary of the Working Group's review and deliberations is organised on the basis of the revised draft outline, a clean version of which is

⁴ UNIDROIT 2017 – Study 80B – Doc. 2, <https://www.unidroit.org/english/documents/2017/study80b/wg/s-80b-02-e.pdf>.

included in Annex 3 and a redline version of which is included in Annex 4.⁵ The draft outline includes in brackets references to possible resources, and a non-exhaustive list of possible resources is also included in Annex 5.

A. Preface

15. It was queried, at the outset, whether it was necessary to include a preface. It was said in reply that the preface could provide important framing and explain the guide's purpose and approach, including identifying the guide's target audience. Regarding the target audience specifically, the Working Group recommended broadening that audience from legal counsels for investors to legal counsels involved in agricultural land investment contracts, including those for host-State governments, local communities and various stakeholders. In broadening the target audience, it was said that the guide could respond to capacity constraints of host-State governments and the balance of power between investors and host-State governments. It was also recommended that the guide aim to support tenure holders' knowledge of their rights, as well as protection and respect for those rights by host-States and investors respectively. Regarding the guide's approach, it was said that, in laying out that the guide would provide contractual guidance on agricultural land investment contracts and incorporating necessary safeguards into them, UNIDROIT's private law expertise should be emphasised.

B. Introduction

16. The Working Group recommended that the introduction should include a general overview on agricultural land investment contracts and a portion setting out the guide's scope. For the former, the Working Group recommended that the overview should introduce the notion of agricultural land investment contracts, including why such contracts were important and being treated in the guide, and some of the issues that had been identified with respect to such contracts.

17. For the guide's scope, the Working Group recommended that there should be portions addressing various agricultural land investment contracts in practice (e.g. leases, concession and investment agreements and purchases) and then identifying, with examples and key definitions, what contracts would fall within the scope of the guide. With respect to the contracts to be covered, the Working Group's discussions focused on three main areas: (a) the possible parties; (b) leases and sales; and (c) foreign and domestic investment.

18. Regarding the possible parties, it was queried whether the guide should cover only contracts between investors and host-States, as well as local communities, or if the guide should also cover contracts between private parties. On the one hand, it was said that trying to cover both private party – public party contracts and private party – private party contracts would be too complicated and render it difficult to prepare a concise guide. It was pointed out that the two different scenarios raised very different issues as, for example, in the case of a host-State there would be different issues at stake (e.g. taxation). It was also pointed out that dealing with contracts between investors and host-States was most important because those contracts often granted large tracts of land without necessary safeguards for legitimate tenure right holders or local communities as, in some States, the government retained legal title to the land. On the other hand, it was pointed out that, with the evolution of property rights and land recordation across the world, private party – private party contracts would become more important and should be covered. It was further said that, given the importance of the UNIDROIT Principles to the work and that those Principles focused on private party contracts, it would be odd to exclude purely private party contracts. In this regard, it was suggested that the guide could first set out core guidance applicable in both private party – public

⁵ The redline version of the draft, in-progress outline compares the outline that resulted from the Working Group's second meeting (Rome, 13-15 September 2017) with the one that resulted from the Working Group's first meeting (Rome, 3-5 May 2017).

party and private party – private party scenarios, followed by guidance tailored to each of those scenarios respectively. Ultimately, the Working Group recommended that the guide should focus on contracts between investors and host-State governments, with the understanding that some of the guidance provided could also be useful for private party – private party contracts. In this regard, a portion of the guide could be dedicated to pointing out the parts of the guide that could be particularly useful in the context of private party – private party contracts.

19. In addition, reference was made to the third-party beneficiary principle, and it was emphasised that this principle would have to be taken into consideration, for example, in connection with legitimate tenure right holder and local communities. It was suggested, in this regard, that some treatment of linked agreements would be needed. The Working Group recognised that the importance of the multiparty dimension, in particular with respect to the inclusion of legitimate tenure right holders, whether as a party to the contract or through consultations.

20. Regarding whether to cover sales as well as leases, the importance of a long-term, ongoing relationship was emphasised. It was said that the ongoing obligations in a lease would allow for the incorporation and monitoring of necessary contractual safeguards. The importance of the remedy of termination was also emphasised, as it could play a key role in remedying the lack of respect of safeguards in land leases. In this regard, it was pointed out that not all sales contracts were one-off transactions, as such contracts could include a provision by which the land would revert from the buyer to the seller if certain requirements were not met. It was further pointed out that that type of provision essentially established an ongoing relationship to which safeguards could be attached. It was then recognised that the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security (VGGT) sought to discourage permanent, large-scale transfers of tenure rights and to promote alternative business models, and accordingly it would be better to exclude sales. It was stated in reply, however, that the 99-year or longer duration of some leases of agricultural land effectively rendered them like a sale. It was queried, in addition, whether leases or sales were more predominant, and it was stated that there were more leases than sales in practice. It was then suggested that it might be best to cover only leases, but at the same time to acknowledge that it might be useful for prospective parties to a sale to have a look at the guide's advice and guidance. Ultimately, the Working Group recommended that the guide would cover leases and not sales.

21. Regarding whether the guide would cover only foreign investment, as opposed to foreign and domestic investment, it was suggested that, even if the focus was on foreign investment, the guide would still have to deal extensively with domestic law issues as the contracts would be subject to host-State law. It was observed that confining the guide to foreign investment did not properly reflect the reality, as it was often a requirement for investors to establish a domestic subsidiary or company in the host-State and many domestic investors were involved in land leases. It was recalled that, at the first meeting, the Working Group had recommended that the starting point for the guide should be foreign investment, but that domestic investment should not be excluded. It was then suggested that it might not be necessary to place too much emphasis on this distinction. Following discussions, the Working Group decided to retain its prior recommendation that the foreign investment would be the starting point for the guide, but that it would also treat domestic investment.

22. Further to the discussion of the guide's scope, the Working Group considered possible investment structures and models. It was said that the guide's introduction should address such structures in considering the various possible parties and contractual arrangements, such as joint ventures and partnership agreements. It was said that this diversity of possible arrangements should be treated in the guide and that the key point was that the arrangements were not one-off transactions, but ongoing long-term contractual relationships. It was then pointed out that, given UNIDROIT's expertise in contract law, the focus should be on providing contractual solutions, which could be applicable to various investment structures and models involving or linked to a lease of agricultural land. It was recommended that the introduction touch upon these issues and briefly

highlight the complexities in contractual arrangements. For example, an investor – as an alternative to leasing land from a host-State government – could enter into a joint venture with that government, by which the government would retain the tenure rights to the land. As another example, an investor could lease land from a joint venture company established between the host-State government and the investor or other entities, and the contract for the lease and the contract for the joint venture would essentially co-exist.

23. Lastly, it was emphasised that examples should be included to show what falls within the guide’s scope, in particular what was meant by the term “agricultural land investment contract”. In this regard, it was recommended that the introduction set out definitions or descriptions for key terms in the guide, including agricultural land investment contract, investor, host-State government, legal tenure right holder and legitimate tenure right holder. It was said that, depending on how the guide developed, there could also be a glossary of terms to which this portion of the introduction could make reference.

C. Legal Framework (Chapter 1)

24. For the chapter on the legal framework, the Working Group reviewed and discussed in detail a working paper containing an initial draft of the chapter. In the draft’s presentation, it was said that the chapter sought to support legal counsels in understanding and assessing the applicable legal framework by briefly describing the various sources and areas of law that make up that framework. It was further said that, instead of just listing sources and areas, the chapter sought to identify a few specific issues that could arise with respect to each area of law and then cross-reference to where those issues would be more fully developed in the guide.

25. With respect to the chapter’s structure, it was observed that the distinction between the legal regime applicable to the agricultural land investment contract and the broader regulatory environment was not as workable in practice as it had seemed in discussions during the Working Group’s first meeting. It was said that there was overlap between the two categories and that some topics might need to be treated in both, which was unnecessarily repetitive. It was proposed that the chapter should be restructured to begin with the principle of freedom of contract and then to address limitations on that freedom arising from mandatory rules of domestic and international law. In this regard, reference was made to Article 1.4 of the UNIDROIT Principles (Mandatory rules), which could prove to be useful. It was suggested that there could also be a discussion, building upon the principle of freedom of contract, on party autonomy. It was cautioned, however, that there should not be too much emphasis on party autonomy because, for example, it might not be viewed in some jurisdictions as a neutral term.

26. In furthering the restructuring of the chapter, it was said that, following a brief discussion of freedom of contract and limitations on that freedom, the chapter could address sources of law, in particular domestic and international sources. With respect to domestic sources, it was pointed out that judicial decisions should be given more emphasis in the draft. Following the treatment of sources, it was said that the relevant areas of law and regulation could be addressed. It was said that such areas could be organised around key themes, which could then be built upon throughout the guide, in particular in chapter 3 on obligations and rights of the parties. The possible themes were discussed extensively, and it was recommended that the following ones be used: (a) land tenure and administration; (b) human rights and social obligations; (c) environment; (d) finance; (e) protection of investment and regulatory autonomy; and (f) transparency, compliance and monitoring.

27. With respect to human rights and broader social obligations, there were lengthy discussions on how they should be framed and characterised, including whether they should be treated together under the broad umbrella of human rights or whether human rights and social obligations should be treated as separate themes. It was then pointed out that, for example, gender issues fell under the

umbrella of human rights, but had been treated separately in the draft. In this regard, it was suggested that human rights could perhaps be treated in two parts: first, principles of human rights and second, procedural aspects of human rights. Reference was made to the UN Guiding Principles for Business and Human Rights, which were adopted after very wide cross-sector consultations and could offer the Working Group a way for thinking about and addressing the human rights and social obligations issues. Reference was also made to the principle of do no harm, which could also be mentioned where applicable within the guide. The Working Group, as reflected in paragraph 42 below, discussed this issue again in connection with chapter 3's section on social obligations, ultimately deciding to place the relevant text of the draft outline in brackets and to consider this issue further.

28. There were also discussions regarding how to deal with the fact that some international human rights instruments were binding, whereas others were not. It was said in this regard that there should be some brief explanation in the guide that some international human rights instruments or particular aspects of them could form part of customary international law and that, even if some instruments such as the VGGT were non-binding, they incorporated best practice standards.

29. Regarding the particular international instruments discussed, it was queried whether the relevant areas of law and regulation should be a sort of checklist rather than a thorough discussion. It was pointed out that the point of the section was not just to be aware of these areas, but to assess and address them. It was said in reply that the key point to be expressed was that the parties were not free to do what they wanted and that they had to take into account various human rights, environmental and other responsibilities.

30. With respect to customary rules and usages, it was queried whether the brief paragraphs treating this important topic would be sufficient for a legal counsel without prior experience dealing with such rules and usages. It was further queried how those paragraphs could be made more constructive. It was said in reply that the most important point was to alert the reader of the possible relevance of customary rules and usages, so that the reader could assess their role in preparing for the negotiation of an agricultural land investment contract. It was said that the paragraphs should make clear that, as a general matter, some States' law formally recognised customary rules and usages, whereas others did not. It was then stated that, even in the latter scenario, it was necessary to investigate and assess the role of customary rules and usages, which might still be relevant in various ways to the agricultural land investment contract, as well as with respect to consultations with – and possible safeguards for – legitimate tenure right holders and local communities.

D. Parties, Formation and Form (Chapter 2)

31. For this chapter, it was said that it should focus more on the possible parties to agricultural land investment contracts and the processes for preparing for such contracts, including identifying and consulting legitimate tenure right holders. Regarding investors, it was noted that they might not always be private sector entities, but could also be State-owned enterprises and sovereign wealth funds. It was emphasised that transparency in the identity and nationality of each party – including issues of beneficial ownership and shell companies, which could cross reference to capitalisation requirements in chapter 3's section on financial obligations and to changes in control in chapter 5 – were important points to be addressed. It was also emphasised that, in connection with investors, the need for due diligence and free, prior and informed consent (FPIC) could be stressed. Regarding legal tenure right holders, it was said such holders could include, for example, host-State governments, local communities and private individuals. It was pointed out that, in some States, consultations might be just as important with respect to legal tenure right holders as it was with respect to legitimate tenure right holders. It was further pointed out that, in these States, it was communities, chiefs or land-holding families that held legal title and were signing land leases, and the host-State government's role was more to incentivise investors to make investments there. It was said that it would be helpful if the guide could cover these various nuances. Regarding legitimate

tenure right holders, it was essential to consider the range in ways that such holders could be brought into the contracting process, including through tripartite and other agreements that were linked to the main lease contract. It was pointed out that incorporating legitimate tenure right holders as parties to the contract entailed various benefits and risks and that, for example, an investor could possibly sue a community if that community was a party to a contract with the investor. It was then said that the way to bring in third parties would be through a broad understanding of linked agreements and that Article 1.4 of the UNIDROIT Principles (Mandatory rules) could provide a useful umbrella for covering all of the relevant parties and stakeholders. Lastly, it was said that there should be a brief section on other possible parties or relevant stakeholders and their potential roles, including local officials or public notaries, as well as a section covering the various types of contracts or options, including with respect to third parties. It was said that such types would be touched upon in the introduction, but could be developed further in this section and could, to a certain extent, draw upon Articles 5.2.1 et seq. of the UNIDROIT Principles, which dealt with third party rights. It was also said that that section could provide an introduction to community development agreements, together with a cross reference to the discussion of such agreements in chapter 3's section on social obligations.

