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b) Elaboration d'un Guide international sur les contrats d'investissement en terres agricoles

(Document préparé par le Secrétariat)

<i>Sommaire</i>	<i>Le présent document présente une mise à jour concernant les travaux de préparation d'un document d'orientation international sur les contrats d'investissement en terres agricoles</i>
<i>Action demandée</i>	<i>Prendre note de la mise à jour</i>
<i>Document connexe</i>	UNIDROIT 2016 - C.D. (95) 7(b)

INTRODUCTION

1. Le présent document présente une mise à jour concernant les travaux de préparation d'un document d'orientation international sur les contrats d'investissement en terres agricoles. Il fournit (1) des informations sur les précédents travaux d'UNIDROIT dans ce domaine; et (2) un résumé de l'état actuel du projet.

I. ANTECEDENTS

2. Après l'adoption du Guide juridique sur l'agriculture contractuelle lors de sa 94^{ème} session (6-8 mai 2015), le Conseil de Direction "a donné instruction au Secrétariat d'entreprendre un inventaire et une étude de faisabilité sur les contrats d'investissement foncier, pour décider si les compétences spécifiques d'UNIDROIT pouvaient représenter un atout supplémentaire dans ce domaine" ¹.

3. Conformément aux instructions du Conseil de Direction, le Secrétariat a préparé l'étude demandée. Il a effectué l'état des lieux demandé, a examiné si un éventuel instrument d'UNIDROIT serait un apport supplémentaire utile dans ce domaine et a conclu qu'"il sembl[e]ait bien exister un besoin" en ce qui concerne les aspects de droit privé des contrats d'investissement en terres agricoles, et qu'"UNIDROIT semblait bien placée pour préparer un instrument sur ces aspects et pourrait mettre à profit son expertise en matière de droit privé en se basant sur les initiatives

¹ UNIDROIT 2015 - C.D. (94) 13, para. 68.

existantes, rassembler des experts de haut niveau, et préparer en collaboration avec les organisations pour l'agriculture et l'alimentation du système des Nations Unies basées à Rome, et d'autres institutions, des orientations utiles pour les agriculteurs, les communautés, les investisseurs, les gouvernements et les autres parties prenantes à cet égard."²

4. Après avoir examiné l'étude de faisabilité, le Conseil de Direction, lors de sa 95^{ème} session (Rome, 18-20 mai 2016), a recommandé d'inclure dans le programme de travail d'UNIDROIT pour la période triennale 2017-2019 la préparation d'un document d'orientation international sur les contrats d'investissement en terres agricoles en tant que sujet prioritaire.

5. Conformément à la recommandation du Conseil de Direction, le Secrétariat a organisé, avec la FAO et le FIDA, une réunion informelle avec des experts et des parties prenantes intéressées à la FAO le 20 octobre 2016³, en marge de la 43^{ème} session plénière du Comité de la sécurité alimentaire mondiale (CSA) (Rome, 17-21 octobre 2016). L'objectif de la réunion était de sensibiliser les participants à l'activité d'UNIDROIT dans ce domaine et de solliciter des commentaires sur la portée, le contenu et la forme d'un instrument éventuel sur les contrats d'investissement en terres agricoles. Les commentaires formulés ont été pris en considération en vue de la formation du Groupe de travail et seront communiqués au Groupe une fois constitué pour sa première réunion (Rome, 3-5 mai 2017)⁴.

6. A la suite de la réunion informelle, à sa 75^{ème} session (Rome, 1er décembre 2016), l'Assemblée Générale a approuvé le Programme de travail pour la période triennale 2017-2019, qui inclut les travaux sur les contrats d'investissement en terres agricoles avec un niveau de priorité élevé.

II. ETAT ACTUEL DU PROJET

7. A la date de la rédaction du présent document, la première réunion du Groupe de travail sur les contrats d'investissement en terres agricoles est prévue au siège d'UNIDROIT du 3 et 5 mai 2017. Les membres du Groupe de travail comprennent les experts suivants: M. José Antonio MORENO RODRÍGUEZ, Avocat et Professeur, Altra Legal, et membre du Conseil de Direction d'UNIDROIT; M. Lorenzo COTULA, chercheur principal, droit et développement durable, Institut international pour l'environnement et le développement (IIED); M. DARYONO, Professeur, Universitas Terbuka, Jakarta; Mme Bénédicte FAUVARQUE-COSSON, Professeur, Université Panthéon-Assas, Paris 2; Mme Jean HO, Professeure adjointe, Faculté de droit, Université nationale de Singapour; et M. Pierre-Etienne KENFACK, Professeur, Université Yaoundé 2.

8. Pour la réunion, le Secrétariat a préparé un projet d'ordre du jour annoté⁵ et une Note⁶ présentant de façon préliminaire les questions que le Groupe de travail souhaiterait examiner dans le cadre de ses travaux de préparation d'un instrument international sur les aspects du droit privé des contrats d'investissement en terres agricoles. Comme il est indiqué dans ces documents, le Groupe de travail devrait discuter, en particulier, des questions suivantes:

- UNIDROIT et les travaux qu'il a effectués en matière de droit privé et développement agricole;

² UNIDROIT 2015 – C.D. (95) 7(b), para. 103.

³ Ont participé à la réunion des représentants de la FAO, du FIDA, de la Banque mondiale, du Ministère français des affaires étrangères et du développement international, du Ministère fédéral allemand pour la coopération et le développement international (BMZ), l'Agence de coopération internationale japonaise (JICA), l'Agence des Etats-Unis pour le développement international, la *Deutsche Gesellschaft für Internationale Zusammenarbeit* (GIZ); le *Columbia Center on Sustainable Investment* (CCSI); l'Institut international pour l'environnement et le développement (IIED); l'Institut international du développement durable (IISD); et la *International Land Coalition* (ILC).

⁴ Pour plus d'informations sur la réunion, voir l'Annexe 2 au para. 12.

⁵ Voir UNIDROIT 2017 – Study 80B – Inf. 1 rev., qui figure en Annexe 1 (en anglais seulement).

⁶ Voir UNIDROIT 2017 – Study 80B – Doc. 1 rev., qui figure en Annex 2 (en anglais seulement).

- des considérations générales en vue des travaux sur les contrats d'investissement en terres agricoles, en particulier concernant le concept de tels contrats; la cohérence du travail au regard des initiatives existantes, y compris les Directives volontaires pour une gouvernance responsable des régimes fonciers applicables aux terres, aux pêches et aux forêts dans le contexte de la sécurité alimentaire nationale) (VGGT)⁷ et des Principes pour l'investissement responsable dans l'agriculture et les systèmes alimentaires (Principes CFS-RAI)⁸; La coopération avec les agences de développement agricole des Nations Unies, les organisations non gouvernementales, la société civile, le secteur privé et d'autres parties prenantes; et l'objectif et le public cible du futur instrument;
- l'examen de la structure du futur instrument et l'identification des questions à traiter, y compris la portée, le contenu et la forme de l'instrument; et
- l'organisation des travaux futurs.

9. En ce qui concerne ce dernier point en particulier, le Secrétariat a suggéré que le Groupe de travail pourrait envisager la meilleure manière de procéder à l'organisation initiale et la rédaction de l'instrument et comment engager des consultations avec les parties prenantes. On s'attend à ce que, sous réserve des vues du Groupe de travail, la deuxième réunion du Groupe de travail soit élargie pour inclure d'autres experts et participants et pourrait se tenir au début de l'automne avant la 44^{ème} session plénière (Rome, 9- 13 octobre 2017) du Comité de la sécurité alimentaire mondiale (CSA). Ainsi, une réunion d'un groupe de consultation plus large pourrait être convoquée à l'occasion de cette session - qu'il s'agisse d'une réunion informelle ou d'un événement parallèle formel du CFS - afin de sensibiliser le public au travail sur le terrain et d'obtenir des commentaires des parties prenantes.

10. Lors de la présentation du présent document lors de la session du Conseil de Direction, le Secrétariat fournira des informations actualisées sur les délibérations du Groupe de travail et les développements connexes lors de sa première réunion.

III. ACTION DEMANDEE

11. *Le Secrétariat invite le Conseil de Direction à prendre note des informations actualisées concernant les travaux relatifs à un document d'orientation sur les contrats d'investissement en terres agricoles.*

⁷ CFS, FAO, Directives volontaires pour une Gouvernance responsable des régimes fonciers applicables aux terres, aux pêches et aux forêts dans le contexte de la Sécurité alimentaire nationale (11 mai 2012), disponible à <http://www.fao.org/docrep/016/i2801f/i2801f.pdf> (VGGT).

⁸ CFS, Principes pour l'investissement responsable dans l'agriculture et les systèmes alimentaires (15 oct. 2014), disponible à http://www.fao.org/fileadmin/templates/cfs/Docs1314/rai/CFS_Principles_Oct_2014_FR.pdf (Principes CFS-RAI).

APPENDIX I

ANNOTATED DRAFT AGENDA

First meeting of the Working Group on agricultural land investment contracts

(Rome, 3-5 May 2017)

(Study 80B – Inf. 1 rev.)

1. Opening of the meeting and election of the Chairman
2. Adoption of the agenda and organisation of the meeting*
3. UNIDROIT and its work on private law and agricultural development
4. General considerations in relation to the work on agricultural land investment contracts
 - A. Notion of agricultural land investment contracts
 - B. Alignment of the work on agricultural land investment contracts with existing initiatives
 - C. Co-operation with the UN agricultural development agencies, non-governmental organisations, the private sector and other stakeholders
 - D. Objective and target audience of the future instrument
5. Consideration of the structure of the future instrument and identification of issues to be covered
 - A. Scope
 - B. Content
 - C. Form
6. Organisation of future work
7. Any other business
8. Closing of the meeting

* See UNIDROIT 2017 - Study 80B – Doc. 1 rev., which provides a preliminary outline of issues that the Working Group on agricultural land investment contracts may wish to consider in preparing an international instrument providing guidance on private law aspects of such contracts.

ANNOTATIONS

Item No. 1 – Opening of the meeting and election of the Chairman

1. In accordance with UNIDROIT practice, groups of experts shall, as possible, be presided over by members of the Governing Council (*cf.* UNIDROIT Statute, Article 13(2)). On this basis, the Working Group may wish to appoint Mr José Antonio Moreno Rodríguez as Chairman of the Group.

Item No. 2 – Adoption of the agenda and organisation of the meeting

2. Subject to confirmation by the Working Group, the meeting hours will be as follow:

Morning sessions: on Wednesday 3 May, opening will be at 10 a.m.

On other days: 9.30 a.m. – 11 a.m.

11.30 a.m. – 1 p.m.

Afternoon sessions: 2.30 p.m. – 3.45 p.m.

