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**UNIDROIT Working Group
on Agricultural Land Investment Contracts**

Fourth meeting
Rome, 9-11 October 2018

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

Rome, 9-11 October 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 item¹ - held its fourth meeting at UNIDROIT's seat in Rome from 9-11 October 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 (*excused*); 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; Ms Yuliya Panfil, Associate, Investments at Omidyar Network; Ms Priscila Pereira de Andrade, External Associate Professor and Researcher, Centro Universitário de Brasília. 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 International Institute for Sustainable Development (IISD) and Welthungerhilfe.
3. The complete list of participants for the third meeting is included in Annex 1.

1. Opening of the meeting

4. Mr José Antonio Moreno Rodríguez opened the meeting and, consistent with UNIDROIT's practice,² kindly served as chair. He welcomed the members and representatives to UNIDROIT and, in noting that the Working Group had expanded, he asked everyone to introduce themselves. In doing so, he introduced the Working Group to the new UNIDROIT Secretary-General, Professor Ignacio Tirado, who had assumed his post on 27 August 2018.
5. The Secretary-General thanked the Chairman and expressed his gratitude to all of the members of the Working Group for their contributions thus far to the future Legal Guide on Agricultural Land investment Contracts (the 'Legal Guide' or the 'Guide'). He noted that he was not an expert in the area of agricultural development, but emphasised that he saw great value and significance in the work and promised to continue to prioritise the Guide's preparation, adoption and implementation going forward.

2. Adoption of the agenda and organisation of the meeting

6. For the meeting, the Secretariat had prepared a revised annotated agenda, which contained *inter alia* a proposed provisional order of business and a list of the Working Papers for the session.³ 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) presented the various documentation for the session, as well as the Secretariat's proposed order of business for reviewing the Working Papers in detail.

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

² Cf. UNIDROIT Statute, art. 13(2).

³ UNIDROIT 2018 – Study 80B – WG4 Inf. 1 rev. 2, <https://www.unidroit.org/english/documents/2018/study80b/wg04/s-80b-wg04-inf01-rev02-e.pdf>.

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 third meeting (Rome, 25-27 April 2018), a videoconference was held on 2 July 2018 to discuss developments with respect to the work, drafting and revising notes that had been prepared by the Secretariat for use by the experts in revising their drafts, and various questions regarding the drafts and next steps. It was further recalled that, in conjunction with the Working Group, the Secretariat and Working Group members were participating in various conferences and events to raise awareness about the future Legal Guide and to seek stakeholder input, including presentations in connection with the International Bar Association's Annual Meeting (Rome, 7-12 October 2018) and the CFS' 45th plenary session (Rome, 15-19 October 2018).

10. For the former, Professor James Gathii, a Working Group expert, made a presentation on the future Legal Guide and some of the key contractual issues that it would address as part of a panel on "Sustainable investment in agriculture" that took place on 8 October 2018. Ms Margret Vidar, a representative of FAO, also participated in the IBA panel as a panellist and, together with Professor Gathii, reported to the Working Group that the event successfully raised awareness about the future Legal Guide, as well as an upcoming FAO guide on land tenure due diligence for private sector lawyers, which itself included helpful references to the future Legal Guide. They observed that attendees at that panel signalled significant interest in both of the guides and that it would be useful if they could be made available as soon as possible so that private sector lawyers could start using and benefiting from them.

11. For the latter, Mr Bergman noted that the joint UNIDROIT-FAO-IFAD proposal for a CFS 45 Side Event entitled "Improving Agricultural Investment Contracts and the Contracting Process" had been accepted and that the Side Event would take place on 18 October 2018. The Side Event would be moderated by Secretary-General Ignacio Tirado and included expert panellists – Ms Vidar (FAO), Mr Charles Forrest (IFAD), Mr Lorenzo Cotula (IIED), Mr Brian Baldwin (PSM/CFS) and Ms Ilaria Bottigliero (IDLO) – who would discuss the future Legal Guide, examine some of the key issues and safeguards addressed in it and seek input from participants.

12. The Chairman then asked whether the Working Group would like to discuss further 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 noted that some of the chapters were still drafted as if the Guide's focus was strictly upon agricultural land investment contracts between investors and governments. It was pointed out that, as set out in the draft Preface and Introduction, the Guide was to focus on contracts not only between investors and governments, but also between investors and local communities. Similar to previous meetings, there were discussions regarding how best to cover both sets of contracts and the difficulties in drafting some sections to cover both situations. These discussions took place both at this stage of the meeting in the context of general comments and when the various Working Papers were reviewed. Overall, the Working Group confirmed that the Guide should adopt what some experts referred to as a bifocal approach (i.e. covering both sets of contracts within its scope), and further points regarding the implementation of this approach were made in connection with the review of the chapter drafts (see Part 4 below).

14. Regarding drafting and style in particular, it was observed that, while many of the drafts were much improved, there were still some inconsistencies in terminology, repetition in treatment of certain issues and the need for more cross-references. It was emphasised that, following the receipt

of the input from the Working Group, the Secretariat, in conjunction with the experts, would undertake to consolidate the various drafts into a single document and, in doing so, seek to harmonise the various terminology and style.

4. Review of chapter drafts and in-progress outline

15. 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.⁴ In doing so, the Working Group also revisited and built upon some of the discussions of general considerations for the work from the third meeting and emphasised the importance of the work of harmonising and consolidating the various chapter and issue drafts into a cohesive draft. 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 consistent with the envisioned order of the future Guide and the list of Working Papers contained in Annex 3.

A. Preface and Introduction (WP.1)

16. For the presentation of the draft, it was recalled 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 and more responsible investment in agriculture, the role of agricultural land investment contracts and the Guide's scope.

17. With respect to general comments, it was noted that the draft Preface and Introduction had been briefly reviewed at the Group's last session and generally parked pending further development of the rest of the Guide. It was emphasised that the Preface and Introduction were of critical importance in setting out the scope of the Guide, its purpose and context.

18. The following section- and paragraph-specific input was provided by the Working Group:

- Paragraph 1: The order of the instruments was queried, and it was said in particular that the UN Guiding Principles should be listed first. It was also queried whether UNIDROIT's instruments should appear in the list in this paragraph. It was said in reply that the paragraph could be tweaked to make reference to the relevant UNIDROIT instruments after the UN Guiding Principles, VGGT and CFS-RAI Principles. The use of the term "to promote secure tenure rights" was then queried, and it was suggested to refer to the language of VGGT, such as "to promote respect for legitimate tenure rights". Lastly, it was said that the term "growing consensus" could be reconsidered because consensus has been reached in some areas (e.g. broad endorsement of the UN Guiding Principles).
- Paragraph 2: It was suggested that not only in this paragraph, but more broadly in the guide, the structure of the sentence could be reconsidered in order to ensure that it did not create the impression that the Guide covered only contracts between investors and Governments. It was said that the first sentence, for example, was crafted in a way which suggested the Guide was primarily addressed to Governments.
- Paragraph 3: It was said that this paragraph should be more like paragraph 28, which stated the focus of the Guide, instead of simply listing the Guide's content like an outline.
- Paragraph 5: It was suggested to reconsider the language stating that "the guide does not endorse large-scale transfer of tenure rights" to make that point in a more nuanced way, for

⁴ For reference, the draft in-progress outline of the future Guide is available in Annex 3 of the Annotated Agenda, UNIDROIT 2018 – Study 80B – WG4/Inf. 1. rev. 2.

example, by adding that the Guide would be “relevant to investments of different scales and relevant to both domestic and foreign investors”.

- Paragraph 8: In noting the different nature of the documents to which reference was made in this paragraph, it was suggested to distinguish better between international instruments (e.g. the VGGT, CFS-RAI Principles) and guidance documents which supported the implementation of those instruments.
- Paragraph 11: It was suggested to include more context on the need for investment in agriculture and its value because this section constituted the fundamental point of the Guide and the paragraph, as currently stated, seemed to be too conclusionary. It was then noted that the Guide’s aim was to promote responsible investment rather than encouraging land acquisitions, therefore this issue was very delicate and should be handled with utmost care. It was further noted that it would be necessary to define what constituted covered agricultural investments and that this definitional issue should be considered in connection with the statement in paragraph 5 that the Guide does not endorse large-scale land acquisitions. In addition, it was said that this paragraph, together with paragraphs 12 to 14, were repetitious and could be consolidated.
- Paragraph 12: It was said that the reference to agricultural land investments having “structural, contractual or other faults” could be clarified, as it was unclear exactly, in the context of this paragraph, what those terms meant.

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

19. For the presentation of the draft, it was recalled that the Chapter was designed to inform the user about the applicable legal framework, the various sources of law of which that framework was comprised, and potential issues. It was said that Part I covered the various sources and Part II covered relevant areas of law and regulation, the latter of which was to be aligned with the subsequent chapters.

20. With respect to general comments, the extent to which parties could decide to build rights or obligations into the contract and bind themselves according, even if they differed from domestic or international law, was discussed. In particular, the relative importance of the contract, as compared to domestic and international law, was queried. It was further said in this regard that the sources should be addressed in the order of domestic law, international law and then the contract, with domestic law being the most important in this context. It was also said that the chapter’s introductory paragraphs could be revised along these lines, while also noting that international law could supersede domestic law in some jurisdictions.

21. Regarding Part I generally, it was said that it seemed to be more addressed to investors than the possible grantors. It was further said that the Part should be revised to make sure that it equally addressed the other possible parties as well.

22. Regarding Part II generally, it was said that it did not seem to add significant value, as currently framed, to the Guide because it was repetitive of subsequent chapters and not particularly definitive. It was said in reply, however, that this Part was meant to flag some of the relevant areas of law and regulation and their respective issues. It was further said that, even if the Part was repetitive, that would not necessarily be a problem because users would not be expected to read the Guide from start to finish.

23. The following section- and paragraph-specific input was provided by the Working Group:

- Paragraph 5: It was said that the need for the “timely” assessment of the legal framework could be emphasised.