32. With respect to feasibility studies and impact assessments, it was recognised that these studies and assessments were very important to ensuring that an agricultural land investment contract would be successful and sustainable in that they helped to identify potential negative impacts and the need for contractual safeguards. It was said that the respective sections on such studies and assessments could be organised around the key themes identified earlier in the guide. As far as feasibility studies, the importance of identifying suitable land, access to necessary resources and properly valuing such land, as well as developing a business plan, was emphasised. As far as impact assessments, the key points would relate to: land tenure, in particular legitimate tenure rights; human rights and social aspects, which would include food security, gender and labour and would be subject to ongoing discussion on exactly how to characterise and frame this theme or themes; and the environment, including impacts on water and other natural resources and on access to such resources.

33. With respect to the tender process, it was noted that the topic came up in chapters 1, 2 and 3 and that there could be some overlap between the chapters which would require consultations between drafters and further review. It was suggested that the topic could be introduced in Chapter 1, treated as needed in chapter 2 and then dealt with more fully in chapter 3 in connection with the section on transparency, compliance and monitoring, which would cover contract disclosure and publication. It was said that that latter section would highlight the need for a competitive, inclusive and transparent process – as such processes often were not used by host-States in the context of agricultural land investment contracts – and could consider various types of tendering processes. It was said that the topic would not be dealt with in great detail and that, accordingly, existing instruments would be referred to as much as possible.

34. With respect to contract formation and form, it was pointed out that this section could address important issues of capacity, consent and contractual form and content requirements. It was said that, depending upon how it developed, the section could actually be made into a separate chapter or placed elsewhere, as it did not seem to fit with the process-oriented spirit of chapter 2, though the Working Group recommended keeping it there for the time being. It was stated that there were some process-oriented aspects to the section, in particular with respect to discussing capacity and consent and the role that those who would intervene and assist in negotiations could play. It was pointed out that the Legal Guide on Contract Farming contained a similar section, essentially setting out a summary description of what the contract would look like, and that section could serve as a useful resource. As far as issues that could be included in this section, it was pointed out that it could treat, more broadly, validity, capacity and consent, and contractual form and content requirements and that the relevant Articles of the UNIDROIT Principles could be useful in this regard. It was recommended in this regard that, in order to have a holistic document, checklists of issues could be

used – not only in this section but throughout the guide – in order to identify the fuller range of issues that legal counsels should address and consider.

E. Obligations and Rights of the Parties (Chapter 3)

35. It was recognised that the chapter on the obligations and rights of the parties was shaping up to be one of the most important and sizeable within the guide. In reviewing the working papers containing an initial draft on tenure rights aspects and a detailed outline on the various possible development, financial, social and environmental obligations, there were lengthy deliberations on (a) how much detail should be provided on each topic or issue due to the relative size of the chapter and (b) whether the initial draft outline's structure of the chapter was sufficient.

36. Regarding how much detail should be provided, it was observed that the portion on possible obligations on investors alone could be very substantial and that it would be important for the Working Group to consider how much emphasis certain issues should receive. It was stated in reply that – because the possible obligations on investors dealt with many of the contractual safeguards that could be used to address, for instance, human rights and tenure rights risks and threats – it would make sense for this portion to be longer than others. It was observed that the issues that would be most helpful for legal counsels should be those for which more guidance was provided. It was recommended that some of those issues would not have to be addressed in detail and that cross-references to other international instruments or guidance documents could be provided. It was then said that the guidance should be in a narrative and descriptive style, identifying issues for legal counsels and offering solutions to them, and the importance of checklists of issues was once again emphasised.

37. Regarding the chapter's structure, it was observed that the initial draft outline had established a distinction between possible obligations on the host-State (e.g. to grant tenure and related rights) and possible obligations on the investor (e.g. development, financial, social and environmental obligations) that might not work well, as there could be overlap on some issues. It was further observed that the Working Group could follow the structure of the Legal Guide on Contract Farming in this respect as a model and reorganise the chapter accordingly. In this regard, there were extensive discussions on whether to reorganise the chapter on the basis of core obligations and additional obligations – as had been done in the Legal Guide on Contract Farming – or on the basis of key themes. It was said that the former structure could be difficult to implement, in particular with respect to legitimate tenure right holders and safeguards related to them as those holders were generally not parties to the contract. It was said in reply, however, that the core obligations and additional obligations, together with treatment of third party rights could be seen as more consistent with the structure and Articles of the UNIDROIT Principles. It was further said that the chapter could first deal with the core obligations deriving from the contract (e.g. land, quantity, quality, use of the land, payment for the lease, duration and conditions) and then deal with additional obligations, either deriving from the contract, linked agreements or other sources. It was stated in reply that distinguishing between core and additional obligations might suggest that the core, contractual obligations were more important than the additional ones which, in this context, included very important safeguards for legitimate tenure right holders. It was then said in response that that was not what was meant by the term "core", which could be replaced by another term, such as "characteristic obligations" of the contract. Ultimately, the Working Group recommended reorganising the chapter thematically, using the themes that would be used in the chapter on the legal framework in discussing the relevant areas of law and regulation, in particular: (a) land tenure and administration, (b) human rights and social obligations, (c) environment, (d) finance, (e) protection of investment and regulatory autonomy, and (f) transparency, compliance and monitoring.

In this regard, it was noted that the framing of the theme or themes on human rights and broader social obligations remained subject to further discussions.

38. With respect to the chapter's introductory section, it was recommended that it could recognise that not all agricultural land investment contracts would require or include clauses on all of the topics or issues identified in the section depending on, for example, the type of contract, the parties to that contract and any legitimate tenure right holders. It was further recommended that the section also recognise that the topics or issues might not be addressed in the order that they were organised in the chapter. It was said that the section could also acknowledge the complexity of the various contractual arrangements and identify some of the key parameters of agricultural land investment contracts, perhaps built upon an overall checklist of issues for chapter 3.

39. With respect to the section on land tenure, it was said that, in further developing the working paper on these aspects, there should be more emphasis on responsible investment practices. It was said that the approach should be more narrative and descriptive of best practices with respect to the topics to be addressed, including: location of the land; tenure rights, which could also cross-reference to the discussion of the identification of such rights and consultations and FPIC in the prior chapter, as well as to the section on social obligations later in the chapter; duration and renewal, which was to be dealt with in this section instead of in chapter 5 on transfer and return; conditions; and the purpose of the investment and land management aspects. It was suggested that, subject to drafting and further discussion, both duration and renewal and conditions might fit better in another part of the guide.

40. Regarding land development obligations, it was pointed out that there was overlap with the land tenure section, which could be streamlined in treating such obligations together with that section. It was said that placing time limits on development by the investor could generate negative impacts and that performance indicators should be contemplated in the context of the lifespan of the investment project. It was then said that some of the land development obligations could be of a very long duration and that the section might have to contemplate the effect of climate change. It was said in reply that that could be dealt with in this section, in particular with respect to the need to prevent degradation to the soil and to maintain water quality, as well as in the chapters on contractual non-performance as it related to supervening events and force majeure. It was suggested that use of good farming practices and best available science could be recommended in this context, and that a reference to the Voluntary Guidelines for Sustainable Soil Management would be useful. It was further suggested that Article 5.1.6 of the UNIDROIT Principles (Determination of quality of performance) could also be useful in this context, in helping to frame and provide the necessary guidance. It was then said that these issues could be dealt with in the context of the section on periodic review and that there might be consideration of the role monitoring boards could play in this regard. Lastly, it was suggested that infrastructure aspects should be dealt with in this portion, and a cross-reference could potentially be made, subject to drafting, to the treatment of related rights.

41. With respect to the section on financial obligations, it was queried how this section could deal with the collateralisation of the land and the agricultural production. It was said in reply that collateralisation might be addressed, together with cross references, in multiple sections of the guide (e.g. with respect to bankability and security of rights, assignment of rights, and tenure rights and duration). It was then said that this section, given the focus on leases involving investors and host-State governments, was essentially about price (e.g. for taxes, duties, etc.), making the price-related provisions of the UNIDROIT Principles quite useful, in particular Article 5.1.7 (Price determination). It was stated in reply that the various financial obligations might be more complicated than ordinary economic contracts. It was then suggested that the section should also consider some other issues, including: land valuation; various fiscal models that could be used; the impact of different types of crops (e.g. tree crops) which might take significant time to develop; and tax exemptions and transparency with respect to such exemptions offered to investors, as well as financial lending to

investors. It was further suggested that concepts from general investment promotion regimes might not translate flawlessly to the area of agricultural investment, so they should be considered carefully.

42. With respect to the section on social obligations, it was recognised that this section was difficult to frame without defining exactly who the parties to the contract were, in particular whether legitimate tenure right holders or a local community were party to the contract. It was also said, with respect to framing, that some of what was covered related not just to broader social obligations but were binding human rights obligations, so the title and framing of the section would have to be considered further. It was stated in reply that the section treated legally binding obligations relating to social matters, but that it was not clear that obligations to consider an outgrower scheme or to obtain local content were actually human rights issues rather than social issues with a human rights dimension. It was emphasised in this regard that the guide needed to be clear as to what could constitute a human rights violation as opposed to what could be done to realise progressively economic and social rights through employment and other opportunities. It was further emphasised that if a State made a policy choice to prioritise employment opportunities for local communities in its negotiations with an investor, instead of seeking other social benefits, that did not necessarily mean that the State was failing to protect human rights in some way. Regarding terminology, it was suggested that perhaps the guide could follow the UN Guiding Principles' approach, which addressed States' duty to protect human rights and investors' duty to respect them. It was emphasised that, while the process-oriented aspects of engaging with legitimate tenure right holders and local communities would be dealt with in chapter 2, thinking about contractual safeguards relating to such holders was essential and that the International Institute for Sustainable Development's ongoing work on a model contract for the East African Community might be a useful resource. It was suggested that inclusion of protections for human rights defenders could be included in the contract, though it could go in a different section. Regarding the treatment of access to natural resources, it was queried who retained rights to those resources. It was pointed out that, in many instances, not all of the land would be cultivated and neighbouring communities could continue to have access (e.g. to collect firewood), but that contractual provisions could address and clarify these issues. It was also pointed out that particular natural resources might be regulated by different government ministries, which could justify treating certain resources separately in the guide. Lastly, it was noted that protection and access to cultural and religious sites should be addressed in this section.

43. With respect to the section on environmental obligations, it was suggested that the relevant contract could contain a provision acknowledging that the investor was required to comply with all environmental laws and regulations of the host-State and to obtain any necessary permits. It was then suggested that protection of the wildlife habitat and the watershed was very important, as well as waste management aspects, in particular upon project closure. It was said that financial assurances with respect to project closure, such as environmental performance bonds, would be an important area that the guide could address, and that these assurances could be broader than just protecting against environmental impacts. It was pointed out that the Ghana Commercial Agriculture Project's model lease agreement contained a provision requiring the establishment of an environmental management plan and the escrowing of funds for implementation of that plan. It was then suggested that pesticides and other chemicals (e.g. fertilisers, herbicides) used on the leased land could have an impact on the health and safety of local communities and that some contracts contained a prohibition on the spraying of pesticides by plane near the borders of the leased land. It was pointed out that buffers could be used along the leased land because aerial application was not the only issue, as they help to prevent natural drifting of pesticides and pollination (e.g. GMOs) and erosion along waterways. It was also suggested that the section should take into account the growing field of environmental services, which provided mechanisms to ensure that the land's natural capital was maintained. Lastly, it was pointed out that the section could emphasise the importance of

contractualising compliance with international standards that the host-State government might have not yet adopted or implemented.

44. With respect to the section on protection of investment and regulatory autonomy, it was said that it could cover expropriation and respect for regulatory space, physical security, and stabilisation and security of rights. Regarding expropriation in particular, it was suggested that the guide should note that the potential need for resettlement could raise a number of red flags and concerns about a prospective investment and that the guide could refer to other relevant international instruments and guidance documents in this regard. It was then stated that the VGGT sought to avoid displacement and that, in terms of human rights, forced evictions constituted a human rights violation that should be mentioned. Regarding both physical and legal security, it was said that the UN Principles for responsible contracts could serve as a very useful resource.

45. With respect to the section on transparency, compliance and monitoring, it was noted that it could cover insurance, recordkeeping and audits, inspections, conservation of premises, monitoring and reporting requirements and amendments and periodic review. The importance of promoting and enhancing transparency was emphasised, including between the parties themselves and the parties and the public, subject to the protection of confidential information. It was also noted that the initial draft outline's inclusion of a subsection on representations and warranties could create some confusion regarding terminology and that that subsection might not be needed. It was said in reply that perhaps these representations and warranties issues could be flagged in the checklist for this section, but not developed in detail.

F. Contractual Non-Performance (Chapter 4)

46. In reviewing proposed revisions to the initial draft outline for chapter 4, it was suggested to amend the title of this chapter to contractual non-performance. It was proposed that the chapter should address excuses for non-performance and remedies for breach. Regarding excuses for non-performance, it was said that the section would contain an introductory part discussing, in general, force majeure, change in circumstances, and ways to contractually allocate risks, as well as insurance and other risk mitigation schemes. It would then treat force majeure and change in circumstances in greater detail. Regarding remedies for breach, it was said that the section would cover types of breaches and provide an overview of remedies, the role of the aggrieved party's conduct, the right to cure, renegotiation and the duty of co-operation.

