



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

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

***First meeting***  
**Rome, 3-5 May 2017**

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

**Rome, 3-5 May 2017**

*(prepared by the UNIDROIT Secretariat)*

1. The Working Group on agricultural land investment contracts (the Working Group) - established pursuant to the Work Programme for the 2017-2019 triennium which included work on such contracts as a high priority item<sup>1</sup> - held its first meeting at UNIDROIT's seat in Rome from 3-5 May 2017.

2. The Working Group was composed of the following members: Mr José Antonio MORENO RODRÍGUEZ, Attorney and Professor, ALTRA Legal, and Member of the UNIDROIT Governing Council; Mr Lorenzo COTULA, Principal Researcher, Law and Sustainable Development, International Institute for Environment and Development (IIED); Mr DARYONO, Professor, Universitas Terbuka, Jakarta; Ms Bénédicte FAUVARQUE-COSSON, Professor, Université Panthéon-Assas, Paris 2; Ms Jean HO, Assistant Professor, Faculty of Law, National University of Singapore; and Mr Pierre-Etienne KENFACK, Professor, Université Yaoundé 2. The Working Group also included representatives from the Food and Agriculture Organization of the United Nations (FAO), the International Fund for Agricultural Development (IFAD), the International Land Coalition (ILC), the World Farmers' Organisation, and the Secretariat for the Private Sector Mechanism of the UN Committee on World Food Security.

3. The complete list of participants for the first meeting is included in Annex 1.

### **1. Opening of the meeting and election of the Chairman**

4. The Secretary-General of UNIDROIT, Mr José Angelo Estrella Faria opened the meeting. He welcomed the participants and thanked them for participating in UNIDROIT's work on agricultural land investment contracts.

5. Consistent with UNIDROIT's practice,<sup>2</sup> the Working Group appointed Mr José Antonio Moreno Rodríguez as Chairman of the Group, and he proceeded to chair the meeting.

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

6. For the meeting, the Secretariat had prepared a draft annotated agenda<sup>3</sup> and a memorandum<sup>4</sup> providing a preliminary discussion of issues that the Working Group might wish to consider in beginning its work on an international instrument on private law aspects of agricultural land investment contracts, including for discussion purposes a preliminary draft outline and an initial collection of hyperlinks to possible resources.

7. Mr Neale Bergman (Legal Officer, UNIDROIT) presented the agenda, the memorandum, and some of the relevant existing initiatives and resources. He emphasised, in particular, the importance of the Principles for Responsible Investment in Agriculture and Food Systems (CFS-RAI Principles), the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the context of National Food Security (VGGT) and the related VGGT Technical Guides that had been prepared, the UNIDROIT Principles of International Commercial Contracts (the UNIDROIT Principles or UPICC), the UNIDROIT-FAO-IFAD Legal Guide on Contract Farming (Legal Guide on Contract Farming) and other key initiatives and resources.

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

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

<sup>3</sup> UNIDROIT 2017 - Study 80B – Inf. 1 rev.

<sup>4</sup> UNIDROIT 2017 - Study 80B – Doc. 1 rev.

8. The Working Group adopted the agenda – which is included in Annex 2 – as proposed. The Working Group accordingly followed that agenda throughout its deliberations with the exception that it considered the instrument's possible form before examining in detail the instrument's possible content.

### **3. UNIDROIT and its work on private law and agricultural development**

9. The Secretary-General provided a brief overview on UNIDROIT, its mandate and its working methods and emphasised UNIDROIT's expertise in drafting private law rules in various areas, such as commercial contracts, secured transactions involving high-value mobile equipment and financial markets. With respect to commercial contracts, he discussed two instruments that were particularly relevant to the future work on agricultural land investment contracts: (a) the UNIDROIT Principles, which were first published in 1994, covered virtually all the important topics of contract law through the adoption of revised editions, and had proven to be successful in various ways, including in the negotiation of contracts, dispute resolution proceedings and legal codification efforts; and (b) the Legal Guide on Contract Farming, which was developed in partnership with FAO and IFAD and provided legal guidance on contract farming arrangements to promote the creation of a favourable, equitable and sustainable environment for contract farming.