- Paragraph 8: It was suggested to change “codified” to “written” in the first sentence.
- Paragraph 10: It was said that VGGT Technical Guide No. 5 should be referenced in this paragraph.
- Paragraph 11: It was said that the Guide should reflect the reality that customary rules were not fixed rules and that it might be useful to point out, as an example, how a lawyer would typically consider customary rules by comparison with how an anthropologist would do so. It was further said that the Guide should do more to point out that some customary rules could be exclusionary including, for example, rules that prohibited women from owning or inheriting property. In addition, it was queried whether there should be a reference to religious law because it could play a role with respect to agricultural investment in some States. It was noted in reply that, although such a reference should not go into detail about religious law, it would be useful to provide more context and flag difficult issues. Lastly, it was said that use of the word “prevail” in the final sentence of the paragraph might suggest a particular hierarchy between the laws, which might not be accurate in all situations.
- Paragraph 12: It was said that this paragraph should note that court decisions might interpret customary rules differently than how local communities interpreted those rules. It was further said that, as a result, the paragraph should flag the difference between customary rules as applied by local communities and as applied by courts.
- Paragraph 14: It was queried whether it was necessary for this paragraph, together with paragraph 15, to be framed along the lines of Article 38 of the ICJ Statute. It was also said that an elaboration on the kinds of risks, in the second to last sentence of paragraph 14, could be useful.
- Paragraph 15: It was said that the last part of the fourth sentence, which stated “...and be able to avoid that State’s court system” should be deleted to make sure that the Guide was not assisting the reader with avoiding the domestic court system, especially considering that the court system was necessary for enforcement.
- Paragraph 17: It was suggested that more could be stated with respect to corporate social responsibility (CSR) policies, considering that this was one of the first chapters in which those policies were referenced and that the reference in this paragraph lacked clarity.
- Paragraph 18: It was suggested to distinguish between primary soft law instruments (e.g. the VGGT) and secondary guidance documents which aimed to operationalise those instruments.
- Paragraph 20: It was suggested to shorten the discussion on land tenure and to include a separate paragraph on the tendering process under local laws and regulations before this paragraph, including consideration of anticorruption scenarios and representation issues (e.g. lack of authorisation to consent). It was further suggested that the last sentence of this paragraph could be included in that new paragraph.
- Paragraph 21: Regarding the applicable fiscal regime, it was said that the paragraph seemed to draw a straight line between high taxes and social developments, which might be misleading. It was suggested in this regard to remove the reference to “social development” and to note instead that there were various factors to be considered in designing the fiscal regime applicable to the agricultural land investment contract.
- Paragraph 25: It was suggested to remove the last sentence of this paragraph because it overlapped with paragraph 15’s treatment of investment treaties. It was further suggested to flip the order of the third and fourth sentences. It was then queried whether “regulatory

autonomy” should be addressed in this paragraph, because that issue might be better addressed before this Chapter and was already addressed elsewhere in the Guide.

C. Chapter 2.I-IV.A – Parties, Contractual Arrangements and Due Diligence (WP.3)

24. For the presentation of the draft, it was said that it had been changed in line with the input from the previous meeting, including with respect to: (a) treating different parties who were not the investor and not necessarily the government; and (b) addressing legitimate tenure holders and local communities, in particular whether they were to be included in the contract or negotiations. It was then recalled that it had been decided to use the terms “investor” and “grantor”. It was further observed that the sections addressed multi-party contracts and included an expanded treatment of third-party beneficiaries.

25. With respect to general comments, there was a discussion regarding whether the legal tenure right holder was always the grantor. It was said that, if the legitimate tenure right holder was distinct from the legal tenure right holder, it was important for the contract to take into account that there could not be from a legal perspective a contract between a legitimate tenure right holder and the investor, without the legal tenure right holder.

26. The following section- and paragraph-specific input was provided by the Working Group:

- Paragraphs 1-5: The difference between these paragraphs and Part II.C was queried. It was suggested that these paragraphs should elaborate upon the relation between the legitimate tenure right holder and legal tenure right holder, instead of solely dealing with legitimate tenure right holders. It was further suggested that these paragraphs should reflect that, especially in bilateral contracts, the legitimate tenure holder might also be the legal tenure right holder. In this regard, the differentiation between the legitimacy and legality of the right was queried, and it was noted, for instance, that there were cases in which the legal tenure right holder might not be considered as legitimate. It was stated that adding a brief introduction to how legal and legitimate tenure right holders related to one another in this type of contract could be beneficial for the Guide, especially for investors’ legal counsel. In addition, it was questioned whether defining “parties” as individuals or communities with a power to sign was too narrow, and it was suggested to change the wording to “signatories”. It was said in reply that this terminology could, however, create confusion, in particular with respect to third-party beneficiaries and related agreements.
- Paragraph 2: It was noted that the way in which the VGGT treated legitimate tenure rights should be fully aligned with the Guide in order to make sure that the Guide did not add further requirements to that term.
- Paragraphs 10-11: It was suggested that clarification was needed with respect to where the obligations with which the investor should comply derived. It was further suggested that the contractual obligations could, in some jurisdictions, be expressly linked to domestic law, whereas in others they should be laid out in detail in the contract.
- Paragraph 12: There were extensive discussions of the Guide’s focus in connection with this paragraph, in particular with respect to whether it should target contracts between investors and governments or whether it should also address contracts between investors and local communities. Following the discussions, it was said that this paragraph should be tweaked to be consistent with paragraphs 28-29 of the Introduction (WP.1). In addition, it was suggested that the footnote might not be accurate with respect to government ownership of land.
- Paragraph 13: It was suggested that the draft should also note that the grantor’s representative should be identified in the contract.
- Paragraph 14: It was suggested to add a different section on governmental bodies and other levels of government that are not parties to the contract but are stakeholders who have an important role to play in the success of the contract or the broader investment. It was said in

reply that a brief section entitled “Other Stakeholders” could be added, together with related information in Part IV on due diligence in this regard.

- Paragraph 16: It was said at the outset that the subsection heading should refer to legitimate tenure right holders instead of a single holder. The question of who determined the legitimacy of legitimate tenure right holders was then raised. It was noted in this regard that the VGGT did not provide a specific definition of legitimate tenure rights but they did provide guidance on how States should identify such rights, specifically regarding transparency of the process and disclosure of information. It was further noted that references to the VGGT should be added to this paragraph.
- Paragraph 18: It was queried whether FPIC was only to be applied to investments which affected indigenous people and, more broadly, what constituted good practice with respect to other communities. It was then noted that this paragraph needed to be consistent with international principles and standards, in particular with respect to the use of the term “must” and “should”. It was then suggested that VGGT Technical Guide No. 3 on FPIC could be consulted and referenced in this regard.
- Paragraph 20: It was suggested that this subsection on local communities might be redundant or could be combined with the brief section on “other stakeholders”, which was discussed in connection with paragraph 14. It was said that the subsection could be called “Other Stakeholders (Local Communities and Other Groups)”. It was further said that language noting that there could of course be local communities who were not legitimate tenure right holders would be added to the relevant portion of the Introduction.
- Paragraph 21: It was said that this paragraph should be moved up into subsection C.
- Paragraphs 22-30: It was said that the language should be revised from “incorporating legitimate tenure holders” because “incorporating” could come across as imposing a top-down approach, which was not intended. It was also said that, to avoid creating the impression that local communities could only be involved in multi-party contracts, paragraph 24 could be clarified to indicate that local communities could be involved as legal tenure right holders in bilateral contracts. It was also said that Part III.B could be clarified to note that it was addressing situations in which legitimate tenure right holders did not have legal tenure rights. It was noted that this distinction should be made where necessary in other parts of the Guide including, for example, the Introduction.
- Paragraph 40: This paragraph’s treatment of investor respect for human rights being considered as a recognised custom and usage was discussed extensively, and reference was made to Article 5.1.1 of the UNIDROIT Principles in this regard. The wording of “have embraced” was then questioned, and it was suggested that the language could be tweaked to make it more consistent with current practice. It was suggested that the wording of “respect for” could be tweaked to “responsibility to respect”. It was then noted that this paragraph was promoting an idea that did not have much support in current law. It was further noted that, while the current situation was unsatisfactory, the current legal instruments in the paragraph did not set out any obligations binding upon investors. It was suggested that, in order to provide an accurate picture to legal counsel who would consult the Guide, there could be a footnote indicating the current situation. It was noted that parties could be bound by the custom and usages that were widely known and regularly observed. In that regard, it was then questioned whether the VGGT and CFS-RAI Principles could be regarded as “regularly observed”. It was pointed out that the wording of “to promote” could be controversial in the first sentence. It was then noted that this paragraph should be revised for greater consistency with the current situation, to reflect the obligations of both the investors and the grantors and, overall, to adopt an aspirational approach to promoting the UN Guiding Principles, VGGT and CFS-RAI Principles.
- Paragraph 48: It was said that “[d]ue to power dynamics” could be tweaked into something similar to “information and other symmetries”. It was stated in reply that this phrase should

be changed to something along the lines of “due to power and information dynamics inherent...”. It was then suggested to emphasise the plurality of communities at stake and the fact that some of these communities or some members of them might not be evident to investors. It was further suggested to refer briefly to the possible need to research historical and ethnographical information regarding the land in question. It was said that it was necessary to indicate the importance of transparent discussions with local communities and not just representatives of those communities about the investment’s purposes.

- Paragraph 49: Similar to the points made with respect to paragraph 48, it was said that the timeline of land use could be added as a key question in this paragraph.
- Paragraph 51: It was suggested that it would be useful to point out that one of the aims of this subsection was not only to highlight the importance of consultations, but also to indicate that such consultations could lead to adjustments to the project in order to avoid or mitigate negative impacts.
- Paragraph 55: With respect to inclusivity, it was pointed out that every consultations process and context would be different. It was said that it was thus important to draft this portion in a way which emphasised flexibility and cross-referenced the earlier discussion on stakeholder mapping.
- Paragraph 57: It was emphasised that there might be power imbalances and lack of access to information not just between investors and local communities, but also within the local communities themselves. It was said that this paragraph should recognise that such imbalances might exist within communities, in which case there might be some need for disaggregation in the consultations process.

D. Chapter 2.IV.B – Due Diligence (WP.4)

27. For the presentation of the draft, it was said that the draft had been revised to address all of the input that had been received at the Working Group’s last session. It was further said that it had been restructured in accordance with that input as well.