47. For both sections, it was pointed out that the UNIDROIT Principles could serve as a useful model which could be tailored to the guide's particular context because numerous Articles addressed these issues. It was also recognised that both sections would benefit from subparts addressing considerations for host-States because, as proposed, it seemed to focus on private party to private party transactions. In this regard, it was emphasised that, based on the guide's scope, treating such considerations for host-States and their lawyers was essential. It was said that, in addition to the private law contractual excuses and remedies, there would likely be other possible excuses and remedies that would need to be addressed. It was pointed out that, for example, necessity under international law differed from force majeure.

48. With respect to remedies in particular, it was said that this chapter would address termination for breach and related issues which, under the initial draft outline, were to be addressed in both chapters 4 and 5. It was then suggested that the guide address how to ensure, for example, that a breach of a linked agreement, such as a community development agreement between the investor and a local community, could also trigger remedies under the lease contract between the investor and the host-State. It was cautioned, however, that the host-State could seek to use the alleged breach of a linked agreement to expropriate an investment. It was then pointed out that remedies for local communities who were parties to the lease contract or a related agreement might need to be treated as well. It was said that, if a local community was no longer able to access a water source

that community might have remedies, depending on the circumstances, both against the investor and the State. It was also said that the role of remedies arising under bilateral and multilateral investment treaties should also be considered. For the portion on considerations for host-States, it was noted that there could be a discussion of, among other things, possible counterclaims.

G. Transfer and Return (Chapter 5)

49. For the chapter on transfer and return, it was recommended that it should address the transfer of obligations and rights, including assignment, and return of the land at the end of the contract. It was recommended that the issues of renewal and termination, previously identified as falling within the chapter in the initial draft outline, were to be moved to chapters 3 and 4 respectively as they would better fit in those chapters. With these issues moved, it was queried whether the remaining issues in chapter 5 should also be dealt with elsewhere. Subject to further discussion, it was recommended that transfer and return issues remain a standalone chapter.

50. Regarding transfer, it was pointed out that transferability of obligations and rights, the legality of such transfers and limitations on them could be discussed, together with an emphasis on the importance of disclosure. It was pointed out that the entire contract might be transferred or only particular rights arising under that contract. It was then pointed out that transfer of the entire contract might be the most important aspect. It was said that, in dealing with changes in control in this section, such changes could be manipulated, for example through corporate reorganisations, in order to extend enjoyment of financial benefits, such as longer tax holidays. It was further said that transparency with respect to the identity of the parties remained important, as the host-State and any other parties or stakeholders would need to know that the new investor was capable of fully implementing the contract. As another example, it was noted that, while the lease contract could bar transfer of the lease to another investor, that other investor could simply buy the initial investor's company to gain control of that lease. As a result, it was further noted that the section should address both direct and indirect transfers. Reference was made to chapter 9 of the UNIDROIT Principles, which addressed assignment of rights, transfer of obligations and assignment of contracts and could serve as a useful resource.

51. Regarding return of the land, it was recommended that the term "return" be used instead of termination, which had been proposed, in order to avoid confusion with the treatment of the remedy of termination in chapter 4. It was said that this section could address the condition in which the land was to be returned, including replanting and maintenance obligations, subject to the business plan. It was further said that it could address liabilities for deterioration, as well as restitution aspects, the latter of which could build upon the relevant Articles of the UNIDROIT Principles. It was pointed out that liabilities for deterioration might overlap, for example, with the discussion of environmental obligations in chapter 3, as that section could cover how to deal with environmental liabilities at project closure. In this regard, it was recommended that the two chapters be coordinated in order to minimise overlap.

H. Dispute Resolution (Chapter 6)

52. For the chapter on dispute resolution, the Working Group reviewed and discussed in detail a working paper containing an initial draft of the chapter. In the draft's presentation, it was acknowledged that the draft had been prepared consistent with the Working Group's earlier recommendation on the target audience – which had now been expanded from focusing on legal counsels for investors to legal counsels for all parties and stakeholders involved – and would accordingly be subject to some reframing.

53. With respect to the introductory paragraphs to the chapter, there was a discussion of *lex rei sitae* issues, in particular the important role of host-State law. Recalling the prior discussion of governing law clauses from the Working Group's first meeting, it was said that the role of such law

had to be further emphasised, for example by moving up the treatment of this point within the draft and by cross-referencing to the chapter on the legal framework.

54. With respect to the section on disputes arising from agricultural land investment contracts, it was suggested that points about legal pluralism and forum shopping could be made more explicitly. It was then suggested that the statement that parties “may” agree on a preferred mode of dispute settlement should be qualified, because whether it was possible to agree would be subject to domestic law.

55. Regarding the importance of access to justice, it was suggested that the term “access to justice” might be too restrictive and that the relevant terminology of the International Covenant on Civil and Political Rights could be used. It was also suggested that, in looking at a broader target audience, there could be a reference to parties or stakeholders that were not an investor or the State. It was further suggested that reference could be made to grievance mechanisms and the various other remedies available to those other possible parties and stakeholders, as well as to customary rules and practices. It was then said that, in briefly touching upon the possible mechanisms available for the various parties, the UN Guiding Principles might be a useful reference as remedies was one of those Principles’ three key pillars.

56. Regarding the provision of access to justice, it was suggested that the initial sentence could be rephrased to make clear that, if there was an arbitration clause, it might not be possible for a party to submit that dispute to a domestic court. It was pointed out, however, that many investor-State arbitrations related to disputes that had first been submitted to a domestic court and that it was not clear in practice that an arbitration clause would prevent submission of a dispute to a domestic court. With respect to the reference to a domestic court’s “coercive powers”, it was queried whether such powers should be qualified (e.g. quasi-coercive) or if reference should be made to more traditional bases of jurisdiction.

57. With respect to non-judicial dispute resolution, in particular grievance mechanisms, it was suggested that there could be a cross-reference to the UN Guiding Principles. It was then said that treatment of grievance mechanisms could be expanded, as such mechanisms constituted an important safeguard. With respect to such mechanisms, it was pointed out they were an aspect of ongoing process of engagement and consultation – such that an investor would have a social license to operate – with local communities and stakeholders. Regarding expert determinations, it was suggested that the paragraph could clarify who would select the expert and what issues experts could typically determine in this context, in particular issues of fact. In this regard, it was said that it would be important to point out the difference between experts providing factual determinations and experts providing opinions, for example, during an arbitration. It was then said that the Legal Guide on Contract Farming could serve as an example for how some guidance could be provided for legal counsels on each of the possible dispute resolution mechanisms. Lastly, it was suggested that, in addition to negotiation and mediation, conciliation could also be addressed.

58. Regarding arbitration, it was suggested that it would be very helpful to encourage the parties to draft an arbitration clause expressing a clear intention to arbitrate. It was pointed out that, while the parties’ consent to arbitrate was often found in the agricultural land investment contract, a host-State might have a standing offer to arbitrate in its investment code or, if applicable, an international investment agreement (e.g. BITs or FTAs with investment chapters). In this regard, use of the word “located” in the draft was said to be unclear. It was then suggested that third-party participation (e.g. under the UNCITRAL or ICSID Arbitration Rules) could be addressed in this subsection. It was next pointed out with respect to the draft that it might be preferable to avoid (a) entering into the debate about breaches of nature justice and (b) making a statement about courts’ enforcing arbitral awards in the vast majority of cases. It was then asked whether there should be some treatment of a situation in which the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards might not apply and other routes of enforcement, including seeking enforcement in a third

State. It was then suggested that there could be a brief reference to separability (i.e. whether the arbitration clause expires with the contract) perhaps by reference to the UNCITRAL Model Law on International Commercial Arbitration, and it was pointed out that the Legal Guide on Contract Farming briefly treated this issue as well.

59. It was then queried whether addressing non-judicial dispute resolution before judicial dispute resolution would suggest that one route was better than another. It was stated in reply that there could be a statement in the introduction to the chapter noting that there was no preference. With reference to judicial dispute resolution, it was said to be important to point out that domestic courts had primary jurisdiction, and reference was made to the principle of exhaustion of local remedies. It was then stated that, because of differences between domestic court systems, caution should be used in making assertions about the cost and length of arbitral and judicial procedures. It was acknowledged that, with the broader target audience, this section would be revised accordingly.

60. Regarding domestic versus international contracts, it was said that addressing this issue could give rise to a range of concerns with respect to the internationalisation of contracts, in particular in the context of State contracts. It was further said that the notion that a third-State could have jurisdiction would be very controversial, given that the land fell within the host-State's jurisdiction. It was suggested that, because the guide would address both domestic and foreign investment, it might be both possible and better either to leave this issue out or to treat it much more briefly, by pointing out some of the implications if a foreign investor was involved instead of getting into internationalisation of the contract.

61. Regarding domestic versus international courts, it was suggested that the title should reflect not just courts but also arbitral tribunals. It was pointed out that simply adding arbitration to that title might not be workable, and it was suggested to have a first subsection on fundamental rights, including the right to fair trials, and then a second subsection on international courts, with arbitration primarily being dealt with in the non-judicial dispute resolution section. It was further suggested that the reference to diplomatic protection could give rise to some concerns with respect to possible bilateral pressures and should be reconsidered, unless what was meant could be clearly defined. It was said in this regard that perhaps a reference to the International Law Commission's Articles on Diplomatic Protection would suffice. It was also suggested that reference should be made to regional human rights courts.

62. With respect to enforcement of settlements or decisions resolving a dispute, it was suggested that recognition proceedings could be mentioned as well. It was then suggested that enforcement mechanisms for third-parties should be added into this section.

I. Possible annexes to the future guide or future steps in the work

63. Regarding possible annexes, it was stated that there could be annexes to the guide containing a glossary, if needed, and a combined version of the checklists of issues developed in connection with the various chapters. For the checklists, the Secretariat suggested that it could assemble them in reviewing the contributions and preparing a combined first draft of the guide for the Working Group's third meeting.

64. With respect to model contractual provisions, it was said that there had been several guides addressing agricultural land investment already published and that the development of such provisions could constitute a very useful contribution in this area. It was said in reply that it was not advisable to prepare such provisions as they might be difficult to draft given that they could apply in so many different contexts and that, in any event, they would take a significant number of Working Group meetings to develop. It was then suggested that the blackletter rules of the UNIDROIT Principles could be included with the guide, in place of model contractual provisions, not as applicable law, but as a list of issues to be considered by the parties in drafting. It was stated in reply that including the

UNIDROIT Principles, which focused on private party transactions, but not other model provisions addressing areas not covered by the Principles, could be problematic. It was further stated that, in any event, the guide would link to the Principles, so it would be unnecessary to include them. It was then suggested that perhaps the guide could include some general examples for particularly important issues, but not model contractual provisions. It was further suggested that such examples might provide more guidance and increase the guide's usefulness to legal counsels. Lastly, it was recommended that these various possible annexes and next steps should remain in brackets in the draft outline for further discussion.

J. Guidelines for drafting

65. In conducting the review of the working papers and the draft outline, the Working Group noted that the draft outline remained in progress and that drafters would have flexibility in addressing the topics and issues identified in the outline.

66. Regarding the terminology to be used, the Working Group recommended that the introduction provide definitions or descriptions for key terms, including agricultural land investment contract, investor, host-State government, legal tenure right holder and legitimate tenure right holder. It was further recommended that, if useful, a glossary could be added. It was then noted that the Secretariat would be responsible for assembling the members' various drafting contributions and for harmonising the terminology and overall style of those contributions.

67. Regarding the framing of guidance to be offered, it was said that the guidance should generally be framed in a narrative way, identifying and describing various issues and setting out possible contractual solutions, as well as, if possible, identifying best practices. It was further said that the Legal Guide on Contract Farming could serve as a model in this regard and that, where it was not necessary to target certain guidance to a particular party (i.e. investor, host-State or other party), the guidance could be drafted neutrally. It was also said that the various drafters would have leeway in framing the guidance in their contributions, the styles of which could be harmonised by the Secretariat.

68. Regarding the level of detail to be provided, it was said that, for common contract law issues about which most counsels would already be aware, those issues could be identified in the checklists of issues, but then not elaborated upon significantly. It was then said that a holistic document was sought, but that it should emphasise those areas in which UNIDROIT's contract law expertise would be most useful, for example, with respect to contractual safeguards for protecting and respecting the rights of legitimate tenure right holders.

69. It was then emphasised that the guide, where possible, could refer to other international instruments (e.g. the VGGT, CFS-RAI Principles, the UNIDROIT Principles) and related international guidance documents (e.g. VGGT Technical Guides). The inclusion of references to other sources (e.g. case law, scholarly works) was encouraged for purposes of developing the guide, though those references would be removed from the final version. It was then pointed out again that the guide would not have to go into detail on every topic or issue, provided that another international instrument provided necessary guidance, to which reference could be made.

5. Organisation of future work

70. The Working Group discussed several aspects of the organisation of future work, including drafting responsibilities, stakeholder engagement, and the schedule for next steps in the work. Regarding drafting responsibilities, the Working Group agreed that first drafts of all of the topics and issues identified in the draft outline should be prepared in time for the Working Group's next meeting,

so that the Secretariat could assemble a substantially complete first draft of the guide for review at that meeting.

71. Regarding stakeholder engagement, the importance of consultations with stakeholders, in particular civil society and private sector organisations was emphasised. It was recognised that, in light of the guide's broadened scope – now including legal counsels for host-States – it would be important to seek review and input from those counsels as well. It was also pointed out that notary organisations might wish to provide input and participate in the guide's development.

