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

***Third meeting***  
**Rome, 25-27 April 2018**

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**Report of the Third Meeting of the UNIDROIT Working Group  
on Agricultural Land Investment Contracts**

**Rome, 25-27 April 2018**

*(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 item<sup>1</sup> - held its third meeting at UNIDROIT's seat in Rome from 25-27 April 2018.
2. The Working Group was made up of the following members: Mr José Antonio Moreno Rodríguez, 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); Ms Bénédicte Fauvarque-Cosson, Professor at Université Paris 2; Mr Virgilio de los Reyes, Professor at the College of Law of De La Salle University; 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 (WFO), the Secretariat for the Private Sector Mechanism of the UN Committee on World Food Security (PSM/CFS), the Columbia Center on Sustainable Investment (CCSI) and the International Institute for Sustainable Development (IISD).
3. The complete list of participants for the third meeting is included in Annex 1.

## 1. Opening of the meeting

4. The UNIDROIT Secretary-General *a.i.*, Professor Anna Veneziano, opened the meeting and welcomed the members and representatives to UNIDROIT. She expressed gratitude in particular to those who had prepared and revised drafts of various chapters and issues for the future Legal Guide on Agricultural Land Investment Contracts, noting that those drafts provided the Working Group with a very solid basis for review, revision and further development. She also expressed gratitude to the representative of the various organisations that were present, recognising in particular FAO and IFAD for their ongoing collaboration and support on the work. She then introduced Mr José Antonio Moreno Rodríguez who, consistent with UNIDROIT's practice,<sup>2</sup> kindly chaired the meeting.
5. The Chairman also welcomed the members and representatives and thanked them for participating in UNIDROIT's work on agricultural land investment contracts. Noting that some participants were joining the meeting for the first time, the Chairman invited the members and representatives to introduce themselves.

## 2. Adoption of the agenda and organisation of the meeting

6. For the meeting, the Secretariat had prepared a draft revised annotated agenda, which contained *inter alia* a proposed provisional order of business and a list of the Working Papers for the session.<sup>3</sup> The Working Papers contained the drafts for various chapters and issues that had been identified in the draft in-progress outline and prepared by the Working Group members and the Secretariat. At the Chairman's request, Mr Neale Bergman (Legal Officer, UNIDROIT Secretariat)

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<sup>1</sup> 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 75<sup>th</sup> session (Rome, 1 December 2016)).

<sup>2</sup> Cf. UNIDROIT Statute, art. 13(2).

<sup>3</sup> UNIDROIT 2017 - Study 80B – WG3 Inf. 1 rev., <https://www.unidroit.org/english/documents/2018/study80b/wg03/s-80b-wg03-inf01-e.pdf>.

presented the various documentation for the session, as well as the Secretariat's proposed order of business for reviewing the Working Papers in detail.

7. Following that presentation, the Chairman proposed adoption of the draft agenda, which was adopted and is included in Annex 2. The list of Working Papers is included in Annex 3.

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

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

9. Mr Bergman recalled that, following the Working Group's second meeting (Rome, 13-15 September 2017), a second informal meeting was held at FAO during the 44th plenary session (Rome, 9-13 October 2017) of the Committee on World Food Security (CFS), during which many experts and interested stakeholders were in Rome for CFS-related events. That meeting raised awareness about the work and solicited input on the draft in-progress outline, and the input received had been circulated to the Working Group in the form of a brief summary report. In this regard, he thanked his FAO colleagues for their assistance with the informal meeting.

10. Mr Bergman also recalled that the Working Group had held a videoconference (8 February 2018) to discuss the input received at the informal meeting, to review an initial draft of the Preface and Introduction of the future Guide and to consider the experts' questions and comments relating to their respective drafting responsibilities. In this regard, he expressed appreciation to the Working Group for their participation in the videoconference and for their input on the initial draft of the Preface and Introduction, both in the lead up to the videoconference and during it.

11. Mr Bergman then discussed UNIDROIT's involvement in the World Bank's Annual Land and Poverty Conference (Washington, 19-23 March 2018). That involvement consisted of a presentation as part of a panel on "Land Governance and the VGGT" and accompanying paper, both of which gave a brief overview of the future Guide and sought stakeholder input on it for consideration by the Working Group. He reflected that the involvement had not resulted in detailed input but that, thanks to consultations with participants, it was clear that there was general interest and support for the future Guide, which could be a very useful contribution to the operationalisation of the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security (VGGT) and the CFS Principles for Responsible Investment in Agriculture and Food Systems (CFS-RAI Principles). It was also clear, however, that the Working Group should consider the areas or gaps in the field of private law and agricultural development upon which the future Guide should focus in order to make the Guide's contribution to this field as useful and unique as possible because there were many existing initiatives and ongoing efforts. To do so, Mr Bergman suggested that the Working Group might wish to spend more time considering those chapters and issues that addressed important areas, gaps or key themes – such as guidance regarding the identification and involvement of legitimate tenure right holders in agricultural land investment contracts and the possible contractual safeguards for those holders – whereas the Working Group could spend less time considering other issues that were already addressed by other instruments or guidance documents to which the Guide could refer.

12. The Chairman then asked whether the Working Group would like to discuss the Secretariat's update, in particular the latter point about maximising the Guide's contributions, and whether the Working Group would wish to revisit any of the general considerations in relation to the work (e.g. scope of the instrument, target audience, key themes).

13. With respect to the scope of the Guide, it was queried whether the frequent use of the term "host-State government" would suggest that the Guide was limited to foreign investment. It was observed that confining the Guide to foreign investment did not properly reflect the realities of agricultural investment, 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 leases of agricultural land. 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 further recalled that, at the second meeting, the Working Group discussed this issue again and retained its prior recommendation, specifically that foreign investment would be the starting point for the Guide, but that it would also treat domestic investment. As a result, it was said that, in drafting, it would be advisable to use a term other than “host-State government” because that might suggest that the Guide was only addressing foreign investment.

14. Further to the scope of the Guide, it was suggested that the Guide should be limited to addressing only contracts between investors and State governments because it would be difficult to provide guidance for all of the possible parties who might grant tenure rights in land to investments (e.g. State governments, legitimate tenure right holders, local communities, customary authorities and private landowners). It was recalled that the Working Group had deliberated this issue extensively at the first and second meetings and ultimately recommended that the Guide should focus on contracts between investors and State governments – as well as legitimate tenure right holders, local communities and customary authorities either as (a) possible parties to so-called investor-community contracts, tripartite contracts (i.e. investor-State-community), or linked agreements (e.g. community development or benefit sharing agreements) or (b) stakeholders to be consulted – with the understanding that some of the guidance provided could also be useful for private party to private party contracts. In this regard, it was further recalled that the Working Group had discussed two options in this regard: (a) drafting chapters in a flexible way, so as to address the various possible parties and scenarios; or (b) tailoring chapters to contracts between investors on the one hand and State governments, legitimate tenure right holders, local communities and customary authorities on the other, with a specific portion of the Guide dedicated to pointing out the parts of the Guide that could also be particularly useful or applicable in the context of private party to private party contracts. In supporting the latter option, it was said that, as a matter of drafting and style, it had to be clear who was granting the tenure rights in the land in order to prevent particular guidance from being misunderstood or taken out of context.

15. Regarding drafting and style in particular, it was said that the Secretariat, as part of the next steps for the work, would review and suggest edits to the drafts in redline in order to harmonise the terminology and style. The Working Group recommended that the Secretariat should take an active role in editing the various drafts and that the drafters could review those suggested edits in advance of the Working Group’s fourth meeting.

16. Regarding ways in which to maximise the Guide’s contributions, it was said that one of the Guide’s unique contributions would result from providing private law guidance to a broad range of legal counsel, in particular counsel for private investors, who might not be aware of many of the issues and safeguards covered in the Guide. In this way, the Guide could raise awareness and support the target audience in considering these issues and incorporating safeguards into the contracts that they negotiated, thereby supporting and fostering greater and more responsible agricultural investment. It was stated in reply that UNIDROIT should get in contact with companies and institutes – such as the Practising Law Institute or the Practical Law Company – to which many legal counsels turned for guidance when working on agricultural land investment contracts or on the financial aspects of those transactions. It was further stated that the Guide could interface well with the guidance that those entities offered, in particular by raising awareness of the VGGT, CFS-RAI Principles, the UN Guiding Principles on Business and Human Rights and other instruments and guidance documents, which addressed important issues and safeguards that might not be covered by those entities. It was also said that UNIDROIT should seek input from various notary associations in order to ensure that notaries were aware of the work and in a position to provide input on it. It was stated in reply that the Secretariat was in contact with the Union Internationale du Notariat (UIN), which had been invited to be represented at the meeting, and it was hoped that a UIN representative would be able to attend the Working Group’s next meeting.

#### 4. Review of chapter drafts and in-progress outline

17. The Working Group proceeded to review and consider in detail the Working Papers containing the drafts of the chapters and issues set forth in the draft in-progress outline, as well as that outline itself. In doing so, the Working Group also revisited and built upon some of the discussions of general considerations for the work from the second meeting and contemplated drafting issues in order to further define 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. Though the Working Group proceeded to review the Working Papers in a different order in accordance with the proposed order of business, 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 included in Annex 4 and a redline version of which is included in Annex 5.<sup>4</sup>

##### A. Preface and Introduction (WP.1)

18. In the presentation of the draft, it was pointed out that the draft Preface and Introduction addressed important introductory matters, including – within the Preface – an overview of the Guide and its purpose, a discussion of its approach and how to use the Guide and – within the Introduction – a discussion of the need for greater investment in agriculture, the role of agricultural land investment contracts and the Guide's scope. It was recalled that the draft Preface and Introduction of the future Guide had been drafted and circulated for review in advance of the Working Group's interim videoconference (8 February 2018) between the Working Group's second and third meetings and that the draft had benefited from the Working Group's review and comments in the lead up to and during that videoconference. As a result, it was generally recommended that the Working Group should discuss the draft briefly and then revisit and review the draft in detail during a later stage in the Guide's development, in particular once the other chapters were further developed and finalised.

19. With respect to general comments, it was said that the Introduction's part entitled "The need for greater investment in agriculture and the role of agricultural land investment contracts" should be amended to "The need for greater *and more responsible* investment . . ." in order to better reflect that part's content, as well as the importance of promoting more responsible investment.

20. The following paragraph-specific input was provided by the Working Group:

- Paragraph 1: it was said that, instead of referring to "key international instruments", it might be preferable to refer to the consensus reflected by those standards, which were the result of broad and extensive consultations. In this way, it would read in a more affirmative manner rather than appearing as a listing of instruments.
- Paragraph 4: it was said that the reference to "transferring land to investors" should be clarified to something along the lines of a transaction over tenure rights.
- Paragraph 6: it was stated that it might be necessary to be clear whether the additional instruments mentioned, for example, in paragraph 1 were to be considered as mandatory or default rules. In particular, clarification was sought regarding what was meant by the term "default" rules.
- Paragraphs 11-12, 15: it was stated that, with respect to the need for greater investment in agriculture, these paragraphs should be tweaked to make clear that there was a need for both greater and more responsible investment. It was also said that the Guide should not be

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<sup>4</sup> The redline version of the draft in-progress outline compares the outline that resulted from the Working Group's third meeting (Rome, 25-27 April) with the one that resulted from the Working Group's second meeting (Rome, 13-15 September 2017).

seen as suggesting that private sector investment was the best way to achieve the estimated 140 billion USD in additional investment required for agriculture and rural development, as there could also be, for example, significant public investment or investments by or with smallholder farmers. It was then said that the reference to nucleus estates coupled with outgrowers might not be perceived positively, so it might be necessary either to eliminate that reference or to address it in greater detail. It was said that the wording should be tweaked in order to address these points properly while taking into consideration the immense amount of research that had already been done.

- Paragraph 17: it was said that the framing of the list of common issues – specifically in light of the list’s use of “parties may not ...” – should be tweaked either to acknowledge in the sentence prior to the list that these issues were some of the common risks but not that they arose in every case or to frame the discussions in the list more affirmatively as “the parties should” or the “the parties must”.
- Paragraph 19: it was stated that it might be necessary to tweak the statement regarding land leases being more common than sales. It was further stated that, while that was likely true with respect to recent land acquisition trends, that might not be true over the longer term. It was also said that this point could be elaborated upon by referring to data from the Land Matrix or other sources and by showing increasing use. In addition, it was stated that the reference to the prohibition of foreign investors leasing land within certain States might need to be tweaked, in light of the fact that the Guide was addressing contracts between investors and States.
- Paragraph 21: it was stated that, as to the scope of the Guide, consistency had to be ensured between the discussion of the possible parties contained in paragraph 21, in the relevant definitions in paragraph 29 and in Chapter 2, which dealt with the possible parties in detail.
- Paragraph 27: it was asked, with respect to alternative business models, how far the Guide should go in discussing non-land based investments. In this regard, it was said that a possible solution would be to refer to other instruments regarding alternative models, such as the Legal Guide on Contract Farming, in order to provide more guidance and clarity.
- Paragraph 29: it was pointed out that, while the descriptions of legal tenure right holder and legitimate tenure right holder were satisfactory, there were instances in the other draft chapters that might wrongly seem to suggest that legal tenure right holders were not legitimate tenure right holders. It was said that the usage of the terms throughout the Guide should be reviewed and clarified in this regard. It was also said that the Guide should not offer a description for the term “indigenous peoples”, that the term “host-State government” should be revised to “State government” consistent with the Working Group’s earlier discussion on the latter point,<sup>5</sup> and that the term “agricultural land investment contracts” should be clarified to make clear that it was a transaction involving or over tenure and related rights. It was then pointed out that the other definitions could be tweaked in the context of the editing and stylistic reviews of the chapters to ensure consistency and that it might be better to fold the key terms into the respective sections on “Parties” and “Contractual arrangements” in order to streamline the Introduction.

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<sup>5</sup> See *supra* paragraph 13.

**B. Chapter 1 - Legal Framework (WP.2)**

21. In the presentation of the draft, it was recalled that an initial draft of the chapter had been reviewed at the Working Group's second meeting. It was further recalled that, pursuant to the input received at that meeting, the draft chapter had been restructured and revised to offer a brief discussion of freedom of contract and limitations on that freedom, to discuss key sources of domestic and international law and then to address key areas of law which were essentially themes that could be built upon throughout the Guide.