4.15 p.m. – 5.30 p.m.

Every day, morning and afternoon refreshments and, on Wednesday, a light lunch will be served at the Institute.



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

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

First meeting
Rome, 3-5 May 2017

UNIDROIT 2017
Study 80B – Doc. 1 rev.
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April 2017

**Preparation of an international instrument on agricultural land investment contracts:
A preliminary outline of issues**

(prepared by the UNIDROIT Secretariat)

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INTRODUCTION

1. This memorandum provides a preliminary discussion of issues that the Working Group on agricultural land investment contracts may wish to consider in preparing an international instrument providing guidance on private law aspects of such contracts.

2. It is structured – consistent with the draft annotated agenda for the Working Group’s first meeting – as follows. Part I provides background on UNIDROIT and its work on private law and agricultural development. Part II addresses some general considerations in relation to the work on agricultural land investment contracts, in particular (a) the notion of agricultural land investment contracts; (b) alignment of the work on such contracts with existing initiatives, including the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the context of National Food Security (VGGT)¹ and the Principles for Responsible Investment in Agriculture and Food Systems (CFS-RAI Principles);² (c) co-operation with the UN agricultural development agencies, non-governmental organisations, the private sector and other stakeholders; and (d) the objective and target audience of the future instrument. Part III considers the scope, content and form of the future instrument in order to determine a possible structure for it and to identify issues to be covered. Lastly, Part IV briefly addresses the organisation of future work.

¹ CFS, FAO, Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the context of National Food Security (11 May 2012), available at <http://www.fao.org/docrep/016/i2801e/i2801e.pdf> (VGGT).

² CFS, Principles for Responsible Investment in Agriculture and Food Systems (15 Oct. 2014), available at http://www.fao.org/fileadmin/templates/cfs/Docs1314/rai/CFS_Principles_Oct_2014_EN.pdf (CFS-RAI Principles).

I. UNIDROIT AND ITS WORK ON PRIVATE LAW AND AGRICULTURAL DEVELOPMENT

3. At its 88th session (20-23 April 2009), the UNIDROIT Governing Council examined a memorandum prepared by the Secretariat containing various considerations regarding the possibility of UNIDROIT embarking on a new field of activity centring around the interaction between private law and economic and social development.³ The Governing Council agreed that UNIDROIT's broad mandate in the field of private law gave UNIDROIT a wide range of opportunities that would permit it to contribute to the development goals established by the international community, in particular in the field of agricultural investments and production. This would also permit the further exploration of any synergies with other inter-governmental organisations and enable the development of joint projects with some of them.⁴

4. At its 89th session (10-12 May 2010), the Governing Council considered a document submitted by the Secretariat on "Private Law Aspects of Agricultural Finance", which stressed that little attention had been devoted to the question of "the extent to which the various fields of private law that affect investment decisions, financing and marketing mechanisms for agricultural commodities in most countries promote sustainable agricultural investment, facilitate the mobilisation of capital for rural enterprises or favour rational and efficient choices for marketing of agricultural commodities."⁵ The Governing Council agreed that the Secretariat should pursue preliminary research to identify the areas in which UNIDROIT could make a meaningful contribution, in particular with a view to supplementing the work conducted by other organisations. The Council decided to recommend the inclusion of aspects of the private law of agricultural finance in UNIDROIT's Work Programme,⁶ and this recommendation was endorsed by the UNIDROIT General Assembly at its 67th session on 1 December 2010.⁷

5. The Secretariat continued its informal consultations with the two Rome-based organisations specialised in development and agricultural finance – namely, the Food and Agriculture Organization of the United Nations (FAO) and the International Fund for Agricultural Development (IFAD) respectively – and participated in two meetings organised by these organisations, respectively in March and April 2011.⁸ In addition, the Secretariat organised a Colloquium (Rome, 8-10 November 2011) on "Promoting Investment in Agricultural Production: Private Law Aspects", with a view to exploring the nature of the contribution that UNIDROIT might make to global efforts intended to address the objectives of food security, taking into account UNIDROIT's specific mandate and its expertise in formulating uniform private law rules, in synergy with the multilateral organisations working for agricultural development. The Colloquium focused on the following potential areas of work: (a) title to land, (b) contracts for investment in agricultural land; (c) legal structure of agricultural enterprises, (d) contract farming, and (e) the financing of agriculture.⁹

6. For the Governing Council's 91st session (7-9 May 2012), the Secretariat provided a memorandum on the Colloquium, and it reported, in part, the following regarding contracts for investment in agricultural land:¹⁰

³ UNIDROIT 2009 – C.D. (88) 7 add. 6.

⁴ See UNIDROIT 2009 – C.D. (88) 17, paras. 87-98.

⁵ UNIDROIT 2010 – C.D. (89) 7 add. 4, para. 44.

⁶ UNIDROIT 2010 – C.D. (89) 17, paras. 112-115.

⁷ UNIDROIT 2010 – A.G. (67) 9 rev.

⁸ UNIDROIT 2011 – C.D. (90) 9, paras. 9-24.

⁹ The Acts of the Colloquium were published in the *Uniform Law Review*. See XVII UNIF. L. REV. (2012-1/2).

¹⁰ UNIDROIT 2011 – C.D. (91) 8, paras. 14-18.

14. Among the different legal sources applicable to investments in land, the contract holds a place of particular prominence. In effect, national laws (which are applicable in matters of property law, land law and management of natural resources, health regulations, taxation, labour law, settlement of disputes, etc.) are mostly full of gaps and difficult to implement. As the contract is generally concluded by the State in its capacity as owner of the land, it is subject to the treaties and the provisions on foreign investments which in essence protect the investor. In this context, the contract appears to be the most suitable instrument to manage the investment operation as a whole – not only to regulate its different aspects, but also to remedy the shortcomings of the national legislation. International arbitration, which is usually applicable to international contracts, will enable the contract provisions to be made operational.

15. This is why it is widely recommended that agricultural investment contracts give full effect to the principles enshrined in the non-mandatory international instruments on responsible investments and sustainable development [citing, e.g., the CFS-RAI Principles, which were being finalised at that time, and the Performance Standards on environmental and social sustainability, which were developed by the International Finance Corporation (IFC) for the activities of the private sector which it finances in developing countries] (Myers, Mann) as well as in the instruments produced by multilateral organisations, in particular those on human rights and the struggle against corruption. The private sector for its part is increasingly anxious to combine economic objectives with social and environmental values and with principles of good governance.

16. The most sensitive question with regard to investments in agricultural land concerns their impact on the local populations and communities which are often threatened with displacement in the wake of agricultural development and intensive farming programmes and see their access to resources radically changed. The contract may play a central role in ensuring that these communities' rights are taken into consideration and that they can participate in the investment process, in particular where the legislation and the public authorities of the host country do not sufficiently recognise and protect them, so as to ensure that the risks will be as contained as possible and that suitable compensation is offered, and that the community will have access to the advantages deriving from the investment (Lima, Lindsay, Mann, Myers).

17. Another central aspect of investments in land is that of the lack of transparency which surrounds such operations by (or on behalf of) the public authorities in certain host countries, which leaves ample room for abusive practices and corruption. The contract and the legislative and regulatory framework within which the contract is negotiated may, on the contrary, provide that open and transparent procedures accompany the entire operation even before the contract is concluded, involving such mechanisms as calls for tender, the definition of objectives and evaluation criteria for all areas involved. This is so as to encourage competition between investors, guarantee impartiality and fairness in selecting an investor and give the best prospects as regards the performance of the contract, while enabling the beneficiaries to invoke the remedies open to them in the event of non-performance. In this respect, the international recommendations enshrined in the instruments adopted by the United Nations Commission on International Trade Law (UNCITRAL), i.e., the Legislative Guide on Privately Financed Infrastructure Projects (2000), the Model Legislative Provisions on Privately Financed Infrastructure Projects (2003) and the Model Law on Public Procurement (2011), could provide useful guidelines for the procurement of contracts for agricultural investment (Ms Caroline Nicholas, UNCITRAL).

18. The complexity and scope of land investment transactions give rise to a host of questions regarding the rights, obligations and responsibilities of the parties – including those of the local populations as stakeholders. To be noted in particular are the nature and extent of the investor’s rights to the land and other natural resources, of which water is a key element, the technical and economic agricultural development plan and the advantages granted to investors, issues linked to the investor’s payments, the services and infrastructures provided, as well as the economic collaborative models involving local farmers and their implications, environmental obligations, the many issues relating to the long term of the contract and its performance in an inherently fluid context (changes in local regulations, supply fluctuations in the local market that affect food security in the host country, the availability of water, etc.), non-performance and its consequences, termination of the contract, its renewal, transfer of the contract or of the obligations under the contract, compliance management and settlement of disputes (Mann).

7. In synthesising the proposals as to the content of possible future work, the memorandum further stated that:¹¹

46. Information gathered to date highlights both the key role of the contract in ensuring a balanced investment relationship and the general weakness of the legislative environment in an area where huge economic, social and environmental issues are at stake. It should be noted that several international projects are underway in this area – in particular the preparation of a set of Principles for Responsible Agricultural Investment.

47. While fully aware of the complexity of this subject, which incorporates multiple aspects involving different areas of the law, the expertise gained with the Principles of International Commercial Contracts might enable UNIDROIT, together with other organisations, in particular FAO – which has already indicated that it recognises the usefulness of such an initiative – to envisage the preparation of an instrument that would serve as a guide and a repository of “best practices” especially designed for land investment contracts. Such an instrument would offer an in-depth legal analysis of the different aspects of the problem and suggest balanced and sustainable solutions. It might be used in drafting contracts, and as a reference for national legislators engaged upon improving the domestic legislative and regulatory framework.

8. As requested by the memorandum,¹² following supportive interventions by representatives of FAO and IFAD,¹³ the Governing Council, *inter alia*, authorised the Secretariat to proceed with work on the preparation of an international guidance document on contract farming and “to pursue – resources permitting – its consultations and preliminary work with a view to the possible preparation, in the future of an international guidance document on land investment contracts, taking account, in particular, of the UNIDROIT Principles of International Commercial Contracts.”¹⁴

9. For the Governing Council’s 92nd session (8-10 May 2013), the Secretariat suggested in a memorandum on possible future work on private law aspects of agricultural investment and financing that any decision on the preparation of an international guidance document on agricultural land

¹¹ *Id.* paras. 46-47.

¹² *Id.* para. 54.

¹³ See UNIDROIT 2012 – C.D. (91) 15, paras. 91-92 (FAO), 93 (IFAD).