72. In considering various ways in which input on the draft outline and guide could be obtained, it was recalled that a second informal meeting would be held at FAO during the week of the CFS' 44th session (Rome, 9-13 October 2017) to raise awareness and seek input on the work from the many experts and stakeholders who would be in Rome for that session, including from civil society, the private sector, and bilateral development agencies. It was suggested that, because of the sensitivity of the work, it might be useful to hold a multiday event with key stakeholders, perhaps after the first draft of the guide was available. In addition, it was recommended that the Secretariat should seek to participate in the Land Policy Institute's Conference on Land Policy in Africa (Addis Ababa, 14-17 November 2017) and the World Bank Group's Land and Poverty Conference on land governance in an interconnected world (Washington DC, 19-23 March 2018). With respect to these events, as well as other possible contacts with stakeholders undertaken by the Secretariat to seek input, the Secretariat noted that it would provide any comments received to the Working Group for its consideration.

73. Regarding the schedule, the Working Group agreed upon drafting deadlines and decided to hold an interim teleconference to discuss progress on the work on 8 February 2018. The Working Group then agreed to hold its third meeting in Rome on 25-27 April 2018, to which interested civil society, private sector and other stakeholder representatives would be invited. As far as future steps, subject to the progress achieved in the ensuing months, the Working Group discussed the possibility of holding a fourth meeting of the Working Group in the fall of 2018, as well as a formal side event at the CFS' 45th session. Those steps could be followed, in the fall of 2018 and the spring of 2019, by an open online consultation – similar to what had been done with drafts of the Legal Guide on Contract Farming and the VGGT – and by a series of consultation events held around the world in coordination with the members of the Working Group, with the Secretariat incorporating any comments and input received in conjunction with the members. Ultimately, if possible, it was contemplated that the future guide could be submitted to the UNIDROIT Governing Council for adoption at its session in spring 2019.

6. Any other business and closing of the meeting

74. Seeing no requests for the floor, the Chairman, Mr Moreno Rodríguez, closed the meeting, thanking the experts and representatives for their participation and contributions.

ANNEX 1**LIST OF PARTICIPANTS****Second Meeting of the UNIDROIT Working Group
on agricultural land investment contracts****Rome, 13-15 September 2017****WORKING GROUP MEMBERS / EXPERTS**

Mr José Antonio MORENO RODRÍGUEZ
Attorney - Professor of Law
ALTRA Legal
Chair of the Working Group

Mr James T. GATHII
Professor
Wing-Tat Lee Chair in International Law
Loyola University Chicago School of Law

Mr Lorenzo COTULA
Principal Researcher
Law and Sustainable Development / Team
Leader – Legal Tools
Natural Resources Group
International Institute for Environment and
Development (IIED)

Dr. Jean HO
Assistant Professor
Faculty of Law, National University of
Singapore

Mr Daryono DARYONO
Professor of Law
Universitas Terbuka, Jakarta

Mr Pierre Etienne KENFACK (*excused*)
Professor of Law
University of Yaoundé 2

Mrs Bénédicte FAUVARQUE-COSSON
Professor, Université Panthéon-Assas, Paris 2
Présidente du réseau Trans Europe Experts
Vice-présidente de l'Académie internationale
de droit comparé

Ms Yuliya PANFIL
Associate
Property Rights Investment Team
Omidyar Network

REPRESENTATIVES

FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS (FAO)

Ms Margret VIDAR
Development Law Branch
Legal Officer

INTERNATIONAL FUND FOR AGRICULTURAL DEVELOPMENT (IFAD)

Mr Charles FORREST
Senior Legal Counsel

OTHER INTERGOVERNMENTAL ORGANISATIONS

World Farmer's Organisation (WFO)

Mr Dave VELDE
Vice President of the United States National Farmers' Union
and Board member of WFO

International Land Coalition

Ms Cristina TIMPONI CAMBIAGHI
Thematic Coordination Manager

Mr Luca CHINOTTI
Global Policy Advisor

CCSI

Ms Kaitlin Y CORDES (*remote participation*)
Head: Land and agriculture
Lead: Human rights and investment
Columbia Center on Sustainable Investment

Others

Mr Naoyuki OKANO
Ph.D. Candidate (Comparative Law and Politics)
Nagoya University, Graduate School of Law

UNIDROIT Secretariat

Mrs Frédérique MESTRE, Senior Officer
Mr Neale BERGMAN, Legal Officer

ANNEX 2**Second Meeting of the UNIDROIT Working Group
on agricultural land investment contracts****Rome, 13-15 September 2017****AGENDA**

1. Opening of the meeting
2. Adoption of the agenda and organisation of the meeting
3. Recent developments and general considerations in relation to the work
4. Consideration of the draft outline of the future legal guide on agricultural land investment contracts, proposed revisions and initial chapter drafts
5. Organisation of future work
6. Any other business
7. Closing of the meeting

ANNEX 3**DRAFT IN-PROGRESS OUTLINE**
for UNIDROIT’s future guide on agricultural land investment contracts

PREFACE [see, e.g., Legal Guide on Contract Farming, Preface]

- I. Overview and purpose
 - A. Brief summary of the Guide
 - B. Statement that the Guide seeks, *inter alia*, to:
 - Respond to the need for greater investment in agriculture for food security and nutrition [CFS-RAI Principle 1];
 - Support responsible agricultural investment, which incorporates necessary safeguards to protect legitimate tenure right holders, human rights, livelihoods, food security and the environment and is consistent with the objectives of social and economic growth and sustainable human development [VGGT, para. 7.1 et seq., 12.1 et seq.; CFS-RAI Principles 2-10];
 - Respond to capacity constraints of host-State governments and the balance of power between investors and host-State governments; and
 - Support tenure holders’ knowledge of their rights, protection of those rights by host-State governments and respect of those rights by investors.
- II. Approach and how to use the Guide
 - A. Approach is for UNIDROIT – in light of its particular private law expertise and in collaboration with FAO and IFAD – to provide legal guidance on agricultural land investment contracts, incorporating necessary safeguards into them, and implementing and monitoring them in six stages (i.e. the legal framework; parties, formation and form; obligations and rights of the parties; contractual non-performance; transfer and return; and dispute resolution)
 - B. Guide is to further the implementation of the VGGT and CFS-RAI Principles by serving as a reference tool for legal counsels and is to contain references to practical operations, contract practices and international instruments (e.g. VGGT; CFS-RAI Principles; UPICC)

INTRODUCTION [see, e.g., Legal Guide on Contract Farming, Introduction]

- I. General introduction to agricultural land investment contracts
 - A. The notion of agricultural land investment contracts, including why such contracts are important and being treated in the Guide

B. Issues that have been identified with respect to such contracts

- Tenure rights in general [see, e.g., Munro-Faure and Palmer, An Overview of the Voluntary Guidelines on the Governance of Tenure, LAND TENURE JOURNAL (2012)]
- Rights of legitimate tenure right holders not being protected by host-State governments or respected by investors, including difficulties in identifying such holders
- Gaps and difficulties in the implementation of domestic laws

II. Scope of the Guide

A. Description of various agricultural land investment contracts in practice, such as leases, concessions/investment agreements, purchases (i.e. a more technical discussion than in Part I.A above)

- Various possible parties and contractual arrangements (including JVs, PPPs, etc.)
- Briefly highlight complexities in such arrangements

B. Identification of those contracts falling within the Guide's scope, specifically leases and concessions/investment agreements for agricultural land

- Identifying, with examples, what falls within the scope of the Guide
- Setting out key definitions [agricultural land investment contract, investor, host-State government, legal tenure right holder, legitimate tenure right holder – with cross-reference to glossary]

CHAPTER 1 – THE LEGAL FRAMEWORK

I. Introduction

A. Freedom of contract

B. Limitations on that freedom for agricultural land investment contracts

- Mandatory rules from various sources – domestic and foreign
- Relevant areas

II. Sources

A. Domestic sources [VGGT Technical Guide No. 4 at 33 et seq.]

- Rules and principles of law (e.g. from legislation, judicial decisions or regulations)
- Customary rules and usages

B. International sources

- International treaties (e.g. ICCPR, ICESCR, CERD, CEDAW, CRC, ICRMW or bilateral/multilateral investment treaties binding for the respective State Parties) [VGGT Technical Guide No. 4 at 32]
- Soft law instruments (e.g. VGGT; CFS-RAI Principles; UPICC)
- Guidance documents (including standards documents) [e.g. OECD-FAO Guidance for Responsible Agricultural Supply Chains]

III. Relevant areas of law and regulation

- Land tenure/administration
- Human rights (including food security, gender and labour)
- [Social obligations / Protecting and respecting rights]
- Environment (including water)
- Finance (e.g. tax, accounting rules and anticorruption measures)
- Protection of investment (including national investment codes and IIAs) and regulatory autonomy
- Transparency, compliance and monitoring (including tendering process [CFS-RAI Principle 9; VGGT Technical Guide No. 4 at 47 et seq., 61 et seq.])
 1. Need for a competitive, inclusive and transparent process involving all stakeholders
 2. Draft contract publication/disclosure [VGGT, para. 11.7; UN Principles for responsible contracts, no. 10; IISD Model Contract, para. 12.0]

CHAPTER 2 – PARTIES, FORMATION AND FORM

- I. Identification of the possible parties to the contract and relevant stakeholders (including processes for doing so)
 - A. Types of parties and relevant stakeholders [CFS-RAI Principle 5; VGGT para. 12.1 et seq.; UN Principles for responsible contracts, nos. 1-2, 7; VGGT Technical Guide No. 5 at 20 et seq.; VGGT Technical Guide No. 7 at 38; ISLP/CCSI Guide, part 2.2]
 - Investor(s)
 - Transparency in the identity and nationality of each party, including issue of beneficial ownership
 - Corporate organisation [GCAP Model Lease, Section 16]
 - Need for due diligence and FPIC (including cross references to Parts II and III below)

- Legal tenure right holder(s) (e.g. host-State government, community, private individual)
 - Legitimate tenure right holder(s) [VGGT, paras. 3.2, 9.1]
 - Other possible parties or relevant stakeholders (e.g. local officials or public notaries)
- B. Types of contracts or options (including with respect to third parties and an introduction to community development agreements [cross-reference to Chapter 3.IV.G below])
- II. Feasibility studies [GCAP Model Lease, Appendix 1; IISD Model Contract, para. 6.1]
- A. Suitable land availability (including access to necessary resources) and valuation [VGGT, para. 18.1 et seq.; VGGT Technical Guide No. 4 at 37; VGGT Technical Guide on valuation (forthcoming)]
- B. Development of a business plan
- III. Impact assessments [CFS-RAI Principle 10; VGGT paras. 3.2, 12.10; IFC Performance Standard 1; Right to Food Guidelines, para 17.2; VGGT Technical Guide No. 4 at 56 et seq.; VGGT Technical Guide No. 7, parts 2-3, 6; IISD Model Contract, para. 6.2]
- A. Land tenure (including legitimate tenure rights)
- B. Human rights and social aspects (including food security [CFS-RAI Principles 1-2; VGGT, paras. 12.1, 12.4, 12.12], gender and labour)
- C. Environment [GCAP Model Lease, Appendix 2] (including impacts on water and other natural resources and access to those resources [CFS-RAI Principles 5-6])
- IV. Contract formation and form [Legal Guide on Contract Farming at 57; UPICC, Chapter 2]
- A. Capacity and consent
- B. Role of those who intervene or assist in contract negotiation
- C. Required contract form and content and consequences for breach of such requirements, as well as any formalities for leases of agricultural land

CHAPTER 3 – OBLIGATIONS AND RIGHTS OF THE PARTIES

- I. Introductory section
- A. Recognising that not all agricultural land investment contracts (which might actually be a single contract or a series of contracts) would require or include clauses on all of the topics identified below, depending on the type of contact, the parties to that contact, and other circumstances
- B. Recognising that the topics might not be addressed in this order
- C. Introducing the key parameters and themes from Chapter 1.III above (i.e. land tenure/administration; human rights (including food security, gender and labour); [social obligations / protecting and respecting rights]; environment (including

water); finance; protection of investment and regulatory autonomy; and transparency, compliance and monitoring)

II. Land tenure

A. Location/description of the land [GCAP Model Lease, Section 3; ISLP/CCSI Guide, part 2.4]

- Identification (e.g. total size; boundaries; geospatial data)
- Option for additional land and right of first refusal for such land

B. Tenure rights [GCAP Model Lease, Section 5; IISD Model Contract, para. 5.1; ISLP/CCSI Guide, part 2.5]

- Identification of rights (cross-reference to Chapter II) and highlighting the importance of the issue

Grant of tenure rights

- Rights of use (e.g. land; water, including specification of water commitments and drought events; and underground resources)
- Rights of entry and control (e.g. who owns improvements; fixtures; etc.) [UNCITRAL PFIP Guide at 108 et seq.]
- Rights withheld (e.g. limitations on exclusivity/use; rights of way; continued access, etc.) [UNCITRAL PFIP Guide at 111 et seq.]