22. With respect to general comments, it was queried whether the draft text read too much like a textbook. It was stated that the draft should be revised to be more consistent with the needs of the target audience, in particular legal counsel involved with the preparation, negotiation and review of these contracts. It was said that the chapter should be tailored to lay out generally the legal framework and then emphasise the different areas about which counsel had to be aware and which might need to be addressed in the contract to varying degrees. To better target the chapter, it was suggested that it should be built around some key messages, such as the importance of the domestic law of the State in which the investment was located, the relationship between the agricultural land investment contract and domestic law and the need for awareness of the broader framework. In this regard, it was suggested that the Guide should flag the importance of certification bodies as the contract could, for example, refer to various standards defined by those bodies. It was then said that the chapter should not try to inventory or lay out all of the relevant areas of law, but instead to bring out the messages that had to be conveyed to counsel to these transactions. It was stated, in other words, that it was necessary to find the right balance between description and practical guidance.

23. With respect to the part on sources of law, it was suggested that they could be reorganised into those which one was required to follow and those which should be followed. The importance of properly addressing soft law instruments was emphasised in this regard, and it was queried precisely what was meant by the term "soft law". It was said in reply that it might be useful to avoid having soft law as a category and instead to be specific regarding the instrument to which the Guide was referring and be more proactive in guiding parties to operationalise them in their contract. It was then said that the VGGT, CFS-RAI Principles and UN Guiding Principles, for example, reflected an international consensus that had been the subject of wide consultations – with governments, civil society and the private sector – and some of their provisions and guidance should be addressed in the contract. To support the incorporation of this consensus into the various contracts, it was suggested that Articles 1.9 (Usages and practices) and 5.1.2 (Implied obligations) of the UNIDROIT Principles might be of use, with the latter being particularly relevant because that Article made clear that "parties are bound by a usage that is widely known to and regularly observed in international trade by parties in the particular trade concerned except where the application of such a usage would be unreasonable." It was very important for parties to understand and give proper respect to such usages, which could become part of the contract in that way.

24. Further to sources of law, the importance of providing a description of the different legal orders that could be applicable to an investment was emphasised, in particular with respect to legitimate tenure right holders. It was pointed out that the role of judicial decisions – both domestic and international – could be addressed in greater detail and, in this regard, it was said that the growing importance of regional human rights courts, such as the African Court on Human and Peoples' Rights, should be covered. It was also pointed out that some judicial decisions were helping to advance corporate social responsibility trends. Regarding customary rules and usages, it was said that it would be useful to signal that some customs could be very exclusionary and inconsistent with international standards. Regarding international sources in general, it was said that the chapter should better describe why it was addressing international sources and that the relevant paragraphs could perhaps cross-reference, as an example, to the brief discussion of general international law which was in

Chapter 3's sections on human rights and social obligations to ensure that all of this content was well-connected.

25. In addition, the following paragraph-specific input was provided by the Working Group:

- Paragraph 2: it was said that the chapter, and the Guide in general, should be more precise regarding the term "mandatory rules".
- Paragraph 14: it was queried why this paragraph only provided examples of core human rights instruments. It was suggested that the paragraph could also mention some environmental instruments.
- Paragraphs 18-19: it was said that, with respect to international custom and general principles of law, a reference could be made to due diligence obligations, such as with respect to environmental impact assessments, which could also be linked to technical standards. It was further said that a reference could be made to sustainable development in this regard.
- Paragraphs 26-28: it was suggested that, with respect to the discussion on land tenure and administration, there could be a brief discussion of the way in which different entities and individuals that held tenure rights could be structured so that investors, for example, would know who they should be dealing with and would take their structure into account.
- Paragraph 34: it was suggested that the discussion of financial aspects should include a reference to the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. It was said in reply that it might also be useful to look at the Foreign Corrupt Practices Act in the United States, in particular with respect to the extraterritorial effects of regulations, which might not necessarily be taken into account by the parties.

### **C. Chapter 2.I – Parties (WP.3)**

26. In the presentation of the draft, it was said that the draft dealt with many of the issues that had already been discussed at length at the current meeting and previous ones (e.g. legal tenure right holders and legitimate tenure right holders) and that it sought to lay out in a clear way the various possible parties and stakeholders, as well as addressing due diligence aspects, consultations and types of contracts, with a particular focus on including legitimate tenure right holders and respecting their rights.

27. With respect to general comments, there was a discussion regarding legitimate tenure right holders during which it was said that, at the outset of the draft, there needed to be an introductory section on legitimate tenure rights. It was emphasised that extra guidance was necessary on such holders and that this guidance could be one of the Guide's unique contributions. With respect to the relationship between legitimate tenure right holders and local communities, it was said that the overlap between the two should be clarified as a community might be a legal or legitimate tenure right holder itself with respect to the land in question or it might represent such holders. It was then said, however, that the draft seemed to devote a significant portion of its content to legitimate tenure right holders and might not be sufficiently balanced. In reply to the point about balance, it was said that the emphasis on legitimate tenure right holders, as well as indigenous peoples, was very important, as States had an obligation to take into consideration and protect their rights and investors had an obligation to respect those rights. It was then said that the draft's focus on legitimate tenure right holders might not be as useful in all parts of the world, even if addressing issues arising from legitimate tenure rights was one of the most unique contributions of the Guide. In this regard, it was said that the draft could perhaps explain in more detail why such rights could

be very important in some situations and less important in others (e.g. in systems in which such rights were formally recognised).

28. Regarding structure, it was said that the draft could be rebalanced by moving the section on types of contracts and dealing with that section first, following a brief introductory section which could touch upon legitimate tenure rights. The types of contracts could be dealt with in a general way, and the draft could then move on to address the various parties and stakeholders to those contracts. It was also said that “contractual arrangements” might be a better term to use than “types of contracts” and that that section should begin, consistent with the Guide’s scope, with a brief portion on the main transactions upon which the Guide was focusing (i.e. investor-State contracts or transactions).

29. Further to structure and balancing, it was said that the due diligence aspects of the draft, including the parts on consultations and free, prior and informed consent (FPIC) seemed optically to be too short compared to other parts of the draft and should be extended. In connection with deliberations regarding the draft on feasibility studies and impact assessments (WP.4), it was recommended that the draft could briefly refer to the due diligence aspects, which would be dealt with in greater detail in a separate section in combination with those studies and assessments.

30. With respect to parties and stakeholders, it was suggested that the draft could first deal with all potential stakeholders and then address how or why those stakeholders could be a party. For the part on investors in particular, it was suggested that the discussion should be revised to ensure that it covered situations involving domestic or local companies which were, for example, involved in food processing, made the decision to invest in local land and were not corporations. It was then queried whether the Guide should promote legitimate tenure right holders becoming parties to agricultural land investment contracts (e.g. in tripartite contracts between the investor, State government and the legitimate tenure right holders). It was said in reply that, for the Guide to promote inclusive agricultural investment, it was necessary to lay out the various options for involving legitimate tenure right holders including, for example, as stakeholders to be consulted or as parties to the agricultural land investment contract or a linked agreement. It was pointed out that the Working Group was again returning to the discussion of the Guide’s scope with respect to the party that was granting the tenure rights, and it was emphasised that the Guide had to be clear as to which possible parties it was addressing. It was said that the Guide had to include the possibility that legitimate tenure right holders could be parties to the contracts or linked agreements and that the Guide should be more proactive in describing the various options for involving them, including by discussing the advantages and disadvantages or risks of each option. It was then noted that most current practices were not consistent with the VGGT, so laying out the options would be very beneficial.

31. Further to the discussion on various options for involving legitimate tenure right holders, it was pointed out that such holders could be treated as third party beneficiaries, by which they might have rights under the contract even though they were not party to it. It was pointed out that it might not necessarily always be advantageous to be a party to a contract as that status entailed not just rights but also obligations. It was said that being part of a tripartite contract could expose legitimate tenure right holders to various liabilities and that there were relevant examples of such liabilities from the extractives sector. It was further said that third party protections might actually be stronger, though it was acknowledged that the Guide could likely not be categorical in this regard because third party beneficiaries were not treated the same in all systems. It was said that, in some systems, third party protections would be the default rule. The importance of third party rights was emphasised, while it was pointed out that it was essential, depending on who were the relevant parties, to take into consideration the principle of *nemo dat quoa non habet*. It was then pointed out that not all third parties would be affected by an investment in the same way, as legitimate tenure right holders downstream from an investment might be affected even if their rights were not to the land that was leased. It was further pointed out that, looking at the UNIDROIT Principles, there were differences if a third party was expressly referred to or whether an obligation was implied in the

contract and that interpretation of the contract would be subject to domestic law. It was said that some references to the respective parts of the UNIDROIT Principles could be useful, as well as some text on interpretation of the contract, either here or elsewhere in the Guide.

32. Regarding the term “third party” specifically, it was said that that term was broad and could cover a range of stakeholders. It was further said that, as a result, the term should be clarified or more specific terms should be used. It was stated in reply that the draft should treat parties and stakeholders in a more balanced way, while generally avoiding the term third party. It was then stated that the draft could instead refer to (a) signatories to the contract and (b) stakeholders. The Working Group recommended, for purposes of revising the draft and subject to ongoing review, use of those terms.

33. Regarding the draft’s treatment of third party beneficiary structures, it was noted that the Legal Guide on Contract Farming offered guidance on third party rights in a general and neutral way, which could be helpful, regardless of the particular legal system in which that guidance would be applied. It was queried whether the part on such structures should be retained. It was said in reply that the part should not be deleted as it could be a possible option for protecting legitimate tenure right holders and local communities. It was further said that it should be revised in a more general and neutral way so that future users of the Guide would be comfortable reading it, regardless of their legal system or background. It was then said that it should be revised, in coordination with the Secretariat, to be as consistent as possible with the terminology used by the UNIDROIT Principles with respect to third party rights. It was noted, for example, that Articles 5.2.1 et seq. addressed “contracts in favour of third parties” and recognised that such rights could be conferred by express or implied agreement.

34. The Working Group also discussed (a) legacy situations (i.e. taking over an existing agricultural investment) and (b) representation of legitimate tenure right holders, local communities and customary authorities. For the former issue, it was suggested that the draft could have a paragraph dealing with legacy issues, in particular those arising from the taking over of an existing agricultural investment. For the latter, it was queried how the investor would be sure that it was dealing with the proper representative of a particular group of tenure right holders. In this regard, it was said that the Guide should address the accountability of the relevant authorities and representatives and how to ensure that the representative was actually fully authorised by a particular community. It was then suggested that the Guide should address, as a matter of best practice, what level of dissent within a particular community could be tolerated. For issues of representation, it was recalled that those issues would be dealt with in the section of Chapter 2 addressing contract formation, in particular negotiations and the related issues of capacity, representation and consent.<sup>6</sup>

#### **D. Chapter 2.II-III – Feasibility Studies and Impact Assessments (WP.4)**

35. In the presentation of the draft, it was said that a lot of thought had been put into the framing and development of the draft. It was further said that the draft was faithful to the in-progress outline and was generally inclusive in addressing all of the matters related to the issues identified in that outline.

36. With respect to general comments, the Working Group considered (a) the structure and (b) the “voice” of the draft. Regarding the structure, it was queried whether the title of “feasibility studies” suitably described the content in that part. Following deliberations and in conjunction with the deliberations on the due diligence aspects in Working Paper 3 on parties and stakeholders, it was

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<sup>6</sup> In light of the restructuring and revisions recommended by the Working Group to the discussed portions of the Chapter 2 and in the interest of time, the Working Paper for Chapter 2.IV on contract formation and form (WP.5) was not submitted for review at the session and was held pending revisions and circulation to the Working Group in the lead up to its next session.

recommended that this draft be retitled “due diligence,” that it could deal with due diligence with respect to (a) parties and stakeholders and (b) land and potential impacts, and that the current content from this draft and that in Working Paper 3 could be reorganised into that structure.

37. Regarding the “voice” of the draft, it was queried whether feasibility studies, business plans and impact assessments were required by law or were matters of good or best practice. It was said in reply that this was a question that applied to many of the drafts, in particular how normative or prescriptive the Guide’s guidance was intended to be. It was pointed out that, while investors would study the feasibility of an investment, impact assessments were matters of best practice and that the Guide should take into consideration what was already available in other instruments and guidance documents and primarily seek to add value. It was said in reply that perhaps something stronger than “good practice” was necessary to emphasise the importance of these studies and assessments. It was then said that this discussion would be taken into consideration in the revision of the draft and that the Secretariat, more broadly, would review the various drafts to ensure consistency in the framing and tone of the Guide’s guidance.

38. With respect to the part on feasibility studies, the following input was provided by the Working Group:

- Suitable land availability and valuation (paragraphs 3-4): it was suggested that the draft could make reference to the new VGGT Technical Guide on valuing land tenure rights. It was further suggested that replacement value was an important aspect to discuss. In connection with suitable land availability, it was said that the draft could treat these issues in greater detail, specifically with respect to the process of identifying land and valuing it (e.g. by whom, using which standards and which services). It was also suggested that the draft should deal more with non-market values, which were difficult to deal with in practice. It was then queried how transparent the feasibility studies were meant to be. It was said in reply that the studies were often complicated, but could nevertheless be useful to others and that, in general, greater transparency was better than less in this regard.
- Access to resources (paragraphs 5-7): it was queried, in noting the overlap with the part on land tenure in Chapter 3, whether it was necessary to address access to resources at this point. It was stated in reply that there was indeed overlap and that the relevant content regarding identification of the land and its availability, including acquisition aspects, should be dealt with in this draft, together with cross references to that part of Chapter 3. It was then noted that access to water was particularly important and could be treated in greater detail. With respect to paragraph 5 in particular regarding adjoining land, it was said that those lands might not necessarily be owned by the government.
- Business plans (paragraphs 8-11): it was said that there should be a link between the business plan and the agricultural land investment contract, including an obligation not to deviate from the business plan. It was further said that it was necessary to make sure that the business plan was then used. It was then questioned whether a sovereign investor could use a business plan to create so-called “pre-investment rights”, though it was said that it might not be necessary to address this question in the Guide.