¹⁴ *Id.* paras. 97-98.

investment contracts should (a) await the adoption of the CFS-RAI Principles and take into account other ongoing initiatives, (b) consider the relationship between UNIDROIT's possible work on long-term contracts and land investment contracts, and (c) build upon the experience which UNIDROIT will by then have acquired with the preparation of a Legal Guide on Contract Farming and upon the co-operation established in the meantime with international organisations active in the agricultural area.¹⁵ At the session, the Governing Council reaffirmed its interest in the possible future work, including on land investment contracts, and "encouraged the Secretariat to revisit these issues once the Legal Guide on Contract Farming had been completed."¹⁶

10. Following the adoption of the UNIDROIT/FAO/IFAD Legal Guide on Contract Farming at its 94th session (6-8 May 2015), the Governing Council "instructed the Secretariat to undertake a stocktaking exercise and feasibility study on land investment contracts, in order to decide whether UNIDROIT's particular expertise would be of additional benefit in this field."¹⁷ Pursuant to the Governing Council's instruction, the Secretariat prepared the feasibility study, which took stock of existing initiatives relevant to land investment contracts and examined whether a possible UNIDROIT instrument would be of additional benefit.¹⁸ That study concluded that:

the private law aspects of land investment contracts have not been sufficiently addressed by existing initiatives. As a gap seems to exist in this regard, UNIDROIT would appear to be well placed to prepare an instrument on such aspects, using its private law expertise to build upon existing initiatives, bring together key experts, and develop, in collaboration with the Rome-based food and agriculture organisations of the United Nations system and other institutions, valuable guidance for farmers, communities, investors, governments, and other stakeholders. In particular, among the various options, this study indicates that the preparation of model provisions for land investment contracts, together with concise explanatory comments, could both add value to the important work conducted thus far and further the implementation of the VGGT, the CFS-RAI Principles, and other initiatives.¹⁹

11. At its 95th session (Rome, 18-20 May 2016), the Governing Council considered the Secretariat's feasibility study and took note of it, ultimately deciding to recommend to the General Assembly that it retain work on an international guidance document on agricultural land investment contracts in the UNIDROIT Work Programme for the 2017-2019 triennium with a high level of priority.²⁰

¹⁵ UNIDROIT 2013 – C.D. (92) 7(b), para. 6.

¹⁶ UNIDROIT 2013 – C.D. (92) 17, para. 94.

¹⁷ UNIDROIT 2015 – C.D. (94) 13, para. 68; *see also id.* para. 66 (summarising an IFAD representative's intervention, which "welcomed the suggestion of UNIDROIT undertaking a preliminary study in this area, and indicated that IFAD would like to collaborate on any future product"; "noted that there were many opportunities to explore in this vast field, so an initial consideration of where UNIDROIT might be able to contribute was vital to ensure any future project did not negatively impinge on existing projects"; and "also noted that IFAD would be interested in testing the recently adopted Responsible Investment in Agriculture (RAI) principles and looking at additional work building on them"); *id.* para. 67 (summarising a FAO representative's intervention, which "welcomed the opportunity to continue its close collaboration with the partner organisations and asked partners to move forward on new projects; specifically noted that land investment contracts might be an area of potential additional work"; "further noted that FAO had led a lot of projects in this area and had developed several technical guides, including one aimed at governments, one tailored to the private sector and one for legal service providers"; and pointed out "that these projects were linked to the work of FAO's Committee on World Food Security").

¹⁸ *See* UNIDROIT 2016 – C.D. (95) 7(b), http://www.unidroit.org/english/governments/councildocuments/2016_session/cd-95-07b-e.pdf (Feasibility study).

¹⁹ *Id.*, para. 103.

²⁰ UNIDROIT 2016 – C.D. (95) 15, para. 200; *see also id.* para. 199 (summarising FAO representative's intervention, which "stressed that FAO was generally very well disposed to working with UNIDROIT and that the co-operation

12. Consistent with the Governing Council's recommendation, the Secretariat organised, together with FAO and IFAD, an informal meeting which was held with experts and interested stakeholders at FAO on 20 October 2016, during the Committee on World Food Security's 43rd plenary session (Rome, 17-21 October 2016).²¹ The meeting raised awareness about UNIDROIT's work in this area and solicited input on the scope, content, form and target audience of the future instrument on agricultural land investment contracts. Participants emphasised the various types of agricultural land investments that the future instrument could cover and that it had to be ensured that the future instrument did not endorse – or even appear to endorse – large-scale agricultural land acquisitions. Regarding gaps in existing guidance in addition to issues already identified that the future instrument could address, it was suggested the future instrument could provide guidance on the equitable and sustainable use of local goods and services in the investor's supply contracts for a particular investment. Regarding form, concerns were raised about the feasibility study's suggestion that "model provisions or land investment contracts, together with concise explanatory comments" might be preferable,²² as some in the group expressed a preference for an instrument which provided detailed legal guidance, together with examples of contractual provisions, though not individual model ones. A few others, however, spoke in favour of examining the possibility of developing model provisions. Overall, general support was expressed for work in this area, as it was seen as an opportunity to deliver legal guidance which was consistent with the VGGT and the CFS-RAI Principles to new audiences, in particular legal counsels to parties to agricultural land investment contracts and related stakeholders, including host States, legitimate tenure holders, local communities, investors – whether commercial entities or public financial or investment institutions – and providers of risk insurance.

13. Following the informal meeting, the General Assembly approved, at its 75th session (Rome, 1 December 2016), inclusion of the work on agricultural land investment contracts as a high priority item on UNIDROIT's Work Programme for the 2017-2019 triennium.

II. GENERAL CONSIDERATIONS IN RELATION TO THE WORK ON AGRICULTURAL LAND INVESTMENT CONTRACTS

14. There are various general aspects that, at the outset, the Working Group may wish to keep in mind or to consider, including: (a) the notion of agricultural land investment contracts; (b) alignment of the work on such contracts with existing initiatives; (c) co-operation with the UN agricultural development agencies, non-governmental organisations, the private sector and other stakeholders; and (d) the objective and target audience of the future instrument.

thus far had been very useful. She noted that FAO had been examining the feasibility study with great interest, in particular in the pros and cons of the various options proposed, and was looking forward to further discussions regarding the scope of the project. Referring to the Secretary-General's statement, she emphasised the importance of those further discussions and the need for any work to be aligned with the CFS's instruments as envisaged. She also stressed that there was strong public law component regarding land investment, which could not be ignored. It was essential, as the Secretariat had acknowledged, that UNIDROIT draw upon outside expertise, such as other international organisations, governments, NGOs, and the private sector, and consult extensively not just with experts, but also with civil society generally, for instance through the CFS' civil society mechanisms.").

²¹ Participants included representatives of FAO; IFAD; the World Bank; the French Ministry of Foreign Affairs and International Development; the German Federal Ministry for Economic Cooperation and Development (BMZ); the Japan International Cooperation Agency (JICA); the United States Agency for International Development; the Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ); the Columbia Center on Sustainable Investment (CCSI); the International Institute for Environment and Development (IIED); the International Institute for Sustainable Development (IISD); and the International Land Coalition (ILC).

²² See *supra* note 19 and accompanying text.

A. Notion of agricultural land investment contracts

15. The notion of agricultural land investment contracts is broad and covers various agreements.²³ As discussed in the feasibility study, the legal framework in this area is generally comprised of the following components:

- (a) *domestic law*, in particular the law of the State where the investment is made (i.e. the host State), which could include the State's constitution, laws and regulations;
- (b) *international investment treaties*, for example, bilateral investment treaties (BITs) or investment chapters in trade agreements between the host State and the home State of the investor; and
- (c) *agricultural land investment contracts*.²⁴

The latter could include, for example, contracts for purchase or lease of land for agricultural use agreed between private individuals and investors or between communities and investors, by which investors gain tenure rights generally in exchange for payment or rent, though there may be various additional commitments by the buyer and seller or the lessee or lessor. It could also include, where the land is State-owned, concession or investment agreements for agricultural use negotiated between host States and investors, which may provide investors not only tenure rights, but also additional rights to facilitate an investor's operations,²⁵ in exchange for various payments.²⁶

16. The type of agricultural investment agreement depends in part upon the land tenure holder, who transfers their tenure rights to the investor. The work thus must take into account the great diversity of land regimes around the world, which is more complex than a public-private dichotomy,²⁷

²³ ISLP/CCSI, Guide to Land Contracts: Agricultural Projects, at 5 (March 2016), <http://ccsi.columbia.edu/files/2016/03/Aq-Guide-2016.pdf> (noting that "[a]gricultural investment contracts come in many varieties, cover a range of issues, and vary depending on the country context, the investor's objectives, and other factors.").

²⁴ Feasibility study, para. 11.

²⁵ ISLP/CCSI, Guide to Land Contracts: Agricultural Projects, at 5 (March 2016), <http://ccsi.columbia.edu/files/2016/03/Aq-Guide-2016.pdf> ("For example, a government may lease an investor a parcel of land to grow sugarcane for purposes of ethanol production. Additional rights may include the right to build a factory capable of converting raw sugarcane into biofuel; the right to import the equipment and skilled labor needed to operate the factory; rights to use existing infrastructure on and around the land to carry out the project (for example, irrigation or water supply systems); or rights of way through adjoining lands, which the investor may require to transport equipment to, or agricultural products from, the land.").

²⁶ *Id.* (noting that such payments "may include concession fees or rents, taxes, customs duties, and other fees. Some of these payments will be required by domestic law (for example, taxes). Agricultural investment contracts may also require additional payments, or may include exemptions to taxes or other payments required by law, depending on what is negotiated between the investor and the government. In addition to these payments, the investor will commit to obligations that will define the parameters of its activities. These can take the form of affirmative obligations, such as obligations to maintain books and records, to source needed products domestically, or to provide certain financial and social benefits to local communities. They can also take the form of negative obligations: for example, restrictions on the use of certain chemicals or limitations on the amount of debt the investor can incur.").

²⁷ For example, the Ghana Commercial Agriculture Project (GCAP), an initiative undertaken by the Ministry of Food and Agriculture of Ghana, the World Bank and USAID, to facilitate and realise sound agricultural investment, describes in its Model Commercial Lease Agreement the main categories of land ownership in Ghana as follows:

State and vested land: The state is expected to manage the lands it owns (state lands) in a way that yields the optimum benefit for the entire citizenry. Vested lands belong to a community; however, the right to make land management decisions such as leasing has been transferred to the state. The landowning community reserves the right to benefit and receive proceeds from the land despite management being in the hands of the state. For state and vested lands, the decision to alienate rests with the Public and Vested Lands Management Division of the Lands Commission, which is expected to work closely with the communities that could be affected by its decisions.

Stool or skin land: Stool and skin lands are collectively owned by an identifiable ethnic or tribal group. Management authority over such lands is often entrusted to a designated person, such as a chief, who

but carefully avoid interference with or policy recommendations on the substance of domestic property regimes.