28. With respect to general comments, it was queried whether the rationale for – as well as the differences between – feasibility studies, impact assessments and business plans was sufficiently clear. It was then suggested that there could be more of an introduction in this regard, or the draft’s structure could be further refined. It was also suggested regarding the section on impact assessments that there was overlap and a need for restructuring. It was said, for example, that paragraphs 23-24 overlapped with paragraphs 31-32. It was then pointed out that, within this part, impact assessments were treated in general up until paragraph 31, and in detail in paragraphs 35-36, and then they were treated in general again towards the end of the draft. It was said that the section should be restructured and, in doing so, there could be a portion on human rights impact assessments, which would include food security and the right to food. It was further said that there could be a portion on “economic assessments” as well. In addition, it was stated that the overlap between this draft and the draft on environmental obligations (WP.8bis) could be streamlined.

29. The following section- and paragraph-specific input was provided by the Working Group:

- Paragraphs 1-6: It was stated that the text was too descriptive and could guide the user more by adding linkages between the contract and feasibility studies, impact assessments and business plans as had been done under the section on environmental impact assessments. It was then stated that paragraph 1 could be refined in light of the Guide’s scope, which was to address counsel more generally and not just counsel for investors. It was further stated that there could be some rebalancing needed in this regard as well and that the introductory

chapters should flag the potential harm that could result from the failure to perform feasibility studies and impact assessments and to complete business plans.

- Paragraph 7: It was said that the question of which parcel of land was suitable for investment and which was not could lead to a dispute between the government and local communities even before an investment was made. It was further said that there could be issues not only of existing agricultural production but also of cultural heritage. It was suggested in this regard that the section seemed to move right into valuation of the land, whereas there could be more of a distinct emphasis on identification of the particular land and the related issues. It was then said that the term “governments” should be replaced with “grantors”.
- Paragraphs 9-10: It was queried whether these paragraphs might fall outside the scope of the Guide because they seemed to be making policy recommendations.
- Paragraph 12: It was said that Namati had issued a new guidance document addressing replacement values for buildings and resources used by local communities, such as the loss of access to firewood.
- Paragraphs 13-14: It was flagged that these paragraphs related to the expropriation of the land for the investment project rather than the expropriation of the project itself. It was then queried whether it would be useful to refer to international instruments and guidance documents such as the VGGT’s treatment of expropriation and the FAO’s 2008 study on compulsory acquisition of land and compensation. It was said that footnote 32 to paragraph 14, in particular with respect to its treatment of “public purpose”, could be moved into the main text. It was then suggested that a brief, separate paragraph could be added with the heading of “Expropriation of the investment,” which would refer to the separate situation of the expropriation of the investment project that was dealt with later in the Guide. Lastly, it was stated that these paragraphs should be more detailed, specifically with respect to the rights that could be expropriated, the standards of compensation for those rights, and common issues that had arisen in this respect under domestic law which could be addressed in the contract.
- Paragraph 15: It was said that this paragraph and the following ones seemed to be addressed more to investors, in particular foreign ones, and that these paragraphs should be rebalanced. For the sentence starting with “[i]n cases where indigenous or other affected communities”, it was said that such communities might have specific needs for natural resources, to which reference could be made in the paragraph.
- Paragraph 17: It was queried whether it would be useful to refer to eco-efficiency and, if so, it was suggested that the UNCTAD Manual for Preparers and Users of Eco-efficiency Indicators could be helpful in this regard. It was then pointed out that, where governments were warned about a potential claim that could arise from a treaty, that warning might actually better fit elsewhere in the Guide. It was stated in reply that this issue could be flagged in several parts of the Guide.
- Paragraph 19: In emphasising the importance of this section, it was suggested to insert in the first sentence a reference to financial statements, which would indicate the financial experience for the undertaking and the possible outcomes of an investment before it was implemented. It was also suggested that, taking into account that business plans change over time, an obligation on the part of an investor to provide information to the grantor regarding modifications could be added, such as to present periodically balance sheets and other financial documents. It was then proposed to refer as well to non-financial reporting. In addition, it was suggested to make the link between the contract and the contracting process more explicit in this paragraph and the following one, and it was said that, in the second sentence, “environmental and sustainable” should be added next to “social and economic development”.
- Paragraphs 21-22: It was noted that the scope of these paragraphs extended to a due diligence process rather than just what was expected from a business plan (e.g. researching the

applicable laws, determining whether there was compliance with them, and identifying who the legal and legitimate tenure right holders were) and could accordingly be reformulated.

- Paragraph 23: It was said that, in the first sentence, it should be noted that all impact assessments should be done ex ante by independent experts. It was further said that a reference to ISO 26000 could be made regarding corporate social responsibility.
- Paragraph 24: It was queried whether the Guide would create new requirements other than what was expected under the VGGT, and it was said that the paragraph should be consistent with that instrument. It was then suggested that, in the second sentence, the usage of the term “internationally agreed upon best practice” should be harmonised with the draft on environmental obligations (WP.8bis).
- Paragraph 28: It was suggested that there could be a link to the Guide’s treatment of conditions in Chapter 3.I.E, for example by noting that when an impact assessment indicated an unavoidable adverse impact the contract would not be effective. It was then questioned whether the usage of “...or even cancel the project” in the first sentence would be correct in that sense.
- Paragraph 34: It was suggested to emphasise the legal aspects of this section a bit more by referencing impact assessment requirements under national laws and international instruments. It was stated in this regard that a reference could be made to ISO 14000 for certifying the assessment.
- Paragraphs 37-38: It was suggested to add a reference to SDG 2 in relation to food security and nutrition.

E. Chapter 2.V – Formation (WP.5)

30. For the presentation of the draft, it was said that the draft had been kept rather short, given the overall length of the Guide thus far, even though it addressed rather important issues, including investor screening and negotiations.

31. With respect to general comments, it was pointed out that, throughout the draft, the use of the word “the contract” could be ambiguous because there could be different types of contracts. It was suggested that, considering the Guide’s focus on contracts between investors and governments and investors and local communities, as well as related agreements, it would be necessary to conduct a thorough review of the draft to ensure that more precise language was used. Regarding the portion on tendering (Part V.A), it was said that some jurisdictions might as a matter of domestic law require a tendering process to be undertaken and screening could be applied to tendering or an unsolicited proposal. It was further said that, in this sense, this portion could be confusing in that it suggested that it was a combined tendering and screening process, and it was proposed that the section could better distinguish and explain the two. In this regard, it was said that the guidance on tendering could benefit from more context (e.g. meant to attract the best investor and to get the best deal). It was further said that there should be guidance on managing unsolicited proposals. Lastly, it was said that there should also be guidance noting that, in some situations, the government might change frequently, and such situations should be taken into account.

32. The following section- and paragraph-specific input was provided by the Working Group:

- Paragraph 2: While acknowledging that good faith was not a universally accepted principle, it was suggested to add more description and guidance in this regard.
- Paragraph 4: It was queried whether the use of tendering processes for agricultural investments was indeed increasing. It was noted in this regard that, though increasing, that sentence should indicate that it was still not used in the majority of situations.
- Paragraph 9: Because of the various parties, contractual arrangements and stakeholders covered by the Guide, it was suggested that the language should be more about “consulting”

or “engaging”. It was also suggested to broaden the concept of “legal representation” in the last sentence to include legal advice or legal consultation as well as actual representation.

- Paragraph 11: It was suggested to clarify that, because an investment project might involve multiple final contracts, the use of an entire agreement clause should be carefully considered, as such a clause could create confusion. It was said that, for example in common law jurisdictions, the final written document was binding and any other oral statements would be excluded. In this regard, it was further said that the Guide should ensure that the final written document reflected the entirety of the deal, and that the paragraph emphasised the importance of coherence and consistency in situations involving multiple contracts.
- Paragraph 15: It was suggested that there should be a clarification that the mistake should be material rather than small, unimportant mistakes. The second to last sentence was then queried, in particular whether it meant there was a case of fraud rather than a case of mistake when a party was involved in the mistake and did not deserve protection. It was also suggested to separate fraud and mistake into two different paragraphs and to include a reference to various anti-corruption treaties to make the point that agreements procured through corrupt means were not enforceable under international law. In reply to the point about separation, it was said that the paragraph should better distinguish between fraud, mistake and threat, considering that, in some instances, the result was a void contract, whereas in others it was a voidable contract. In this regard, it was pointed out that matters of the formation of a contract, in particular conclusion of one, were typically dealt with in domestic law. It was further pointed out that the paragraph should make that clear, including by referring to Chapter 1 on the legal framework, to ensure compliance with domestic law. It was then suggested that there could also be a reference to the UNIDROIT Principles’ treatment of illegality.
- Paragraph 16: It was pointed out that what was improper pressure for one party might not be improper pressure for another party, and it was said that this paragraph should distinguish between what could qualify as improper pressure for different parties (e.g. government and local communities). In this regard, it was stated that, in situations in which the military actively supported the government in the investment area and local communities were opposed to a proposed investment, it would be useful to flag in the Guide that such military support could affect the validity of the agreement. It was then suggested that duress and undue influence could be explained in a more descriptive manner and that the issue of human right defenders could be flagged in this paragraph, as well as in the relevant portions of the part on due diligence in this Chapter and Chapter 3 on monitoring.
- Paragraph 17: It was said that an investor needed to be cautious and clear about the capacity of representation, taking into account the differentiation between the lawyers that worked for the benefit of the investor and those that were also part of advocacy groups working for public interest. It was further said that, in such situations, there could be conflicts of interest, and this issue should be flagged in the Guide.
- Paragraph 19: It was said that it would be useful to add a cross-reference to Part IV.A.1 on stakeholder mapping. It was then suggested to add a sentence drawing a line between the government consenting to the contract and the government giving permits. It was stated in this regard that investors should be aware that obtaining consent from one ministry might not mean that they obtain consent, or a required permit, from another ministry.
- Paragraph 21: It was suggested to add several sentences for the issues that might arise during negotiations for the government side, for example one sentence on the necessity of coordination across ministries and another sentence on having a very clear negotiation mandate, including the limits of that mandate. It was then noted that there could be a

reference to Attorney Generals because, in some systems, they had responsibility for consenting on behalf of the government.