10. The Secretary-General noted that, like the work on agricultural land investment contracts, the origins of the development of the Legal Guide on Contract Farming could be traced to the Colloquium on "Promoting Investment in Agricultural Production: Private Law Aspects" (Rome, 8-10 November 2011), which had explored 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 expertise, in collaboration with FAO and IFAD. He recalled that, following that Colloquium, it was decided to make work in the area of contract farming the first priority for two main reasons. First, this priority was consistent with FAO's policy of promoting contract farming as a preferred development model. Second, the development of the CFS-RAI Principles, which would guide any work in the area of agricultural land investment contracts, was still in progress at that time. He then pointed out that, with the adoption of the Legal Guide on Contract Farming and the CFS-RAI Principles, UNIDROIT could now contribute its private law expertise to an instrument on agricultural land investment contracts that was consistent with the policy framework provided by the VGGT and the CFS-RAI Principles.

11. Regarding the aim of the work, the Secretary-General emphasised that, even if contract farming was to be promoted as the preferred investment model, foreign land acquisitions were still happening in the absence of proper guidance and functioning legal frameworks. The goal was thus to prepare an instrument providing legal guidance on such contracts. He recalled that, at the informal meeting held with experts and interested stakeholders at FAO on 20 October 2016, during the 43<sup>rd</sup> plenary session (Rome, 17-21 October 2016) of the Committee on World Food Security (CFS), it was suggested that the future work could focus such guidance on investors, in particular how they could ensure that the contracts they negotiated and entered into were consistent with the VGGT and CFS-RAI Principles and incorporated the necessary safeguards. He found that suggestion to be appealing, in light of the many existing initiatives directed towards host States and their domestic legal frameworks and the need for investors to act consistently with the VGGT and CFS-RAI Principles, but stated that he looked forward to the Working Group's deliberations on this topic.

12. With respect to the background on the work, the representative of FAO praised the work on the Legal Guide on Contract Farming, noting that UNIDROIT's special expertise had been helpfully brought to bear on that topic. She then recalled the work of the CFS, noting that CFS was made up of representatives of FAO, IFAD, and the World Food Programme (WFP), their Member States, non-Member States of FAO that were Member States of the UN, as well as representatives of other UN agencies and bodies, civil society and NGOs, and the private sector. She discussed FAO's role in the

implementation of the VGGT and CFS-RAI Principles, stating that she was pleased that any work on agricultural land investment contracts would follow those instruments and noting that FAO could not participate in any work on land issues unless it would be consistent with those instruments. She then pointed out the importance of two CFS mechanisms for facilitating broader participation, in particular the Civil Society Mechanism (CFS-CSM) and the Private Sector Mechanism (CFS-PSM). She noted that, while a CFS-PSM representative was present, a CFS-CSM representative was not present, and that it was essential that both be included to ensure that the work took into consideration and reflected all views and would not be subject to criticism in this regard. With respect to the content of the future instrument, the representative of FAO emphasised, in particular, the importance of legal guidance on (a) identifying legitimate tenure right holders, who might not hold legal title, and including them in any contract negotiations; and (b) addressing gender issues.

13. With respect to the issue of identifying legitimate tenure right holders, the Working Group proceeded to discuss how work in the area of agricultural land investment contracts involved not only private law matters, but also public law matters as States were often legal title holders to the land and various public policy issues were at stake in such contacts. This overlap was recognised, though the Working Group felt that it was possible to draft any future instrument in a way in which that instrument – while addressing public law matters and perhaps referring to existing initiatives in this context – would focus on private law matters.

14. The representative of the ILC clarified that the ILC was a global coalition of civil society and intergovernmental organisations working together on land issues and, as a coalition, did not speak on behalf of civil society alone. She noted her appreciation for the work to be undertaken in this area, in particular how it was intended to build upon the VGGT and CFS-RAI Principles, and stated that it was an important opportunity to address challenges in this area and to ensure that any contracts would be more equitable.