17. Overall, as noted in a recent Working Paper with respect to foreign agricultural investment:

Studies show that foreign investment in land takes place through purchase or long-term leases. Long-term lease of agricultural land is a more frequent arrangement than purchase in the case of foreign investment, partly due to the fact that several countries have regulations prohibiting the sale of land to foreigners. However, the economic and social implications tend to be similar as for outright sale since lease contracts are generally for a long period (typically 50 years and sometimes up to 99 years). In some cases of purchase, a local counterpart to the foreign investor is involved.²⁸

18. *Keeping this in mind, the Working Group may wish to consider, as a general matter or in connection with the discussion of the possible scope of the instrument, the type or types of agricultural land investment contracts that the future instrument should cover.*

B. Alignment of the work on agricultural land investment contracts with existing initiatives

19. As covered in the feasibility study, there are numerous existing initiatives in this area.²⁹ Among the various initiatives, there are two in particular to which the work and the future instrument must be aligned – the VGGT and the CFS-RAI Principles – and others which should be taken into consideration.

20. First, the VGGT, endorsed in May 2012, were developed in response to growing and widespread interest on responsible tenure governance and built upon prior FAO and partner work.³⁰ The VGGT are “to serve as a reference and to provide guidance to improve the governance of tenure of land,

is expected to manage and administer this jointly owned resource for the benefit of all members of the landowning community. When the land to be acquired is owned by stool or skin, the principal actors are the hierarchy of chiefs who together are custodians of the community land with the overlord or paramount chief as head of that corporate tenure group. However, customs and statutes require that decisions to alienate land should be jointly taken by the custodians, the elders and the entire community.

Family/clan land: This category of land belongs to a family with the head of the family acting as trustee for and on behalf of the members of the landowning family. Family lands have their respective peculiarities in terms of the processes of acquisition. For Family lands, the head of family, acting as trustee of the family, is the head of the corporate tenure group. However, customs and statutes require that decisions to alienate land should be jointly taken by the custodians, the elders and the entire community.

Model Commercial Agriculture Lease Agreement (July 2015), at 3, available at <http://gcap.org.gh/wp-content/uploads/2017/04/Model-Commercial-Agriculture-Lease-Agreement-2.pdf> (GCAP Model Lease).

²⁸ Pascal Liu, *Impacts of Foreign Agricultural Investment on Developing Countries: Evidence from Case Studies*, FAO Commodity and Trade Policy Research Working Paper No. 47, at 6 (2014), <http://www.fao.org/3/a-i3900e.pdf>; see also David Hallam, *Foreign Investment in Developing Country Agriculture – Issues, Policy Implications and International Response*, OECD Global Forum on International Investment (7-8 December 2009), at 3, <http://www.oecd.org/investment/globalforum/44231828.pdf> (“The main form of recent investments is acquisition mostly through long-term leasing of up to 99 years of agricultural land for food production.”).

²⁹ Feasibility study, Part II.

³⁰ VGGT at v. In particular, the VGGT “built on and supports the *Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food in the Context of National Food Security* (Voluntary Guidelines on the Right to Food), which were adopted ... in November 2004, and the 2006 *International Conference on Agrarian Reform and Rural Development* (ICARRD).” *Id.*

fisheries and forests with the overarching goal of achieving food security for all and to support the progressive realization of the right to adequate food in the context of national food security.”³¹

21. The VGGT identify guiding principles of responsible tenure governance, including general principles³² and implementation principles.³³ Guidelines are also provided on (a) legal recognition and allocation of tenure rights and duties; (b) transfer and other changes to tenure rights and duties; (c) administration of tenure; (d) responses to climate change and emergencies; and (e) promotion, implementation, monitoring and evaluation. Many of the Guidelines address issues related to land investment contracts, but only at a high level consistent with FAO’s practice for voluntary instruments.³⁴

22. To assist with the VGGT’s dissemination and implementation, FAO has thus far issued important Technical Guides focusing on gender,³⁵ forestry, indigenous people,³⁶ agricultural

³¹ *Id.* at iv.

³² The general principles provide that States should:

- (1) Recognize and respect all legitimate tenure right holders and their rights. They should take reasonable measures to identify, record and respect legitimate tenure right holders and their rights, whether formally recorded or not; to refrain from infringement of tenure rights of others; and to meet the duties associated with tenure rights.
- (2) Safeguard legitimate tenure rights against threats and infringements. They should protect tenure right holders against the arbitrary loss of their tenure rights, including forced evictions that are inconsistent with their existing obligations under national and international law.
- (3) Promote and facilitate the enjoyment of legitimate tenure rights. They should take active measures to promote and facilitate the full realization of tenure rights or the making of transactions with the rights, such as ensuring that services are accessible to all.
- (4) Provide access to justice to deal with infringements of legitimate tenure rights. They should provide effective and accessible means to everyone, through judicial authorities or other approaches, to resolve disputes over tenure rights; and to provide affordable and prompt enforcement of outcomes. States should provide prompt, just compensation where tenure rights are taken for public purposes.
- (5) Prevent tenure disputes, violent conflicts and corruption. They should take active measures to prevent tenure disputes from arising and from escalating into violent conflicts. They should endeavour to prevent corruption in all forms, at all levels, and in all settings. *Id.* para. 3.1.

³³ The principles of implementation include (1) human dignity; (2) non-discrimination; (3) equity and justice; (4) gender equality; (5) holistic and sustainable approach; (6) consultation and participation; (7) rule of law; (8) transparency; (9) accountability; and (10) continuous improvement. *Id.* para. 3B.

³⁴ See, e.g., paras. 5 (containing guidelines on policy, legal and organisational frameworks related to tenure); 11-12 (containing, with respect to transfers and other changes to tenure rights and duties, guidelines on markets and investments); 21 (containing guidelines on resolution of disputes over tenure rights). The VGGT “follow the format of other FAO voluntary instruments that set out principles and international accepted standards for responsible practices” which are accordingly “relatively short documents that provide frameworks that can be used when developing strategies, policies, laws, programmes and activities.” *Id.* at v; see also VGGT para. 26.3 (noting that partners are encouraged to provide support, including “technical cooperation, financial assistance, institutional capacity development, knowledge sharing, and exchange of experience, assistance in developing national tenure policies, and transfer of technology”).

³⁵ Technical Guide No. 1, Governing land for women and men: A technical guide to support the achievement of responsible gender-equitable governance land tenure (2013) at 4-5, 34, available at <http://www.fao.org/docrep/017/i3114e/i3114e.pdf> (providing “advice on mechanisms, strategies and actions that can be adopted to improve gender equity in the processes, institutions and activities of land tenure governance” consistent with the Convention on the Elimination of All Forms of Discrimination Against Women (1979) and noting *inter alia* that “the use of model leases can be particularly beneficial” for supporting gender-equitable leasing arrangements) (VGGT Technical Guide on gender).

³⁶ Technical Guide No. 3, Respecting free, prior and informed consent: Practical guidance for governments, companies, NGOs, indigenous peoples and local communities in relation to land acquisition (2014), at 3-5, 20, available at <http://www.fao.org/docrep/019/i3496e/i3496e.pdf> (providing advice on respecting and protecting free, prior and informed consent consistent with the UN Declaration on the Rights of Indigenous People (2007), describing how consultation can be carried out with those affected by land-use changes, and noting *inter alia* that “because in many indigenous areas land markets have often been absent, the terms on which lands should be

investment, legal professionals, pastoral lands, the private sector, commons and, in a preliminary version, fisheries.³⁷ The Technical Guide on agricultural investment was “developed in response to concerns regarding large-scale land acquisitions and the need to increase investment in agriculture” and “supports application of the [VGGT] at the national level by providing technical guidance on how to safeguard tenure rights in the context of agricultural investments, including in land.”³⁸ It is specifically intended to:

focus[] on ensuring that appropriate safeguards are in place to protect legitimate tenure rights when agricultural investments are made. In particular, it addresses concerns that large-scale land acquisitions by private investors may put at risk the legitimate tenure rights on which some people depend for their livelihoods. Consistent with the [VGGT], this guide promotes types of investment that do not result in the large-scale transfer of tenure rights to investors in ways that infringe the legitimate tenure rights of other people, particularly those who are vulnerable. To avoid such cases, the guide promotes investments that encourage partnerships with local tenure right holders.³⁹

In particular, the Technical Guide provides *inter alia* key messages and guidance on agricultural investment and tenure in the following areas – (1) creating an enabling environment; (2) identifying the need for safeguards; (3) investment approval; and (4) investment monitoring – as well as offering other tools and resources. In doing so, it recognises the importance of land investment contracts. Indeed, one of the Technical Guide’s key points is that “[w]here regulatory frameworks or policy guidance are weak or in the process of development, investment agreements and contracts can serve as mechanisms for safeguarding tenure rights if they are written in ways that allow legal enforcement and are accompanied by adequate enforcement mechanisms.”⁴⁰ In this regard, the Technical Guide does briefly address the “[n]egotiation of land lease or sale”.⁴¹ As an additional resource, it provides a checklist of “provisions that should be included in lease agreements” but does not set forth model provisions.⁴²

23. For its part, the Technical Guide for lawyers and other legal service providers covers the role of law in giving effect to the VGGT’s provisions and recognises the importance of legal professionals

fairly transferred from customary owners to investors – whether by rental, lease or sale – are unclear. In such circumstances, government agencies have a major responsibility to ensure fair play and to protect the interests of communities with weak or unsecured rights”).

³⁷ The Technical Guides, including those not specifically discussed herein, are available at <http://www.fao.org/nr/tenure/information-resources/en/> (last accessed 20 April 2017).

³⁸ Technical Guide No. 4, Safeguarding land tenure rights in the context of agricultural investment: A technical guide on safeguarding land tenure rights in line with the [VGGT] for government authorities involved in the promotion, approval and monitoring of agricultural investments (2015) at 6, available at <http://www.fao.org/3/a-i4998e.pdf> (VGGT Technical Guide on agricultural investment).

³⁹ *Id.* at 8; *see also id.* at 14 (citing VGGT, paras. 12-6).

⁴⁰ *Id.* at VIII; *see also id.* at 38 (“Laws pertaining to property, land registration, spatial planning, expropriation, contracts, concessions, inheritance, environmental protection, agriculture, forestry, water, gender, trade, investment, indigenous peoples and other issues depending on the country context should be reviewed to ensure consistency and coherence.”); *id.* at 82 (“Before agreeing to any investment, verify that all negotiated impacts and benefits, such as payments, hiring and training of local workers, and provision of health care, infrastructure, are clearly spelled out in the contract.”).