39. With respect to the part on impact assessments, it was said that, as a general matter, there were various types of impact assessments to be performed. In this regard, it was noted that human rights impact assessments were fairly new and that Guide could make an important contribution by providing guidance on them.

40. Regarding the various assessments, it was suggested that economic impact assessments should be included. It was stated in reply that the draft could address that type of assessment, though it was necessary to keep in mind that not every project would require every type of

assessment. It was then said that the discussion could be more linked to the VGGT and CFS-RAI Principles, in order to show the basis for the guidance and whether the assessments were meant for the entire investment project or just for particular aspects of it. The OECD-FAO Guidance for Responsible Agricultural Supply Chains was also suggested as a useful resource. It was then said that the CFS-RAI Principles promoted impact assessments, but did not mandate the preparation of a human rights impact assessment, and that it was up to the parties to take them into account. It was further said that there was a difference between the draft's approach and what was done thus far in practice. It was stated in reply that, as set forth in the UN Guiding Principles, businesses have a responsibility to respect the rights of those affected by their investments. It was further stated that the UN Guiding Principles were developed in a multi-stakeholder environment with widespread consultations and were endorsed by private-sector representatives. In this regard, attention was drawn to paragraph 3.2 of the VGGT's General Principles, as well as to paragraph 6 in the Principles of Implementation, both of which supported the need for impact assessments. It was then said that the Guide should push legal counsel in the direction of performing the necessary impact assessments, while recognising that not all such assessments would be required by every project. In this regard, it was said that the Working Group might wish to consider whether the due diligence process could involve screenings, such that a full impact assessment would only be performed if a preliminary screening indicated one was indeed needed.

41. In connection with the discussions of the various possible impacts, it was queried whether the Guide would address what would happen in the case of project failure. It was said, for example, that an investment might go bankrupt and leave behind environmental damage. It was stated in reply that the Guide should indeed cover this situation, including by suggesting some sort of deposit or performance guarantee, though this issue would not be addressed in this part of the Guide.

42. Regarding the draft's reference to FPIC, it was queried whether the language was consistent with the UN Declaration on the Rights of Indigenous Peoples, the VGGT and other instruments. It was noted that the draft, and the Guide in general, should be consistent with the VGGT and CFS-RAI Principles in this regard.

#### **E. Chapter 3.I-II(e) – Introduction and Land Tenure (WP.6)**

43. For the presentation of the draft, it was acknowledged that the draft overlapped with some of the due diligence, land identification and access to resources issues that had been discussed in Chapter 2. It was further acknowledged that the draft remained in-progress and, subject to the Working Group's input, would be further developed, including through the addition of more references to other instruments and guidance documents.

44. With respect to the section on location and description of the land, it was said that this section was of absolute importance because it dealt with specifically identifying and laying out in the contract the land that was to be granted. It was further said that the section was too general and that a more detailed discussion of these issues was warranted. In particular, it was stated that more guidance could be added regarding the possible tenure right holders with respect to particular land, including taking into consideration that the holders might be individuals or a collective group and that the land might have various characteristics, both of which would affect the preparation of the contract. It was noted that this content should be cross-referenced to the content on legitimate tenure rights in the first part of Chapter 2.

45. Regarding identification in particular, it was said that the role of surveyors was an important aspect which could be addressed. It was queried whether the terms "delimitation" and "demarcation" could be clarified or reconsidered because those words might have particular, differing meanings in various systems. It was then queried, when considering that the contract should identify the land, which contract that should be in instances in which multiple contracts were used instead of one comprehensive contract. For paragraph 8 in particular, it was said that the statement "must attend

the transaction” was unclear and required clarification. It was stated in reply that the terms and statements could indeed be reconsidered and clarified and that, with respect to identification and multiple contracts, it would generally be the second contract, which would come after the initial establishment contract.

46. Regarding the option for additional land, it was queried whether the statement that “the land rights holder decides to put these portions up for lease” was accurate. It was further queried whether such option rights – that investors seemed to seek in practice because it gave them flexibility to expand – should be promoted or referred to by the Guide, as there could be high opportunity costs for States in making that adjoining land available. It was pointed out that it seemed to be assumed that the adjoining land in question was already titled, which might not be the case, and that this issue might need to be addressed in the draft, though it would likely fit better in Chapter 2’s section on identification of the land. It was further pointed out that it would be useful to promote practices that would enable land users to have the opportunity to stay on the adjoining land. It was said that, if the Guide addressed this option, it should very clearly link its use to key performance indicators, signalling that the option to expand was subject to having met certain targets.

47. The deliberations on the option for additional land led to a discussion of expropriation by the government. It was said that expropriations could be justified by the government by claiming that the agricultural investment was for a public purpose. It was said that the “public purpose” standard could be abused and that expropriations of the land to be leased could be very problematic, but that these issues should be addressed in the Guide, in connection with the discussion of the identification of the land, feasibility studies and impact assessments in Chapter 2.

48. With respect to the section on tenure rights, it was said that some of the statements regarding the grant of tenure and related rights (e.g. “unrestricted access to other resources” in paragraph 14 and the treatment of resources below ground in paragraph 15) should be clarified because they seemed to suggest that some of the rights were unlimited, though they might not be. It was further said that, as various legal systems and jurisdictions had different land and property systems, the language should be more nuanced and general. In this regard, it was pointed out that, as part of the broader discussion of the Guide’s tone and approach, revisions were needed to ensure the right balance between descriptive, normative and prescriptive approaches.

49. Regarding related rights in particular, it was said that these paragraphs were very much focused on the rights of the investor. It was further said that these paragraphs could be rebalanced by, for example, taking into account issues of food security in paragraphs 27-31. It was then said that that the whole discussion of related rights could be a significant component of the Guide and could be dealt with in greater detail. In this regard, it was suggested that other instruments and guidance documents had already dealt with these rights so the draft, in order to address fully these rights in a concise way, should refer to those instruments and documents to the extent feasible. It was also suggested that export conditions and restrictions, which were referred to in paragraph 31, warranted fuller treatment.

50. With respect to the section on duration and renewal, it was queried what was meant by the term “statutory duration” and what these paragraphs were meant to address, and it was suggested that paragraphs 34 and 35 were inconsistent with the draft of Chapter 4 on contractual non-performance (WP.11), in particular regarding remedies. It was also queried whether the section could risk promoting practices which might not lead to sustainable and responsible agricultural investment by suggesting that there could be a very short two-year provisional lease which, if completed, could result in a much longer one. It was said that this approach was not a helpful way of viewing a potentially 50-year investment and that this provisional arrangement could affect the bankability and viability of the investment. It was pointed out that, in other words, such arrangements could make it difficult to collateralise the investment, and collateral aspects should be treated. It was said that it would be preferable to speak of a more reasonable period of time, such as ten years, as well as the

monitoring and evaluating of performance on the basis of key performance indicators. At the same time, it was understood that the treatment of duration should not be seen as too investor-friendly as leases were often for 99 years and, in many ways, effectively constituted sales. In this regard, it was said that caution was needed regarding the possible links between the content on contractual duration in paragraph 38 and fiscal incentives. Regarding drawbacks of limitations on period, it was said that this portion duplicated some of the other content and could be rebalanced in order to ensure that land was not kept out of land users' hands longer than necessary. In this regard, it was queried whether the draft could address this issue of reversion of the tenure rights to the original land users at the end of the lease.

51. With respect to the section on purpose of the investment, it was stated that this section should be moved up within the Guide's overall structure. In this regard, it was acknowledged that it too overlapped with some of the content in Chapter 2, for instance, regarding feasibility studies and business plans and was thus ripe for streamlining. It was then said that this section was too prescriptive, and it was pointed out that business plans were not always required, even if such plans constituted good or best practice. It was further said that, for example, the project might evolve and, in some instances, a change in crops might be required and that this possibility should be taken into account in the description of the land's intended use.

#### **F. Chapter 3.II(g) – Infrastructure (WP.7)**

52. For the presentation of the draft, it was acknowledged that the draft overlapped with various portions of the Guide (e.g. related rights, land development obligations, social infrastructure, monitoring and contractual non-performance) and that the Working Group might wish to consider the best place in the Guide to deal with these aspects and the use of cross-references to that portion.

53. With respect to general comments, it was said that it was very important for the Guide to consider infrastructure-related issues in detail because there could be obvious benefits for local communities if infrastructure was properly planned, constructed and managed. It was further said that it was not just a matter of constructing new infrastructure but of using and improving what was already in place. In this regard, the importance of supporting private sector investment in infrastructure was emphasised. It was then said that the Guide's treatment of these aspects, regardless of where it was placed within the Guide, should deal with what would need to be built, who would pay for it or build it and who would have an obligation to maintain it. It was further said that these points could be key ones in the negotiation of an agricultural land investment contract – as it involved trade-offs (e.g. an agreement by the investor to construct and maintain a road to which local communities would have access might entail lower fees for the leased land) – and that these points should be flagged. In this regard, the use of local inputs was emphasised, and it was said that there should be a cross-reference to the Guide's treatment of local content clauses and policies. Other cross-references were suggested with respect to the Guide's treatment of monitoring aspects, as the infrastructure's construction and maintenance would need to be monitored, and to the Guide's treatment of land acquisition aspects in Chapter 2, as the development of infrastructure projects could raise land acquisition issues as well.

54. Regarding the way in which infrastructure aspects could be framed, it was pointed out that there could be different approaches to these aspects based on location (i.e. inside or outside of the land area to be leased) or on whether the infrastructure was for commercial use (i.e. by the investment) or general use. It was said that the location criteria was potentially risky because local communities within large plantations could become isolated and that the Guide should not base its guidance purely on location. In this regard, it was generally acknowledged that the commercial

versus general approach was more useful and, subject to ongoing review, the draft could be further developed in accordance with that approach.

55. With respect to the types of infrastructure, it was pointed out that the agricultural land investment contract or a related agreement could deal with social infrastructure (e.g. to build a school within a local community). In this regard, it was said that this content should be coordinated with the portion on social obligations and responsibilities, so that it was covered together and was not duplicative. It was then said that some of the examples offered in paragraph 5 should be reconsidered, in particular with respect to irrigation. It was further said that irrigation systems were important and that, where referred to, they had to be treated in greater detail, specifically with respect to legitimate tenure right holders, who should be able to benefit from those systems.

56. Regarding placement of the Guide's treatment of infrastructure aspects, it was said that it overlapped most with the topic of related rights and land development obligations within the draft on land tenure (WP.6). It was further said that the Secretariat, in consultation with the respective drafters, should incorporate the draft on infrastructure aspects into that draft and ensure that the overlap with other sections (e.g. social infrastructure, monitoring and contractual non-performance) was coordinated and cross-referenced as needed to avoid duplication.

#### **G. Chapter 3.II(f), III-V – Land Development, Finance, Social and Environmental Obligations (Investor Obligations) (WP.8)**

57. For the presentation of the draft, it was acknowledged that this draft covered vast terrain and, as a result, raised issues of detail versus readability that the Working Group might wish to consider. It was said that the draft aspired to cater to the full range of contracts within the Guide's scope, but was tailored to contracts with public authorities. It was further said that the draft could serve as the basis for further discussion between normative and descriptive approaches as the Guide would have to be consistent in this regard. It was then said that the draft, in covering vast terrain, would be further developed in light of the Working Group's input, would include cross-references to related sections of the Guide (e.g. on impact assessments or transparency aspects) and would contain more references to other instruments and guidance documents including, among others, the UN Principles for Responsible Contracts.

58. With respect to general comments, it was said that a guiding principle of the draft should be to offer a sort of checklist of contractual clauses and guidance that the parties could incorporate into their contract. It was said that it could offer such checklists, consistent with the discussion of possible contractual arrangements in Chapter 2, for tripartite contracts and linked agreements, as well as for the stipulation of rights for others (i.e. third party beneficiaries). It was further said that the Guide's goal should be practical guidance on contractual clauses and that, elsewhere in the Guide, there could also be a discussion of conditional clauses. Further to providing practical guidance, it was said that not only this draft – but all of Chapter 3 together with Chapter 1 on the legal framework – should emphasise the place of the contract in the domestic legal environment and cover how to coordinate domestic laws and contractual clauses. In this regard, it was said that it would be useful to get more detail on the actual contractual clauses and that perhaps the checklist could be more like a model list of possible provisions. In this latter respect, it was recalled that the Working Group could prepare the guidance text first and then consider the issue of particular clauses at a later stage.

59. Regarding the use of "should" and "must" and the overall drafting approach, it was noted that the VGGT, for example, used the term "should" 153 times, and its guidance was not binding. It was said, however, that "should" was often what had to be used or what was needed. It was further said that, if an international financial institution or donors, such as the World Bank, were involved in a particular investment, some of the issues that were being discussed would not be a matter of "should" but would be required by the regulations of those institutions. It was acknowledged that there were aspects of the draft that were indeed "required" and that "must" should be used in connection with

them, but that various governments might have different ways of achieving requirements and, accordingly, might promote particular safeguards (e.g. local production requirements). It was then noted that the Secretariat would provide guidance to drafters in this regard and would review the various drafts and suggest edits to them for consistency.

60. Regarding the draft's coverage of vast terrain, it was said that the various issues nevertheless fit together because they all formed part of the package that a government leasing a sizable portion of agricultural land should present to its citizens in order to justify the various arrangements. It was said that, to maintain a manageable size for the draft, it could rely more on generally applicable law and other instruments. It was also said that it could rely, to the extent feasible, on the guidance contained in the OECD-FAO Guidance for Responsible Agricultural Supply Chains.

61. Further to this discussion, the Working Group considered the level of detail to be provided by the Guide in offering guidance on particular issues. It was said that flagging issues for parties to bear in mind would not sufficiently ensure that the Guide was achieving its purpose of promoting greater and more responsible agricultural investment. It was further said that, in some instances, the guidance would be very general, whereas in others it would be more detailed, depending on the Guide's various contributions. The importance of cross-references was emphasised in this regard, and it was said that references to the UNIDROIT Principles, Legal Guide on Contract Farming and other instruments could be added. The overlaps between, for example, the project development and the land acquisition portions of the draft with other portions of the Guide (i.e. Chapter 3 on land tenure and Chapter 2 on feasibility studies) were also recognised. It was acknowledged that the project development and land acquisition portions should indeed be moved elsewhere and that this move could help to ensure that the draft on investor obligations did not become too long and out of balance with the rest of the Guide.