15. The CFS-PSM representative sought background on the letter submitted by the US Department of State in support of work in the area of agricultural land investment contracts, which had been circulated to the participants together with the various documents for the session.<sup>5</sup> The Secretary-General replied that that letter had been received in the context of UNIDROIT's recent review and adoption of its Work Programme for the 2017-2019 triennium, for which the UNIDROIT Secretariat had written to its Member States and various stakeholders soliciting their views on the ongoing and possible projects for the Work Programme. The letter was in support of a broad line of work in this area, suggesting that the work could include three interrelated elements: (a) a legal guide on agricultural land investment contracts; (b) model provisions for such contracts; and (c) model legislative provisions in areas related to agricultural land investment contracts. The Secretary-General noted that the letter was not binding in any way, but that he personally thought it best to undertake the first suggestion – a legal guide – at this time with the possibility that the other options could be considered at a later stage. With respect to the development of the future instrument in response to the earlier statement about the importance of the CFS mechanisms, the Secretary-General also noted that the size of the Working Group was smaller for this initial meeting, as was the case for the Legal Guide on Contract Farming, in order for the scope of the instrument and its possible content to be better defined. Once there was a better sense of the contours of the work to be undertaken, the Working Group was to be expanded, and additional Working Group and informal meetings were to be held, to ensure that the necessary expertise, experience and input was obtained from all stakeholders and that all had the opportunity to participate in the development of the instrument.

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<sup>5</sup> UNIDROIT 2016 – C.D. (95) 13 rev., ann. 3 (containing US letter proposal dated 30 November 2015).

16. The Chairman recognised that the work was complex and sensitive, but saw significant value in undertaking work in this area and expressed confidence in the Working Group.

#### **4. General considerations in relation to the work on agricultural land investment contracts**

17. Following discussion of the background of the work and related comments, the Working Group discussed various general matters in relation to the work, including the (a) notion of agricultural land investment contracts; (b) the 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.

##### **A. Notion of agricultural land investment contracts**

18. The Working Group considered what should be treated as “agricultural land investment contracts” for purposes of the instrument and how the future instrument would fit into the broader legal framework. It was recognised that the question of what should be covered by the term “agricultural land investment contracts” was very much linked to the possible scope of the future instrument.

19. As an initial matter, it was queried how the term “tenure” was translated into other languages, such as French, as it could give rise to confusion about exactly what was meant and what types of contracts were to be covered. It was noted that the term was not a legal concept and was meant to cover the relations between people with respect to land. Although the VGGT, for instance, did not contain a definition of the term, it was nevertheless a term that was widely used in soft-law instruments and guidance documents in this area. It was also noted that, for example, legitimate tenure right holders might not be legal right holders in a particular system. In this regard, it was emphasised that a description of what was meant by the term would need to be set out in the future instrument.

20. It was pointed out that agricultural land investment contracts could come in various forms, depending on whether the land was privately or publicly held and whether it was to be sold or leased. Differences between a private holder-investor contract and a State-investor contract, such as a concession or investment agreement, could be significant. An agricultural land investment contract, in addition, might be made up of a single, detailed contract, or of multiple contracts dealing with particular aspects of the transaction (e.g. feasibility studies, tax regime, land lease conditions, etc.). It was suggested that the Working Group should consider mapping out the various possible parties and types of contracts in order to identify the proper scope for the future instrument.

21. It was also pointed out that the term “agricultural land investment contracts” could be meant to cover strictly contracts involving land for agricultural use, or could be meant to cover as well contracts that involved not only agricultural land but also facilities for processing or other related buildings and activities. It was noted in this regard that the use of land in some systems might actually be specifically classified (i.e. land for agricultural use, for industrial use, etc.) by domestic law, though such classifications might not be observed.

22. In this context, it was observed that contracts for the outright sale of land between private parties would not likely contain stipulations on land use, as that would be covered by the applicable domestic land law. It was further observed that this situation was not one that the future instrument should cover because such sales were often one-off transactions which did not entail ongoing obligations between the buyer and the seller, and sales, in general, could be attempts by investors to land grab. It was then stated that, in any event, long-term leases of agricultural land tended to occur more frequently than outright purchases. Contracts for the lease of agricultural land, moreover,

often contained land use stipulations and other clauses setting out ongoing obligations (e.g. development, social, etc.), into which necessary safeguards could be incorporated, monitored and enforced.