- Paragraph 22: It was suggested that Namati's new guides on helping communities negotiate fair contracts with investors could serve as useful resources for further developing this paragraph.

F. Chapter 3.I – Introduction and Land Tenure (WP.6)

33. For the presentation of the draft, it was recalled that it had been written on the basis of existing contracts and contractual practices. The draft reflected the input from the Working Group's prior session, for example with respect to statutory and contractual limitations on the duration of an agricultural land investment contract. It was also emphasised that this draft had received significant input from the Secretariat, in particular regarding the portion on infrastructure. It was then said that the draft addressed critical issues within the Guide and offered a sort of checklist of those issues to assist the parties in preparing an adequate and effective contract.

34. With respect to general comments, it was said that the Introduction's discussion about the relation between the contract and domestic law might need to be stated again in the introductory portion of this Chapter because it dealt with the various rights and obligations. It was suggested to add a chapeau to capture the different issues and offer a better roadmap of those issues and the themes. It was said in this regard that the part on social and economic issues, as set forth in WP.8, could be better incorporated into the introductory part, for example by unpacking some of those issues in paragraph 4. It was then emphasised that there needed to be a balance in the Guide between the descriptive and more practical approaches in order to be most useful for users, who might read only portions of the Guide at a time. It was suggested to add some cross-references to topics which were addressed elsewhere in the Guide, but to keep nevertheless a descriptive approach in the introductory part.

35. Regarding the part on land tenure generally, it was remarked that there had to be, both in this part and more generally throughout the Guide, a review of the use of the word "must". It was said that this word seems to be quite appropriate for the first four paragraphs of this part but probably not for most of the rest of it. It was said more broadly that there should be a review of instances in which the terms "must" and "should" were used throughout the Guide in order to ensure that the Guide was accurate. It was then said it would be useful to extend the discussion about different types of land tenure in order to alert users of these variations. It was also suggested to add cross-references regarding the different typologies of land registration and public management so the discussion on tenure rights would be better placed in context.

36. With respect to the portion specifically addressing tenure rights, it was said that the types of tenure rights described seemed to correspond much more with those in common law systems. It was also suggested to note and add cross-references to where these issues came up elsewhere in the Guide. More broadly, it was remarked that there would be a checklist of issues provided in an Annex to the Guide, which could also provide the aforementioned notes and cross-references.

37. The following section- and paragraph-specific input was provided by the Working Group:

- Paragraph 1: It was said that the final sentence should be nuanced and clarified to emphasise the fact that the scale of the investment was not the only parameter of profitability.
- Paragraph 2: It was said that it might be too repetitive on some points that had already been addressed in the Introduction and Chapter 2, and that this paragraph could possibly be deleted.
- Paragraphs 7-9: It was said that these three paragraphs were very difficult to understand and should be clarified in order to convey better the necessary content and messages. It was said that they were not necessarily consistent with contractual practices because, for example, sometimes multiple contracts were used in setting up an agricultural investment and other times a single contract was used. For paragraph 7, it was said that it would be important to

mention the fact that ideally, the delineation would be done by qualified professionals and that it was also important to involve local communities in that process to ensure greater transparency. In this latter regard, it was said that such communities should indeed be involved in the process and that it should be noted that, where local communities' rights to land were not protected or respected, then that should be a red flag indicating that an investment should not go forward. It was also suggested to add some cross-references to the due diligence obligations in Chapter 2. It was then said that the fourth sentence in paragraph 7 should be clarified regarding how different obligations and frameworks could apply to defined plans for agricultural development. For the identification of land in paragraphs 8-9, it was suggested to emphasise that it was not only a physical and a legal process, but also a social process. For paragraph 9 specifically, it was suggested to rephrase the expression "delineation must be processed legally" by saying that it could be done by an official representative.

- Paragraphs 10-12: With respect to the expression "business plans or certain indicators" in paragraph 11, it was suggested to add some additional safeguard mechanisms (e.g. in terms of time; the interests of legitimate tenure right holders). Then it was said that the end of the first sentence of paragraph 12, specifically "other obligations", needed to be clarified. For option clauses, it was noted that there were probably various definitions of what constituted an option clause. Some option clauses actually entitled the investor to expand the project, provided certain conditions materialised. It was pointed out that this could potentially be difficult for the government, if in each transaction investors had the option to additional land, yet at the same time the government had to protect the rights of local communities. It was further pointed out that such clauses might be inconsistent with the government's obligations to protect legitimate tenure right holders. It was stated in reply, however, that such clauses might actually do that, by ensuring that investors did not try to lease more land than they could actually use at the outset and then only gain access to it once the investment was operating and successful. It was then said that it was not necessary to link such clauses with preventing investment by a competitor, as was noted in the second sentence of paragraph 10. It was next stated that options clauses entailed a significant opportunity cost because land under option still needed to be available to the investor. It was suggested to make these paragraphs more balanced, if they were retained, and to address how local land users would know of the existence of the option.
- Paragraph 14: It was said that this paragraph and those that followed, up until paragraph 24, should be rephrased around some key messages. It was suggested that one could be making it clear that the grant of rights for an agricultural project did not necessarily grant any other rights (e.g. in relation to minerals or commercial use of timber). It was further suggested to have key messages about the resources above and below ground, while also addressing water, and then to address the issue of community rights to resources in the area for which tenure rights were granted.
- Paragraph 15: Regarding the water issue, it was said that there should be a cross-reference to the part on the environment and that it was also important to mention the water issue in the second line of this paragraph, which could have a significant impact on the rights of local communities.
- Paragraph 16: It was emphasised that land use was not limited to agricultural land and could also require the investor to build structures. It was thus suggested to address building rights in this paragraph.
- Paragraphs 17-19: It was suggested to not only address the extent of the right to clean water, according to the needs determined by the feasibility study but also according to existing and potentially competing water uses (e.g. for human consumption, other agriculture, for livestock). For paragraph 17, it was said that some sentences needed to be rephrased because they seemed to be too strong. It was also said that it was unclear why the first sentence mentioned the resources in soil and subsoil, while the further sentences focused on lumber. In

this regard, it was said that more guidance on resources in soil would be useful. It was then suggested that the sentence on lumber for commercial value and the following one should be reformulated because they seemed to suggest that investors could have unrestricted access to resources. For paragraph 18, it was suggested to add more guidance, noting that, in some States, mineral resources could belong in all cases to the State. It was said in reply that, in other States, mineral resources could generally belong to the owner of the land above. It was said that this paragraph could flag the differing approaches and that, in general, the grant of tenure rights in the agricultural land investment contract should not be meant to include all resources. It was further said that these issues should be addressed with clarity, and that these paragraphs should be recrafted to address the principle of State sovereignty over natural resources, and then the diverse approaches to such resources in various systems. Lastly, with respect to lumber in particular, it was noted that there were some examples of agricultural investment serving as a cover for what was actually an investment to extract timber resources. It was further noted that the guidance on timber-related aspects should be stronger and note that speculative investments or those in which the intention did not correspond with the stated objective were to be discouraged.

- Paragraphs 23-24: Regarding the key messages on community rights, it was said that these paragraphs provided good practices for an agricultural contract to include provisions about the rights of local communities to continuous access to the granted area, for conducting activities on a non-commercial basis, insofar as project activities were not disrupted. It was said, for example, that if there were trees that communities had used for a while for collecting fruits or other forest products, they could continue such collection, and that that message could be brought out very clearly in the Guide. It was noted that there were also a number of associated issues that had not yet been addressed yet, including any guidance or requirements in relation to the distance of the cultivated area from the village or from their cultivated fields. It was further noted that, in this context, a buffer zone could be essential to avoiding a situation in which the village was completely surrounded by a monoculture plantation, and that the Guide could provide guidance on the establishment and regulation of such zones by provision of the contract. It was then suggested to include forestry in this section. It was further suggested that stating that “some investors may seek exclusive rights to the land” in the first sentence of paragraph 23 could create the impression that this was always the case. It was also suggested that this point could be rephrased as “in most situations it might be necessary to consider limitations on exclusivity” or deleted.
- Paragraph 25: It was then said that the overall heading of “Land Tenure” for this part might not be suitable because market access and other issues fell within the current scope of this section. It was also noted that collateral aspects should be addressed in this section, including what would happen in the event of a default of a lender.
- Paragraph 27: It was suggested to include guidance in this paragraph regarding an option of the investor or grantor to consider separate agreements with third parties, particularly indigenous people or local communities, because this paragraph was about third party rights.
- Paragraph 29: It was said that the first sentence was unclear and should be reconsidered, together with the second sentence.
- Paragraph 31: It was questioned how often governments denied access to local markets to foreign investors. The third sentence, regarding investors who were interested in growing crops for export rather than for the local market, was similarly queried.

- Paragraph 32: Noting that rights of transport were dealt with by other instruments and elsewhere in the Guide, the added value of this paragraph – absent further development – was questioned.
- Paragraph 33: It was noted that incentives and limitations could be better brought together, by adding more from the grantor’s perspective of ensuring that investment achieved domestic objectives (e.g. for food security). It was then suggested to change the third sentence into “it is advisable for both parties” rather than stating “it is advisable for investors”, to make the Guide more neutral. It was also suggested to add some examples to provide a way to clarify possible export limitations under the contract.
- Paragraphs 34-42: It was queried whether it would be beneficial to make cross-references to Chapter 5. It was suggested, in general, that there should be language that identified what happened if a project failed and more importantly who would clean up the mess or restore the land if damaged (e.g. dairy farms with animal waste). It was said that establishing who was responsible for such damage (e.g. through performance bonds) when the contract was being negotiated could be beneficial for the Guide. It was then suggested that this point could be added at the end of paragraph 39. It was also noted that performance bonds were addressed later in Chapter 3 and that the treatment of such bonds could be streamlined and cross-referenced.
- Paragraph 43: It was said that there might need to be close review and clarification between what were rights and obligations of the investor and what were rights and obligations of the grantor. It was also said, in general, that this section should address “water systems” in some instances, instead of just “water”.
- Paragraph 45: It was suggested to add guidance regarding identifying water usage priorities in cases in which use of water was both for legitimate tenure right holders and the investor, in particular when there was a water shortage.
- Paragraph 48: It was said that this paragraph addressed an important point and had to be further developed.
- Paragraph 49: It was observed that rights of local communities or legitimate tenure right holders came up in other parts of the draft, and the sentence needed to better take into account instances in which legitimate tenure right holders were party to the contract.
- Paragraph 51: It was said that the use of infrastructure such as roads might be closed to local communities by the investment, and that this issue should be flagged. It was further suggested to flag “eminent domain” issues here as they might arise frequently in the infrastructure context.
- Paragraph 53: It was observed that the treatment of social infrastructure here overlapped with Chapter 3’s Part on “Social and Economic Matters”.
- Paragraphs 55-59: It was suggested to remove the “Related issues” section as it was repetitive of other parts of the Guide or to better connect the issues with those parts via cross-references.
- Paragraphs 60-66: It was queried whether this section on “Conditions” would better fit elsewhere in the Guide. It was said that, if retained, the guidance should be more practical and streamlined to be more consistent with the Guide’s key messages. For paragraph 64, it was said that “obligor” should be changed to “grantor”.
- Paragraphs 67-73: It was said that this section on “Duration and renewal” should be reconsidered in order to ensure that it did not promote practices which could generate negative impacts, for example by allowing durations that were either far too short for an investment to become sustainable or far too long, effectively constituting sales of the rights

to the land. It was further said that this section could be rethought as well for consistency with the Guide's key messages.