Grant of related rights

- Right to access and use utilities [GCAP Model Lease, Section 11]
- Rights to import (e.g. supplies; equipment)
- Rights to market, transport and export (e.g. agricultural production)

C. Duration and renewal [GCAP Model Lease, Section 4; IISD Model Contract, para. 5.1]

- Start and end dates
- Drawbacks of limitations on period [UNCITRAL PFIP Guide at 151 et seq.]
- Renewal and renegotiation (e.g. terms for extension/renewal of the lease, including key performance indicators and incentives for renewal) [GCAP Model Lease, Section 4]

D. Conditions [UPICC, Chapter 5.3]

- Overview, including suspensive and resolute conditions [ISLP/CCSI Guide, part 2.3]
- Permits and licenses [GCAP Model Lease, Sections 5, 14]

-
- E. Purpose of the investment/Land management issues [VGGT Technical Guide No. 4 at 87]
- Identification of use
 - Indicative business plan
- F. Land development obligations [GCAP Model Lease, Section 11]
- Introduction: Investments that are not duly implemented can frustrate hopes for jobs, public revenues and social infrastructure (as applicable), and more generally create opportunity costs (other land users could have better developed the land). In some contexts, authorities choose to regulate land use activities (e.g. crop choice, processing) in order to pursue certain goals (e.g. meet domestic demand for a given commodity, or promote in-country processing). So, multiple policy considerations may be involved, depending on the context: (a) discourage speculative acquisitions; (b) timely implementation; or (c) promote specific land use activities.
 - Development plans and related clauses
 - Land use provisions (e.g. specifying forms of land use, and the investor cannot make material changes to the land use envisaged in the contract without prior authorisation in writing from the other party, sometimes with the clarification that the authorisation cannot be unreasonably withheld)
 - Local processing (i.e. provisions to encourage local processing, including via incentives, or to require the investor to explore feasibility of local processing at least in part)
 - Contract monitoring (with cross reference to transparency and monitoring below)
- G. Infrastructure [ISLP/CCSI Guide, part 2.7]
- III. Finance/Financial obligations [GCAP Model Lease, Section 6; IISD Model Contract, para. 7.0 et seq.; ISLP/CCSI Guide, part 2.11]
- A. Introduction: Public revenues are an important way in which the host country can benefit from investments. They can influence a government's ability to provide public services, and ultimately to contribute to inclusive sustainable development. Important role of national legislation (tax law). Agricultural land investment contracts often include provisions on public revenues. These govern issues such as types of revenue streams, applicable rates, monitoring arrangements.
- B. Types of public revenues (e.g. land rental fees; water fees; corporate income tax (charged on the company's profits); royalties (based on the value of production, or more rarely on production volume); withholding tax (tax deducted from payments made by the company to other persons located outside the country); dividends (in joint ventures))
- C. Policy choices
- D. Fixed income versus revenue sharing models

- E. Other contractual issues (e.g. timing and form of monetary payments, and interest accrual on late payments; mechanisms for periodic revisions; and capitalisation)
- IV. [Social obligations / Protecting and respecting rights] [GCAP Model Lease, Section 7; ISLP/CCSI Guide, part 2.13]
- A. Introduction (e.g. widely recognised that community relations are an important factor in the project's ultimate success; "social license to operate" debate; at the same time, relations with communities often one of the most difficult issues in agricultural land investments; developments in contractual practice to address these challenges)
- B. Local/domestic food security [CFS-RAI Principles 1-2; VGGT, para. 12.12]
- C. Land acquisition
- Provisions aimed at minimising extent of land acquisition
 - Provisions on compensation (conceptually distinct from benefit sharing and including compensable items (e.g. land, crops, structures or other items existing on the land), compensation rates, mechanisms, and timing; role of national law, for example, in defining compensable items and applicable rates; however, national law may fall short of international law (e.g. as reflected in human rights law jurisprudence) and international standards)
 - Provisions on continued access to land and resources for local stakeholders insofar as not inconsistent with project activities (with cross-reference to Chapter 3.B above)
- D. Employment [CFS-RAI Principles 2-4; GCAP Model Lease, Section 7; IISD Model Contract, para. 8.1 et seq.]
- Quality and quantity of jobs created through the project
 - Access to employment (i.e. contract provisions establishing priority or even exclusivity for local nationals in relation to specified roles (e.g. unskilled labour) and priority or sliding scales for hiring of local nationals in relation to other roles (e.g. technical, managerial))
 - Capacity support commitments on the part of the investor may be needed in order to achieve these targets (e.g. training for local nationals so they can take up technical or managerial roles)
 - Gender aspects, including possible mechanisms to handle gender segregation in agricultural labour force and promote women's access to skilled positions, as well as youth aspects
 - Monitoring mechanisms and reporting requirements
- E. Local content (e.g. provisions that require the company to prioritise domestic suppliers when sourcing goods and/or services for the agricultural investment) [CFS-RAI Principle 2; IISD Model Contract, para. 8.4]
- F. Outgrower schemes [CFS-RAI Principles 1-2, 8; GCAP Model Lease, Section 7; IISD Model Contract, para. 8.2]

- Contractual arrangements whereby small-scale farmers grow crop around the nucleus plantation to supply the commercial operation
 - Contractual practice with provisions requiring investor to develop an outgrower scheme where this responds to local development priorities (and arrangements for community engagement in the development of the scheme)
 - Basic terms of company-farmer relations (e.g. pricing formulae (possibly linked to international price indices where available), lending arrangements; tenure aspects (outgrowers farming own or company land; if the latter, farmers' tenure security on company land); gender issues (e.g. in outgrower selection, especially where growers farm company land))
 - Reporting requirements and monitoring arrangements
- G. Community development funds or social infrastructure [CFS-RAI Principle 9; GCAP Model Lease, Sections 8-9; IISD Model Contract, para. 8.5]
- Investor obligations in relation to establishing and financing a community development fund, or to provide social infrastructure (e.g. schools, clinics).
 - Policy choices at stake
 - Mechanisms to identify local priorities and translate them into contractualised action, including relevance of community-development agreements (between company and community) and relation / cross-referencing with main investment contract
 - Community development funds
 - Reporting requirements and monitoring arrangements
- H. Protecting and respecting cultural heritage [CFS-RAI Principle 7]
- V. Environment [CFS-RAI Principle 6; IFC Performance Standard 6; GCAP Model Lease, Section 14; IISD Model Contract, para. 9.0 et seq.; ISLP/CCSI Guide, part 2.12]
- A. Introduction
- Agricultural land investments often associated with environmental risks and impacts
 - Key role of national law in setting rules, institutions and processes (e.g. specialised agencies dealing with environmental aspects; impact assessment requirements in many jurisdictions; terms of environmental liabilities, and who can activate them (e.g. administrative sanctions/penalties vs tort liability for damage suffered by private actors))
 - In some contexts, national law not in line with international standards and, in these cases, the contract can provide an opportunity to complement national legislation
- B. Impact assessment and management plans
- C. Applicable standards

- D. Water, including terms for water abstraction (quantity, timing, payments)
 - E. Waste management
 - F. Project closure
 - G. Monitoring, sanctioning and remediation
- VI. Protection of investment and regulatory autonomy
- A. Expropriation and respect for regulatory space [placeholder for resettlement]
 - B. Physical security [UN Principles for responsible contracts, no. 6; GCAP Model Lease, Section 12; IISD Model Contract, para. 5.4; ISLP/CCSI Guide, part 2.8]
 - C. Stabilisation and security of rights, including the importance of legal security for bankability and respect for regulatory space [UN Principles for responsible contracts, no. 4; IISD Model Contract, para. 10.0; ISLP/CCSI Guide, part 2.19]
- VII. Transparency, compliance and monitoring [GCAP Model Lease, Sections 11-12; ISLP/CCSI Guide, part 2.6]
- A. Insurance
 - B. Recordkeeping and audits [IISD Model Contract, para. 5.3]
 - C. Circumstances under which the lessor can enter the property to inspect the investor's activities and monitor compliance [IISD Model Contract, para. 5.3]
 - D. Conservation of premises
 - E. Monitoring [UN Principles for responsible contracts, no. 8; VGGT Technical Guide No. 4 at 70 et seq.; VGGT Technical Guide No. 7 at 68-69; GCAP Model Lease, Section 13; ISLP/CCSI Guide, part 2.14]
 - Performance guarantees [UNCITRAL PFIP Guide at 136-140]
 - Environmental performance bonds
 - Reporting requirements and access to information / disclosure, transparency / revenue transparency [VGGT, paras. 6.9, 11.7; UN Principles for responsible contracts, no. 10; VGGT Technical Guide No. 7 at 45 et seq.; IISD Model Contract, para. 12.0, 16.0 et seq.; ISLP/CCSI Guide, part 2.18]
 - Between the parties
 - Between the parties and the public
 - Protection of confidential information
 - Delivery of notices [GCAP Model Lease, Section 21; ISLP/CCSI Guide, part 2.25]

- F. Amendments and periodic review (e.g. every 5 years, variations of certain indexes) [GCAP Model Lease, Section 18; IISD Model Contract, para. 13.0; ISLP/CCSI Guide, part 2.26]

CHAPTER 4 – CONTRACTUAL NON-PERFORMANCE

- I. Excuses for non-performance [Legal Guide on Contract Farming, Chapter 4]
- A. Particular importance in long-term contracts and underlying legal issues
- Force majeure versus change of circumstances
 - Anticipating the risk (e.g. contractual allocation of risks through force majeure clauses; price revision clauses and price adjustment mechanisms; types of clauses (adverse factors/adverse events))
 - Insurance and other risk mitigation schemes
- B. Force majeure [UPICC, art. 7.1.7; GCAP Model Lease, Section 20; ISLP/CCSI Guide, part 2.21]
- General notion
 - Qualifying events and burden of proof, including natural events (e.g. storm, fire, epidemics), governmental acts impeding fulfilment of obligations and other disturbances
 - Consequences
- C. Changes of circumstances in general/risks [UPICC, Chapter 6.2; UNCITRAL PFIP Guide at 140 et seq.; VGGT Technical Guide No. 7 at VIII-X; Equator Principle 1]
- General notion
 - Qualifying events, including possible link to renegotiations and periodic review
 - Consequences
- D. Additional considerations for host-State governments
- II. Remedies for breach [Legal Guide on Contract Farming, Chapter 5]
- A. Types of breach and types of contractual clauses on remedies
- Breach by the investor (Legal right holder, Legitimate tenure right holder)
 - Interference by the other party [UPICC, art. 7.1.2]
 - Contractual clauses on remedies (exemption clauses; penalty clauses [UPICC, art. 7.4.13])
- B. Overview of remedies
- Remedies in kind (performance, corrective actions)

- Withholding performance [UPICC, art. 7.1.3]
 - Termination and restitution [UPICC, Chapter 7.3; GCAP Model Lease, Section 19; IISD Model Contract, para. 15.0; ISLP/CCSI Guide, part 2.23]
 - Damages [UPICC, Chapter 7.4], including full compensation and foreseeability
 - Interests and late payments
- C. The role of the aggrieved party's conduct (e.g. price reduction or additional period for performance) [UPICC, art. 7.1.5]
- D. The breaching party's right to cure and cure by non-performing party [UPICC, art. 7.1.4]
- E. Renegotiation, including co-operation between the parties [UPICC, art. 5.1.3]
- F. Additional considerations for host-State governments

CHAPTER 5 – TRANSFER AND RETURN [Legal Guide on Contract Farming, Chapter 6]

- I. Transfer of obligations and rights / assignment [UPICC, Chapter 9; VGGT Technical Guide No. 4 at 75; GCAP Model Lease, Section 17; IISD Model Contract, para. 14.0; ISLP/CCSI Guide, part 2.16]
- A. Transferability of obligations and rights (including change of control [ISLP/CCSI Guide, part 2.17])
 - B. Legality of transfer
 - C. Limitations on transfer
 - D. Importance of disclosure
- II. Return [UNCITRAL PFIP Guide at 168 et seq.; ISLP/CCSI Guide, part 2.24]
- A. Stipulation of the condition in which land is to be returned, including replanting obligations (e.g. maintenance of tree crops, subject to or in line with the business plan)
 - B. Liabilities for deterioration

CHAPTER 6 – DISPUTE RESOLUTION [CFS-RAI Principle 9; VGGT, paras. 3.2, 21.1-21.6; Legal Guide on Contract Farming, Chapter 7; VGGT Technical Guide No. 4 at 72-74; VGGT Technical Guide No. 5 at 87 et seq.; VGGT Technical Guide No. 7 at 39 et seq.; GCAP Model Lease, Section 15; IISD Model Contract 11.0 et seq.; ISLP/CCSI Guide, part 2.20]

- I. Disputes arising under agricultural land investment contracts
- A. The importance of access to justice
 - B. The provision of access to justice

II. Non-judicial dispute resolution

- A. Grievance mechanisms, including for local communities and employees [CFS-RAI Principle 9; UN Principles for responsible contracts, no. 9]
- B. Expert determination (e.g. price of processing or of crops, in the event that the project involves processing or an outgrower arrangement respectively)
- C. Negotiation and mediation
- D. Conciliation
- E. Arbitration (e.g. factors to consider, such as what investors might seek and what host States might oppose; considerations with respect to governing law and transparency of proceedings) [GCAP Model Lease, Section 22; ISLP/CCSI Guide, part 2.27]

III. Judicial dispute resolution

- A. Domestic courts
- B. International courts

IV. Enforcement of settlements or decisions resolving a dispute

[POSSIBLE ANNEXES OR FUTURE STEPS (e.g. checklist of issues, model provisions, detailed guidance on community development agreements or local supply contracts, etc.)]