⁴¹ *Id.* at 61-65 (including a table which provides – in six steps – an example investment approval process).

⁴² Although the Technical Guide adapted the checklist – which is set forth in paragraph 49 below – from a presentation by Welthungerhilfe, a private aid organisation based in Germany, the Guide also refers to the IISD Guide to Negotiating Investment Contracts for Farmland and Water (IISD Guide), which is referenced in paragraph 43 and notes 63, 67, 71-72, 74 and 81 below. *See id.* at 57, 63, 87; *see also* <http://www.welthungerhilfe.de/en/about-us/who-we-are.html> (last accessed 20 April 2017) (describing Welthungerhilfe and its aid efforts, including disaster relief, reconstruction, and long-term development projects).

in this regard.⁴³ It also provides more specific guidance in four areas: (1) how to appraise legal frameworks to assess the extent to which they are in line with the VGGT; (2) how to prepare or revise legislation where needed; (3) how to ensure that legislation is duly implemented; and (4) how to use the VGGT in the context of dispute settlement.⁴⁴ With regard to law-making, the Technical Guide recognises that “amending one tenure law may necessitate corresponding amendments to a number of other, related national laws” including, for example, “contract law, environmental laws, water laws, inheritance laws or local government laws”, and emphasises the importance of transparency, impact assessments, and grievance mechanisms.⁴⁵ With regard to making law work in practice, the Technical Guide notes, *inter alia*, the significant roles to be played by (a) States with respect to “supporting communities during negotiations with investors” and “establishing effective sanctions, including termination of investor-state contracts, for investors who fail to fulfil their contractual obligations under community-investor agreements”; and (b) legal service providers with respect to ensuring that there is a written “contract that can be enforced or voided according to national contract law” and includes “enforcement mechanisms and penalties[,] for example, for failure to pay rental fees or to provide agreed benefits.”⁴⁶ Regarding ways forward, the Technical Guide notes the importance of model laws and contracts in facilitating the VGGT’s use in legal practice.⁴⁷

24. Lastly, the Technical Guide for investors recognises that investments which are planned and operated consistent with the VGGT are more likely to be successful and “seeks to help investors apply the Guidelines in ways that will help them to play their part in achieving that result.”⁴⁸ It addresses, *inter alia*: tenure rights; consultation, participation and negotiation; grievances and dispute resolution; transparency and corruption; food security, human rights and the environment and sustainability; and important implementation challenges.⁴⁹ In doing so, it identifies for each what the VGGT covers, the related risks, and how those risks can be managed and mitigated.⁵⁰

25. Second, the CFS-RAI Principles, endorsed in October 2014, are intended to build on the VGGT and “to promote responsible investment in agriculture and food systems that contribute to food security and nutrition, thus supporting the progressive realization of the right to adequate food in

⁴³ Technical Guide No. 5, Responsible governance of tenure and the law: A guide for lawyers and other legal service providers (2016) at 6-8, available at <http://www.fao.org/3/a-i5449e.pdf> (Technical Guide for lawyers) (noting, e.g., with respect to business lawyers, that the VGGT may be “a useful tool for determining whether gaps in national law exist, for designing and drafting contracts to mitigate risks associated with gaps or inconsistencies in domestic law and for the undertaking of due diligence” and, with respect to lawyers working with international development agencies, that such lawyers “can help promote responsible governance of tenure through law-related projects” which “may involve assessing legal frameworks, providing technical assistance in law reform processes or supporting the implementation of existing law”).

⁴⁴ *Id.* at 3.

⁴⁵ *Id.* at 37, 47-51.

⁴⁶ *Id.* at 66, 76.

⁴⁷ *Id.* at 104 (“Legal service providers can facilitate the dissemination and use of the Guidelines in legal practice by drawing on a variety of tools. These tools may include training materials and practice guides, a wide range of communication and capacity-building tools, Web-based and other technological applications, legal assessment tools, *model laws and contracts*, and codes of conduct developed by bar associations or multistakeholder groups.”) (emphasis added).

⁴⁸ Technical Guide No. 7, Responsible governance of tenure and the law: a technical guide for investors (2016) at IV, available at <http://www.fao.org/3/a-i5147e.pdf> (Technical Guide for investors).

⁴⁹ *Id.* at VI-VII.

⁵⁰ *Id.*; see also M. Vidar, Presentation for Law, Justice and Development Week, “FAO’s technical guides to the VGGT” (Nov. 2015) at 12, <http://www.unidroit.org/english/news/2015/20151120-wb-cf/vidar-pres-e.pdf> (presenting the then upcoming Technical Guide for investors, as well as those for lawyers, agricultural investment and indigenous peoples).

the context of national food security.⁵¹ The CFS-RAI Principles set forth the following ten voluntary and non-binding principles together with explanatory paragraphs:

- (1) Contribute to food security and nutrition;
- (2) Contribute to sustainable and inclusive economic development and the eradication of poverty;
- (3) Foster gender equality and women’s empowerment;
- (4) Engage and empower youth;
- (5) Respect tenure of land, fisheries, and forests, and access to water;
- (6) Conserve and sustainably manage natural resources, increase resilience, and reduce disaster risks;
- (7) Respect cultural heritage and traditional knowledge, and support diversity and innovation;
- (8) Promote safe and healthy agriculture and food systems;
- (9) Incorporate inclusive and transparent governance structures, processes, and grievance mechanisms; and
- (10) Assess and address impacts and promote accountability.

26. The CFS-RAI Principles also address the roles and responsibilities of various stakeholders. Such stakeholders include: (a) States; (b) intergovernmental and regional organisations; (c) financing institutions, donors, foundations, and funds; (d) research organisations, universities, and extension organisations; (e) smallholders and their organisations; (f) business enterprises including farmers; and (g) civil society organisations; (h) workers and their organisations; (i) communities; and (j) consumer organisations.⁵² In particular, the CFS-RAI Principles state that inter-governmental and regional organisations, such as UNIDROIT, “have a key role to play in promoting responsible investment in agriculture and food systems” and “are encouraged to integrate the Principles into their own policies, frameworks with member States, programmes, research, outreach activities, technical assistance, and capacity building.”⁵³ Like the VGGT, many of the Principles address issues related to land investment, but only at a high level.⁵⁴

⁵¹ CFS-RAI Principles, para. 10. In particular, the Principles seek to “(i) Address the core elements of what makes investment in agriculture and food systems responsible; (ii) Identify who the key stakeholders are, and their respective roles and responsibilities with respect to responsible investment in agriculture and food systems; and (iii) Serve as a framework to guide the actions of all stakeholders engaged in agriculture and food systems by defining Principles which promote much needed responsible investment, enhance livelihoods, and guard against and mitigate risks to food security and nutrition.” *Id.* para. 11.

⁵² *Id.*, paras. 32-56. The CFS-RAI Principles also emphasise the “shared roles” of the various stakeholders in supporting and disseminating the Principles. *Id.* paras. 57-62.

⁵³ *Id.* para. 44.

⁵⁴ See, e.g., *id.* Principle 1, para. 21 (noting the importance of responsible investment to “[i]ncreasing sustainable production and productivity of safe, nutritious, diverse, and culturally acceptable food, and reducing food loss and waste” and “[e]nhancing the fairness, transparency, efficiency, and functioning of markets”); Principle 2, para. 22 (noting how responsible investment “contributes to sustainable and inclusive economic development and poverty eradication”); Principle 5, para. 25 (noting that responsible investment “respects legitimate tenure rights ... in line with the [VGGT]”); Principle 9, para. 29 (noting that responsible investment “should abide by national

27. In all, the VGGT and CFS-RAI Principles do not provide detailed legal guidance on private law issues with respect to agricultural land investment contracts, instead establishing high-level principles and policy guidance to which the upcoming work on such issues is to be aligned. As set forth in the discussion in Part III below, other existing initiatives, such as the UNIDROIT Principles of International Commercial Contracts⁵⁵ and those containing more detailed guidance on agricultural land investment contracts,⁵⁶ should also be taken into consideration, as the future instrument can build upon them as well, to the extent that they are consistent with the VGGT and the CFS-RAI Principles.

28. *Accordingly, the Working Group may wish to pay particular attention to the VGGT and CFS-RAI Principles and related implementation efforts, particularly the VGGT Technical Guides on agricultural investment, for lawyers, and for investors, which identify important linkages and offer more specific guidance regarding the need to provide supportive legal and administrative frameworks for such investment.*

C. Co-operation with the UN agricultural development agencies, non-governmental organisations, the private sector and other stakeholders

29. Further to alignment with existing initiatives, the work must also be developed in co-operation with the UN agricultural development agencies and in consultation with non-governmental organisations, the private sector and other stakeholders.

30. With respect to the UN agricultural development agencies, in particular FAO and IFAD, the work is to build upon the co-operation enjoyed during the preparation of the UNIDROIT/FAO/IFAD Legal Guide on Contract Farming.⁵⁷ As FAO specifically is the international Organisation empowered to decide agricultural and food security policy, any work completed in this area has to be in complete harmony with FAO's policies as UNIDROIT is only in the position to provide its private law expertise to build upon FAO's instruments, including the VGGT and CFS-RAI Principles.

31. With respect to non-governmental organisations, the private sector and other stakeholders, the Working Group may wish to consider how best to consult extensively not only with legal experts outside the Working Group, but also with private sector and civil society experts and representatives generally.⁵⁸ This is essential to ensuring that the future instrument takes into account both the views of various stakeholders and the need for it to provide useful and practical guidance.

32. In this regard, the Secretariat suggests that, based upon the input received at the initial meeting of the Working Group, the Working Group could be expanded as necessary to ensure representation of the various areas of expertise and stakeholder perspectives. The Secretariat further suggests that, building upon the informal meeting held at FAO on 20 October 2016,⁵⁹ a broader consultation group could also be established to review and comment on the Working Group's draft of the future instrument

legislation and public policies, and incorporate inclusive and transparent governance structures, processes, decision-making, and grievance mechanisms, accessible to all"); Principle 10, para. 30 (describing ways in which responsible investment "assess[es] and address[es] impacts and promote[s] accountability"); see *also* note 34 *supra* (regarding the VGGT).

⁵⁵ The 2016 UNIDROIT Principles – which were amended to take better into account the characteristics and needs of long-term contracts, such as agricultural land investment contracts – have recently been made available on UNIDROIT's website and could be particularly useful. UNIDROIT Principles 2016, <http://www.unidroit.org/english/principles/contracts/principles2016/principles2016-e.pdf>.

⁵⁶ See, e.g., note 72 *infra* (listing key existing initiatives).

⁵⁷ UNIDROIT/FAO/IFAD Legal Guide on Contract Farming (2015), available at <http://www.unidroit.org/english/guides/2015contractfarming/cf-guide-2015-e.pdf>.