- Paragraphs 74-76: It was said that this section on "Renewal and renegotiation" was duplicative of content elsewhere in the Guide (e.g. with respect to renewal in the monitoring section later in Chapter 3 and to negotiations in Chapter 2) and could be streamlined in the process of consolidating the Guide.

G. Chapter 3.II – Social and Economic Matters (WP.8)

38. For the presentation of the draft, it was said that the title of the draft might be too general and would be tweaked as the Guide was finalised. It was further said that there were various issues address in the draft which could be addressed elsewhere in the Guide and would be moved to other sections. It was then pointed out that the language had been changed to be more normative, but not overly prescriptive.

39. With respect to general comments, there was a discussion regarding the overall title of Chapter 3, which was currently "Obligations and Rights of the Parties". It was said that that, in updating the title of this draft, it might be necessary to update the title of the Chapter as well. It was acknowledged that this Chapter identified various issues that contracting parties needed to or should address. From that perspective, the Chapter could acknowledge that there would obviously be variations in different contexts, but that the Guide could serve as a good starting point for the parties by pointing out issues about which they might not have thought. It was said in reply that it was not easy to organise the draft because of the complexity and numerous variations, and that the next step for the Working Group would be to bring all the different drafts together. It was noted in this regard that the initial consolidation work would be undertaken by the Secretariat and reviewed by the Working Group. It was then said that, in that process, it might be beneficial to move some of the draft's treatment of malnutrition and food safety arising from the development of monoculture in outgrower schemes to the Guide's overall introduction because of the importance of these points.

40. In reviewing the draft in general, it was said that there were gaps with respect to gender and cultural heritage issues. It was said in reply that there was language about gender and social differentiation (e.g. regarding labour aspects and outgrower schemes) and that having a separate section on gender might be quite repetitive. It was further said that it would be better to treat gender issues in the various situations and thus to mention those issues more frequently, rather than having a completely gender blind discussion and a separate full paragraph about gender. It was suggested in reply that it would be helpful to have a brief section on gender issues earlier in the Guide to flag the importance of such issues, and that section could cross-reference to other paragraphs in which such issues were treated throughout the Guide. It was said in this regard that the importance of spouses joining on the execution of contracts should be addressed. It was said in reply that this issue might be better treated elsewhere, in particular in Chapter 2's portion on contract formation, which included consent, capacity and representation. It was then suggested that a similar kind of brief section could be developed for youth aspects, together with cross-references.

41. With respect with cultural heritage, it was agreed that some language should be inserted, in particular references to other instruments in this regard, especially the CFS-RAI Principles. It was suggested that culture heritage could be linked with the environmental and biological diversity sections later in Chapter 3 or with the availability of land and due diligence sections in Chapter 2. It was said that cultural heritage issues, while very important, could be addressed sufficiently without an abundance of text, specifically through the use of references.

42. The following section- and paragraph-specific input was provided by the Working Group:

- Paragraphs 1-7: With respect to the articulation between the contract and domestic law, it was suggested that some reference to domestic law should be moved to the beginning of the entire chapter, because that guidance applied to the other parts of the Chapter too. It was then said that some elements had to be merged with the content in WP.6. Paragraphs 1-4, for example,

needed to come together because they were essentially introducing the set of rights and obligations of the parties in the context of a contract, the role of the contract vis-à-vis domestic law, the caveat of cross-border investment, the fact that issues were complex, and that contractual practices differed around the world. It was stated that these paragraphs could be merged into Chapter 3's introductory part. It was suggested that the draft on land tenure should be unpacked a little bit because at the moment some parts (e.g. access to market) did not really belong there. It was further suggested that the section on monetary obligations could be part of a financial sub-section and that a section on human rights and social obligations could follow.

- Paragraphs 8-18: With respect to the section on monetary obligations, it was acknowledged that it was particularly important and that it was one in which the future Guide would have the opportunity to improve the treatment of such obligations. It was noted that different payment options had been introduced (e.g. profit or revenue sharing or joint ventures), but this portion could actually be expanded upon and that it would be quite useful for parties to have a full understanding of the various options that could be put in place. It was said that there were more sophisticated considerations and arrangements than simply monthly or annual payments and even profits and revenue sharing could be described (e.g. land for equity; joint ventures; mixed arrangements (such as combined agriculture and forestry investments and related payment options); and more complicated project finance schemes). It was also suggested that it could be useful to highlight some kind of pros and cons of the different types of arrangements. It was mentioned that there needed to be a distinction between revenue sharing and profit sharing, which appeared in paragraphs 8 and 15 and seemed to be used interchangeably.
- Paragraph 22: It was said that a distinction should be made between national and international labour law and different sources were mentioned, such as ILO instruments, the IFC Performance Standards and the OECD Guidelines for Multinational Enterprises. It was then asked if the Guide should encourage incorporation or inclusion of provisions or aspects from these instruments. It was then said that one of the most difficult issues in this area was how to establish a workable and sustainable employment creation obligation. It was said that, in typical contractual practice, employment creation was not an obligation but an objective, being based on the feasibility study and business plan. Some references were then made to contractual practices that went beyond that, and those practices often included use of revision clauses or periodic review clauses. It was said that this paragraph could be reconsidered along those lines. Regarding the OECD Guidelines, questions were asked about that framework and its applicability in this context. It was said in reply that it might be best not to base the paragraph in full on those Guidelines, but to refer to them in the footnotes for further information.
- Paragraphs 36-39: It was said that some indicators regarding protection of indigenous intellectual property should be included. It was then noted that this section overlapped with the part on monitoring and transparency later in Chapter 3 and that the two could be streamlined. It was then recalled that beneficiaries of contractual obligations were not necessarily the contracting parties and that third-party beneficiaries could play a role in monitoring and compliance, among other things to ensure that – if necessary – the government would be notified and held to account to take action. It was acknowledged that this possible role was indeed very important and could possibly be best addressed in that latter part on monitoring.
- Paragraphs 40-41: With respect to performance requirements, it was said that the Guide should emphasise the current diversity of possible obligations in this regard, for example with the addition of a sentence to alert users that there might be obligations under applicable law.
- Paragraph 42: Regarding WTO obligations, it was said that there were relevant exceptions to flag for least developed countries (LDCs). To ensure that the guidance was accurate, it was

said that it could be addressed in cautionary terms, and it was pointed out that, for local content for example, a particular approach might be permissible in one context but not in another. It was said that the guidance should thus be flexible and that the Guide should also emphasise the importance of technology transfer issues. It was further stated that local processing clauses offered good opportunities for technology transfer, and the Guide might be able to allude, possibly in a footnote, to the consensus that was developing in this regard. It was observed that LDCs had done an excellent job at the WTO advocating for technology transfers.

- Paragraphs 43-53: With respect to the language in this section, it was asked how best the process and context of agricultural land investment contract could support contract farming arrangements. It was said that this section was important for the overall Guide's balance, in particular for striking the right balance through its promotion of inclusive business models and outgrower schemes. For paragraph 43, it was said that the reference to the CFS-RAI Principles was inapplicable and should be deleted. For paragraph 46, it was suggested, regarding the reference to the "value chain", to add some additional references to the OECD-FAO Guidance for Responsible Agricultural Supply Chains and to other instruments addressing the integration of smallholder farmers into regional value chains. It was acknowledged that this would be consistent with the paragraph's last sentence, which alluded to some of the supply chain risk. For paragraph 47, it was said that, regarding smallholder farming, there was significant informality in this area and that some of the best practices described would not be practical in reality. It was further said that a lot of arrangements did not tend to be regulated by formal law, and that some investors preferred to deal with smallholder farmers in that informal way to avoid taxes and other requirements. In order to discourage these practices, it was said that more research would be conducted in this regard to clarify further the section along these lines. It was also said that the section should briefly flag the issue of side-selling, which was often an issue for investors who refused to engage in this sort of outgrower schemes because of risks associated with side-selling.
- Paragraphs 54-57: It was said that more emphasis could be placed on community-investor agreements, especially regarding the framework for these agreements. It was also said that this section should be expanded by a couple of paragraphs to unpack further these important issues, including to clarify how to use such agreements for community development and how the contract should reflect equity in the community.

H. Chapter 3.III – Environment (WP.8bis)

43. For the presentation of the draft, it was said that the draft was a shorted version of the paper that had been submitted for the last session and that it sought to identify the key environmental issues and the related obligations and rights of the parties, as well as third parties. It was noted that environmental issues came up in other sections throughout the Guide and that they could be streamlined through the use of cross-references.