62. With respect to the section on financial arrangements, it was queried what exactly was meant by that term, and it was said that this area was one in which more guidance could be provided. It was said in reply, however, that government officials using the future Guide would more likely be interested in the various social obligations and safeguards provided in that regard. It was then said that this section could again be quite lengthy and reach issues of tax, rents and royalties and, accordingly, might require additional tax expertise. It was stated in reply that the chapter could flag the existence of various tax regimes and indicate the need for understanding them and how they might affect various decisions to be made by the parties. The details, to the extent feasible, could be provided through references to other instruments and guidance documents dealing with this area, such as the OECD Guidelines for Multinational Enterprises. It was said that the section could be made more consistent with the UNIDROIT Principles and that, for example, it would be helpful to refer to the Principles' Chapter 5 on content of the contract. It was then said that, in revising the section, it could cover, in general, various financial models and tax regimes, thereby flagging issues for the parties to consider, but that it was not necessary to go into great detail. Lastly, it was suggested that there could be a cross-reference to the portion of the Guide on the identity of the investors, who could be registered in a tax haven, and the need for transparency in agricultural investment.

63. With respect to the section on employment, it was said that this was a very important topic and that it was essential to addressing impacts on different groups within communities, including women and youth. It was further said that domestic laws on employment often were not tailored to the agricultural sector and that employment creation programmes often did not focus on that sector. It was then said that the draft could try to go beyond the minimum standard and seek to promote employment and training programmes for women and youth. It was acknowledged that it might be hard to translate employment-related safeguards into specific contractual clauses, and it was suggested that it might be possible to identify specific employment targets and firmer numbers. Examples of contractual provisions were offered in this regard, and it was said that they would be provided. It was recognised that this section was connected to the section on contract farming and outgrower schemes, which could support employment for marginalised groups. It was also said that

paragraph 25 could refer to the UNIDROIT Principles, Article 5.1.4 (Duty to achieve a specific result. Duty of best efforts) regarding the criterion for whether a contractual provision on employment was indeed fulfilled.

64. With respect to the section on local content and processing, it was stated that it seemed to be drafted strictly for use by foreign investors, and it was suggested that it should perhaps be tweaked with respect to having local companies as investors. It was then said that the UNIDROIT Principles' Articles on conditions (i.e. 5.3.1 et seq.) might be useful. It was stated in reply that the notion of making the contract conditional on compliance with local content was intriguing but could in practice be quite difficult. Regarding the possibly limited effectiveness of local content requirements mentioned in paragraph 33, it was suggested that the first sentence should be rephrased in order to prevent parties from simply not treating these possible requirements and to ensure that they were given some consideration. It was stated in reply that, although there was indeed some scepticism with respect to these requirements, the drafting could perhaps be better calibrated. Regarding the risk that local content clauses might violate international agreements in paragraph 34, reference was made to the non-discrimination exception for least developed countries to the rules of the World Trade Organization, as well as to bilateral investment treaties which might also set out provisions regarding performance requirements. It was said that these points could be further developed and then generally reviewed for consistency with potentially applicable BIT provisions and WTO rules.

65. With respect to the section on contract farming, outgrower schemes and supply chain relations, it was emphasised that the core relationship at issue in the future Guide was different than the one covered in the Legal Guide on Contract Farming, which dealt with contracts between producers and contractors. It was said that, in the case of the future Guide, it was more about the investor and the government making a production contract opportunity available to nearby farmers and that the activities might be very different. While the Legal Guide on Contract Farming's guidance was of course going to be useful and references could be made to it, it was suggested that the draft could focus on the unique issues involved in the relations dealt with in the future Guide, specifically in how to promote making that production contract opportunity available. It was said in this regard that FAO was about to publish a legislative study on "Enabling regulatory frameworks for contract farming" which could be useful in this regard. It was then acknowledged that it was difficult to create a outgrower safeguard without imposing it, and that one particularly important aspect was transparency and consultations with prospective outgrowers. It was further acknowledged that this section would be expanded in accordance with the input received, which also included the following paragraph-specific input:

- Paragraph 36: it was said that this paragraph offered an opportunity to promote smaller-scale investments by the investor.
- Paragraph 37: it was stated that, absent a requirement for an outgrower scheme to be established, it was likely that – based on available evidence – one would not be established. It was further stated that this paragraph could be strengthened accordingly.
- Paragraph 38: it was said that this paragraph fell squarely inside a third party beneficiary scheme and that it could be considered and reframed, consistent with the UNIDROIT Principles, as a stipulation for the benefit of third parties.
- Paragraph 39: it was said that the use of "could" with respect to the securing of the tenure position of outgrowers farming leased land was too weak. It was further said that the position of those farmers should be strengthened.

66. Regarding the section on the environment, it was said that the value of environmental clauses was not only to address gaps in environmental standards in domestic laws but also to establish good agricultural practices (e.g. with respect to soil and water preservation). It was also said that the

section could deal with issues like intercropping and that, in general, the section could be a bit more detailed. In this latter regard, it was recalled that the draft could be supplemented by a contribution developed by a UNIDROIT Research Fellow on environmental aspects for use in various draft chapters, including this section (WP.14). In the presentation of that contribution, it was said that the paper tried to offer an introduction on environmental laws – both domestically and internationally – and included ten contractual clauses on various environmental issues that should be considered by the parties before, during and after the investment. With respect to that paper, it was said that, for example, some of the content in paragraph 35 (WP.14) regarding desertification could be moved into the draft (WP.8). Regarding paragraph 42 in the draft (WP.8), it was stated that the reference to general international law was helpful and that such a reference could be useful in other sections of the future Guide. Also with respect to that paragraph, it was stated that it could include a reference to BITs, which addressed environmental issues.

67. Regarding the section on community development funds and social infrastructure, it was acknowledged that this section would be an important part of the draft but remained very preliminary and subject to further development. It was suggested that one of the options in this regard could be the possibility for legitimate tenure right holders or local communities to hold equity in the investment enterprise. It was further suggested that such equity did not necessarily mean voting rights, but could mean at a minimum a right to income from the enterprise. It was stated in reply that there had been some land for equity initiatives which could be reviewed in this regard.

68. Regarding the section on reporting requirements, monitoring arrangements and sanctions for non-compliance, it was noted that the section overlapped with the subsequent draft on transparency, compliance and monitoring (WP.10) and could be dealt with in greater detail in that latter section. In the context of these deliberations, there was a discussion regarding the collection of data and intellectual property rights and whether and where data- and IP-related issues should be dealt with in the future Guide. It was pointed out that, in relation to SDG 17 (Partnerships for the goals), there was a focus on data, and that OECD guidance documents might be useful with respect to data issues. It was further pointed out that issues regarding the collection of data and IP rights were indeed important ones to flag. It was said that, with respect to spatial data, investors often had much more advanced data than the government itself. It was also said that investors often sought to control their IP rights and business information but that, in the context of a responsible agricultural land investment, those rights and information might not be exclusively for them. It was generally agreed that data and IP issues should be considered further and that there could be drafting for them in conjunction with the section on monitoring (WP.10).

#### **H. Chapter 3.VI – Protection of Investment and Regulatory Autonomy (WP.9)**

69. For the presentation of the draft, it was said that the draft was meant to discuss investment protections offered to investors and the need for governments to retain the necessary regulatory space for them to be able to properly regulate in the interests of their citizens. It was recalled that, consistent with the in-progress outline, the draft was meant to address (a) expropriation, (b) physical security and (c) legal security.

70. With respect to general comments, it was said that the concept of regulatory autonomy did not come across clearly in the draft and that there was some question whether this part was fitting well within Chapter 3. It was said in reply that the term “regulatory autonomy” could be considered as a term of art and that it might be better understood within the context of international investment law. It was then said that, if this draft was to be revised and included in the future Guide, it needed to address international investment law aspects as well in order to offer the complete picture. It was said that the UN Guiding Principles and the UN Principles for Responsible Contracts addressed the need for governments to preserve their regulatory autonomy, which was about having the necessary policy space to be able to regulate. It was generally agreed that the draft should not be eliminated, but should be revised in line with the input received. It was said that, in that way, the draft could be

evaluated again at the Working Group's next meeting, in particular regarding whether to eliminate it or simply to flag these issues in the checklist at the end of Chapter 3 together with references to other instruments and guidance documents.

71. Regarding the section on expropriation, it was said that the draft seemed to focus on expropriation of the land at the outset of the investment project, which would fit better with the consideration of land acquisition aspects in Chapter 2. It was further said that the note regarding resettlement issues would fit better there in Chapter 2 as well. It was then suggested that this section, if kept, should be reframed to focus on contractual clauses – or BIT provisions – protecting against expropriation of the investment by the government. It was further suggested that it could briefly address compensation standards in the event that an investment was indeed expropriated. It was said that, although refocused in that way, it should nevertheless cross-reference back to Chapter 2's treatment of expropriation in the context of land acquisition aspects for purposes of clarity.

72. Regarding the section on physical security, it was said that the term was defined in an opaque way and, if the section was kept, should be clarified. It was further said that the section might address issues that should be avoided altogether in the context of responsible and inclusive sustainable investment and that, as drafted, seemed to lack necessary safeguards. It was said that this section might be read to suggest that responsible investments required extensive security arrangements. It was further said that this suggestion would not be consistent with the Guide's spirit and purpose. It was then pointed out that, somewhere within the Guide, there should be a reference to the UN Declaration on Human Rights Defenders because of the importance of providing specific protections to such defenders.

73. Regarding stabilisation and security of rights, it was said that this section would be drafted to address two main points: (a) to clarify what stabilisation clauses were and to discuss how they were to be treated with caution and (b) to cover the treatment of such clauses by the UN Guiding Principles and the UN Principles for Responsible Contracts. It was further said that, in this way, the general advantages and disadvantages could be explained, including why governments should be careful with respect to such clauses. It was queried whether the Guide should avoid drawing attention to such clauses as flagging them might suggest to investors that they should seek their inclusion in the contracts. It was then said that the draft could generally describe the various forms that stabilisation clauses could take and, again, the need for caution in this regard was emphasised.

#### **I. Chapter 3.VII – Transparency, Compliance and Monitoring (WP.10)**

74. For the presentation of the draft, it was said that the draft covered a number of very important issues for the successful negotiation and implementation of an agricultural land investment contract and that its development remained in progress.

75. With respect to the introductory paragraphs, it was said that stronger links could be made to the obligations and contractual clauses that would be discussed in the part. It was further said that the sections should focus on what the contract could do to promote enhanced transparency, compliance and monitoring. It was then said that a reference could be made to the duty of co-operation between the parties, as set forth in Article 5.1.3 of the UNIDROIT Principles.

76. With respect to the section on monitoring in general, it was stated that more could be added to the discussion of third-party monitoring, in particular regarding what that monitoring would look like and how to make it work well. Regarding state-owned enterprises (SOEs), it was said that agricultural investments involving such enterprises could be susceptible to additional pressure. It was pointed out that, though the relevant portion of the draft seemed to focus on SOEs as investors, they could be the legal tenure right holder with respect to the land to be leased, so the draft should be revised to take this possibility into account. It was stated in reply, however, that the portion on

SOEs might not be necessary and, in any event, needed to be more balanced. It was further pointed out that reference should be made to the VGGT's treatment of SOEs.

77. With respect to the section on performance guarantees and environmental performance bonds, it was queried how often performance guarantees were seen in practice, as they seemed to arise in the context of infrastructure projects. It was said that, if the Working Group believed that such guarantees could be useful in the context of responsible agricultural investment, then the draft should be revised to state more clearly why they would be appropriate in such context. It was stated in reply that – as land was a particularly valuable asset and proper land valuation could prove to be difficult in high population States – these guarantees and bonds constituted contractual practices that should be encouraged in order to ensure timely and productive implementation of an agricultural land investment contract. It was then stated that phased performance bonds had indeed been used in an agricultural investment in connection with clearly defined objectives (e.g. the clearing of land and other steps) in order to incentivise implementation. It was said that, subject to the input received, this section should be retained and revised, though it might fit better in connection with compliance issues later in the draft.

78. With respect to the section on “the importance of reporting and access to information”, it was said that the overall framing could be improved by, for example, dealing with (a) investor transparency and (b) government transparency. It was further said that both of those portions should respectively address transparency with other parties to the contract and transparency with stakeholders or the general public.

79. Regarding investor reporting and transparency, it was said that the guidance should be more practical and should cover not just financial reporting, but also operational reporting. It was further said that it should refer to reporting obligations under domestic law, which if the investor was foreign, might arise under both the laws of the host-State of the investment and the home-State of the investor. It was then said that the draft should take Global Reporting Initiative (GRI) standards, as well as those from the International Organization for Standardization (ISO), such as ISO26000 on social responsibility. It was stated that investors might push back on reporting requirements, so it was necessary for the government to be clear regarding what it was requiring. It was further stated that reporting should be done periodically and should be balanced and that it might be necessary in some instances to set page limits to prevent excessive reporting, which could mask or obfuscate relevant information. It was then suggested that reporting requirements could be linked to the chapter on contractual non-performance, which could be helpful in ensuring that required reports were indeed submitted.

80. Regarding State transparency, it was said that, in paragraph 23 for example, more background could be given on how the information identified could be provided.

81. Regarding public access to information, it was queried whether more information should be made available to affected communities within the investment's footprint than to the general public. It was further queried what the investor should be doing to keep local communities informed. Regarding access to information generally, it was suggested that it might be helpful for the Guide to refer to the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, though it was said in reply that references could be made instead to the VGGT and CFS-RAI Principles, which also dealt with transparency. It was then suggested that public hearings for permits were an important component of transparency that should be encouraged and that there could also be a cross-reference to Chapter 6's section on grievance mechanisms as transparency played an important role in ensuring that those mechanisms functioned well.

82. Regarding the protection of confidential information, it was said that defining clear boundaries with respect to what qualified as such information would be quite helpful as differing definitions in

various systems could be exploited. It was said that, to be complete, the Guide should also address what would happen if there was an unauthorised disclosure of information that was truly confidential.