⁵⁸ See, e.g., note 20 *supra* (regarding need for consultations with civil society).

⁵⁹ See para. 12 *supra*.

as it develops. Like the informal meeting, the consultation group could meet in connection with the CFS' next plenary session during the fall of 2017, whether as another informal meeting or as a formal plenary side event.

33. In addition, as for the UNIDROIT/FAO/IFAD Legal Guide on Contract Farming, consultation events to raise awareness about the future instrument and to solicit input from stakeholders could be held, resources-permitting, around the world.⁶⁰ Online consultations could be utilised as well.

34. *The Working Group may wish to consider such co-operation, as a general matter or in connection with the organisation of future work.*

D. Objective and target audience of the future instrument

35. In taking stock of existing agricultural land investment initiatives, the feasibility study noted that many such initiatives seek to avoid or limit the negative effects of the acquisition of land tenure rights by international investors. Those initiatives, moreover, often recommend that land acquisitions are to be avoided altogether and may refrain from offering guidance on them in favour of promoting more inclusive contractual models which do not result in the transfer of land tenure rights, such as contract farming.⁶¹ Indeed, contract farming was the first focus of UNIDROIT's work in the area of private law and agricultural development, resulting in the UNIDROIT/FAO/IFAD Legal Guide on Contract Farming.

36. At the same time, however, the feasibility study acknowledged that agricultural land investment contracts involving a transfer of such rights might continue to be concluded in contexts involving little or no legal framework, or private law guidance on best practices and the protection of legitimate public interests, possibly resulting in unbalanced deals which negatively affect local communities and do not support sustainable economic development.⁶²

37. Therefore, for deals not following the contract farming model, the future instrument on agricultural land investment contracts could seek to fill this gap and support more equitable and sustainable agricultural investment, which benefits States, legitimate tenure holders, local communities and investors. More specifically, the future instrument could be of assistance to parties – in particular their legal counsels – in negotiating and drawing up equitable and sustainable agricultural land investment contracts by identifying the legal issues involved, discussing best practices and possible approaches to those issues and, where appropriate, suggesting solutions which parties may wish to consider.

38. In this way, the future instrument could bring this important topic to new audiences, such as corporate in-house and outside counsels, international dispute settlement specialists, and private law academics, who typically follow UNIDROIT's work closely. At the same time, it appears preferable for the future instrument to be drafted in an accessible way, so that it is not only useful for them but also for a broader audience. Indeed, as the instrument is to be fully consistent with – and contribute to the implementation of – the VGGT and CFS-RAI Principles, it could assist in the evaluation of whether a particular agricultural land investment contract is in line with those instruments. Though

⁶⁰ *Id.* at iii (noting that the UNIDROIT/FAO/IFAD Legal Guide on Contract Farming “is the product of a Working Group set up by UNIDROIT, which brought together internationally recognised legal scholars, partner multilateral organisations and representatives from the farming community and agribusiness. Stakeholder representatives, international civil servants, practising lawyers and academics from different backgrounds and legal cultures contributed to the process of development of the Guide, and valuable input was received during consultations held during 2014 with stakeholders in Buenos Aires (Argentina), Addis Ababa (Ethiopia), Rome (Italy) and Bangkok (Thailand), as well as through online consultations.”).

⁶¹ Feasibility study, paras. 11-13.

⁶² *Id.*

the target audience could be legal counsels, all stakeholders involved in the preparation, negotiation, and monitoring and enforcement of an agricultural land investment contract (including IOs, host governments, development agencies, investment promotion agencies, NGOs and civil society, and the private sector) could benefit from the instrument.

39. *Accordingly, the Working Group may wish to consider the objective and target audience of the future instrument, in particular (a) whether it should be primarily addressed to legal counsels, yet drafted in an accessible way so that it would be a practical resource for all stakeholders in agricultural land investment contracts; and (b) how it could be crafted to maximise its usefulness for those various audiences.*

III. CONSIDERATION OF THE STRUCTURE OF THE FUTURE INSTRUMENT AND IDENTIFICATION OF ISSUES TO BE COVERED

40. This Part considers the potential structure of the future instrument and the possible issues to be covered, in particular with respect to the instrument's scope, content and form. Building upon the following and without wishing to presuppose any of the recommendations that the Working Group might make, the Secretariat provides for discussion purposes a suggested preliminary outline for the future instrument (see Annex Annex 1: Preliminary draft outline) and an initial collection of hyperlinks to possible resources (see Annex Annex 2: Additional resources).

A. Scope

41. As the feasibility study observed, the majority of existing initiatives have a broad scope, dealing with, for example, ranges of issues related to agricultural land investment, tenure or both. By contrast, those few initiatives which treat agricultural land investment contracts more specifically are in most instances tailored to land leases.⁶³ As noted above, long-term land leases of agricultural land appear to occur more frequently.⁶⁴ *The Working Group may wish to consider whether to limit the scope of the future instrument to land leases.*

42. Further to what types of land investments the future instrument should cover, another consideration would also have to be with respect to land ownership. As noted with respect to the notion of agricultural land investment contracts above, there is great diversity among land tenure regimes around the world, and it is not just a matter of agricultural land being publicly or privately owned.⁶⁵ If the future instrument were to focus on land leases, for example, that scope could be sufficiently limited, or it could be limited even further to agricultural land investment contracts between host States, investors and relevant stakeholders (i.e. concession or investment agreements). *Accordingly, the Working Group may wish to consider whether there should be further limitations of the future instrument's scope in this regard.*

43. In addition, ensuring that the future instrument both (a) does not endorse – or even appear to endorse – large-scale agricultural land acquisitions and (b) properly addresses the interplay between agricultural land investment and the environment, including natural resources, is essential to the preparation of the instrument. For the former, a statement or disclaimer in this regard could be included at the outset of the instrument, *inter alia*, making reference to the UNIDROIT/FAO/IFAD Legal Guide on Contract Farming. USAID's Operational Guidelines, for example, state the following:

⁶³ See, e.g., *supra* note 27 (GCAP Model Lease) and Smaller et al., The IISD Guide to Negotiating Investment Contracts for Farmland and Water (Nov. 2014), available at http://www.iisd.org/sites/default/files/publications/iisd-guide-negotiating-investment-contracts-farmland-water_1.pdf (IISD Guide).

⁶⁴ See *supra* note 28 and accompanying text.

⁶⁵ See *supra* para. 16.

[t]his guide does not endorse large-scale acquisitions of land. USAID strongly recommends that investors consider smaller-scale projects or alternatives that avoid or limit the transfer of land and resource rights, such as contract farming and smallholder out-grower schemes, in place of large-scale investments. Increasingly, research shows that these alternatives can lead to positive economic and social outcomes.

This guide recognizes, however, that large-scale acquisitions are occurring, and will continue to occur, and in this context provides advice and highlights best practices relating to structuring such acquisitions in the most sustainable way possible.⁶⁶

The IISD Guide, as another example, similarly provides that:

[i]mportantly, leasing farmland is not the [only option for investment in agriculture. There are alternative farming and investments that have proven to be economically profitable and more socially and politically acceptable than large-scale land investments. They should be thoroughly explored before pursuing large-scale land deals, and incorporated in government investment strategies for the agriculture sector. Joint ventures, farmer-owned cooperatives or businesses, management contracts, contract farming or “outgrower schemes,” although not without their own drawbacks, have become a preferred farming model for many agribusinesses and supermarket retailers. ... Nevertheless, the reality is that contracts are being signed between states and investors (or between local chiefs and investors). This guide provides options for ensuring that such contracts contribute to long-term benefits for all stakeholders involved.⁶⁷

The Working Group may wish to consider including a statement or disclaimer in this regard at the outset of the future instrument and emphasizing it accordingly.

44. For the latter, the Secretariat suggests that the interplay between agricultural land investment and the environment raises various issues – including the use of natural resources, in particular water, and pollution – which are to be addressed. *The Working Group may wish to consider how best to address such interplay, whether as a separate part of the future instrument, where it arises with respect to various contractual issues, or both.*

B. Content

45. Various existing initiatives have offered both roadmaps for the agricultural land investment contracting process and lists of issues to be covered by the contracts themselves.

46. First, with respect to the contracting process, the various approaches for setting forth and describing that process could be used to consider and determine the appropriate one to adopt and how such an approach should be adapted or tailored to best address private law aspects of agricultural land investment contracts.

47. There are numerous existing approaches. The World Bank Group’s discussion paper on “Investment Contracts for Agriculture: Maximizing Gains and Minimizing Risks”, for example,

⁶⁶ USAID, Operational Guidelines for Responsible Land-Based Investment, at 1-2 (2015), available at <http://www.usaidlandtenure.net/documents/operational-guidelines-responsible-land-based-investment> (also noting that “[s]ome out-grower and contract farming models have not performed as well as hoped. Therefore, in pursuing alternatives to large-scale acquisitions, it is important to identify the best models for your particular project”) (USAID Operational Guidelines).

⁶⁷ IISD Guide, *supra* note 63 at 3. See also VGGT Technical Guide on agricultural investment, para. 22 *supra* (discussing inclusive investment models, such as contract farming, management contracts, tenant farming/sharecropping, joint ventures, and farmer-owned businesses and cooperatives).

identifies the following three key stages in the contracting process: (1) preparing for contract negotiations; (2) drafting the contract; and (3) monitoring and enforcement.⁶⁸ CCSI's Negotiations Portal, however, adopts a four-stage roadmap, including: (1) setting the legal and policy framework (e.g. government policies and strategies, legislative and regulatory frameworks, and sector-wide analyses); (2) pre-negotiation (e.g. feasibility studies, impact assessments, and tender process and financial structure); (3) contract negotiation (e.g. prepare for the negotiations, assemble a negotiation team, develop a negotiation position, and contract negotiation); and (4) implementation & monitoring (e.g. monitoring, implementation, and grievance mechanisms).⁶⁹ The Analytical Frameworks produced by the New Alliance and the Technical Committee on Land Tenure and Development could be useful in this regard as well.⁷⁰

48. The approach chosen could influence the amount of legal guidance that is to be provided, as breaking the contracting process into more steps would likely, although not necessarily, entail providing more guidance. On the one hand, if it would be decided to address the applicable legal framework separately and not as part of preparing for contracting negotiations, such a decision may entail a more detailed discussion of agricultural land investment contracts, domestic law, and international investment treaties and the relationship between them, for which UNIDROIT would have much existing material to analyse, synthesise, and further develop.⁷¹ On the other hand, a more concise instrument could be developed. *The Working Group may wish to consider how best to structure the future instrument's content, including whether the approach of an existing instrument or document would be suitable.*

49. Second, with respect to the issues to be addressed in the contract, certain initiatives have already provided lists and, in a few instances, model provisions, on such issues.⁷² These lists could be used for consideration of what particular issues should be covered. The VGGT Technical Guide on

⁶⁸ See Smaller et al., Investment contracts for agriculture: maximizing gains and minimizing risks (1 June 2015), available at <http://documents.worldbank.org/curated/en/2015/06/24680795/investment-contracts-agriculture-maximizing-gains-minimizing-risks> (last accessed 20 April 2017).