23. It was then observed that, even if the notion of agricultural land investment contracts was generally limited to leases, there still could be various parties involved in the transaction, including investors, States, local communities, legitimate tenure right holders and private individuals. In an instrument tailored to focus on leases between public authorities and an investor, moreover, it was noted that such authorities might not be the central government, but a local government or a traditional authority as, for example, in Ghana. In this regard, it was observed that, if the future instrument took the form of a guide, it would be easier to lay out the various possible parties involved in the lease and the related obligations. As an initial matter and subject to further discussions, the Working Group felt that it would indeed be useful to first develop a guide and consider other possible forms and steps at a later stage. It was also noted that the work could benefit from existing initiatives, as they could be consulted on how they dealt with the issues to be covered.

24. With respect to whether only foreign investment should be covered, it was suggested that the future guide's focus should be on foreign investment (i.e. land leases for agricultural use entered into by foreign investors). It was observed, however, that many foreign investors often established local subsidiaries in the host State for various reasons (e.g. to comply with domestic law), and that such situations should be covered. It was also pointed out that there might not be significant differences in a contract between a State and a domestic investor and a contract between a State and a foreign investor. Following discussion, the Working Group noted that foreign investment could be the starting point but that the private law guidance contained in the future guide might be useful in domestic investment situations.

25. With respect to the broader legal framework, it was recognised that agricultural land investment contracts played an important role, together with domestic law and international agreements, including human rights instruments and international investment treaties. It was observed that the relevant legal framework should be generally set out in the future guide. In this regard, it was emphasised that an initial chapter in the future legal guide could generally identify relevant aspects of domestic and international law and possible gaps that might exist in such law or in its implementation. In addition, this chapter was seen as significant with respect to the framing of the guide, which would be focused on providing private law guidance but would also identify and touch upon the important public law aspects that were at stake in agricultural land investments. It was observed, however, that the guide would not address in detail subjects that fell entirely within the realm of public law.

26. The Working Group also discussed other matters that the Group might wish to cover under the scope of the future guide. Such matters included, *inter alia*: (a) lease of agricultural land for conservation or preservation purposes – in connection with which it was observed that the VGGT also covered forestry; (b) agricultural land and carbon-offsetting; (c) data collection and privacy with respect to agricultural land; and (d) differences between so-called green-field investments and brown-field investments in this area. It was recognised, however, that the guide could likely not cover all possible issues.

27. In sum, the Working Group agreed, with respect to the form of the future instrument and subject to the following discussions, that it should begin preparing a legal guide on agricultural land investment contracts, with the possibility of considering other possible steps in the work, such as model contractual provisions or other follow-on work at a later stage.

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

28. The Working Group discussed the alignment of the work on agricultural land investment contracts with existing initiatives. At the outset, the Secretariat identified the VGGT and the CFS-RAI Principles as two instruments to which the future guide had to be aligned. With respect to the VGGT, the Secretariat noted the various VGGT Technical Guides which had been produced as they could be very useful in preparing the future guide.

29. In particular, references were made to the VGGT Technical Guides on agricultural investment (No. 4) and for investors (No. 7). For the former, it was observed that that Technical Guide: (a) contained a list of “necessary information” to be included in lease agreements on page 87; (b) that list had served as a basis for the preliminary outline that had been prepared by the Secretariat for discussion purposes; and (c) that the statement on page 41 – that “[i]nvestments that transfer agricultural land through the market do not threaten tenure rights if, for example, the land is held by a private owner and nobody else holds legitimate customary or other tenure rights to that land” – was an example of a statement to which important private law guidance could be added. For the latter, it was observed that that Technical Guide contained helpful checklists of issues to be addressed by investors, to which private law guidance could be added.

30. In this context, it was also observed that the VGGT contained a section addressing investments, which was influenced by the UN Guiding Principles on Business and Human Rights (the UN Guiding Principles). It was noted that the UN Guiding Principles was a key initiative to be taken into consideration in the preparation of the future guide.