44. With respect to general comments, it was said that the new length of the section worked well. It was stated that the draft could be redrafted to have a broader focus than investor-Government contracts, as local communities could be grantors as well, and to give more guidance to legitimate tenure right holders and those communities. It was said in this regard that such additional guidance could also include a reference to related agreements between investors and such holders and communities. It was further said that local communities might have distinct environmental concerns, which could be addressed in the contract or a related agreement, and that the obligation to conserve biodiversity in paragraph 9, for example, was framed in general terms but could include some guidance more specific to local communities. It was then suggested the Guide could benefit from the addition of a paragraph identifying that the obligation to utilise land resources in the context of environmental preservation and protection was an ongoing one. It was acknowledged that a dynamic approach was needed in this regard, and the fact that environmental obligations could be adapted

to different circumstances and scientific knowledge. It was said in reply that this point about the utilisation of land resources and ongoing obligations could be addressed just before paragraph 14. The particular issue of productive land requirements was also flagged and discussed by the Group, noting that such requirements could have unintended consequences. It was said in this regard that the Guide could note the possibility of recognising environmental conservation as a productive land use.

45. The following section- and paragraph-specific input was provided by the Working Group:

- Paragraph 2: It was observed, regarding the reference to the Pulp Mills decision, that it would be better to rely on Principle 17 of the Rio Declaration on Environment and Development instead of that decision. It was recalled in reply that the Pulp Mills case referred to the obligation of conducting an impact assessment as part of general international law but did not use the term “customary”. It was then said that the ICJ’s more recent decision between Costa Rica and Nicaragua addressed environmental impact assessments in a cross-border context and could be examined. It was suggested to separate better international and domestic law aspects. It was said that domestic law could not be suspended because of an agricultural investment, which was why it was important to emphasise the significance of domestic law independently. It was then said that many of the obligations noted in this paragraph were protected, not only by investment treaties, but also by the so-called original treaties. It was noted that there was increasing talk regarding climate change and that it could be a way for framing the importance of environmental issues like the obligations to prevent soil degradation and to conserve biodiversity.
- Paragraph 4: It was suggested to rephrase the paragraph in a more neutral way, rather than using the “interesting and innovative role” language.
- Paragraph 5: It was suggested to clarify that these issues were illustrative and not the only ones possibly having to be considered and addressed. It was said in reply that it was not possible to be exhaustive in this context because of the diversity of context and situations.
- Paragraph 6: In referring to the prior review of the Guide’s discussion of conditions in WP.8, it was said that the discussion of a “sine qua non practice” could be rephrased in term of conditions.
- Paragraphs 7-8: It was suggested that a specific paragraph could be added between these two to address the question of pollution, in particular from agrochemicals. Indeed, it was pointed out that this issue was already addressed in paragraph 11 on waste management but could be clarified or alluded to here. For paragraph 8, it was suggested to add references to specific soil conservation measures, or smart indicators, and possible sources of information regarding such measures and indicators were discussed (e.g. the USDA, new CCSI-Namati Community-Investor Negotiation Guides).
- Paragraph 14: It was suggested to note the possibility that the failure to comply with an environmental obligation could be submitted to informal resolution procedures, though this should not be seen as an opportunity to avoid a more significant penalty.

I. Chapter 3.IV – Protection of Investment and Regulatory Autonomy (WP.9)

46. For the presentation of the draft, it was noted that the draft had been revised based on the input received at the Working Group’s last session. It was recalled that the Working Group had previously queried whether these issues should be addressed in greater detail or simply mentioned, together with references to other instruments, in the checklist of issues that would be added to the Guide.

47. With respect to general comments, it was said that the treatment of regulatory autonomy might fit better elsewhere in the Guide, other than in the Chapter dealing with the obligations and rights of the parties. It was also noted how much overlap there was with other sections in the Guide,

so the importance of cross-references was emphasised. It was said in reply that, while these issues were important, they might end up being treated elsewhere in the Guide, for example by treating investment protections together with Chapter 1 on the legal framework or Chapter 6 on dispute resolution.

48. The following section- and paragraph-specific input was provided by the Working Group:

- Paragraph 1: It was suggested to insert a sentence regarding the government's obligation to ensure food security for its citizens. It was then suggested to add "for themselves and for their investors" at the end of the last sentence.
- Paragraph 2: It was suggested that, considering that investors could also raise their claims in the host State's courts, the last sentence of this paragraph could be tweaked along the following lines: "absent such consent, investors would be reliant upon other forms of dispute settlement (see Chapter 6)".
- Paragraph 5: It was queried whether a reference to the VGGT's treatment of expropriation could be made, bearing in mind that the VGGT did not cover specifically expropriation of foreign investment. It was then said that the treatment of expropriation should perhaps be reconsidered, given that the Guide's focus was on land leases. It was said in reply that there were two scenarios in which expropriation could be relevant: (a) the government expropriates the land in order to lease the land; and (b) the government expropriates the land to build infrastructure in order for the investment to be accessible. It was clarified in reply that these scenarios were to be treated in Chapter 2 regarding suitable land availability, to which this section should nevertheless refer for clarity. It was then said that this section was meant to address instances in which the government might attempt to expropriate the investor's investment, and it was pointed out that – even though the Guide addressed land leases – the rights under those leases could be expropriated. It was emphasised that this paragraph should not go into too much detail, taking into account that expropriation claims were often very complicated. Further to this point, there was extended discussion on where best to address these expropriation aspects, and it was said that this section should focus more overall on regulatory autonomy.
- Paragraph 6: It was said that this issue of expropriation protections and coverage should not be dealt with solely in this section because agricultural investments often fell within the scope of investment treaties. It was further said that there should be cross-references with Chapter 6 on dispute resolution.
- Paragraph 9: It was noted that compensation standards were subject to extensive debates and that, as a result, the paragraph needed greater clarity. It was said in this regard that reference should be made to the "adequate compensation" standard in the first sentence. It was said that the Guide should also note the importance of monitoring payment of compensation, not only in connection with the expropriation of an investor's investment but very importantly for the expropriation of land from local communities for use by investors, the latter of which could be noted in the relevant portion of Chapter 2.
- Paragraph 10: It was said that it might be necessary to clarify what was meant by "maintaining sufficient regulatory space for the government", including with respect to investment treaties. It was suggested that a reference to a definition of regulatory space could be used, for example, from a recent investment treaty.
- Paragraphs 11-14: It was queried whether this section should not be addressed in detail, but moved to the checklist of issues. It was said in this regard that the section should not be meant to suggest that responsible agricultural investments required extensive security arrangements. It was also said that this section should deal with issues like vandalism and theft which could arise and should make clear that, if an agricultural investment had to be militarised through extensive use of security forces, then that was certainly a red flag indicating that that investment should not go forward or otherwise continue. It was then queried whether the link

with the “full protection and security” standard fit in this section, as it might be better treated in Chapter 6 on dispute resolution. It was emphasised again that the reference to the UN Declaration on Human Rights Defenders was an important one and should be preserved, even if the section was reduced during the process of consolidating the various drafts. For paragraph 12 in particular, it was said that the use of “may include” could be made more normative and changed to “should”.

- Paragraphs 15-20: As for the last section, it was queried whether this section should also not be addressed in detail, but moved to the checklist of issues. It was recalled that the Working Group had previously considered whether mentioning stabilisation clauses drew attention to them and might suggest to investors that they should seek their inclusion in the contracts. It was then said that the language could be tweaked and included in the consolidated version, though it might fit elsewhere in the Guide better, at which time that language could be reviewed again to determine whether it should be removed and simply added to the checklist of issues.

J. Chapter 3.V – Monitoring, Transparency and Compliance (WP.10)

49. For the presentation of the draft, it was said that the draft covered various important issues for the successful negotiation and implementation of an agricultural land investment contract and that it had been revised in accordance with the input provided at the Working Group’s last session. It was noted that the draft reflected some initial cross-references to other sections in the Guide, given the importance, for example, of monitoring possible impacts and implementation of the business plan in connection with those aspects of Chapter 2, as well as the various rights and obligations of the parties addressed in Chapter 3.

50. With respect to general comments, it was said that the importance of certification aspects should be flagged in the section on monitoring, including the identification of certification standards and potential involvement of certification bodies. It was then said that, for the section on transparency, it should be reorganised because it seemed to reflect only investor-government contracts, and not investor-local community contracts. It was further said that it should be reframed in the context of investors and grantors and that the latter should be broken into governments and other grantors (e.g. local communities). It was suggested that, between this Part and Chapter 4 on contractual non-performance and remedies, there was perhaps an area to be addressed, in particular related to the importance of the ongoing relationship between the parties. It was further suggested that, while this Part touched upon that relationship through treatment of reporting and periodic review, it would be useful to address the relational aspects, specifically the significance of open and ongoing communications, in greater detail.

51. The following section- and paragraph-specific input was provided by the Working Group:

- Paragraph 9: It was noted that third-party monitoring for these kind of projects was considered to be best practice, and it was said that a reference should be made to such monitoring. It was further noted that independent monitoring could be expanded to identify who would do the independent monitoring considering most other obligations, excluding monetary obligations, would impact not only the grantor but the community as well.
- Paragraph 10: It was suggested to highlight more the growing trend towards transparency in business generally and in this type of investments specifically.
- Paragraph 11: It was said that, regarding positive impacts, emphasising specifically financial stability could be a bit problematic because these investments could also lead to financial instability for particular parties and stakeholders.
- Paragraph 14: It was said that it would be necessary to identify a way of ensuring the information that was made available was, in practice, actually available to those impacted, for

example those in local communities. It was further said that, in this way, grievance mechanisms and other possible remedies for adverse impacts could be pursued.