83. With respect to the section on key compliance issues, notice and periodic review, it was said that this section would address the issues flagged in the outline, including insurance, conservation of premises, delivery of notices and amendments and periodic review. It was also said that the portion of the draft on performance guarantees and environmental performance bonds might actually fit better here.

84. With respect to other issues, the discussion of data and IP issues was recalled, and it was said that treatment of these issues might fit well in the draft's section on monitoring. In this regard, it was stated that the European Union's General Data Protection Regulation would soon come into effect and that some guidance could be given regarding extraterritorial effects of data protection rules. It was then said that the draft had raised the issue of transparency in the tendering process by which an investor was selected by the State to make an agricultural investment. It was further said that transparency in this process should be dealt with in the Guide, and it was recalled that this issue would be treated in the draft on contract formation and form (WP.5).<sup>7</sup> In that regard, it was mentioned that the UNCTAD-World Bank "Knowledge into Action" Note regarding investor screening could be a useful resource. Relatedly, it was stated that transparency aspects of PPPs should be treated as well, whether in this draft or in the one of contract formation and form.

#### **J. Chapter 4 – Contractual Non-Performance (WP.11)**

85. For the presentation of the draft, it was said that it had been prepared to be consistent with the in-progress outline and that it would be more fully developed in light of the Working Group's input. It was further said that it included some possible examples for the various excuses and remedies covered in the draft and that these examples would be reviewed and expanded in the lead up to the Working Group's fourth meeting.

86. With respect to general comments, it was said that the draft could be tailored more to the specificities of agricultural land investment contracts and, subject to the development of all of the various drafts, could be further tied into the other parts of the future Guide through cross-references. It was then said that, in dealing with the specificities of these contracts, there could be additional content regarding legitimate tenure right holders and possible recourse for them, whether as a party to the main agricultural land investment contract, to a linked contract or as a third-party beneficiary. It was suggested that the length of the draft was perhaps too long compared to the length of the other drafts. It was stated in reply that the draft could indeed be more tailored to agricultural land investment contracts, include additional content on legitimate tenure right holders and be shortened through references not only to other portions of the Guide but also to other instruments and guidance documents. It was further stated that the introduction to the Chapter would be revised in this regard.

87. With respect to the part on excuses, it was said that the initial paragraphs could more clearly lay out the importance of excuses and that well-drafted clauses on them would provide greater legal certainty. Regarding force majeure, it was queried whether protests or a brushfire that destroyed all of the crops qualified and whether the section should deal more with changes in government. It was suggested that, in order to avoid confusion, the relevant subsection could just be entitled "Qualifying events", and it was acknowledged that the current title had been taken verbatim from the in-progress outline and could indeed be changed. Regarding the consequences of a force majeure event, it was queried whether the delay arising from the climatic conditions contemplated in paragraph 13 was necessarily best practice. Regarding the contractual allocation of risks, it was said that this portion could be streamlined and could point out that suspension of obligations was preferable to termination.

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<sup>7</sup> See note 6 *supra*.

For the portion on change of circumstances, it was said that this portion could also be streamlined and more tailored to the agricultural context.

88. With respect to the section on additional considerations for States regarding excuses, it was said that the section should address questions arising in the international investment law context, in particular whether the defence of necessity might be available and how it related to the various excuses discussed in the Chapter. It was also said that the section could address how that international investment law context related to whether the host-State could be liable for the actions of its populace (e.g. riots and looting). Stabilisation clauses were mentioned in connection with this discussion, and it was said that they, if dealt with, should be treated in the draft on protection of investment and regulatory autonomy (WP.9) or in the contemplated checklist of issues.

89. With respect to the part on remedies for breach, it was said that the introductory paragraphs could clarify what the part was ideally trying to achieve and, as a whole, set the stage for a section that was more tailored to agricultural land investment contracts. It was also said that those paragraphs could touch upon the importance of co-operation between the parties, including with respect to the duty to mitigate. It was stated that that duty was important for demonstrating that a party that had suffered damage could not just refrain from doing anything and that inspiration in this regard could be drawn from the Legal Guide on Contract Farming. It was then queried whether the duty of good faith and fair dealing might be used creatively to provide effective remedies for non-performance.

90. With respect to the section on types of breaches and contractual clauses on remedies, it was said that examples of breaches by the investor could be provided and that paragraph 35 could be expanded. It was also said that a cross-reference could be made to Chapter 3's treatment of local content clauses. Regarding interference by the other party, it was stated that interference by the local community should be addressed. Regarding contractual clauses on remedies, it was said that the discussion of exemption clauses could give rise to concerns and should be clarified. It was further said that the repetition in paragraph 42 could be reduced and that that paragraph could be particularly relevant to legitimate tenure right holders. It was then said that the example provided in footnote 15 should be deleted.

91. With respect to the overview of remedies, it was queried whether text could be included on specific performance for the failure to perform certain types of obligations. It was said in reply that this issue was dependent on the *lex contractus*. It was further said that the importance of specific performance could be emphasised because it could promote the continuation of the contract. For price reductions, it was queried whether this issue was relevant to agricultural land investment contracts. It was said in reply that such reductions could be quite important, for example, if the land did not fulfil expectations or if the investor did not fulfil its commitments. It was further said that it should, subject to ongoing review, be retained. For termination, it was queried whether the effects of termination on the main contract and a linked contract, if any, could be clarified. For damages, it was said that the draft could address how legal costs were awarded, as well as attorneys' fees. It was also queried generally whether the Guide should address the seeking of injunctive relief, for example, to prevent an investor from using the land.

## **K. Chapter 5 – Transfer and Return (WP.12)**

92. For the presentation of the draft, it was said that the draft sought to address issues and potential safeguards arising in the context of the land's transfer and its return at the conclusion of the lease. It was further said that the draft would indeed benefit from the Working Group's input and would be revised accordingly.

93. For the part on transfer, it was said generally that transfers must be viewed as a relationship and that such relationships did not always come across in this part. In this regard, it was mentioned

that the transfer might involve not just the land, contract or certain rights or obligations, but also transfer of the investor, which could be purchased by another entity. It was stated that the draft could lay out more clearly the practical relevance of this chapter, in particular with respect to transfers occurring because of business takeovers and with respect to bankability as the ability to transfer the land was typically important for obtaining financing. In this regard, the addition of examples was emphasised because they could help to demonstrate the chapter's practical relevance (e.g. for transparency, mortgageability and insurability of the investment) and provide useful guidance.

94. Regarding the framing, it was said that some of the drafting was framed more for legal counsel for investors than those for States. In this regard, it was stated that paragraph 3 suggested a very permissive regime for the land to be transferred from one investor to another. It was said that, from the perspective of the State, there had to be full prior disclosure of the transfer, that this disclosure could arise from the duty of good faith and fair dealing and that these points could be emphasised in a revised paragraph 3. Similarly, it was pointed out that the statement regarding the "mere transfer of rights" in paragraph 10 could also give rise to the impression that the investor could do what it wanted in that regard, and it was subsequently queried whether the treatment of a transfer of rights was really practical or necessary because it was much more likely that a transfer of the land or the investor would occur. It was then said that the issue, in general, was not to know when notification of a transfer had to be made, but that the investor had to disclose any transfer to the State and local communities. It was stated that, in this regard, paragraph 25 could be further developed and that, if transfer was not disclosed, there should be a connection to possible remedies, either in this draft or the draft on contractual non-performance.

95. Regarding legitimate tenure right holders and local communities, it was queried whether a new investor – for example, taking over a particular lease or taking over an entity that held a lease – would have to identify any legitimate tenure right holders and other stakeholders with respect to that land. It was stated that the State would have a role to play in this regard as investors might be tempted not to reach out to legitimate tenure right holders or local communities to avoid having to consult or obtain their consent. It was further queried whether the consultation process was an ongoing one. It was said that questions could also be asked about whether the FPIC process mentioned in paragraph 12 was an ongoing one and, in particular, whether a transfer triggered a new FPIC requirement. It was emphasised in reply that FPIC was indeed a continuous process, though it was queried whether, for example, a takeover of one business entity by another could be tied to the consent of an indigenous community. In this regard, the difference between the FPIC requirement for investments affecting indigenous peoples and consultations with local communities was emphasised, and it was said that the latter was – consistent with the VGGT – good practice. It was stated in reply, however, that consultations could be considered as required. It was then said that, with respect to paragraphs 11-14 specifically, the discussion of local communities and ILO Convention No. 169 could be reframed, including to better align that discussion with the VGGT. It was also stated that these paragraphs should contemplate the continuation of obligations in linked agreements with legitimate tenure right holders and local communities.

96. Further to the discussion regarding legitimate tenure right holders and in connection with the transfer of the investor itself, it was suggested that change of control clauses could provide an effective mechanism for dealing with this situation and the draft could map out how such clauses could cover various situations (e.g. direct transfer of the land, indirect transfer of it via takeover of the investor, or a change in shareholders). It was said that paragraph 16 should address the specificities of direct and indirect changes in control. It was then said that issues of liabilities and legacy should also be dealt with in connection with the transfer of the investor itself.

97. For the part on return, it was queried generally whether return meant the return of the tenure rights only to legal tenure right holders or also to legitimate tenure right holders. It was further queried whether the legitimate tenure rights would, in practice, be recognised and respected upon

return under domestic law. It was pointed out that return to the original holders was, in most cases, preferable but perhaps not all in cases (e.g. when very productive land might revert to significantly less production and affect food security). It was then said that the statement in paragraph 40 that certain conditions “should not be onerous for the investor” was not sufficiently balanced in light of the Guide’s purposes and target audience and should be clarified.

#### **L. Chapter 6 – Dispute Resolution (WP.13)**

98. For the presentation of the draft, it was said that the input on the draft from the Working Group’s previous session had resulted in changes, including reformulating it to deal with access to effective remedy and expanding the portion on expert determinations. It was also said that treatment of investor-State treaty arbitration had been added, but that the arbitration section had become quite long. It was suggested that, in light of the Working Group’s earlier discussion, there might be some reconsideration of the usage of the term “third party” in the chapter.

99. With respect to general comments, it was suggested that the chapter, in some ways, read too much like a textbook, and it was queried whether some of the topics should be left out, such as with respect to enforcement. It was said in reply that the chapter could be more tailored to agricultural land investment contracts generally and take more into consideration possible issues with respect to legitimate tenure right holders. It was suggested that, to do so, there could be a general discussion of advantages and disadvantages with respect to each of the possible mechanisms. It was said in this regard that the section on grievance mechanisms seemed to be the most tailored to agricultural land investment contracts and could serve as a model for tailoring the other possible mechanisms. It was also said that there could be more specificity through references to the UN Guiding Principles. Regarding legitimate tenure right holders, it was suggested that, while the draft was tailored to contracts between investors and States, it could further address aspects related to contracts between investors and a community or to linked agreements which provided benefits to such holders or local communities. It was said in reply to the latter point that the draft had, as guided by the in-progress outline, focused on bipartite transactions between investors and States, but that it could be expanded to include legitimate tenure right holders and local communities. It was also suggested that the chapter could treat the issue of asset-less parties, such as shell companies, which might create dispute resolution difficulties, including for the recovery of any damages. It was said that this issue could be flagged and that any discussion could refer to capitalisation requirement clauses or performance bonds, which were to be addressed in Chapter 3’s sections on financial arrangements and monitoring and compliance respectively.

100. With respect to the sections on access to effective remedy, it was said that the “access to effective remedy” formulation might be too restrictive with respect to the content covered. It was said in reply that the formulation could be exchanged for a better one, but that it seemed both to work sufficiently and to provide symmetry. In connection with paragraph 7, it was first suggested that the draft could allude to the possibility that investors might try to insist on a choice of forum clause. It was then said that that paragraph might suggest that all agricultural land investment contracts would have an arbitration clause, which was not always the case in practice. It was said that the paragraphs 7-8 could be clarified to be more descriptive, without implying that arbitration clauses were always used.

101. With respect to the section on grievance mechanisms, it was said that the description of what a grievance mechanism was should be broadened. Reference was made to paragraph 3.2 of the VGGT, stating that “[b]usiness enterprises should provide for and cooperate in non-judicial mechanisms to provide remedy, including effective operational-level grievance mechanisms, where appropriate, where they have caused or contributed to adverse impacts on human rights and legitimate tenure rights.” It was said that, as reflected in that statement, the establishment of grievance mechanisms fell short of being an obligation and that the draft might need to be clarified. It was stated in reply that the section was inspired by the UN Guiding Principles, that that reference

to the VGGT could be useful and that paragraph 16 could be clarified in that regard. It was then said that paragraph 18 could be a bit stronger, including by changing the “may adopt” to “should adopt” with respect to effectiveness criteria from the UN Guiding Principles.

102. With respect to the section on expert determination, it was suggested that it could be clarified to make clear that the determinations related to issues of fact but not issues of law.

103. With respect to the section on arbitration, it was said that it might be useful to have a review of arbitration’s advantages and disadvantages, the latter of which including that arbitration could be used as a way of denying access to courts and preventing or minimising the possibility for discovery. It was then said that the section could elaborate upon the differences between arbitration based on a contractual clause and that based on an investment treaty or domestic investment code. It was further said that the treaty-based component could be made more directly relevant to the various parties and stakeholders. It was said in reply those aspects could be addressed, but that the section was already quite long and that the length might have to be managed in order not to risk implying that arbitration was the most important option.