31. It was then stated that much work had already been done with respect to agricultural land investment, even if gaps existed with respect to private law issues in this area. It was further stated that the future guide should not seek to supersede existing initiatives, but to complement them. In this regard, it was queried how, in practice, the future guide could be aligned to such initiatives. In response, it was noted that, while the VGGT and CFS-RAI Principles provided the policy direction, those instruments did not provide detailed legal guidance on agricultural land investment contracts. Where possible, for example, the future instrument could make specific reference to particular principles in those instruments and then supplement them by providing detailed legal guidance consistent with those principles.

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

32. The Secretariat emphasised the importance of co-operation with the UN agricultural development agencies, non-governmental organisations and civil society, the private sector and other stakeholders.

33. The Working Group noted that such co-operation had already been addressed to a certain extent in the context of the earlier discussions and opted to discuss it further in the context of the organisation of future work.

## **D. Objective and target audience of the future instrument**

34. The Secretariat recalled, as it had already been discussed earlier in the meeting, the suggestion that had been made at the informal meeting at FAO on 20 October 2016 that the future guide should be targeted to legal counsels for investors, while being drafted in an accessible way, so that it would be not only useful for them but also for a broader audience (e.g. international organisations, host governments, development agencies, investment promotion agencies, civil society and NGOs). The Secretariat described how, further to that suggestion, 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 followed UNIDROIT's work. For that audience, the objective could be to provide legal guidance – addressing *inter alia* preparations for an investment in agricultural land, negotiations and the content of the contract, and implementation and monitoring of the contract – that was fully consistent with and would contribute to the implementation of the VGGT and CFS-RAI Principles. Thus the future guide could assist in the evaluation of whether a particular agricultural land investment contract was in line with those instruments.

35. Regarding the target audience, it was observed that there was obvious appeal to drafting the future guide as broadly as possible, so that it could be used by various stakeholders. It was suggested that the guide might target not only legal counsels for investors, but legal professionals generally. It was noted, however, that attempting to target the guide at legal counsels for investors and legal counsels for States might be too broad. Instead, it was proposed that the future guide be specifically targeted to legal counsels for investors, while keeping in mind that it could be utilised by State officials to understand how investors were being advised. It was stated that, by addressing the various issues from this angle, the future instrument could be most useful, as existing initiatives already provided significant guidance to States on their legal frameworks.

36. It was also observed that guidance to the private sector might also be directed to non-lawyers, as there were many non-lawyers involved in agricultural land investment contracts who were asking legal questions and who could be assisted by the guide. Reference was made to the International Institute of Sustainable Development (IISD) Guide to Negotiating Investment Contracts for Farmland and Water, which offered guidance on preparing for negotiations and a model contract. It was noted that a VGGT Technical Guide for legal professionals (No. 5) had been produced, which might serve as a useful reference in developing a future guide targeted to legal counsels. It was noted that the future guide could perhaps address in detail why legal counsels needed to be concerned not only with compliance with the law, but also with respecting the rights of legitimate tenure right holders, and what that meant in practice.

37. In addition, it was observed that, as the investor was often the stronger party in negotiations, the legal counsel to the investor might actually try to assist various sides to reach an agreement – as legitimate tenure right holders might not have legal representation – which could constitute a conflict of interest. In this regard, it was suggested that a possible fund for legal representation of legitimate tenure right holders and local communities could be addressed in the guide. It was said in reply, however, that the guide might not be the appropriate instrument for addressing such a fund.

38. Regarding the objective of the guide, it was noted that there were various models of agricultural investments, including *inter alia*: contract farming, which was the subject of the Legal Guide on Contract Farming and was a preferred model of agricultural investment; a plantation-based model; and a mixed model, such as a plantation at which an outgrower arrangement was also in place, as well as the possibility of joint ventures. It was observed that the guide could include, at the outset, a portion on contract farming, thereby linking the future guide with the Legal Guide on Contract Farming, and then provide detailed guidance on plantation and mixed models.

39. It was then observed that, by drafting a guide, there was inherently more flexibility in addressing various issues and providing guidance on them. It was observed that the main aim of the guide would be to advise the private sector, in particular legal counsels to investors, on how to prepare for negotiations, negotiate a contract and implement a sound, equitable and secure agricultural land investment that was consistent with the VGGT and CFS-RAI Principles.