⁶⁹ See Negotiations Portal, available at <http://negotiationsupport.org/about> (last accessed 20 April 2017) (explaining that the Negotiations Portal is supported by the G7's CONNEX initiative and covers not just agriculture, but includes broadly issues related natural resources, such as mining and oil and gas) see also GCAP Community/Investor Guidelines for Large-Scale Land Transactions, at 1-2 (July 2015), available at <http://gcap.org.gh/wp-content/uploads/2017/04/COMMUNITY-INVESTOR-GUIDELINES-FOR-LARGE-SCALE-LAND-TRANSACTIONS-1.pdf> (GCAP Guidelines) (laying out the following five phases: (1) preparing for commercial agricultural investment; (2) initial engagement between community and investor; (3) impact assessments; (4) negotiation and consent; and (5) monitoring and enforcement of the Agreement); USAID Operational Guidelines, *supra* note 66 at 5-7 (laying out the following five stages: (1) due diligence (e.g. mapping, impact assessments, understanding land tenure framework); (2) stakeholder engagement (to "raise awareness" and "consult"; (3) mapping ("to identify land claims, occupancy patterns, land uses, existing natural assets, and active land disputes"); (4) contract negotiations (to engage with a broad group of stakeholders in a transparent and participatory manner); and (5) project operations (to continue engagement, monitor, and establish grievance mechanisms)).

⁷⁰ See, e.g., New Alliance and Grow Africa, Analytical Framework for Land-based Investments in African Agriculture (2015), available at https://www.growafrica.com/sites/default/files/Analytical-framework-for-land-based-investments-in-African-agriculture_0.pdf (last accessed 20 April 2017); Technical Committee on Land Tenure and Development, Guide to due diligence of agribusiness projects that affect land and property rights, at 9, 47, (Oct. 2014), available at: <http://www.foncier-developpement.fr/wp-content/uploads/Guide-to-due-diligence.pdf> (last accessed 20 April 2017) (Technical Committee Operational Guide).

⁷¹ See, e.g., Feasibility study, paras. 72, 76 (listing IIED and IISD publications in this regard).

⁷² See, e.g., *supra* note 42 (VGGT Technical Guide on agricultural investment), note 23 (ISLP/CCSI Guide to Land Contracts: Agricultural Projects), note 27 (GCAP Model Lease), note 55 (UNIDROIT Principles), note 63 (IISD Guide), and ELAW, Natural Resource Contracts: A Practical Guide (Nov. 2013), available at https://www.elaw.org/sites/default/files/images_content/general_page_images/publications/Natural_Resource_Contracts_Guide.pdf (last accessed 20 April 2017).

agricultural investment, for instance, contains the following list of “necessary information” to be included in a land lease:

- Parties to the lease agreement, including guarantors;
- Description of the area to be leased, including its total extent;
- Duration of the lease – start and termination dates;
- Terms for extension/renewal of the lease;
- Purpose of the investment;
- Time limit for development by the investor, and penalties for failure to develop;
- Description of possessory rights, including limitations on the uses and activities that the investor may engage in;
- Timing and form of lease payments, and interest accrual on late payments;
- Frequency of rent revisions and method of calculating adjustments to the rent;
- Compensation rates for crops, structures or other items on the land, and periods of compensation (e.g. on entry, annual, at exit);
- Details of rehabilitation and resettlement plans for land users who do not hold legitimate tenure rights;
- Contribution to or payment of the legal expenses of the community or holder(s) of legitimate tenure rights through an “arms length” fund;
- Conditions under which the lessor can enter the property to inspect the investor’s activities and monitor lease compliance;
- Final court of litigation;
- Dispute-resolution mechanisms;
- Terms for renegotiation;
- Assignment or transfer of the lease conditions, including stipulation of the condition on which land is to be returned and the liabilities for deterioration.⁷³

In reviewing the various lists, it would be possible to identify those issues warranting treatment in the future instrument. For example, some issues, such as force majeure, are covered in some initiatives, but not in others.⁷⁴ As noted in the feasibility study with respect to the UNIDROIT Principles, it was observed that force majeure in the context of land investment contracts warranted further consideration.⁷⁵ As the work on the future instrument is to be aligned to the VGGT and the CFS-RAI Principles, the Technical Guide’s list could serve as a starting point to which other issues could be added.

⁷³ VGGT Technical Guide on agricultural investment, note 42 *supra* at 87 (citing Welthungerhilfe, “Policy guidelines on large-scale land acquisitions,” presentation to Bo District Council, Sierra Leone (24 May 2014)).

⁷⁴ *Compare* IISD Guide, note 63 *supra* (not containing a force majeure clause) *with* GCAP Model Lease, note 27 (containing a section on force majeure).

⁷⁵ See M.J. Bonell, “International Investment Contracts and General Contract Law: a Place for the UNIDROIT Principles of International Commercial Contracts?”, XVII UNIF. L. REV. at 155-58 (2012-1/2) (observing that an open issue for further consideration is force majeure in the context of food shortages).

50. For instances in which the initiatives offer model provisions, those provisions could be analysed in detail and, to the extent necessary, modified and adapted.⁷⁶ They could thus serve as a basis for UNIDROIT's work and be analysed against the agricultural land investment contracts which have been made available thus far.⁷⁷

51. Further issues for consideration include identifying legitimate tenure holders; ensuring that agricultural land investments benefit local communities (including benefit sharing arrangements, such as community development agreements or trust funds to distribute benefits in an equitable and transparent manner);⁷⁸ incorporating benefit sharing arrangements, if necessary, into agricultural land investment contracts between the investor and land holder; improving transparency; dealing with force majeure situations, in particular food shortages; covering assignment and termination so that arable land does not lie fallow; promoting the equitable and sustainable use of local goods and services in the investor's supply contracts for a particular investment; and necessary safeguards not just for local communities but also for the environment.

52. *With respect to the issues to be covered, the Working Group may wish to consider using the list provided by the VGGT Technical Guide on agricultural investment and building onto it, by drawing upon other lists of issues, available model provisions and possible further issues that have been flagged for consideration.*

C. Form

53. There are various options to consider regarding form, including a legal guide, model contractual provisions or a combination of those options. With respect to a legal guide, this could, as previously envisaged, provide "in-depth legal analysis" and serve as "a repository of 'best practices' especially designed for land investment contracts" to be used "in drafting contracts, and as a reference for national legislators engaged upon improving the domestic legislative and regulatory framework."⁷⁹ As the stocktaking exercise in the feasibility study showed, an abundance of general guides and handbooks already exist or are currently being developed. Thus, the usefulness of any UNIDROIT-developed guidance document would derive not from replicating what has already been produced, but from focusing on private law aspects of agricultural land investment contracts. In this regard, it might be useful to discuss whether the future instrument would seek to address all issues comprehensively, or be more concise and instead refer to other initiatives where possible.

54. With respect to model contractual provisions, international Organisations have thus far refrained from developing such provisions.⁸⁰ Instead, a few State and non-profit initiatives have

⁷⁶ For example, the GCAP Model Lease, which acknowledges that it meant to "address the specific challenges that investors, landowners, and affected communities often encounter in commercial agricultural land transactions in Ghana", could be analysed, compared to other provisions and practices and, if useful, modified to be applicable more broadly. See *supra* note 27 at 1.

⁷⁷ See, e.g., Open Land Contracts, available at <http://www.openlandcontracts.org/> (last accessed 20 April 2017) (Open Land Contracts).

⁷⁸ See UNIDROIT 2017 – Study 80B – WP.1 on Community development agreements in agricultural land investments: Lessons learned from extractive industries (forthcoming).

⁷⁹ See *supra* para. 7 (excerpting UNIDROIT 2011 – C.D. (91) 8, para. 47).

⁸⁰ See, e.g., *supra* note 35 (addressing the VGGT Technical Guide on gender which recognises that "model leases could be particularly beneficial" for supporting gender-equitable arrangements, but does not provide such a model); note 47 (addressing the VGGT Technical Guide for lawyers which recognises the importance of "model laws and contracts" to the VGGT's dissemination and use but does not provide such models); African Union, African Development Bank and Economic Commission for Africa, Guiding Principles on Large Scale Land Based Investments in Africa, at 10 (2014), available at <http://www.uneca.org/publications/guiding-principles-large-scale-land-based-investments-africa> (last accessed 20 April 2017) (recognising that "[c]ontracts ... should clearly identify the rights and obligations of all parties. These rights should be formulated in specific and enforceable terms and should provide effective arrangements for monitoring compliance and sanctioning non-compliance including contract termination in case of material non-compliance"); note 68 at 23 (discussing need for

stepped in to offer such provisions, some of which have been cited by international Organisations⁸¹ and could serve as a starting point for analysis, synthesis, and development into an international instrument. As noted above, however, concerns were raised at the informal meeting regarding the preparation of model contractual provisions, as some expressed a preference for an instrument which provided detailed legal guidance, together with examples of contractual provisions, though not individual model ones.⁸²

55. *The Working Group may wish to consider the various possible options and the input received at the informal meeting.*

IV. ORGANISATION OF FUTURE WORK

56. With respect to the organisation of future work, the Working Group may wish to consider how best to proceed with the initial drafting of the instrument and, once the draft is underway, how to engage in consultations with stakeholders.

57. Regarding initial drafting, once the basic structure of the future instrument and issues to be covered are decided, the members of the Working Group could volunteer to draft particular portions of the future instrument for review at the subsequent meeting, or the Working Group could offer detailed, expert input to the Secretariat so that it could prepare drafts of the various portions for circulation to the experts for their review.

58. Depending on the drafting arrangements, it might be useful to discuss the possibility of holding occasional videoconferences to discuss the development of the future instrument in between in-person meetings.

59. Regarding stakeholder engagement, the Secretariat suggests that, if an initial draft could be sufficiently advanced by that time so as to permit a second meeting, such a meeting could take place in the fall, prior to the CFS' next plenary session. In that way, provided that the Working Group agrees with the suggestion of establishing a broader consultation group, the draft and any related developments could be shared with that group, whether as an informal meeting during the CFS' session or as a CFS side-event.