ANNEX 4

~~INITIAL-DRAFT~~ IN-PROGRESS **OUTLINE**
for UNIDROIT's future guide on agricultural land investment contracts

PREFACE [see, e.g., Legal Guide on Contract Farming, Preface]

- I. Overview and purpose
 - A. Brief summary of the Guide
 - B. Statement that the Guide seeks, *inter alia*, to:
 - Respond to the need for greater investment in agriculture for food security and nutrition [CFS-RAI Principle 1]; ~~and~~
 - Support responsible agricultural investment, which incorporates necessary safeguards to protect legitimate tenure right holders, human rights, livelihoods, food security and the environment and is consistent with the objectives of social and economic growth and sustainable human development [VGGT, para. 7.1 et seq., 12.1 et seq.; CFS-RAI Principles 2-10];
 - Respond to capacity constraints of host-State governments and the balance of power between investors and host-State governments; and
 - Support tenure holders' knowledge of their rights, protection of those rights by host-State governments and respect of those rights by investors.
- II. Approach and how to use the Guide
 - A. ~~Approach is~~ Approach is for UNIDROIT – in light of its particular private law expertise and in collaboration with FAO and IFAD – to provide legal guidance on agricultural land investment contracts, incorporating necessary safeguards into them, and implementing and monitoring them in six stages (i.e. the legal framework; ~~negotiation and parties,~~ formation; ~~[rights and] form;~~ obligations and rights of the parties; contractual non-performance; transfer; ~~renewal~~ and ~~termination~~ return; and dispute resolution)
 - B. Guide is to further the implementation of the VGGT and CFS-RAI Principles by serving as a reference tool for legal counsels, ~~in particular those for investors,~~ and is to contain references to practical operations, contract practices and international instruments (e.g. VGGT; CFS-RAI Principles; UPICC)

INTRODUCTION [see, e.g., Legal Guide on Contract Farming, Introduction]

- I. General introduction to agricultural land investment contracts
 - A. The notion of agricultural land investment contracts, including why such contracts are important and being treated in the Guide
 - B. Issues that have been identified with respect to such contracts

- Tenure rights in general [see, e.g., Munro-Faure and Palmer, An Overview of the Voluntary Guidelines on the Governance of Tenure, LAND TENURE JOURNAL (2012)]
- Rights of legitimate tenure right holders not being [protected by host-State governments or respected by investors](#), including difficulties in identifying such holders
- Gaps and difficulties in the implementation of domestic laws

II. Scope of the Guide

- A. Description of various agricultural land investment contracts in practice, such as leases, concessions/investment agreements, purchases (i.e. a more technical discussion than in Part I.A above)

- [Various possible parties and contractual arrangements \(including JVs, PPPs, etc.\)](#)
- [Briefly highlight complexities in such arrangements](#)

- ~~B. Identification of those contracts falling within the [Guide's scope of the Guide](#), including primarily, specifically leases and concessions/investment agreements, but also other contracts to the extent feasible~~

~~III. for [CHAPTER 1 – THE LEGAL FRAMEWORK](#)~~

- ~~B. [The legal regime applicable to the](#) agricultural land~~

- [Identifying, with examples, what falls within the scope of the Guide](#)
- [Setting out key definitions \[agricultural land investment contract, investor, host-State government, legal tenure right holder, legitimate tenure right holder – with cross-reference to glossary\]](#)

CHAPTER 1 – THE LEGAL FRAMEWORK

- ~~I. [Introduction](#) (i.e. applicable to the~~

- ~~A. [Freedom of contract](#) itself and the rights and obligations arising~~

- ~~B. [Limitations on that freedom for agricultural land investment contracts](#)~~

- [Mandatory rules from it\) various sources – domestic and foreign](#)
- [Relevant areas](#)

[II. Sources](#)

- C. Domestic sources [VGGT Technical Guide No. 4 at 33 et seq.]

- Rules and principles of law (e.g. ~~contract law; property law; company law~~ [from legislation, judicial decisions or regulations](#))
- Customary rules and usages

D. International sources

- International treaties (e.g. ICCPR, ICESCR, CERD, CEDAW, CRC, ICRMW or bilateral/multilateral investment treaties binding for the respective State Parties) [VGGT Technical Guide No. 4 at 32]
- Soft law instruments (e.g. VGGT; CFS-RAI Principles; UPICC)
- Guidance documents (including standards documents) [e.g. OECD-FAO Guidance for Responsible Agricultural Supply Chains]

~~IV. The regulatory environment~~

~~A. Domestic sources~~

III. Relevant areas of law and regulation

- Land tenure/administration ~~/land reform~~
- ~~• Environmental protection~~
- ~~• Promotion and protection of investment~~
- Human rights (including food security, gender and labour)
- [Social obligations / Protecting and respecting rights]
- Environment (including water)
- Finance (e.g. tax, accounting rules and anticorruption measures)
- Protection of investment (including national investment codes and IIAs) and regulatory autonomy
- Transparency, compliance and monitoring (including tendering process [CFS-RAI Principle 9; VGGT Technical Guide No. 4 at 47 et seq., 61 et seq.]
 1. Need for a competitive, inclusive and transparent process involving all stakeholders
 2. Draft contract publication/disclosure [VGGT, para. 11.7; UN Principles for responsible contracts, no. 10; IISD Model Contract, para. 12.0]
- ~~• Other potentially applicable domestic sources~~

~~B. International sources~~

- ~~• Food security~~
- ~~• Human rights~~
- ~~• Gender~~
- ~~• Environmental law~~

- ~~• Labour law~~
- ~~• Transparency~~
- ~~• Other potentially applicable international sources~~

CHAPTER 2 – ~~NEGOTIATION AND~~ PARTIES, FORMATION AND FORM

- I. Identification of the possible parties to the contract and relevant stakeholders ([including processes for doing so](#))
 - A. ~~Parties~~ [Types of parties](#) and relevant stakeholders [CFS-RAI Principle 5; VGGT para. 12.1 et seq.; UN Principles for responsible contracts, nos. 1-2, 7; VGGT Technical Guide No. 5 at 20 et seq.; VGGT Technical Guide No. 7 at 38; ISLP/CCSI Guide, part 2.2]
 - Investor(s)
 - [Transparency in the identity and nationality of each party, including issue of beneficial ownership](#)
 - Corporate organisation [GCAP Model Lease, Section 16]
 - ~~◦ Change of control [ISLP/CCSI Guide, part 2.17]~~
 - [Need for due diligence and FPIC \(including cross references to Parts II and III below\)](#)
 - Legal tenure right ~~holders (e.g. private holder(s))~~ [\(e.g. host-State government, community, private individual\)](#)
 - Legitimate tenure right holder(s) [VGGT, paras. 3.2, 9.1]
 - ~~◦ Common challenges in identifying legitimate tenure right holders, as well as the challenge of legitimacy of those representing them [VGGT Technical Guide No. 7 at 16–36]~~
 - ~~◦ Free, prior and informed consent [UNDRIP; ILO C169; VGGT, paras. 3B.6, 9.9, 12.7; VGGT Technical Guide No. 3]~~
 - ~~◦ Introduction to community development agreements [cross-reference to Chapter 3.VI.C below]~~
 - Other possible parties or relevant stakeholders (e.g. local officials or public notaries)
 - ~~• Delivery of notices [GCAP Model Lease, Section 21; ISLP/CCSI Guide, part 2.25]~~
 - B. [Types of contracts or options \(including with respect to third parties and an introduction to community development agreements \[cross-reference to Chapter 3.IV.G below\]\)](#)

- II. Feasibility studies ~~and risk assessments~~ [GCAP Model Lease, Appendix 1; IISD Model Contract, para. 6.1]
- A. Suitable land availability (including access to necessary resources) and valuation [VGGT, para. 18.1 et seq.; VGGT Technical Guide No. 4 at 37; VGGT Technical Guide on valuation (forthcoming)]
 - ~~D. Food security [CFS-RAI Principles 1-2; VGGT, paras. 12.1, 12.4, 12.12]~~
 - ~~E. Availability of water and other natural resources [CFS-RAI Principles 5-6]~~
 - B. Development of a business plan
- III. Impact assessments [CFS-RAI Principle 10; VGGT paras. 3.2, 12.10; IFC Performance Standard 1; Right to Food Guidelines, para 17.2; VGGT Technical Guide No. 4 at 56 et seq.; VGGT Technical Guide No. 7, parts 2-3, 6; IISD Model Contract, para. 6.2]
- ~~F. Human rights~~
 - ~~G. Legitimate tenure rights~~
 - ~~H. Social and livelihood~~
 - A. Environmental Land tenure (including legitimate tenure rights)
 - B. Human rights and social aspects (including food security [CFS-RAI Principles 1-2; VGGT, paras. 12.1, 12.4, 12.12], gender and labour)
 - ~~A.C. Environment [GCAP Model Lease, Appendix 2] (including impacts on water and other natural resources and access to those resources [CFS-RAI Principles 5-6])~~
 - ~~V. Tender process [CFS-RAI Principle 9; VGGT Technical Guide No. 4 at 47 et seq., 61 et seq.]~~
 - ~~A. Need for a competitive, inclusive and transparent process~~
 - ~~1. Draft contract publication/disclosure [VGGT, para. 11.7; UN Principles for responsible contracts, no. 10; IISD Model Contract, para. 12.0]~~
- IV. Contract formation and form [Legal Guide on Contract Farming at 57; UPICC, Chapter 2]
- A. Capacity and consent
 - B. Role of those who intervene or assist in contract negotiation
 - C. Required contract form and content and consequences for breach of such requirements, as well as any formalities for leases of agricultural land

CHAPTER 3 – ~~[RIGHTS AND]~~ OBLIGATIONS AND RIGHTS OF THE PARTIES ~~(introduction to this chapter to recognise~~

I. Introductory section

- A. Recognising that not all agricultural land investment contracts (which might actually be a single contract or a series of contracts) would require or include clauses on all

of the topics identified below, depending on the type of contact, the parties to that contact, and other circumstances)

~~B.A. Purpose of the investment [VGGT Technical Guide No. 4 at 97]~~

- ~~• Identification of use~~
- ~~• Indicative business plan~~

[B. Recognising that the topics might not be addressed in this order](#)

[C. Introducing the key parameters and themes from Chapter 1.III above \(i.e. land tenure/administration; human rights \(including food security, gender and labour\); \[social obligations / protecting and respecting rights\]; environment \(including water\); finance; protection of investment and regulatory autonomy; and transparency, compliance and monitoring\)](#)

[II. Land tenure](#)

~~C.A. Location/description of the land [GCAP Model Lease, Section 3; ISLP/CCSI Guide, part 2.4]~~

- Identification (e.g. total size; boundaries; geospatial data)
- Option for additional land and right of first refusal for such land

[B. Tenure rights \[GCAP Model Lease, Section 5; IISD Model Contract, para. 5.1; ISLP/CCSI Guide, part 2.5\]](#) ~~Duration of the contract~~

- [Identification of rights \(cross-reference to Chapter II\) and highlighting the importance of the issue](#)

~~D.A. Conditions [UPICC, Chapter 5.3]~~

- ~~• Overview, including suspensive and resolutive conditions [ISLP/CCSI Guide, part 2.3]~~
- ~~• Permits and licenses [GCAP Model Lease, Sections 5, 14]~~

~~VIII. Rights granted to the investor [GCAP Model Lease, Section 5; IISD Model Contract, para. 5.1; ISLP/CCSI Guide, part 2.5]~~

Grant of tenure rights

- Rights of use (e.g. land; water, including specification of water commitments and drought events; and underground resources)
- Rights of entry and control (e.g. who owns improvements; fixtures; etc.) [UNCITRAL PFIP Guide at 108 et seq.]
- Rights withheld (e.g. limitations on exclusivity/use; rights of way; continued access, etc.) [UNCITRAL PFIP Guide at 111 et seq.]

Grant of related rights

- Right to access and use utilities [GCAP Model Lease, Section 11]
- Rights to import (e.g. supplies; equipment)
- Rights to market, transport and export (e.g. agricultural production)

~~E.C.~~ Duration and renewal [GCAP Model Lease, Section 4; IISD Model Contract, para. 5.1]

- Start and end dates
- Drawbacks of limitations on period [UNCITRAL PFIP Guide at 151 et seq.]
- Renewal and renegotiation (e.g. terms for extension/renewal of the lease, including key performance indicators and incentives for renewal) [GCAP Model Lease, Section 4]

D. Conditions [UPICC, Chapter 5.3]

- Overview, including suspensive and resolute conditions [ISLP/CCSI Guide, part 2.3]
- Permits and licenses [GCAP Model Lease, Sections 5, 14]

E. Purpose of the investment/Land management issues [VGGT Technical Guide No. 4 at 87]

- Identification of use
- Indicative business plan

~~IX. Obligations on the investor (introduction to this subpart to recognise that there are trade-offs here, such as putting in place extensive social obligations may, in turn, require lower rental fees, etc.)~~

F. ~~Development~~ Land development obligations [GCAP Model Lease, Section 11]

- ~~Time limit for development by the investor~~
- ~~Timing and form of non-monetary obligations~~
- Processing (e.g. whether to take place locally) Introduction: Investments that are not duly implemented can frustrate hopes for jobs, public revenues and social infrastructure (as applicable), and more generally create opportunity costs (other land users could have better developed the land). In some contexts, authorities choose to regulate land use activities (e.g. crop choice, processing) in order to pursue certain goals (e.g. meet domestic demand for a given commodity, or promote in-country processing). So, multiple policy considerations may be involved, depending on the context: (a) discourage speculative acquisitions; (b) timely implementation; or (c) promote specific land use activities.
- Development plans and related clauses

- Land use provisions (e.g. specifying forms of land use, and the investor cannot make material changes to the land use envisaged in the contract without prior authorisation in writing from the other party, sometimes with the clarification that the authorisation cannot be unreasonably withheld)
- Local processing (i.e. provisions to encourage local processing, including via incentives, or elsewhere) [IISD Model to require the investor to explore feasibility of local processing at least in part]
- Contract, ~~para. 8.3~~ monitoring (with cross reference to transparency and monitoring below)

G. Infrastructure [ISLP/CCSI Guide, part 2.7]

H.III. Finance/Financial obligations [GCAP Model Lease, Section 6; IISD Model Contract, para. 7.0 et seq.; ISLP/CCSI Guide, part 2.11]

A. ~~Timing~~Introduction: Public revenues are an important way in which the host country can benefit from investments. They can influence a government's ability to provide public services, and ultimately to contribute to inclusive sustainable development. Important role of national legislation (tax law). Agricultural land investment contracts often include provisions on public revenues. These govern issues such as types of revenue streams, applicable rates, monitoring arrangements.