40. In this regard, it was queried whether guidance on establishing a secure investment would include advice on how to create a legally robust investment, such that it would discuss how investors could bring claims against States. In response, it was said that, although the primary goal was to

provide contractual guidance consistent with the VGGT and CFS-RAI Principles, certain issues needed to be addressed, such as dispute resolution mechanisms and stabilisation clauses, but that the guidance on such issues had to be balanced. With respect to stabilisation clauses, the guide could point out that an investor might have an interest in seeking a contractual clause protecting against possible regulatory changes, while at the same time pointing out that States could prefer to preserve their sovereign right to regulate. It was understood that this concern was to be flagged, dealt with in the appropriate subpart of the guide and could be revisited and reviewed as the guide was drafted.

41. In sum, the Working Group felt that, subject to ongoing review during the drafting process, the guide should provide legal guidance consistent with the VGGT and CFS-RAI Principles and targeted to legal counsels for investors. In addition, the guide was to be drafted in a way in which it would also be useful to other audiences, such as State officials and non-lawyers involved in agricultural land investment contracts.

## **5. Consideration of the structure of the future instrument and identification of issues to be covered**

42. The Working Group then considered the future instrument's structure and the issues that it should cover, focusing on its (a) scope; (b) form; and (c) content.

### **A. Scope**

43. The Secretariat outlined, in light of the earlier discussions on the notion of agricultural land investment contracts, various preliminary issues with respect to scope, in particular if the Working Group would wish to consider further whether to limit the scope of the future instrument to land leases, what types of land leases should be covered, how to ensure that the future guide would not endorse – or even appear to endorse – large-scale agricultural land acquisitions, and how to address properly the interplay between agricultural land investment and the environment.

44. Regarding the limitation of the scope to land leases and the types of relationships to be covered, the earlier discussion on this question was recalled, including the point that long-term leases of agricultural land appeared to occur more frequently than outright purchases, partly due to the fact that some States had laws prohibiting the sale of land to foreigners. In this respect, reference was made to the helpful data available on the Land Matrix, a land monitoring initiative with a searchable online database. It was clarified that the limitation to leases would include concessions and investment agreements. In this regard, it was further clarified that the limitation should be to long-term leases, concessions or investment agreement relationships, as those relationships would involve ongoing obligations and could incorporate necessary safeguards, as well as provide for monitoring. It was pointed out that, in limited instances, certain sales could fall under the limitation, if the sales contract did not represent a one-off transaction, but included provisions allowing for ownership of the land to revert to the seller if, for example, certain conditions were not met. It was also pointed out that an agricultural land investment could take other forms, for example involving a public-private partnership or a transaction in shares of a company if that company had tenure rights over agricultural land to which various financial, development and social obligations could be attached.

45. It was suggested that, as there were different types of long-term relationships, they could be mapped out and classified on various criteria, including length of the relationship and conditions attached to the transaction, in order to better conceptualise the scope of the future instrument. In this regard, reference was made to the VGGT Technical Guide on agricultural investment (No. 4), which identified various business types and differentiated between investment with little threat to tenure rights and those requiring safeguards. It was said in reply that the guide might wish to lay out the spectrum of relationships and then exclude those that would fall outside a limitation to leases and comparable situations. It was also said that consideration should be given not only to threats to

tenure rights, but also to threats food security. It was then suggested that food security could be treated in two ways: (a) by acknowledging in a section the principles and debate on food security and advising investors that there might be relevant provisions in the applicable legal framework in the host State, which should be investigated because, if the agricultural production might threaten food security, the investment could be called into question; and (b) by noting that some host States might wish to insert into the contract a clause on food security situations, such as those temporarily limiting exports of production in particular scenarios. Further to that suggestion, it was said that an investor could be contractually required to set aside an area of the land for local food production. It was stated in reply that trying to address food security, as well as tenure rights, might open the door to other areas, such as climate change, and make the scope of the guide overbroad. It was then said that the guide could acknowledge those issues and provide guidance on how they could be addressed, even if briefly.