104. In connection with arbitration, there were deliberations on the following related issues and the extent to which they should be addressed in the section:

- Umbrella clauses: it was said that the section could refer to the need for caution on the part of States with respect to umbrella clauses. It was stated in reply that it might be problematic to refer to such clauses, which would essentially flag them for consideration by the parties. It was then suggested that they could be discussed in a cautious and neutral way and that States should consider decisions related to them very carefully.
- Immunity: it was queried whether the section should address, for example, the situation in which an arbitration clause with a State would be deemed to be invalid because the State was immune from jurisdiction. It was said that such immunity, according to current trends, was in practice waived.
- Choice of forum clauses: it was said that such clauses were often exploited through the selection of a distant forum, which made a mandatory arbitration process highly impractical for the economically disadvantaged.
- Governing law clauses: it was queried whether – as part of more expansive deliberations regarding governing law, which could come up in a few different chapters in the in-progress outline – the Guide should treat controversial clauses (e.g. governing law, stabilisation, umbrella), which in effect might draw attention to them. It was said in reply that, though governing law or other clauses could be controversial, the purpose of the Guide was to provide information, offer guidance and promote greater and more responsible agricultural investment, so it was better not to shy away from such clauses. For governing law, it was recalled that the law of the State should be applied to matters of lands within its borders. In this regard, reference was made to Article 24 of the EU’s Brussels I Regulation, by which exclusive jurisdiction concerning rights in land was held by courts where the land was situated. It was pointed out that this reference overlapped with choice of forum issues. It was further pointed out, however, that some investors might push for a governing law clause, by which a law other than that of the host-State would be applied, as it might be a condition for them to obtain financing. It was also pointed out that, though the domestic law would apply, it could be supplemented by relevant international instruments, such as the UNIDROIT Principles. It was said that a cautious approach should be taken to the issue of governing law, for which more information could be gathered by the Secretariat through the canvassing of available agricultural and mining contracts. It was further said that, subject to that research, a brief paragraph could be prepared for incorporation into the chapter on dispute resolution or

elsewhere that would explain the clause while emphasising that the law of the State in which the land was located should be applied.

105. With respect to the part on judicial dispute resolution, it was said that the part should address issues regarding limitation periods. It was then said that limitation issues could arise under arbitration too and might have to be mentioned there as well. Regarding domestic courts, it was suggested that the reference to the United States' Alien Tort Statute in paragraph 39 should be deleted. Regarding international and regional courts, it was suggested that paragraph 41 could be expanded, in addition to human right matters, to include environmental matters. It was then suggested that the discussion of diplomatic protection in paragraph 42 might not be highly relevant to the context of agricultural land investment contracts and could be eliminated or reworded.

#### **M. Drafting and Revising Guidelines**

106. In concluding its review of the Working Papers, the Working Group considered where to treat additional issues (e.g. data and IP rights, project failure, collateral) and to list them, as necessary, in the draft in-progress outline. In connection with these considerations, the Working Group also discussed key drafting and revising guidelines to assist with the preparation of revised drafts following the session. In this regard, the Working Group focused on the scope of the Guide, key terminology, the framing of guidance, the level of detail to be provided and references and citations.

107. For the scope of the Guide, the Working Group's deliberations focused on whether the Guide should cover only so-called investor-State contracts or also so-called investor-community contracts. Earlier discussions in this regard were recalled (see, e.g., paragraph 14 *supra*), and further views were exchanged, in particular with respect to the feasibility – as a matter of drafting – of including both within the Guide's scope. In this regard, the added value that treating the wide spectrum of investor-community contracts would bring to the Guide was emphasised. It was again recommended that, while leases from private landowners would generally fall outside the scope, the guidance provided might nevertheless be applicable to those contracts.

108. For key terminology, in addition to the Working Group's deliberations with respect to the draft descriptions and definitions of terms in the draft Introduction (see paragraph 20 *supra*), the Working Group's deliberations focused on identifying a suitable term for the party that would be offering the land rights under the lease. It was said that a term like "lessor" might not be suitable and, following an exchange of views, it was recommended that, to be consistent with the various possible parties covered by the Guide and to ensure that the various drafts could be harmonised, the term "grantor" should be used.

109. For the framing of guidance, the Working Group discussed the importance of reviewing the drafts and the guidance provided to ensure consistency with respect to what "must" be done (i.e. in terms of obligations), what "should" be done (i.e. in terms of non-binding international standards or principles or best practice) and what options the parties might consider with respect to various issues. In this regard, it was recalled that the Secretariat would review and suggest revisions to the respective drafters for their consideration.

110. For the level of detail to be provided and references and citations, the Working Group discussed its aim to produce a concise Guide, which added value by offering private law guidance on important issues for improving agricultural land investment contracts (e.g. with respect to contractual mechanisms for involving legitimate tenure right holders or to possible contractual safeguards for protecting against negative impacts), while at the same time referring to other inter-governmental instruments and guidance documents where appropriate. In this regard, the Working Group again

emphasised the importance of creating checklists of issues and using such references as a means of creating a holistic instrument, yet not one that was many hundreds of pages long.

111. Overall, the Working Group recommended that the Secretariat prepare a brief two-page document setting forth drafting and revising guidelines along these lines that would first be reviewed by the Working Group and would then assist with the preparation of revised drafts.

## **5. Organisation of future work**

112. 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 revised drafts should be prepared at least one month in advance of the Working Group's next meeting, so that the Secretariat could assemble a substantially complete draft of the Guide for review at that meeting.

113. Regarding stakeholder engagement, the importance of consultations with stakeholders, in particular civil society, private sector and State counsel was again emphasised. In considering various ways in which input on the drafts could be obtained, it was noted that the Secretariat could seek to participate in the International Bar Association's upcoming Annual Meeting (Rome, 7-12 October 2018), for which the Agricultural Law Committee was organising an event on "Sustainable investment in agriculture" (8 October 2018). It was also noted that UNIDROIT should submit a request to hold a formal side-event on the future Guide at CFS 45 (Rome, 15-20 October 2018). It was then suggested that, once the drafts had been revised, they could be made more broadly available and used to seek input directly from civil society, private sector (including the Practising Law Institute or the Practical Law Company, see paragraph 16 *supra*) and State counsel (including through the various contacts of members of the Working Group).

114. Regarding the schedule, the Working Group decided to hold an interim teleconference to discuss recent developments, the drafting and revising guidelines and overall progress on the work on 2 July 2018. The Working Group then agreed to hold its fourth meeting in Rome on 9-11 October 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 not only the IBA and CFS events, but also briefly recalled the plan for an eventual open online consultation – similar to what had been done with drafts of the Legal Guide on Contract Farming and the VGGT – and a series consultation events to be 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.

## **6. Any other business and closing of the meeting**

115. Seeing no requests for the floor, the Chairman, Mr Moreno Rodríguez, closed the meeting and expressed gratitude to the experts and representatives for their participation and ongoing contributions.

**ANNEX 1****LIST OF PARTICIPANTS****Third Meeting of the UNIDROIT Working Group  
on Agricultural Land Investment Contracts****Rome, 25-27 April 2018****WORKING GROUP MEMBERS / EXPERTS**

Mr José Antonio MORENO RODRÍGUEZ  
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ALTRA Legal  
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## OTHER ORGANISATIONS

### International Land Coalition (ILC)

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Global Policy Advisor

### Columbia Center for Sustainable Investment (CCSI)

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Head: Land and agriculture  
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### International Institute for Sustainable Development (IISD)

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Advisor, Agriculture and Investment

### World Farmer's Organisation (WFO)

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

### Secretariat for the Private Sector Mechanism of the UN Committee on World Food Security

Mr Brian BALDWIN  
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### Other Participants

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Mr Maël DESCHAMPS  
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Mr Jasper LUBETO  
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### UNIDROIT Secretariat

Ms Anna VENEZIANO  
Mrs Frédérique MESTRE  
Mr Neale BERGMAN

Secretary-General *a.i.*  
Senior Officer  
Legal Officer

**ANNEX 2****Third Meeting of the UNIDROIT Working Group  
on Agricultural Land Investment Contracts****Rome, 25-27 April 2018****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. Review of chapter drafts and in-progress outline
5. Organisation of future work
6. Any other business
7. Closing of the meeting

**ANNEX 3**

**LIST OF DOCUMENTS**  
**for the Working Group's third meeting (Rome, 25-27 April 2018)**

<b>WP.1</b>	PREFACE AND INTRODUCTION
<b>WP.2</b>	Chapter 1 – THE LEGAL FRAMEWORK
<b>WP.3</b>	Chapter 2 – PARTIES, FORMATION AND FORM Part I: Parties
<b>WP.4</b>	Chapter 2 – PARTIES, FORMATION AND FORM Parts II-III: Feasibility Studies and Impact Assessments
<b>WP.5</b>	Chapter 2 – PARTIES, FORMATION AND FORM Part IV: Contract Formation and Form
<b>WP.6</b>	Chapter 3 – OBLIGATIONS AND RIGHTS OF THE PARTIES Parts I-II(e): Introduction and Land Tenure
<b>WP.7</b>	Chapter 3 – OBLIGATIONS AND RIGHTS OF THE PARTIES Part II(g): Infrastructure
<b>WP.8</b>	Chapter 3 – OBLIGATIONS AND RIGHTS OF THE PARTIES Parts II(f), III-V: Land Development, Finance, Social and Environmental Obligations (Investor Obligations)
<b>WP.9</b>	Chapter 3 – OBLIGATIONS AND RIGHTS OF THE PARTIES Part VI: Protection of investment and regulatory autonomy
<b>WP.10</b>	Chapter 3 – OBLIGATIONS AND RIGHTS OF THE PARTIES Part VII: Transparency, compliance and monitoring
<b>WP.11</b>	Chapter 4 – CONTRACTUAL NON-PERFORMANCE
<b>WP.12</b>	Chapter 5 – TRANSFER AND RETURN
<b>WP.13</b>	Chapter 6 – DISPUTE RESOLUTION
<b>WP.14</b>	Research Fellowship: Contribution on Environmental Aspects for use in various draft chapters (e.g. for Chapters 1, 3(V))
<b>WP.15</b>	UW LLM Collaboration: Examining land tenure and gender issues relating to agricultural investment in Africa, South Asia and South America

**ANNEX 4**

**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**

- Brief summary of the Guide and statement that the Guide seeks, inter alia, to:
- Respond to the need for greater and more responsible investment in agriculture for sustainable development, including 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 State governments and the balance of power between investors and State governments; and
- *Support tenure* holders’ knowledge of their rights, protection of those rights by State governments and respect of those rights by investors.

**II. APPROACH AND HOW TO USE THE GUIDE**

- 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)
- 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. UN Guiding Principles, UPICC, UNIDROIT-FAO-IFAD Legal Guide on Contract Farming, VGGT Technical Guides)

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

**I. THE NEED FOR GREATER AND MORE RESPONSIBLE INVESTMENT IN AGRICULTURE AND THE ROLE OF AGRICULTURAL LAND INVESTMENT CONTRACTS**

- The notion of agricultural land investment contracts, including why such contracts are important and being treated in the Guide (e.g. need for greater investment and

the opportunity for such contracts to shape that investment in a more responsible and sustainable way)

- Issues that have been identified with respect to such contracts, including with reference to data which highlights those issues:
  - 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 State governments or respected by investors, including difficulties in identifying such holders, and the need to promote greater recognitions of States' obligations and investors' responsibilities, particularly to tenure holders
  - Gaps and difficulties in the implementation of domestic laws
  - Lack of transparency
  - Lack of effective grievance and dispute resolution mechanisms
- Preparing, negotiating, implementing and reviewing the contracts in a responsible, inclusive and sustainable way, in particular by incorporating necessary safeguards, can support the realisation of benefits and avoidance or mitigation of negative impacts
- Agricultural investment and land tenure issues are complex, not only technically but also socio-politically. Accordingly, there may be some issues that prospective and contracting parties cannot adequately address through agricultural land investment contracts and, in these instances, careful consideration should be given to whether a particular investment should proceed

## **II. SCOPE OF THE GUIDE**

- Introduction to subpart describing the guide's scope, in particular with respect to (A) various contractual arrangements and (B) possible parties to those arrangements

### **A. Contractual arrangements**

- Description of agricultural land investment contracts in practice, such as leases, concessions/investment agreements, purchases (i.e. a more technical discussion than in Part I above)
- Identification of those contracts falling within the Guide's scope, specifically leases and concessions/investment agreements for agricultural land (including not only new leases/agreements to be negotiated, but also existing ones)
- Briefly highlight complexities in contractual arrangements (including JVs, PPPs, etc.), while noting that some of the complexities (e.g. corporate governance issues relating to JVs) are beyond the Guide's scope
- Include descriptions/definitions for the following key terms, with cross-reference to glossary: Agricultural land investment contract; and Tenure

## **B. Parties**

- Description of various possible parties to agricultural land investment contracts
- Note that, in practice, State governments, legitimate tenure right holders, local communities, customary authorities or private landowners may be grantors
- The Guide, however, is tailored to contracts between investors and State governments which lease agricultural land, as well as those involving legitimate tenure right holders, local communities and customary authorities, including as possible parties to agricultural land investment contracts or as stakeholders to be consulted in the preparation, negotiation and implementation of such contracts
- Include descriptions/definitions for the following key terms, with cross-reference to glossary: Investor; Grantor; State government; Local community; Customary authority; Legal tenure right holder; and Legitimate tenure right holder

## **CHAPTER 1 – THE LEGAL FRAMEWORK**

### **Introduction**

- Freedom of contract
- Limitations on that freedom for agricultural land investment contracts
- Mandatory rules from various sources – domestic and foreign
- Relevant areas

## **I. 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 (including, for example, description of native title)

### **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], customs and general principles
- Soft law instruments and guidance documents, including standards documents (e.g. VGGT; CFS-RAI Principles; UPICC; UNIDROIT-FAO-IFAD Legal Guide on Contract Farming; SDGs; UN Global Compact; UN Guiding Principles; OECD Guidelines for multinational enterprises, OECD-FAO Guidance for Responsible Agricultural Supply Chains; private standards (such as the Global Reporting Initiative) [for the latter, see, e.g., Legal Guide on Contract Farming at 26-27])
- Judicial decisions and scholarly writings (regarding, for instance, need for due diligence and environmental impact assessments)

## II. RELEVANT AREAS OF LAW AND REGULATION

- Land tenure and administration (including customary rules and tenure systems)
- Finance (e.g. tax, accounting rules and anticorruption measures)
- Human rights (including food security, gender, youth and labour)
- Social obligations/responsibilities
- Environment (including water)
- Protection of investment (including national investment codes and IIAs) and regulatory autonomy
- Transparency, compliance and monitoring (including need for competitive, inclusive and transparent process involving all stakeholders and for draft contract publication/disclosure) [VGGT, para. 11.7; UN Principles for responsible contracts, no. 10, IISD Model Contract, 12.0]

## CHAPTER 2 – PARTIES, DUE DILIGENCE, AND FORMATION

### I. PARTIES

- Brief introduction to possible parties to the contract and relevant stakeholders, in particular legitimate tenure right holders
- Roadmap for the chapter