B. Types of public revenues (e.g. land rental fees; water fees; corporate income tax (charged on the company's profits); royalties (based on the value of production, or more rarely on production volume); withholding tax (tax deducted from payments made by the company to other persons located outside the country); dividends (in joint ventures))

C. Policy choices

D. Fixed income versus revenue sharing models

- Other contractual issues (e.g. timing and form of monetary payments, and interest accrual on late payments

A.E. ~~Rental fees, including frequency of rent; mechanisms for periodic revisions and method of calculating adjustments to the rent; and possible use of scales based on land development~~capitalisation)

~~• Taxes (e.g. income; assets; exports) [VGGT, para. 19 et seq.]~~

~~• Customs duties~~

~~• Royalties~~

- ~~Capitalisation, including debt to equity ratio [OECD Guidelines for Multinational Enterprises at 60 et seq.; IISD Model Contract, para. 7.5; ISLP/CCSI Guide, part 2.10]~~

III.IV. [Social obligations / Protecting and respecting rights] [GCAP Model Lease, Section 7; ISLP/CCSI Guide, part 2.13]

- ~~Compensation rates for crops, structures or other items existing on the land, and periods of compensation (e.g. on entry, annual, at exit) [note that this could be moved to financial obligations]~~

A. Introduction (e.g. widely recognised that community relations are an important factor in the project's ultimate success; "social license to operate" debate; at the same time, relations with communities often one of the most difficult issues in agricultural land investments; developments in contractual practice to address these challenges)

A.B. Local/domestic food security [CFS-RAI Principles 1-2; VGGT, para. 12.12]

C. Employment, Land acquisition

- Provisions aimed at minimising extent of land acquisition
- Provisions on compensation (conceptually distinct from benefit sharing and including ~~gender and youth aspects~~ compensable items (e.g. ~~meaningful opportunity to become part of the company~~ land, crops, structures or other items existing on the land), compensation rates, mechanisms, and ~~training-timing; role of national law, for example, in defining compensable items and skills development~~ applicable rates; however, national law may fall short of international law (e.g. as reflected in human rights law jurisprudence) and international standards)
- Provisions on continued access to land and resources for local stakeholders insofar as not inconsistent with project activities (with cross-reference to Chapter 3.B above)

B.D. Employment [CFS-RAI Principles 2-4; GCAP Model Lease, Section 7; IISD Model Contract, para. 8.1 et seq.]

- ~~Procurement, including guidance on contracts with local suppliers~~ Quality and incentives quantity of jobs created through the project
- Access to employment (i.e. contract provisions establishing priority or even exclusivity for local ~~or~~ nationals in relation to specified roles (e.g. unskilled labour) and priority or sliding scales for hiring of local nationals in relation to other roles (e.g. technical, managerial))
- Capacity support commitments on the part of the investor may be needed in order to achieve these targets (e.g. training for local nationals so they can take up technical or managerial roles)
- Gender aspects, including possible mechanisms to handle gender segregation in agricultural labour force and promote women's access to skilled positions, as well as youth aspects
- Monitoring mechanisms and reporting requirements

C.E. Local content (e.g. provisions that require the company to prioritise domestic ~~procurement~~ suppliers when sourcing goods and/or services for the agricultural investment) [CFS-RAI Principle 2; IISD Model Contract, para. 8.4]

~~D.F.~~ Outgrower arrangements, such as contract farming with farmers on adjoining land or tenant farmers subletting land, for which overarching framework could set key parameters (e.g. price, including internationally available indices; indebtedness) schemes [CFS-RAI Principles 1-2, 8; GCAP Model Lease, Section 7; IISD Model Contract, para. 8.2]

- ~~Communications and agreements~~ Contractual arrangements whereby small-scale farmers grow crop around the nucleus plantation to supply the commercial operation
- Contractual practice with local communities (e.g. guidance on substantive content—provisions requiring investor to develop an outgrower scheme where this responds to local development priorities (and arrangements for community engagement in the development of the scheme)
- Basic terms of company-farmer relations (e.g. pricing formulae (possibly linked back to discussion in Chapter II and in the introduction to Chapter III) to international price indices where available), lending arrangements; tenure aspects (outgrowers farming own or company land; if the latter, farmers' tenure security on company land); gender issues (e.g. in outgrower selection, especially where growers farm company land))
- Reporting requirements and monitoring arrangements

~~E.G.~~ Community development funds or social infrastructure [CFS-RAI Principle 9; GCAP Model Lease, Sections 8-9; IISD Model Contract, para. 8.5]

- ~~Environmental obligations~~ Investor obligations in relation to establishing and financing a community development fund, or to provide social infrastructure (e.g. schools, clinics).
- Policy choices at stake
- Mechanisms to identify local priorities and translate them into contractualised action, including relevance of community-development agreements (between company and community) and relation / cross-referencing with main investment contract
- Community development funds
- Reporting requirements and monitoring arrangements

H. Protecting and respecting cultural heritage [CFS-RAI Principle 7]

~~IV.V.~~ Environment [CFS-RAI Principle 6; IFC Performance Standard 6; GCAP Model Lease, Section 14; IISD Model Contract, para. 9.0 et seq.; ISLP/CCSI Guide, part 2.12]

A. Opportunity ~~Introduction~~

- Agricultural land investments often associated with environmental risks and impacts
- Key role of national law in setting rules, institutions and processes (e.g. specialised agencies dealing with environmental aspects; impact assessment requirements in many jurisdictions; terms of environmental liabilities, and who

[can activate them \(e.g. administrative sanctions/penalties vs tort liability for damage suffered by private actors\)](#))

- [In some contexts, national law not in line with international standards and, in these cases, the contract can provide an opportunity to complement national legislation by contractual clauses, such as by building upon international standards or other possibilities \(e.g. rotational cropping; climate smart cropping; best available science\)](#)

B. [Impact assessment and management plans](#)

- ~~Pesticides~~
- ~~Pollution prevention and remediation~~
- ~~Soil management/degradation [VGSSM]~~
- ~~Water use/depletion~~
- ~~Protection of biodiversity [see, e.g., RSPO Principles & Criteria]~~
- ~~Cultural heritage [CFS RAI Principle 7]~~

C. [Applicable standards](#)

D. [Water, including terms for water abstraction \(quantity, timing, payments\)](#)

~~E.~~ [Waste management](#)

F. [Project closure](#)

G. [Monitoring, sanctioning and remediation](#)

VI. [Protection of investment and regulatory autonomy](#)

A. [Expropriation and respect for regulatory space \[placeholder for resettlement\]](#)

B. [Physical security \[UN Principles for responsible contracts, no. 6; GCAP Model Lease, Section 12; IISD Model Contract, para. 5.4; ISLP/CCSI Guide, part 2.8\]](#)

~~D.A. Infrastructure [ISLP/CCSI Guide, part 2.7]~~

C. [Stabilisation and security of rights, including the importance of legal security for bankability and respect for regulatory space \[UN Principles for responsible contracts, no. 4; IISD Model Contract, para. 10.0; ISLP/CCSI Guide, part 2.19\]](#) **Compliance**

~~V.~~ VII. [Transparency, compliance and monitoring](#) [GCAP Model Lease, Sections 11-12; ISLP/CCSI Guide, part 2.6]

A. Insurance

B. Recordkeeping and audits [IISD Model Contract, para. 5.3]

C. Circumstances under which the lessor can enter the property to inspect the investor's activities and monitor compliance [IISD Model Contract, para. 5.3]

D. Conservation of premises

~~E.A. Physical security [UN Principles for responsible contracts, no. 6; GCAP Model Lease, Section 12; IISD Model Contract, para. 5.4; ISLP/CCSI Guide, part 2.8]~~

~~X. Stabilisation / Security of rights, including the importance of legal security for bankability [UN Principles for responsible contracts, no. 4; IISD Model Contract, para. 10.0; ISLP/CCSI Guide, part 2.19]~~

~~F.E. Monitoring [UN Principles for responsible contracts, no. 8; VGGT Technical Guide No. 4 at 70 et seq.; VGGT Technical Guide No. 7 at 68-69; GCAP Model Lease, Section 13; ISLP/CCSI Guide, part 2.14]~~

- Performance guarantees [UNCITRAL PFIP Guide at 136-140]

- [Environmental performance bonds](#)

- Reporting requirements and access to information / disclosure, transparency / [revenue transparency](#) [VGGT, paras. 6.9, 11.7; UN Principles for responsible contracts, no. 10; VGGT Technical Guide No. 7 at 45 et seq.; IISD Model Contract, para. 12.0, 16.0 et seq.; ISLP/CCSI Guide, part 2.18]

- Between the parties
- Between the parties and the public
- [Protection of confidential information](#)

- [Delivery of notices \[GCAP Model Lease, Section 21; ISLP/CCSI Guide, part 2.25\]](#)

- ~~Protection of confidential information~~

~~G.F. Amendments and periodic review (e.g. every 5 years, variations of certain indexes) [GCAP Model Lease, Section 18; IISD Model Contract, para. 13.0; ISLP/CCSI Guide, part 2.26]~~

~~XI. Representations and warranties (and indemnification and anticorruption terminology TBD) [ISLP/CCSI Guide, parts 2.9, 2.15, 2.22]~~

CHAPTER 4 – [CONTRACTUAL NON-PERFORMANCE](#)

[I. Excuses for non-performance \[Legal Guide on Contract Farming, Chapter 4\]](#)

[A. Particular importance in long-term contracts and underlying legal issues](#)

- [Force majeure versus change of circumstances](#)
- [Anticipating the risk \(e.g. contractual allocation of risks through force majeure clauses; price revision clauses and price adjustment mechanisms; types of clauses \(adverse factors/adverse events\)\)](#)
- [Insurance and other risk mitigation schemes](#)

B. Force majeure [UPICC, art. 7.1.7; GCAP Model Lease, Section 20; ISLP/CCSI Guide, part 2.21]

- [General notion](#)
- [Qualifying events and burden of proof, including natural events \(e.g. storm, fire, epidemics\), governmental acts impeding fulfilment of obligations and other disturbances](#)
- [Consequences](#)

~~A.C.~~ Changes in of circumstances in general/risks [UPICC, Chapter 6.2; UNCITRAL PFIP Guide at 140 et seq.; VGGT Technical Guide No. 7 at VIII-X; Equator Principle 1]

~~III. — Excuses [Legal Guide on Contract Farming, Chapter 4]~~

- [General notion](#)

~~B.A. — Force majeure [UPICC, art. 7.1.7; GCAP Model Lease, Section 20; ISLP/CCSI Guide, part 2.21]~~

- Qualifying events, including possible link to renegotiations and periodic review
- Consequences

D. Additional considerations for host-State governments

II. Remedies for breach [Legal Guide on Contract Farming, Chapter 5]

A. ~~Overview~~ Types of breach and types of contractual clauses on remedies

- [Breach by the investor \(Legal right holder, Legitimate tenure right holder\)](#)
- Interference by the other party [UPICC, art. 7.1.2]
- [Contractual clauses on remedies \(exemption clauses; penalty clauses \[UPICC, art. 7.4.13\]\)](#)

B. Overview of remedies

- [Remedies in kind \(performance, corrective actions\)](#)
- Withholding performance [UPICC, art. 7.1.3]
- ~~Cure by non-performing party [UPICC, art. 7.1.4]~~

~~B.A. — Additional period for performance [UPICC, art. 7.1.5]~~

- Termination ~~[cross-reference to Chapter 5.IV below; and restitution~~ [UPICC, Chapter 7.3; [GCAP Model Lease, Section 19](#); [IISD Model Contract, para. 15.0](#); [ISLP/CCSI Guide, part 2.23](#)]

- Damages [UPICC, Chapter 7.4] ~~and penalty clauses [UPICC, art.], including full compensation and foreseeability 7.4.13]~~

- Interests and late payments

C. The role of the aggrieved party's conduct (e.g. price reduction or additional period for performance) [UPICC, art. 7.1.5]

~~B. Breach by the investor~~

- ~~• Legal right holder~~
- ~~• Legitimate tenure right holder~~

~~C. Breach by the lessor~~

D. The breaching party's right to cure and cure by non-performing party [UPICC, art. 7.1.4]

E. Renegotiation, including co-operation between the parties [UPICC, art. 5.1.3]

F. Additional considerations for host-State governments

CHAPTER 5 – TRANSFER, ~~RENEWAL~~ AND ~~TERMINATION~~ RETURN [Legal Guide on Contract Farming, Chapter 6]