46. Following extensive discussion, the Working Group felt that, going forward and subject to ongoing review, it would be best if the future instrument focused generally on contracts involving the lease of agricultural land and similar relationships and activities.

47. With respect to the question of how to ensure that the future guide would not endorse – or even appear to endorse – large-scale agricultural land acquisitions lacking necessary safeguards, the Secretariat noted that some existing initiatives, such as the US Agency for International Development’s Operational Guidelines and the IISD Guide to Negotiating Investment Contracts for Farmland and Water, contained statements in this regard, which encouraged investors to consider alternative agricultural investment models or smaller-scale projects before proceeding.

48. It was stated that the term “large-scale” was imprecise and could give rise to confusion or even abuse. It was stated in reply that some States addressed this issue by limiting the amount of land that a foreign investor could purchase or lease and that States could define what qualified as a large- or small-scale investment, such as in Brazil.

49. It was questioned whether such a statement was needed in a guide which would provide legal guidance on ensuring that contracts, in particular those for lease of agricultural land, included necessary safeguards and were VGGT and CFS-RAI Principles-compliant. It was suggested in reply that such a statement could encourage investors to consider the various investment models and make clear that UNIDROIT was not supporting land leases as the only investment model. It was then said that such a statement was indeed important as a caveat to draw attention to other models, and reference could be made to the Legal Guide on Contract Farming. It was further said that the statement should make clear that the mere fact that guidance was being provided on land leases did not mean that they were by themselves a good result or preferable to other models.

50. The Working Group felt that, subject to drafting, such a statement should be included to avoid misunderstanding, provided that it would draw attention to the various investment models in a neutral way and make clear that UNIDROIT was not endorsing a particular model with the future guide.

51. With respect to the question of how the guide should address the interplay between agricultural land investment and the environment, including natural resources, the Secretariat noted that agricultural land investment raised various environmental issues, including the use of natural resources, in particular water, and pollution. The Secretariat further suggested that the Working Group might wish to consider how such issues would be best addressed.

52. It was queried whether, as the guide was to focus on contractual issues, environmental issues were to be mentioned or addressed in detail, as environmental issues were often dealt with extensively by domestic law. It was suggested in reply that environmental issues could be dealt with in two ways: (a) by referring to corporate social responsibility and the UN Sustainable Development Goals (UN SDGs), including relevant soft-law instruments, but not dealing with each of them in detail;

or (b) by providing guidance on clauses that could be incorporated into the contract and set forth environmental obligations, such as how liabilities would be allocated. It was said that the focus of the guide should remain on the contract and provide contractual guidance on environmental issues only to the extent that they arose in connection with the contract. It was further said that, instead of delving into environmental issues in detail, reference could be made to the CFS-RAI Principles, in particular Principle 6 – which *inter alia* addressed “[p]reventing, minimising, and remedying, as appropriate, negative impacts on air, land, soil, water, forests, and biodiversity” and “[t]aking measures, as appropriate, to reduce and/or remove greenhouse gas emissions”.

53. It was then stated that environmental issues had to be dealt with in the guide because some investors might be seeking to make investments in States where the regulatory framework did not have sufficient environmental protections and ultimately the investment could be subject to criticism if environmental issues were not properly addressed. It was emphasised that the guide should flag this issue, specifically the interface between contractual clauses establishing environmental obligations and the environmental obligations arising under domestic law. It was said that the guide should advise investors to assess any gaps in the domestic law of the host State in this respect and then those gaps could be addressed with contractual clauses. It was stated in reply that both the domestic law and the contract could have environmental protections, as the contract might actually expressly identify some of the protections provided under domestic law. It was then observed that some larger agricultural investments might actually be more environmentally friendly if the latest farming techniques and technologies were used.

54. The Working Group felt that, subject to the discussion on content and future drafting, the interplay between the agricultural investment contract and the environment should be addressed, not by delving into every possible environmental initiative or issue, but by acknowledging the important role of the applicable legal framework – including environmental protections in domestic law and international instruments – and by providing contractual guidance on possible environmental clauses and obligations.