- Paragraph 15: It was said that “typically responsible” should be replaced with “should be responsible” in order to be more prescriptive with respect to this important kind of reporting. It was then suggested to add another paragraph regarding “non-financial reporting”, which could address corporate social responsibility and contain references to the ISO 26000 guidance on social responsibility.
- Paragraph 16: It was said that this paragraph should be tied in well with the related sections elsewhere in the Guide. It was further said to switch “operational reporting” to “periodical reporting” and to add a reference there to Chapter 5 on transfer and return to make clear that parties should comply with reporting obligations during and after the contract’s implementation. It was emphasised that the importance of certification could be mentioned in this paragraph as well.
- Paragraph 20: It was emphasised that it was important to make information available to local communities, not only in terms of access to that information but in terms of involvement in the process. It was said that a way to be inclusive in this regard was for governments to disseminate the impact assessments, together with the involvement of local communities. It was then pointed out that different levels of government might monitor or follow different aspects of the investment’s establishment and implementation and, as a result, it should be ensured that local communities had access to the information at those various levels.
- Paragraphs 22-25: It was queried whether the sequencing of the section made sense from the perspective of promoting transparency and whether there should be consideration of confidential information issues. It was said in reply, however, that this guidance was useful and that paragraph 25 specifically should be broadened to consider damages that could result from unauthorised disclosure of confidential information and the quantification of those damages. It was said in this regard that the damages for a breach of confidentiality could be established by a clause in the contract or by an adjudicator and that injunctive relief could be sought as well.
- Paragraphs 26-29: It was said that non-compliance issues should be dealt with in the Chapter’s introductory part and then in more detail in this section. It was queried whether the section heading of “key compliance issues, notice and periodic review” sufficiently reflected the various content that was currently in the section.
- Paragraphs 30-35: It was said that the treatment of environmental performance bonds seemed to focus on their use as a form of incentive payment in the process of setting up an agreed investment and, in this regard, it was recalled that such bonds could also be used to ensure clean-up of environmental issues at the time of project closure or failure. For the latter, it was said that this aspect should be included as an additional consideration. It was further said that there could be a cross-reference with the environmental section, as set forth in WP.8bis, which touched upon the use of environmental bonds for project closure. It was then said that such bonds could also be used for conservation purposes and that such use could be flagged as well. For paragraph 32 in particular, it was said that, in light of the different types of investments that did not generate profit at the outset but overtime might generate sufficient returns, it was important to note in the Guide that performance guarantees could vary from investment to investment.
- Paragraphs 36-41: It was said that these paragraphs were to be completed during the consolidation of the various drafts of the Guide. It was said in reply that it was important to flag some of the issues to be addressed here, but that it was also important to ensure that the Guide was not being too innovative in addressing those issues. It was further said that the Guide should be consistent with current best and good practices and not be too forward-looking in this regard. For paragraph 37, it was queried whether the Guide should indeed address

issues of microdata and IP rights. It was said in reply that the draft could be developed in this regard, with the paragraph of course subject to review to confirm whether those issues did indeed fit well. For paragraphs 38-41 specifically, it was noted that these issues had already come up in other parts of the Guide and that they should be streamlined in the consolidation process.

K. Chapter 4 – Contractual Non-Performance and Remedies (WP.11)

52. For the presentation of the draft, it was said that this Chapter reflected the narrative approach adopted in the Guide and that it had been expanded with additional content, drawing in part from the Legal Guide on Contract Farming which had also adopted a narrative approach. It was recalled that it was still a work in progress and that some parts needed further research and development, in particular with respect to cross-references to other parts of the Guide. With respect to further development, it was said that the Chapter could be reorganised in order to start with an overview of remedies as part of the general considerations, and then to provide an overview of all available remedies and excuses to non-performance before concluding with the various breaches for non-performance. It was pointed out that, with respect to the proposed final section on breaches and related remedies, the intention was to review briefly the obligations discussed in the Guide and to address the various possible breaches and remedies in relation to them. Overall, it was noted that the chapter's aim was to emphasise the importance of an ongoing process and relationship and the idea that parties should be encouraged to cooperate and to consider and establish some cooperative remedies for common problems in order to be able to cure rather than terminate the contractual relationship.

53. With respect to general comments, it was said that the introductory part of the Chapter needed to better reflect the Guide's scope, which was to cover not only investor-government contracts and investor-local community contracts, but also related agreements like community development agreements. It was said that the Chapter should better address what would happen if an investor breached such a related agreement with a local community or legitimate tenure right holders. It was then suggested to make this Chapter more consistent with the other ones by using more practical language and guidance. In this regard, it was noted that the chapter, especially the first part, was too abstract and should be more tailored to the specifics of agricultural land investment contracts in order to best address the intended users. It was also suggested to shorten substantially the section about excuses because that section dealt with only one or two potential clauses in the contract and was thus far too long proportionally to others parts of the Guide and the role that the various clauses had in the contract. It was then noted that the Chapter seemed to use often the term "governments" while others used the term "States" or "grantors", and it was said that the language throughout the Guide should be made consistent.

54. The following section- and paragraph-specific input was provided by the Working Group:

- Paragraph 2: With respect to the management of a long-term contractual relationship, it was emphasised that predictability and stability were important issues but not the only ones. It was said that an approach that unduly emphasised stability and predictability over other considerations was not suitable, and it was suggested to amend that language in order to ensure the parties preserved sufficient flexibility in their contract.
- Paragraph 3: Regarding the fourth sentence and the use of the term "mandatory provisions" in connection with human rights, it was said that protection and respect of all human rights would necessarily be mandatory. It was suggested to rewrite this sentence in a way that did not suggest that these rights had to be contractualised in order to be mandatory.
- Paragraph 10-11: With respect to the references to monitoring and monitoring boards, it was said that this section could remain here, but that it should include a cross-reference to the transparency section of the Guide. It was then suggested that the question about how third

parties could be engaged in the monitoring system could be addressed in that particular section.

- Paragraph 16: With respect to the consequences of an excused non-performance event on legitimate tenure right holders and local communities, it was suggested to strengthen the language in this paragraph. It was said that the paragraph should reflect better the fact that communities might lose access to land and resources, so the paragraph had to take this into account. With respect to legitimate tenure right holders as aggrieved parties, it was suggested to add a footnote stating that, if they were not parties to the contract, they might nevertheless benefit from the status of third-party beneficiary.
- Paragraph 27-31: It was noted that there was a problem with the way this Chapter had been rearranged because paragraphs 27 and 31 had initially been written to address host States and should thus be taken out of the force majeure section. It was explained that paragraph 27 on civil disturbances could arguably qualify as a force majeure event but necessity definitely did not. It was further noted that paragraph 30 was addressing considerations for governments generally and paragraph 31 was separately addressing necessity situations. It was then noted that this structure seemed to give the impression that the necessity defence could be raised by any contracting party which was not correct because conditions for necessity were linked to the laws of state responsibility. For paragraph 27, it was suggested to drop the reference made to international humanitarian law in the last sentence and to make this paragraph consistent with paragraph 14 of WP.9, which was going to be revised to address issues like vandalism and not to suggest the agricultural investments needed to have extensive private security arrangements. It was then pointed out that the jurisprudence in connection with investment treaties was very controversial and that it might not be suitable to address in the Guide. It was added that this paragraph as it was now written could contribute to the contractualisation of problematic obligations that often resulted in a government being held liable by investor-State tribunals, as a result of broad readings of these types of clauses. It was suggested to draft this paragraph in a way that was less provocative. For paragraph 28, it was said that it should also be redrafted in order to be framed in a more neutral way, so as not to suggest that local communities were in all cases responsible for conflicts regarding the investment project.
- Paragraph 53: It was said that there could be a cross-reference to stabilisation clauses here, but that this topic, if addressed in detail, was better addressed in Chapter 3.
- Paragraph 90: Regarding the section covering remedies and in particular the issue of renegotiation, it was said that this paragraph, which made reference to price revision clauses, should not only address the risk of currency fluctuations. It was said that other reasons could justify the inclusion of a price revision clause, such as inflation. It was then suggested that it should be emphasised that every long-term contract should have a revision mechanism to ensure proper representation of the economic value of the assets. It was added that the language should be changed to “should” instead of “may” and that the inflation issue should be addressed.
- Paragraphs 105, 117: With respect to the interplay with grievance mechanisms, it was pointed out that the language of contract remedies might not be the proper way to think about grievance mechanisms for violation of soft law principles like transparency, disclosure of information, and respect for the rights of legitimate tenure right holders. It was said that this framing might not capture effectively the available solutions and remedies. It was then suggested that perhaps some of the grievance mechanisms that had been developed in the human rights context might be better practices to address in this regard.

L. Chapter 5 – Transfer and Return (WP.12)

55. 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 noted that the draft had been reviewed at the Working Group's last session and that the Working Group's input had been incorporated into this revised draft.

56. With respect to general comments, it was said that the overall balance of the Chapter should be reviewed and reconsidered in order to ensure that it did not favour one party or the other in particular instances. It was pointed out that paragraphs 7 and 9, for example, were in need of rebalancing. It was further said that the opening paragraph of the draft could introduce this balance. It was then said that contractual practices with respect to transfer and return typically used standard terms, and it was suggested to make the draft's terminology more consistent with those practices and terms.

57. The following section- and paragraph-specific input was provided by the Working Group:

- Paragraph 2: It was suggested to introduce the reasons why it was important for the investment to be transferrable (e.g. getting a loan, bankability). It was also suggested to adjust the framing to emphasise that transfer was not necessarily always because an investor was trying to abandon a failing investment. It was then said that the last sentence should be elaborated upon to explain how transfer could favour additional investment.
- Paragraph 4: It was noted that this paragraph and paragraph 7 were a bit duplicative and it was suggested to review these paragraphs again and to move a streamlined version of them into the section on transfer rather than having them in the section on scope.
- Paragraph 6: It was suggested to offer guidance on how transfers would affect related agreements like community development agreements.
- Paragraph 7: It was said that the heading for the paragraph should be changed to "Scope of the investor's right to transfer" because investors did not have an absolute right to transfer. It was suggested to include a statement here discouraging speculative investments.
- Paragraph 16: It was suggested to point out that beneficiary ownership structures could be one way in which a transfer occurred.
- Paragraph 25: It was suggested to further develop this paragraph by including common issues new investors would need to look into (e.g. relevant information about the prior investment and how that information is communicated), as well as the due diligence processes to be performed in order to understand fully the scope of the investment. It was said that the implications of the transfer for those that were affected by the project should also be emphasised.
- Paragraph 26: It was said that the sentence of "[a]s many land leases are concluded between investors and grantors" should be removed because it could be confusing in light of the Guide's scope.
- Paragraph 32: It was said that there could be guidance on potential issues arising between the grantor and other groups (e.g. legitimate tenure right holders) when land was returned. It was further said that reference could be made to the VGGT in this regard.
- Paragraphs 33-37: It was pointed out that, considering that these assets would be conveyed not only in the case of return but also in the case of transfer, the Chapter could be reorganised. It was further pointed out that it might be more logical to divide the Chapter into the following sections: (1) reasons for transfer and return; (2) the parties implicated (e.g. reverting to the grantor or transferred to another investor); (3) legal considerations under the law and contract; and (4) the assets to be transferred or returned. For paragraph 35, it was said that guidance could be added for cases in which the contract was terminated by the investor and

to discuss the effects of that termination. For paragraph 37, it was said that, in observing the reference to the supervisory committee regarding transfers of technology, the Guide was offering guidance on various committees and boards (e.g. monitoring board, grievance committees) and that all of these committees and mechanisms should be tracked and dealt with in a standard way.