- I. Transfer of ~~[rights and]~~ obligations ~~/ and rights /~~ assignment [UPICC, Chapter 9; VGGT Technical Guide No. 4 at 75; GCAP Model Lease, Section 17; IISD Model Contract, para. 14.0; ISLP/CCSI Guide, part 2.16]

~~C. Transferability of obligations and rights~~

~~D. Need for approval~~

A. End (including change of ~~contract / return~~ control [ISLP/CCSI Guide, part 2.17])

B. Legality of transfer

C. Limitations on transfer

D. Importance of disclosure

- II. Return [UNCITRAL PFIP Guide at 168 et seq.; ISLP/CCSI Guide, part 2.24]

A. Stipulation of the condition in which land is to be returned, including replanting obligations (e.g. maintenance of tree crops, subject to or in line with the business plan)

B. Liabilities for deterioration

~~III. Renewal (e.g. terms for extension/renewal of the lease, including key performance indicators and incentives for renewal) [GCAP Model Lease, Section 4]~~

~~IV. Termination [UPICC, Chapter 7.3; GCAP Model Lease, Section 19; IISD Model Contract, para. 15.0; ISLP/CCSI Guide, part 2.23]~~

~~A. Scope~~

~~B. Termination clauses, including definition of default events~~

~~C. Procedure/notice~~

~~D. Effects and consequences~~

CHAPTER 6 – DISPUTE RESOLUTION [CFS-RAI Principle 9; VGGT, paras. 3.2, 21.1-21.6; Legal Guide on Contract Farming, Chapter 7; VGGT Technical Guide No. 4 at 72-74; VGGT Technical Guide No. 5 at 87 et seq.; VGGT Technical Guide No. 7 at 39 et seq.; GCAP Model Lease, Section 15; IISD Model Contract 11.0 et seq.; ISLP/CCSI Guide, part 2.20]

I. Disputes arising under agricultural land investment contracts

A. The importance of access to justice

B. The provision of access to justice

II. Non-judicial dispute resolution

A. Grievance mechanisms, including for local communities and employees [CFS-RAI Principle 9; UN Principles for responsible contracts, no. 9]

B. Expert determination (e.g. price of processing or of crops, in the event that the project involves processing or an outgrower arrangement respectively)

C. Negotiation/~~conciliation~~ and mediation

~~A. Mediation~~

D. Conciliation

~~D.~~E. _____ Arbitration (e.g. factors to consider, such as what investors might seek and what host States might oppose; considerations with respect to governing law and transparency of proceedings) [GCAP Model Lease, Section 22; ISLP/CCSI Guide, part 2.27]

III. Judicial dispute resolution

~~B. Access to justice~~

A. Domestic ~~versus international contracts~~ courts

B. International courts

IV. Enforcement of settlements or decisions resolving a dispute

[POSSIBLE ANNEXES OR FUTURE STEPS (e.g. checklist of issues, model provisions, detailed guidance on community development agreements or local supply contracts, etc.)]

ANNEX 5**LIST OF POSSIBLE RESOURCES**

- AU, African Development Bank and Economic Commission for Africa, The Framework and Guidelines on Land Policy in Africa (2010),
http://www.uneca.org/sites/default/files/PublicationFiles/fq_on_land_policy_eng.pdf
- AU, African Development Bank and Economic Commission for Africa, Guiding Principles on Large Scale Land Based Investments in Africa (2014),
http://www.uneca.org/sites/default/files/PublicationFiles/guiding_principles_eng_rev_era_size.pdf
- CFS, Principles for Responsible Investment in Agriculture and Food Systems (15 Oct. 2014),
http://www.fao.org/fileadmin/templates/cfs/Docs1314/rai/CFS_Principles_Oct_2014_EN.pdf (CFS-RAI Principles)
- CFS, Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the context of National Food Security (11 May 2012),
<http://www.fao.org/docrep/016/i2801e/i2801e.pdf> (VGGT)
- Various resources on the VGGT, <http://www.fao.org/nr/tenure/information-resources/en/>
- VGGT Technical Guide No. 1 – Gender (2013),
<http://www.fao.org/docrep/017/i3114e/i3114e.pdf>
- VGGT Technical Guide No. 2 – Forestry (2013),
<http://www.fao.org/docrep/018/i3249e/i3249e.pdf>
- VGGT Technical Guide No. 3 – Indigenous Peoples (2014),
<http://www.fao.org/docrep/019/i3496e/i3496e.pdf>
- VGGT Technical Guide No. 4 – Agricultural investment (2015),
<http://www.fao.org/3/a-i4998e.pdf>
- VGGT Technical Guide No. 5 – Legal (2016),
<http://www.fao.org/3/a-i5449e.pdf>
- VGGT Technical Guide No. 6 – Pastoral lands (2016),
<http://www.fao.org/3/a-i5771e.pdf>
- VGGT Technical Guide No. 7 – Private sector/investors (2016),
<http://www.fao.org/3/a-i5147e.pdf>
- VGGT Technical Guide No. 8 – Commons (2016),
<http://www.fao.org/3/a-i6381e.pdf>
- VGGT Technical Guide No. 9 – Recording rights (2017),
<http://www.fao.org/3/a-i7559e.pdf>
- VGGT Technical Guide No. 10 – Improving ways to record rights (2017),
<http://www.fao.org/3/a-i7568e.pdf>

VGGT Technical Guide No. 11 – Valuation (2017),
<http://www.fao.org/3/a-i8252e.pdf>

Concession Agreement between Golden Veroleum Liberia and the Government of the Republic of Liberia (Sept. 2010), http://goldenveroleumliberia.com/images/pdf/2014-09-30.2_GVL_Concession_Agreement.pdf

Convention on the Elimination of All Forms of Discrimination against Women,
<http://www.ohchr.org/Documents/ProfessionalInterest/cedaw.pdf> (CEDAW)

Convention on the Rights of the Child,
<http://www.ohchr.org/Documents/ProfessionalInterest/crc.pdf> (CRC)

Cotula, Foreign investment, law and sustainable development: A handbook on agriculture and extractive industries (Feb. 2016), <http://pubs.iied.org/pdfs/12587IIED.pdf>

Cotula, Investment contracts and sustainable development: How to make contracts for fairer and more sustainable natural resource investments (Mar. 2010),
<http://pubs.iied.org/pdfs/17507IIED.pdf>

ELAW, Natural Resource Contracts: A Practical Guide (Nov. 2013),
https://www.elaw.org/sites/default/files/images_content/general_page_images/publications/Natural_Resource_Contracts_Guide.pdf

Equator Principles (2013), http://www.equator-principles.com/resources/equator_principles_iii.pdf

EU Task Force on Land Tenure, EU Land Policy Guidelines for support to land policy design and land policy reform processes in developing countries (Nov. 2014),
https://ec.europa.eu/europeaid/sites/devco/files/methodology-eu-land-policy-guidelines-200411_en_2.pdf

FAO, Voluntary Guidelines for Sustainable Soil Management (2017), <http://www.fao.org/3/a-bl813e.pdf> (VGSSM)

FAO, Voluntary Guidelines to support the progressive realization of the right to adequate food in the context of national food security (2004),
<ftp://ftp.fao.org/docrep/fao/009/y7937e/y7937e00.pdf> (Right to Food Guidelines)

Ghana Commercial Agriculture Project, Model Commercial Agriculture Lease Agreement (July 2015), <http://gcap.org.gh/wp-content/uploads/2017/04/Model-Commercial-Agriculture-Lease-Agreement-2.pdf> (GCAP Model Lease)

Ghana Commercial Agriculture Project, Recommendations for Large-Scale Land-Based Investment in Ghana (July 2015), <http://gcap.org.gh/wp-content/uploads/2017/04/Lease-Consultancy-3.pdf>

Ghana Commercial Agriculture Project, Community/Investor Guidelines for Large-Scale Land Transactions (July 2015), <http://gcap.org.gh/wp-content/uploads/2017/04/COMMUNITY-INVESTOR-GUIDELINES-FOR-LARGE-SCALE-LAND-TRANSACTIONS-1.pdf>

IFC, Performance Standards on Environmental and Social Sustainability (Jan. 2012),
http://www.ifc.org/wps/wcm/connect/c8f524004a73daeca09afdf998895a12/IFC_Performance_Standards.pdf?MOD=AJPERES (IFC Performance Standards)

- IISD, Guide to Negotiating Investment Contracts for Farmland and Water (Nov. 2014), https://www.iisd.org/sites/default/files/publications/iisd-guide-negotiating-investment-contracts-farmland-water_1.pdf (IISD Model Contract)
- ISLP/CCSI, Guide to Land Contracts: Agricultural Projects (Mar. 2016), <http://ccsi.columbia.edu/files/2016/03/Ag-Guide-2016.pdf> (ISLP/CCSI Guide)
- ILO, Convention concerning Indigenous and Tribal Peoples in Independent Countries, No. 169, http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C169 (ILO C169)
- International Convention on the Elimination of All Forms of Racial Discrimination, <http://www.ohchr.org/Documents/ProfessionalInterest/cerd.pdf> (CERD)
- International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, <http://www.ohchr.org/Documents/ProfessionalInterest/cmw.pdf> (ICRMW)
- International Covenant on Civil and Political Rights, <http://www.ohchr.org/Documents/ProfessionalInterest/ccpr.pdf> (ICCPR)
- International Covenant on Economic, Social and Cultural Rights, <http://www.ohchr.org/Documents/ProfessionalInterest/cescr.pdf> (ICESCR)
- Kenfack et al., Land investments, accountability and the law: lessons from Cameroon (May 2016), <http://pubs.iied.org/pdfs/12588IIED.pdf>
- Land Matrix, <http://www.landmatrix.org/en/> (containing an online public database on land deals)
- Munro-Faure and Palmer, An Overview of the Voluntary Guidelines on the Governance of Tenure, LAND TENURE JOURNAL (2012), <http://www.fao.org/nr/tenure/land-tenure-journal/index.php/LTJ/article/download/48/88>
- New Alliance and Grow Africa, Analytical Framework for Land-based Investments in African Agriculture (2015), https://www.growafrica.com/sites/default/files/Analytical-framework-for-land-based-investments-in-African-agriculture_0.pdf
- OECD, Guidelines for Multinational Enterprises (2011), <http://www.oecd.org/daf/inv/mne/48004323.pdf>
- OECD and FAO, Guidance for Responsible Agricultural Supply Chains (2016), <http://mneguidelines.oecd.org/OECD-FAO-Guidance.pdf>
- Open Land Contracts, <http://www.openlandcontracts.org/> (containing an online repository of publicly available land contracts)
- Principles for Responsible Investment, Responsible Investment in Farmland (2014-2015), https://www.unpri.org/download_report/6243
- Roundtable on Sustainable Palm Oil, RSPO Principles & Criteria (2013), <http://www.rspo.org/key-documents/certification/rspo-principles-and-criteria#> (RSPO Principles & Criteria)
- Technical Committee on Land Tenure and Development, Guide to due diligence of agribusiness projects that affect land and property rights (Oct. 2014), <http://www.foncier-developpement.fr/wp-content/uploads/Guide-to-due-diligence.pdf>

UN, Declaration on the Rights of Indigenous Peoples (2007),
http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf (UNDRIP)

UN, Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy Framework” (2011),
http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf (UN Guiding Principles)

UN, Principles for Responsible Contracts: Integrating the Management of Human Rights Risks into State-Investor Contract Negotiations – Guidance for Negotiators (2015),
http://www.ohchr.org/Documents/Publications/Principles_ResponsibleContracts_HR_PUB_15_1_EN.pdf (UN Principles for responsible contracts)

UN, Universal Declaration of Human Rights (1948),
http://www.ohchr.org/EN/UDHR/Documents/UDHR_Translations/eng.pdf (UDHR)

UNCITRAL, Legislative Guide on Privately Financed Infrastructure Projects (2001),
<https://www.uncitral.org/pdf/english/texts/procurem/pfip/guide/pfip-e.pdf> (UNCITRAL PFIP Guide)

UNCITRAL, Model Legislative Provisions on Privately Financed Infrastructure Projects (2004),
https://www.uncitral.org/pdf/english/texts/procurem/pfip/model/03-90621_Ebook.pdf

UNIDROIT/FAO/IFAD Legal Guide on Contract Farming (2015),
<http://www.unidroit.org/english/guides/2015contractfarming/cf-guide-2015-e.pdf> (Legal Guide on Contract Farming)

UNIDROIT Principles of International Commercial Contracts (2016),
<http://www.unidroit.org/english/principles/contracts/principles2016/principles2016-e.pdf> (UPICC)

UNIDROIT Feasibility study on the possible preparation of an international guidance document on agricultural land investment contracts, UNIDROIT 2016 – C.D. (95) 7(b),
<http://www.unidroit.org/english/governments/councildocuments/2016session/cd-95-07b-e.pdf>

USAID, Operational Guidelines for Responsible Land-Based Investment (2015),
https://www.usaidlandtenure.net/wp-content/uploads/2016/09/USAID_Operational_Guidelines_updated.pdf

World Bank Group, A Guide to Investor Targeting in Agribusiness (Aug. 2014),
<https://openknowledge.worldbank.org/bitstream/handle/10986/21720/94928.pdf?sequence=2&isAllowed=y>