#### A. Types of contracts

1. **Investor-Grantor Contracts/Transactions**
2. **Incorporation of Legitimate Land Right Holders**
3. **Tripartite** Contracts/Transactions
4. Linked **Contracts**
5. Third Party **Beneficiary** Structures

#### B. 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]

##### 1. Signatories to the agricultural land investment contract

- Investor(s)
  - Identity and nationality transparency, including issue of beneficial ownership
  - Corporate organisation [GCAP Model Lease, Section 16]
  - Brief reference to the need for investors to exercise due diligence and FPIC, with cross reference to Part II below on due diligence

- Grantor(s)
  - Legal tenure right holder(s) (e.g. State government, local community, private individual)
- Legitimate tenure right holder(s) and local community (if signatories), including a discussion why in some cases legitimate tenure right holder(s) are signatories and in other cases they are not [VGGT, paras. 3.2, 9.1]

## 2. Stakeholders

- Legitimate tenure right holder(s) and local communities who are not signatories [VGGT, paras. 3.2, 9.1]
- Other possible stakeholders (including third parties)

## II. DUE DILIGENCE [OECD-FAO Guidance for Responsible Agricultural Supply Chains]

### A. Identification of potential parties and stakeholders

1. Stakeholder Mapping
2. Consultation
  - Principles of Meaningful Consultation
  - Free, Prior, Informed Consent

### B. Identification of land and potential impacts [GCAP Model Lease, Appendix 1; IISD Model Contract, para. 6.1]

1. Land and feasibility (including cross references to Chapter 3.II.A below)
  - Suitable land availability and valuation [VGGT, para. 18.1 et seq.; VGGT Technical Guide No. 4 at 37; VGGT Technical Guide No. 11; UN Habitat-FIG-GLTN Policy Guide on Valuation of Unregistered Lands]
    - Process of identifying land and properly valuing it (e.g. by whom, using which standards and which services)
    - Best practices in this regard
  - Access to resources
  - Business plans (with link to the agricultural land investment contract) and purpose of investment (the latter previously Chapter 3.II.E) [VGGT Technical Guide No. 4 at 87; GCAP Model Lease, Section 11]
2. 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]

- Land tenure (including legitimate tenure rights) and land acquisition aspects (the latter previously Chapter 3.IV.C)
- Human rights and social obligations/responsibilities (including food security [CFS-RAI Principles 1-2; VGGT, paras. 12.1, 12.4, 12.12], gender, youth and labour [CFS-RAI Principles 2-4])
- Environment [GCAP Model Lease, Appendix 2] (including impacts on water and other natural resources and access to those resources [CFS-RAI Principles 5-6]) (including cross references to Chapter V below)
- Economic aspects [CFS-RAI Principle 10]

### **III. CONTRACT FORMATION** [Legal Guide on Contract Farming at 57; UPICC, Chapter 2]

#### **A. Negotiations**

- Capacity, representation, consent
- Role of those who intervene or assist in contract negotiation (e.g. NGOs/CSOs)
  - Public authorities
  - NGOs / CSOs
  - Others

#### **B. Tendering Process / Transparency** (with cross-references to Chapter 1.II and Chapter 3.VII)

#### **C. Required contractual content and form**

- Consequences for breach of such requirements
- Formalities for leases of agricultural land

## **CHAPTER 3 – OBLIGATIONS AND RIGHTS OF THE PARTIES**

### **I. INTRODUCTION**

- 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 contract, the parties to that contract, and other circumstances
- Recognising that the topics might not be addressed in this order
- 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/responsibilities; 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) (including reference to Chapter 2.B.1 above)
- 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-references to various aspects of Chapter 2, including Chapter 2.II.B.2 on legitimate tenure rights) and highlighting the importance of the issue
1. 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.]
  2. 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), with cross-reference to Chapter 3.II.D regarding infrastructure aspects below

### C. Land/project development (formerly Chapter 3.II.F) [GCAP Model Lease, Section 11]

- Development plans and clauses (with cross-reference to Chapter 2.II.B.1 on land and business plans)
- Key performance indicators
- Project failure (with cross-reference to Chapter 5)

### D. Infrastructure aspects [ISLP/CCSI Guide, part 2.7]

1. Types of infrastructure
2. Rights (e.g. investor, State, local communities) (with cross-references to immediately preceding sections on related rights and land/project development)
3. Fees and Financing

4. Other issues

**E. 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]

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

1. Duration

- Start and end dates
- Contractual duration
- Statutory duration
- Drawbacks of limitations on period (e.g. with respect to collateralisation) [UNCITRAL PFIP Guide at 151 et seq.]

2. Renewal and renegotiation (e.g. terms for extension/renewal of the lease, including cross-reference to key performance indicators in section C above and incentives for renewal) [GCAP Model Lease, Section 4]

**III. FINANCE/FINANCIAL ARRANGEMENTS** [GCAP Model Lease, Section 6; IISD Model Contract, para. 7.0 et seq.; ISLP/CCSI Guide, part 2.11]

- Introduction: Public revenues are an important way in which the State 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.
- 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))
- Policy choices
- Fixed income versus revenue sharing models
- Incentives (e.g. the importance of a cost-benefit analysis on financial/fiscal incentives prior to their allocation; the importance to ensure that incentives induce responsible - as opposed to irresponsible - business conduct; risks associated with granting incentives ad-hoc or making them only available to a certain type of investor; and modalities to ensure that incentives do not induce moral hazard in business conduct (i.e. by granting incentives only ex-post, etc.)) [Report to the G-20 Development Working Group by the IMF, OECD, UN and World Bank on Options

for Low Income Countries’ Effective and Efficient Use of Tax Incentives for Investment]

- Other contractual issues (e.g. timing and form of monetary payments, and interest accrual on late payments; mechanisms for periodic revisions; capitalisation; collateralisation)

#### **IV. SOCIAL OBLIGATIONS/RESPONSIBILITIES** [GCAP Model Lease, Section 7; ISLP/CCSI Guide, part 2.13]

- 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)
- Importance of local/domestic food security [CFS-RAI Principles 1-2; VGGT, para. 12.12]

##### **A. 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 stable and decent 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
- Youth aspects, including access to employment and career development opportunities
- Monitoring mechanisms and reporting requirements

##### **B. Local content and processing** (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]

##### **C. Contract farming, outgrower schemes and supply chain relations** [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))

**D. 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, daycare for children of employees).
- 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

**E. Gender, youth and social differentiation**

**F. Cultural heritage** [CFS-RAI Principle 7]

**G. Reporting requirements, monitoring arrangements and sanctions for non-compliance** (with cross-reference to Chapter 3.VII)

**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]

- Agricultural land investments often associated with environmental risks and impacts (including cross references to Chapter 2.B.II above)
- 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 and indicators (cross-reference to Chapter 2.II.B.2); 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 (applicable standards)
- Water, including terms for water abstraction (quantity, timing, payments)
- Waste management
- Project closure (cross-reference to Chapter 5)
- Monitoring, sanctioning and remediation (with cross-reference to Chapter 3.VII below)

**VI. PROTECTION OF INVESTMENT AND REGULATORY AUTONOMY**

- A. Expropriation** (to deal with potential expropriation of the investment, while land acquisition aspects are to be dealt with in Chapter 2.II.B.2 above)
- 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** [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. 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]
- Matters to be monitored
  - Methods (including inspections)
  - Microdata/IP
- B. Reporting and Access to Information**
- Investor reporting and 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]
  - State government transparency
  - Public access to information
  - Protection of confidential information
- C. Key Compliance Issues, Notice and Periodic Review**
- Insurance
  - Possible use of performance guarantees [UNCITRAL PFIP Guide at 136-140] and environmental performance bonds
  - Conservation of premises
  - Delivery of notices [GCAP Model Lease, Section 21; ISLP/CCSI Guide, part 2.25]
  - 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
- Burden of proof
- Consequences
- Contractual allocation of risks through force majeure clauses

#### C. **Changes of circumstances** [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
- Consequences

#### D. **Additional considerations**

1. State governments (including necessity)
2. Legitimate tenure right holders

### II. **REMEDIES FOR BREACH** [Legal Guide on Contract Farming, Chapter 5; UPICC, Chapters 6-7]

#### A. **Types of breach and types of contractual clauses on remedies**

- Breach by the investor
- Interference by the other party [UPICC, art. 7.1.2]
- Contractual clauses on remedies

**B. Overview of remedies**

1. Withholding performance
2. Remedies in kind
  - Late performance
  - Specific performance
  - Corrective actions: the breaching party's right to cure
3. Price reduction
4. Termination
5. Restitution
6. Damages
7. Interest and late payments

**C. The role of the aggrieved party's conduct and renegotiation** (e.g. price reduction or additional period for performance)

1. The role of the aggrieved party's conduct [UPICC, art. 7.1.5]
2. Renegotiation, including co-operation between the parties [UPICC, art. 5.1.3]

**D. Additional considerations**

1. State governments
2. Legitimate tenure right holders

**CHAPTER 5 – TRANSFER AND RETURN** [Legal Guide on Contract Farming, Chapter 6]**I. TRANSFER** [UPICC, Chapter 9; VGGT Technical Guide No. 4 at 75; GCAP Model Lease, Section 17; IISD Model Contract, para. 14.0; ISLP/CCSI Guide, parts 2.16-17]**A. Scope****B. Legality of transfer****C. Transfer of the investor itself****D. Limitations on transfer****E. Importance of disclosure****II. RETURN** [UNCITRAL PFIP Guide at 168 et seq.; ISLP/CCSI Guide, part 2.24]**A. Conditions of the return**

**B. Cost and liabilities**

**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 FROM AGRICULTURAL LAND INVESTMENT CONTRACTS****A. The importance of access to effective justice****B. The provision of access to effective justice****II. NON-JUDICIAL DISPUTE RESOLUTION****A. Grievance mechanisms** [CFS-RAI Principle 9; UN Principles for responsible contracts, no. 9]**B. Expert determination****C. Negotiation, mediation and conciliation****D. Arbitration** (e.g. factors to consider, such as what investors might seek and what 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 and regional courts****IV. ENFORCEMENT OF SETTLEMENTS OR DECISIONS RESOLVING A DISPUTE**

**ANNEX: Collection of issue checklists from each chapter**

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

## ANNEX 5

**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~~

**I. OVERVIEW AND PURPOSE**

~~A.—Brief summary of the Guide~~

- ~~Statement and statement~~ that the Guide seeks, inter alia, to:
- Respond to the need for greater ~~and more responsible~~ investment in agriculture for ~~sustainable development, including~~ 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~~

**II. APPROACH AND HOW TO USE THE GUIDE**

- 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)
- 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~~ ~~UN Guiding Principles~~; ~~U PICC~~, [UNIDROIT-FAO-IFAD Legal Guide on Contract Farming](#), [VGGT Technical Guides](#))

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

~~I.—General introduction to agricultural land investment contracts~~

## I. THE NEED FOR GREATER AND MORE RESPONSIBLE INVESTMENT IN AGRICULTURE AND THE ROLE OF AGRICULTURAL LAND INVESTMENT CONTRACTS

- The notion of agricultural land investment contracts, including why such contracts are important and being treated in the Guide ([e.g. need for greater investment and the opportunity for such contracts to shape that investment in a more responsible and sustainable way](#))
- Issues that have been identified with respect to such contracts, [including with reference to data which highlights those issues](#):
  - 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, and the need to promote greater recognitions of States' obligations and investors' responsibilities, particularly to tenure holders](#)
  - Gaps and difficulties in the implementation of domestic laws
  - ~~Lack~~ [Scope of transparency](#)
  - [Lack of effective grievance and dispute resolution mechanisms](#)
- [Preparing, negotiating, implementing and reviewing the Guide contracts in a responsible, inclusive and sustainable way, in particular by incorporating necessary safeguards, can support the realisation of benefits and avoidance or mitigation of negative impacts](#)
- [Agricultural investment and land tenure issues are complex, not only technically but also socio-politically. Accordingly, there may be some issues that prospective and contracting parties cannot adequately address through agricultural land investment contracts and, in these instances, careful consideration should be given to whether a particular investment should proceed](#)

## II. SCOPE OF THE GUIDE

- [Introduction to subpart describing the guide's scope, in particular with respect to \(A\) various contractual arrangements and \(B\) possible parties to those arrangements](#)

### A. Contractual arrangements

- 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~~

- Identification of those contracts falling within the Guide's scope, specifically leases and concessions/investment agreements for agricultural land (including not only new leases/agreements to be negotiated, but also existing ones)

- ~~Identifying, with examples, what falls within the scope of the Guide~~

- ~~Setting out key~~ Briefly highlight complexities in contractual arrangements (including JVs, PPPs, etc.), while noting that some of the complexities (e.g. corporate governance issues relating to JVs) are beyond the Guide's scope
- Include descriptions/definitions for the following key terms, with cross-reference to glossary: Agricultural land investment contract; and Tenure

## B. Parties

- Description of various possible parties to agricultural land investment ~~contract, investor, host State government, legal tenure right holder~~ contracts
- Note that, in practice, State governments, legitimate tenure right ~~holder~~ holders, local communities, customary authorities or private landowners may be grantors
- The Guide, however, is tailored to contracts between investors and State governments which lease agricultural land, as well as those involving legitimate tenure right holders, local communities and customary authorities, including as possible parties to agricultural land investment contracts or as stakeholders to be consulted in the preparation, negotiation and implementation of such contracts
- Include descriptions/definitions for the following key terms, with cross-reference to glossary: Investor; Grantor; State government; Local community; Customary authority; Legal tenure right holder; and Legitimate tenure right holder

## CHAPTER 1 – THE LEGAL FRAMEWORK

### Introduction

- Freedom of contract
- Limitations on that freedom for agricultural land investment contracts
- Mandatory rules from various sources – domestic and foreign
- Relevant areas

### I. ~~Sources~~ 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 (including, for example, description of native title)