- Paragraph 39: It was suggested to add a cross-reference regarding environmental performance bonds for project closure.

M. Chapter 6 – Dispute Resolution (WP.13)

58. For the presentation of the draft, it was said that the draft would be revised in accordance with the Guide's scope to cover both investor-government contracts and investor-local community contracts, as it was currently focusing on the former rather than also including the latter. It was said that the draft had been revised in accordance with the Working Group's input from the last session. It was pointed out, however, that one suggestion had been to include pros and cons for each of the dispute resolution mechanisms, but this suggestion had not been implemented because it was thought that pros and cons could be misleading for users.

59. With respect to general comments, it was suggested that, instead of restructuring the entire draft in order to reflect the Guide's scope, it would be possible to tweak the existing structure and certain paragraphs. It was then suggested to add a reference in a footnote to the UPICC, for which *favour contractus* was an animating principle, and this principle was largely consistent with the aim of non-judicial dispute resolution mechanisms. It was then pointed out that the grievance mechanisms and international and regional courts sections would be revised in accordance with the Working Group's deliberations thus far at the session. The term of "third party beneficiaries" was then questioned as potentially being too closely linked to the common law, but it was said that the Guide's terminology should be consistent with the UNIDROIT Principles, which used that term. It was then queried whether regulatory autonomy should be treated in this section, but it was said in reply that it should continue to be treated in Chapter 3, subject to ongoing review by the Working Group.

60. Regarding the possible reordering of the chapter, it was suggested that the Guide's sections on monitoring, remedies and dispute resolution should share similar structures in order to make it easier for the reader to follow and that the language in those sections should be aligned. With respect to terminology in particular, use of the term "investment protection agreements" or "IPAs" was recommended, instead of using the term "international investment agreements" or "IIAs". In considering the amount of detail to provide, it was said that the Guide could not offer too detailed guidance or it would quickly become too lengthy. Taking into account that grievance mechanisms were more about rebalancing and resolving issues rather than formal disputes, it was said that the title of the Chapter should be changed to "Grievance Mechanisms and Dispute Resolution", and the structure tweaked accordingly.

61. Regarding other general issues, it was queried where the choices of forum and law were to be addressed in the Guide and whether it might fit best in this chapter. In this regard, it was suggested that there could be a reference to the Brussels I Regulation in the EU.

62. The following section- and paragraph-specific input was provided by the Working Group:

- Paragraph 15: It was suggested to look at the best practices regarding grievance mechanisms and to review some of the work that had been done.
- Paragraph 17: It was said that another form of grievance mechanism related to third-party monitoring and that mechanism could be included here as well, together with a cross-reference to the section on monitoring.
- Paragraph 20: It was queried whether more information could be provided regarding collaborative grievance mechanisms, in particular with respect to the initiatives noted in this paragraph.

- Paragraph 33: It was said that what was meant by non-parties participating “as observers” should be clarified. It was then suggested to change the term “as observers” into “by observing”, in order to avoid giving them a status.
- Paragraph 34: It was said that the current draft could be perceived as stating that the contracting parties had two options: contract-based arbitration or treaty-based arbitration. It was further said that a few more sentences should be added to distinguish further the two.
- Paragraph 35: It was queried whether this paragraph should address umbrella clauses in more detail. It was said that there could be two different paragraphs about special procedural aspects of treaty-based arbitration and special substantive aspects of treaty-based arbitration, in which stabilisation clauses could also be addressed. In addressing umbrella clauses, however, it was to be noted that there were becoming less and less common.
- Paragraph 40: Starting with the sentence beginning “Additionally, disputing parties”, it was said that all of the following sentences should be deleted considering there was much debate in this regard and no prevailing opinion.
- Paragraph 46: It was suggested to add in the second line, “or who may have rights as third-party beneficiaries” after “who are adversely affected by the activities carried out by the contracting parties” in order to better align this Part with Chapter 2.
- Paragraph 48: A reference to the African Courts of Human and Peoples’ Rights could be added to the examples listed in this paragraph. It was suggested to change the heading into “Regional and Sub-Regional Courts” and to include additional courts (e.g. ECOWAS Court of Justice).
- Paragraph 54: It was queried whether the Working Group wanted to list specific countries in this paragraph considering there were controversies, for example in the United States of America, regarding this issue. It was said that the reference to specific countries would be deleted and replaced with “in some jurisdictions”.

5. Organisation of future work

63. The Working Group discussed several aspects of the organisation of future work, including key issues for the consolidation of the draft, stakeholder engagement, and the schedule for next steps in the work. Regarding consolidation of the draft, it was said that the Secretariat should put the various drafts together and, in doing so, should pay particular attention, *inter alia*, to: harmonising the terminology; reviewing the use of “must” and “should” with respect to the guidance provided for consistency with applicable law and contractual practice; standardising the footnotes; and, in that process, incorporating the particular edits of experts to address input received during the session.

64. 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, once ready, the Secretariat would hold an open online consultation, as has been done for the UNIDROIT-FAO-IFAD Legal Guide on Contract Farming. With that online consultation, it was said that the Secretariat and members of the Working Group could be active in drawing stakeholders’ attention to that consultation, including through FAO and IFAD’s networks (e.g. the CSM, PSM, the FSN Forum, the VGGT Secretariat), and those of the experts and other representatives, such as the ILC Secretariat and the various universities. It was further noted that, subject to available funding, the Secretariat could organise consultation events around the world in coordination with Working Group experts. It was also noted that the Secretariat would continue to seek to participate in relevant conferences and events, including the World Bank’s Annual Conference on Land and Poverty. In addition, it was said that it was not too soon to start thinking about how the Guide could be implemented. It was emphasised that the Guide’s aim should be to make a difference in practice, and suggestions were made regarding

the Guide's incorporation into the investment programmes of international donors and development agencies, as well as into civil society and NGO networks.

65. Regarding the schedule, it was said that the Secretariat would seek to make the consolidated draft of the Guide available by January 2019, at which time experts would be given time to review and insert any edits, comments and questions. Following that review period, it was suggested that a videoconference could be held to discuss any outstanding issues, to consider further the plan for consultations and to confirm that the draft was ready for broad distribution for review and input, including through the online consultation. For that consultation in particular, it was emphasised that sufficient time should be given for the online review and submission of comments, with suggestions ranging from three to six months. It was then noted that the consolidated draft would be submitted to the Governing Council for its 98th session (Rome, 8-10 May 2019), either to update the Council regarding the status of the Guide's development and to obtain the Council's input or, depending on the Guide's progress and the amount of stakeholder input received, to seek the Council's adoption of the Guide subject to the ongoing consultations and amendments. It was also noted that the input received through those consultations would be reviewed by the Working Group, with edits made by the Secretariat in coordination with the respective experts and representatives. It was further noted that, if the input received was sufficiently substantial, the Working Group could opt to hold a fifth and final meeting in the fall of 2019 to review the draft Guide and incorporate that input, after which the draft Guide would be submitted to the Governing Council for adoption at its 99th session in the spring of 2020.

6. Any other business and closing of the meeting

66. 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**

**Fourth Meeting of the UNIDROIT Working Group
on Agricultural Land Investment Contracts
Rome, 9-11 October 2018**

WORKING GROUP MEMBERS / EXPERTS

Mr José Antonio MORENO RODRÍGUEZ
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Vice President of the United States National Farmers' Union
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Mr Luca CHINOTTI
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International Agri-Food Network
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STATE

Ms Veronika VANIŠOVÁ
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Mr Ignacio TIRADO

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Mr Neale BERGMAN

Secretary-General

Deputy Secretary-General

Senior Officer

Legal Officer

Ms Gabrielle LATASTE

Ms Beyza ÖLCER

Intern

Intern

ANNEX 2

**Fourth Meeting of the UNIDROIT Working Group
on Agricultural Land Investment Contracts
Rome, 9-11 October 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 WORKING PAPERS

for the Working Group's fourth meeting (Rome, 9-11 October 2018)

#	TOPIC
WP.1	PREFACE AND INTRODUCTION
WP.2	Chapter 1 – THE LEGAL FRAMEWORK
WP.3	Chapter 2 – PARTIES, DUE DILIGENCE, AND FORMATION Parts I-IV.A: Parties, Contractual Arrangements and Due Diligence
WP.4	Chapter 2 – PARTIES, DUE DILIGENCE, AND FORMATION Part IV.B: Due Diligence
WP.5	Chapter 2 – PARTIES, DUE DILIGENCE, AND FORMATION Part V: Contract Formation
WP.6	Chapter 3 – OBLIGATIONS AND RIGHTS OF THE PARTIES Part I: Introduction and Land Tenure
WP.7	Chapter 3 – OBLIGATIONS AND RIGHTS OF THE PARTIES Part I(e): Conditions (<i>incorporated into WP.6</i>)
WP.8	Chapter 3 – OBLIGATIONS AND RIGHTS OF THE PARTIES Part II: Social and Economic Matters
WP.8bis	Chapter 3 – OBLIGATIONS AND RIGHTS OF THE PARTIES Part III: Environment
WP.9	Chapter 3 – OBLIGATIONS AND RIGHTS OF THE PARTIES Part IV: Protection of Investment and Regulatory Autonomy
WP.10	Chapter 3 – OBLIGATIONS AND RIGHTS OF THE PARTIES Part V: Monitoring, Transparency and Compliance
WP.11	Chapter 4 – CONTRACTUAL NON-PERFORMANCE AND REMEDIES
WP.12	Chapter 5 – TRANSFER AND RETURN
WP.13	Chapter 6 – DISPUTE RESOLUTION