60. Possible coordination with other UNIDROIT work in the area of agricultural development could be considered as well, including implementation activities for the UNIDROIT/FAO/IFAD Legal Guide on Contract Farming and developments related to the future Fourth Protocol to the Cape Town Convention on matters specific to agricultural, construction and mining equipment.

61. *The Working Group may wish to consider how initial drafting should be completed, including the scheduling of the Working Group's next meeting; the possible establishment of a broader*

"translating" World Bank initiatives "into concrete and detailed provisions in contracts or through other legal frameworks and mechanisms applying to investment" and for "[e]stablishing draft lease and concession documents that clearly state the rights and obligations of all parties, incorporate social and environmental safe guards, and support project implementation monitoring and revocation clauses"); para. 49 (noting that VGGT Technical Guide on agricultural investment provides list of matters to be covered in investment contract, but not model provisions).

⁸¹ See, e.g., *supra* notes 42 (noting that the VGGT Technical Guide on agricultural investment refers to the IISD Guide), OECD and FAO, Guidance for Responsible Agricultural Supply Chains, at 40 (2016), available at <http://www.oecd.org/daf/inv/investment-policy/rbc-agriculture-supply-chains.htm> (last accessed 20 April 2017) (noting that the OECD-FAO Guidance for Responsible Agricultural Supply Chains refers to the IISD Guide with respect to environmental impact assessments).

⁸² See *supra* para. 12.

consultation group to raise awareness and obtain input from stakeholders; and whether any coordination with UNIDROIT's other work in the area of agricultural development might be useful.

ANNEX 1: PRELIMINARY DRAFT OUTLINE

[for discussion purposes only]

PREFACE

- I. Overview
- II. Approach and how to use the instrument

INTRODUCTION

- I. General introduction to agricultural land investments/business models
 - A. Overview on tenure rights
 - B. Agricultural land investments/business models that do not threaten tenure rights (e.g. contract farming, management contracts and tenant farming)
 - C. Statement or disclaimer in favour of such investments/business models
 - D. Agricultural land investments/business models requiring safeguards
- II. Scope and objective of the instrument
 - A. Various agricultural land investment contracts in practice (e.g. leases, concessions/investment agreements, purchases)
 - B. Identification of those contracts falling within the scope of the instrument
 - C. Objective to provide legal guidance to ensure that appropriate safeguards are in place in such contracts and to support equitable and sustainable agricultural investment

CHAPTER 1 – THE LEGAL FRAMEWORK

- I. The applicable private law regime
 - A. Legal treatment of agricultural land investment contracts
 - B. Other legal sources
 1. Relevant international agreements (e.g. bilateral/multilateral investment treaties)
 2. Rules and principles of law
 3. Customary rules and usages
 4. Trade usages and practices
 5. Standard terms and guidance documents
 - i. Standard terms

- ii. Technical standards
 - iii. Soft law instruments (e.g. VGGT, CFS-RAI Principles, UNIDROIT Principles)
- II. The role of the regulatory environment
 - A. Public law aspects
 - B. Food security
 - C. Environment
 - D. Finance
 - E. Anticorruption
 - F. Competition
 - G. Human rights
 - H. Labour law
 - I. Other potentially applicable laws and regulations

CHAPTER 2 – PRE-NEGOTIATION / PRE-CONTRACTUAL ISSUES

- I. Identification of the possible parties to the contract and relevant stakeholders (including discussion of consultations and free, prior and informed consent)
- II. Feasibility studies (e.g. suitable land availability and valuation, availability of water and other resources)
- III. Impact assessments (e.g. environmental, social, human rights)
- IV. Tender process (e.g. competitive, inclusive and transparent)

CHAPTER 3 – CONTRACT NEGOTIATION

- I. Parties, formation and form
 - A. Parties and stakeholders
 - 1. Investor(s)
 - 2. Legitimate tenure holder(s)
 - 3. Other parties or stakeholders
 - B. Contract formation
 - 1. Offer and acceptance
 - 2. Capacity and consent

3. Role of those who intervene or assist in contract negotiation
- C. Required contract form and content
 1. Form
 2. Content
 3. Consequences of breach of required form or content
- II. Guidance on contractual content and obligations of the parties
- A. Parties to the contract, including guarantors
 1. Identification of parties
 2. Other stakeholders
 - B. Description of the area, including its total extent
 1. Location
 2. Option for additional land and right of first refusal for such land
 - C. Duration of the contract
 1. Start and end dates
 2. Terms for extension/renewal of the lease
 - D. Purpose of the investment
 - E. Description of possessory rights granted to the investor
 1. Basic rights
 - i. Rights of use, entry and control
 - ii. Right to undertake agricultural production
 2. Related rights
 - i. Infrastructure
 - ii. Importation (e.g. supplies and equipment)
 - iii. Resources
 - a. Specification of water and other resource rights
 - b. Utilities
 3. Limitations on the uses and activities in which the investor may engage

- i. Conservation of premises
 - ii. Time limit for development by the investor, and penalties for failure to develop
 4. Related responsibilities for protection and security of rights
- F. Financial obligations
 1. Timing and form of payments, and interest accrual on late payments
 - i. Rental fees
 - ii. Taxes (income, assets or export)
 - iii. Customs duties
 2. Frequency of rent revisions and method of calculating adjustments to the rent
 3. Compensation rates for crops, structures or other items on the land, and periods of compensation (e.g. on entry, annual, at exit)
 4. Capitalisation
- G. Development obligations
 1. Employment
 2. Procurement (including guidance on contracts with local suppliers)
 3. Outgrower schemes (e.g. contract farming)
 4. Communications and agreements with local communities (e.g. guidance on community development agreements, community trusts or development funds)
- H. Environmental obligations
 1. Applicable environmental laws and standards
 2. Impact assessment and management
 3. Pollution prevention
 4. Soil
 5. Water
- I. Compliance obligations
 1. Permits and licenses
 2. Insurance

3. Recordkeeping and audits
 4. Conditions under which the lessor can enter the property to inspect the investor's activities and monitor compliance
- J. Governing law
- K. Dispute resolution
1. Grievance mechanisms (including for local communities)
 2. Negotiation/Conciliation
 3. Mediation
 4. Arbitration
 5. Choice of court
- L. *Force majeure*
- M. Amendments, periodic review, and terms for renegotiation
- N. Assignment or transfer of the contractual conditions
1. Stipulation of the condition on which land is to be returned
 2. Liabilities for deterioration
- O. Termination
1. Defining default events
 2. Procedure
 - i. Notice
 - ii. Opportunity to cure
- P. Public disclosure/Transparency
- Q. [Other potential content for consideration includes, for example: Definitions; Corporate organisation and change of control; Representations and warranties (and Indemnification); Stabilisation clauses; Anti-bribery/corruption provisions; Notice provisions]

CHAPTER 4 – CONTRACT IMPLEMENTATION, MONITORING AND DISPUTE SETTLEMENT

- I. Implementation and monitoring
 - A. Permits and licenses
 - B. Infrastructure

- C. Performance standards
- D. Performance guarantees (bonds, etc.)
- E. Reporting requirements
- F. Access to information
- G. Periodic review and review mechanisms
- II. Non-performance
 - A. Excuses
 - B. Remedies for breach
 - i. By the investor
 - ii. By the legitimate tenure holder
 - iii. By other parties
- III. Settlement of disputes
 - A. Disputes arising under agricultural land investment contracts
 - B. Non-judicial means of resolution
 - C. Judicial means of resolution
 - D. Enforcement

[ANNEX: MODEL PROVISIONS / EXAMPLE CONTRACTUAL PROVISIONS]

ANNEX 2: ADDITIONAL RESOURCES

AU, African Development Bank and Economic Commission for Africa, The Framework and Guidelines on Land Policy in Africa (2010),

http://www.uneca.org/sites/default/files/PublicationFiles/fg_on_land_policy_eng.pdf

AU, African Development Bank and Economic Commission for Africa, Guiding Principles on Large Scale Land Based Investments in Africa (2014),

http://www.uneca.org/sites/default/files/PublicationFiles/guiding_principles_eng_rev_era_size.pdf

CCSI/ISLP, Guide to Land Contracts: Agricultural Projects (Mar. 2016),

<http://ccsi.columbia.edu/files/2016/03/Ag-Guide-2016.pdf>

CFS, Principles for Responsible Investment in Agriculture and Food Systems (15 Oct. 2014),

http://www.fao.org/fileadmin/templates/cfs/Docs1314/rai/CFS_Principles_Oct_2014_EN.pdf (CFS-RAI Principles)

CFS, Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the context of National Food Security (11 May 2012),

<http://www.fao.org/docrep/016/i2801e/i2801e.pdf> (VGGT)

VGGT Technical Guides, <http://www.fao.org/nr/tenure/information-resources/en/>

ELAW, Natural Resource Contracts: A Practical Guide (Nov. 2013),

https://www.elaw.org/sites/default/files/images_content/general_page_images/publications/Natural_Resource_Contracts_Guide.pdf

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

EU Task Force on Land Tenure , EU Land Policy Guidelines for support to land policy design and land policy reform processes in developing countries (Nov. 2014),

https://ec.europa.eu/europeaid/sites/devco/files/methodology-eu-land-policy-guidelines-200411_en_2.pdf

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

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

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

IFC, Performance Standards on Environmental and Social Sustainability (Jan. 2012),

http://www.ifc.org/wps/wcm/connect/c8f524004a73daeca09afdf998895a12/IFC_Performance_Standards.pdf?MOD=AJPERES

IISD, Guide to Negotiating Investment Contracts for Farmland and Water (Nov. 2014),

https://www.iisd.org/sites/default/files/publications/iisd-guide-negotiating-investment-contracts-farmland-water_1.pdf

Land Matrix, <http://www.landmatrix.org/en/> (containing an online public database on land deals)

New Alliance and Grow Africa, Analytical Framework for Land-based Investments in African Agriculture (2015), https://www.growafrica.com/sites/default/files/Analytical-framework-for-land-based-investments-in-African-agriculture_0.pdf

OECD and FAO, Guidance for Responsible Agricultural Supply Chains (2016), <http://mneguidelines.oecd.org/OECD-FAO-Guidance.pdf>

OECD, Guidelines for Multinational Enterprises (2011), <http://www.oecd.org/daf/inv/mne/48004323.pdf>

Open Land Contracts, <http://www.openlandcontracts.org/> (containing an online repository of publicly available land contracts)

Principles for Responsible Investment, Responsible Investment in Farmland (2014-2015), https://www.unpri.org/download_report/6243

Technical Committee on Land Tenure and Development, Guide to due diligence of agribusiness projects that affect land and property rights (Oct. 2014), <http://www.foncier-developpement.fr/wp-content/uploads/Guide-to-due-diligence.pdf>

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

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

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

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

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

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