## 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]; [customs and general principles](#)
  - ~~Soft law instruments (e.g. VGGT; CFS-RAI Principles; UPICC)~~
- ~~Guidance~~ [and guidance](#) documents ~~(, including standards documents)~~ ~~[e.g. (e.g. VGGT; CFS-RAI Principles; UPICC; UNIDROIT-FAO-IFAD Legal Guide on Contract Farming; SDGs; UN Global Compact; UN Guiding Principles; OECD Guidelines for multinational enterprises, OECD-FAO Guidance for Responsible Agricultural Supply Chains; private standards (such as the Global Reporting Initiative) [for the latter, see, e.g., Legal Guide on Contract Farming at 26-27]~~

### ~~I. Relevant areas of law and regulation~~

- [Judicial decisions and scholarly writings \(regarding, for instance, need for due diligence and environmental impact assessments\)](#)

## II. RELEVANT AREAS OF LAW AND REGULATION

- ~~Land tenure~~ [and administration](#)
- ~~Human rights~~ (including ~~food security, gender~~ [customary rules](#) and ~~labour~~ [tenure systems](#))
  - ~~[Social obligations / Protecting and respecting rights]~~
- ~~Environment (including water)~~
- Finance (e.g. tax, accounting rules and anticorruption measures)
- [Human rights \(including food security, gender, youth and labour\)](#)
- [Social obligations/responsibilities](#)
- [Environment \(including water\)](#)
- Protection of investment (including national investment ~~codes~~ [cods](#) 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~~ [need](#) for a competitive, inclusive and transparent process involving all stakeholders
- ~~Draft~~ [and for draft](#) contract publication/disclosure) [VGGT, para. 11.7; UN Principles for responsible contracts, no. 10; ~~IISD Model Contract, para.~~ 12.0]

## CHAPTER 2 – PARTIES, DUE DILIGENCE, AND FORMATION ~~AND FORM~~

### I. Identification of the PARTIES

- Brief introduction to possible parties to the contract and relevant stakeholders ~~(including processes for doing so)~~, in particular legitimate tenure right holders
- Roadmap for the chapter

#### A. Types of ~~parties and relevant stakeholders~~ contracts

##### 1. Investor-Grantor Contracts/Transactions

##### 2. Incorporation of Legitimate Land Right Holders

##### 3. Tripartite Contracts/Transactions

##### 4. Linked Contracts

##### 5. Third Party Beneficiary Structures

~~G.B.~~ 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]

#### 1. Signatories to the agricultural land investment contract

- Investor(s)
  - ~~Transparency in the identity~~ Identity and nationality ~~of each party~~ transparency, including issue of beneficial ownership
  - Corporate organisation [GCAP Model Lease, Section 16]
  - ~~Need~~ Brief reference to the need for investors to exercise due diligence and FPIC ~~(including, with cross references~~ reference to ~~Parts~~ Part II and III below) on due diligence
- Grantor(s)
  - Legal tenure right holder(s) (e.g. ~~host~~ State government, local community, private individual)
- Legitimate tenure right holder(s) and local community (if signatories), including a discussion why in some cases legitimate tenure right holder(s) are signatories and in other cases they are not [VGGT, paras. 3.2, 9.1]

#### 2. Stakeholders

- Legitimate tenure right holder(s) and local communities who are not signatories [VGGT, paras. 3.2, 9.1]

- ~~Other possible parties or relevant stakeholders (e.g. local officials or public notaries)~~
- ~~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])~~

### ~~Feasibility studies~~

## II. DUE DILIGENCE [OECD-FAO Guidance for Responsible Agricultural Supply Chains]

### A. Identification of potential parties and stakeholders

1. Stakeholder Mapping
2. Consultation
  - Principles of Meaningful Consultation
  - Free, Prior, Informed Consent

### B. Identification of land and potential impacts [GCAP Model Lease, Appendix 1; IISD Model Contract, para. 6.1]

1. Land and feasibility (including cross references to Chapter 3.II.A below)
    - ~~Suitable land availability (including access to necessary resources) and and valuation [VGGT, para. 18.1 et seq.; VGGT Technical Guide No. 4 at 37; VGGT Technical Guide on valuation (forthcoming)]~~No. 11; UN Habitat-FIG-GLTN Policy Guide on Valuation of Unregistered Lands]
- ~~A. Development of a business plan~~
- Process of identifying land and properly valuing it (e.g. by whom, using which standards and which services)
  - Best practices in this regard
  - Access to resources
  - Business plans (with link to the agricultural land investment contract) and purpose of investment (the latter previously Chapter 3.II.E) [VGGT Technical Guide No. 4 at 87; GCAP Model Lease, Section 11]
2. 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]
    - Land tenure (including legitimate tenure rights) and land acquisition aspects (the latter previously Chapter 3.IV.C)

- Human rights and social ~~aspects~~ (obligations/responsibilities (including food security [CFS-RAI Principles 1-2; VGGT, paras. 12.1, 12.4, 12.12], gender, youth and labour) [CFS-RAI Principles 2-4])
- Environment [GCAP Model Lease, Appendix 2] (including impacts on water and other natural resources and access to those resources [CFS-RAI Principles 5-6]) (including cross references to Chapter V below)
- ~~Contract formation and form~~ Economic aspects [CFS-RAI Principle 10]

### III. **CONTRACT FORMATION** [Legal Guide on Contract Farming at 57; UPICC, Chapter 2]

#### **A. Negotiations**

- Capacity ~~and~~ representation, consent
- Role of those who intervene or assist in contract negotiation (e.g. NGOs/CSOs)
  - Public authorities
  - NGOs / CSOs
  - Others

#### **B. Tendering Process / Transparency** (with cross-references to Chapter 1.II and Chapter 3.VII)

#### **C. Required ~~contract form and contractual~~ content and ~~consequences~~ form**

- Consequences for breach of such requirements, ~~as well as any formalities~~
- Formalities for leases of agricultural land

## CHAPTER 3 – OBLIGATIONS AND RIGHTS OF THE PARTIES

### ~~I. — Introductory section~~

#### **I. INTRODUCTION**

- 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
- Recognising that the topics might not be addressed in this order
- 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];~~ responsibilities; environment (including water); finance; protection of investment and regulatory autonomy; and transparency, compliance and monitoring)

### ~~I. — Land tenure~~

## 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) [\(including reference to Chapter 2.B.1 above\)](#)
- 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~~references to [various aspects of Chapter 2, including Chapter 2.II.B.2 on legitimate tenure rights](#)) and highlighting the importance of the issue

#### 1. 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.]

#### 2. 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}), [with cross-reference to Chapter 3.II.D regarding infrastructure aspects below](#)

### **C. ~~Duration and renewal~~Land/project development** (formerly Chapter 3.II.F) [GCAP Model Lease, Section ~~4; IISD Model Contract, para. 511~~]

- [Development plans and clauses \(with cross-reference to Chapter 2.II.B.1} on land and business plans\)](#)
- ~~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~~Key performance indicators
- [Project failure \(with cross-reference to Chapter 5\)](#)

### **D. Infrastructure aspects** [ISLP/CCSI Guide, part 2.7]

#### 1. Types of infrastructure

2. [Rights \(e.g. investor, State, local communities\) \(with cross-references to immediately preceding sections on related rights and land/project development\)](#)

3. [Fees and incentives for renewal](#) [~~GCAP Model Lease, Section 4~~] [Financing](#)

4. [Other issues](#)

#### ~~G.E.~~ **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]

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

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

#### ~~D.F.~~ **Land development obligations** [Duration and renewal](#) [GCAP Model Lease, Section ~~11~~4; [IISD Model Contract, para. 5.1](#)]

1. [Duration](#)

- [Start and end dates](#)
  - ~~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)~~

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

- [Finance/Financial obligations](#) [Contractual duration](#)

- [Statutory duration](#)
  - [Drawbacks of limitations on period \(e.g. with respect to collateralisation\) \[UNCITRAL PFIP Guide at 151 et seq.\]](#)
2. [Renewal and renegotiation \(e.g. terms for extension/renewal of the lease, including cross-reference to key performance indicators in section C above and incentives for renewal\) \[GCAP Model Lease, Section 4\]](#)

### ~~II.III.~~ **FINANCE/FINANCIAL ARRANGEMENTS** [GCAP Model Lease, Section 6; IISD Model Contract, para. 7.0 et seq.; ISLP/CCSI Guide, part 2.11]

- Introduction: Public revenues are an important way in which the ~~host-country~~[State](#) 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.
- 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))
- Policy choices
- Fixed income versus revenue sharing models
- [Incentives \(e.g. the importance of a cost-benefit analysis on financial/fiscal incentives prior to their allocation; the importance to ensure that incentives induce responsible - as opposed to irresponsible - business conduct; risks associated with granting incentives ad-hoc or making them only available to a certain type of investor; and modalities to ensure that incentives do not induce moral hazard in business conduct \(i.e. by granting incentives only ex-post, etc.\)\) \[Report to the G-20 Development Working Group by the IMF, OECD, UN and World Bank on Options for Low Income Countries' Effective and Efficient Use of Tax Incentives for Investment\]](#)
- Other contractual issues (e.g. timing and form of monetary payments, and interest accrual on late payments; mechanisms for periodic revisions; ~~and~~[capitalisation; collateralisation](#))

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

- 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)

- ~~Local~~ [Importance of local](#)/domestic food security [CFS-RAI Principles 1-2; VGGT, para. 12.12]

#### ~~D. 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)~~

#### **A. 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 [stable and decent](#) 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~~
- [Youth aspects, including access to employment and career development opportunities](#)
- Monitoring mechanisms and reporting requirements

#### **B. Local content and processing** (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]

#### **C. ~~Outgrower schemes~~ [Contract farming, outgrower schemes and supply chain relations](#)** [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~~

**D. 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, [daycare for children of employees](#)).
- 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~~

**E. Gender, youth and social differentiation**

**F. Cultural heritage** [CFS-RAI Principle 7]

~~• Reporting requirements and monitoring arrangements~~

~~**E.G. Protecting and respecting cultural heritage** [CFS-RAI Principle 7] [sanctions for non-compliance](#) (with cross-reference to Chapter 3.VII)~~

~~**IV.V. Environment**~~ **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]

~~E. Introduction~~

- Agricultural land investments often associated with environmental risks and impacts ([including cross references to Chapter 2.B.II above](#))
- 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; [and indicators \(cross-reference to Chapter 2.II.B.2\)](#); 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 ([applicable standards](#))

~~F. Impact assessment and management plans~~

~~G. Applicable standards~~

- Water, including terms for water abstraction (quantity, timing, payments)
- Waste management
- Project closure ([cross-reference to Chapter 5](#))
- Monitoring, sanctioning and remediation ([with cross-reference to Chapter 3.VII below](#))

~~II. Protection of investment and regulatory autonomy~~~~A. Expropriation and respect for regulatory space [placeholder for resettlement]~~**VI. PROTECTION OF INVESTMENT AND REGULATORY AUTONOMY**

**A. Expropriation** ([to deal with potential expropriation of the investment, while land acquisition aspects are to be dealt with in Chapter 2.II.B.2 above](#))

**F.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]

~~**G.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]

~~**V.VII. Transparency, compliance and monitoring**~~ **TRANSPARENCY, COMPLIANCE AND MONITORING** [GCAP Model Lease, Sections 11-12; ISLP/CCSI Guide, part 2.6]

~~B. Insurance~~~~C. Recordkeeping and audits [IISD Model Contract, para. 5.3]~~~~D. Circumstances under which the lessor can enter the property to inspect the investor's activities and monitor compliance [IISD Model Contract, para. 5.3]~~~~E. Conservation of premises~~

**A. 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~~

• [Matters to be monitored](#)

• [Methods \(including inspections\)](#)

• [Microdata/IP](#)

## **B. ~~Reporting requirements and access to information / disclosure, transparency / revenue~~ Access to Information**

- Investor reporting and 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~~
- State government transparency
- Public access to information
- Protection of confidential information

## **C. Key Compliance Issues, Notice and Periodic Review**

- Insurance
- Possible use of performance guarantees [UNCITRAL PFIP Guide at 136-140] and environmental performance bonds
- Conservation of premises
- Delivery of notices [GCAP Model Lease, Section 21; ISLP/CCSI Guide, part 2.25]
- 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~~ 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

- [Burden of proof](#)

- Consequences

- [Contractual allocation of risks through force majeure clauses](#)

**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~~**

1. [State governments \(including necessity\)](#)

~~Remedies for breach~~ 2. [Legitimate tenure right holders](#)

**II. REMEDIES FOR BREACH** [Legal Guide on Contract Farming, Chapter 5; [UPICC, Chapters 6-7](#)]

**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**

1. [Withholding performance](#)

2. [Remedies in kind](#) ↵

- [Late performance](#), ~~corrective~~

- [Specific performance](#)

- [Corrective actions](#)): [the breaching party's right to cure](#)

- ~~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~~ 3. Price reduction

4. Termination

5. Restitution

6. Damages

7. Interest and late payments

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

1. The ~~breaching~~ role of the aggrieved party's right to cure and cure by non-performing party conduct [UPICC, art. 7.1.45]

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

**D. Additional considerations ~~for host State governments~~**

1. State governments

2. Legitimate tenure right holders

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

**I. ~~Transfer of obligations and rights / assignment~~ TRANSFER** [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~~ parts 2.16-17]

~~A. Scope Transferability of obligations and rights (including change of control [ISLP/CCSI Guide, part 2.17])~~

A.

~~E.~~ B. Legality of transfer

C. Transfer of the investor itself

~~F.~~ D. Limitations on transfer

~~G.~~ E. Importance of disclosure

**II. ~~Return~~ 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)~~

~~A. Liabilities for deterioration~~

A. Conditions of the returnB. Cost and liabilities

**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~~

I. DISPUTES ARISING FROM AGRICULTURAL LAND INVESTMENT CONTRACTS

**A. The importance of access to effective justice**

**B. The provision of access to effective justice**

~~I.—Non-judicial dispute resolution~~

**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 and conciliation**

~~A.—Conciliation~~

**D. 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]

~~I.—Judicial dispute resolution~~

III. JUDICIAL DISPUTE RESOLUTION

**A. Domestic courts**

**B. International and regional courts**

~~I.—Enforcement of settlements or decisions resolving a dispute~~

IV. ~~F~~ ENFORCEMENT OF SETTLEMENTS OR DECISIONS RESOLVING A DISPUTEANNEX: Collection of issue checklists from each chapter

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