## **B. Form**

55. The Secretariat recalled the various options regarding the form of the future instrument, while recognising that the Working Group had already discussed such options in connection with its earlier deliberations on other issues. The options included a legal guide, which was the preferred form of the Working Group, model contractual provisions or a combination of those options. With respect to a legal guide, given the abundance of existing guides and similar documents, it was emphasised that the usefulness of any UNIDROIT-developed guide would derive not from replicating what had already been produced, but from focusing on providing private law guidance consistent with the VGGT and CFS-RAI Principles. With respect to model contractual provisions, it was noted that, while international Organisations had thus far refrained from developing such provisions, there were a few State and non-profit initiatives that had stepped in to offer such provisions, some of which had been cited by international Organisations and could serve as a starting point for analysis, synthesis, and development into an international instrument. It was also pointed out that the US letter proposal – which had been noted earlier in connection with the initial discussions on UNIDROIT and its work in the area of private law and agricultural development – suggested the possibility of developing model legislative provisions for States to consider in developing or reforming their domestic legal frameworks in this area.

56. In recalling that some concerns had been expressed at the informal meeting about the possible preparation of model contractual provisions, it was queried whether those concerns were shared by all participants at that meeting. It was said in reply that, while those concerns were not shared by all who had participated in that meeting and that some had actually favoured the development of model contractual provisions, most of the participants had expressed a preference for UNIDROIT to prepare a guide, which could itself possibly include examples of contractual provisions. It was then

stated that model contractual provisions might not be feasible at this stage, though that work could be considered at a later stage. The same was stated with respect to the development of model legislative provisions, in particular that it would be best to prepare first the guide and then consider at a later stage whether such provisions could be feasibly developed and, if so, whether they would add value to what would already be set forth in the guide.

57. It was then queried how long the work was to last. Recalling that the Legal Guide on Contract Farming had been completed in two years, it was said that a guide, in a narrative format, was feasible within a similar two- to three-year timeframe.

58. It was then queried whether there would be the same type of follow-up on the future guide as there was for the Legal Guide on Contract Farming, such as the Community of Practice on legal aspects of contract farming. In reply, it was said that UNIDROIT intended, as it had for Legal Guide on Contract Farming, to partner with other Organisations, such as IFAD and FAO, to promote the future guide, which ideally included the guide becoming a part of those Organisations' technical assistance programmes. It was recognised that, if the guide was to be targeted to private sector legal counsels, that might alter how it could be best promoted. It was pointed out that a guide with that target audience might also be promoted by bilateral development agencies in their work in encouraging private sector investment. It was further pointed out that those same agencies were also interested in the promotion of the VGGT and CFS-RAI Principles, so this possibility for collaboration merited exploration.

59. The Working Group, subject to the ensuing discussion on content and future drafting, continued to agree – consistent with its earlier discussion – that the form of the instrument should be a legal guide, with additional work on model provisions or more detailed guidance on other aspects to be considered later, in light of how the initial work would progress.

### **C. Content**

60. The Secretariat recalled that it had circulated a preliminary outline, which was for discussion purposes and was contained in an annex to the memorandum prepared for the session,<sup>6</sup> listing issues that could be addressed in the future instrument. It was further recalled that that outline was based on the list of "necessary information" to be included in a lease contained at page 87 in the VGGT Technical Guide on agricultural investment (No. 4) and on the Legal Guide on Contract Farming. The Secretariat proceeded to present that outline, suggesting that the Working Group could work through the outline by examining it in detail and recommending modifications. In this regard, it was then pointed out that the future guide could make reference to UNIDROIT's instruments (e.g. the UPICC, Legal Guide on Contract Farming) or those of other international Organisations (e.g. the VGGT, CFS-RAI Principles), in order to direct users to helpful information and to not duplicate work that had already been done. It was also pointed out that references were not typically made to other sources, unless there was a compelling reason to do so.

61. As an initial matter, there was an inquiry about references, in particular whether the guide would contain citations to case law, as the target audience might find them to be useful. It was said in reply that, while case law would of course be taken into consideration throughout the preparation of the guide, it was not UNIDROIT's practice to adopt instruments containing specific citations to case law as those citations could become outdated.

62. The Working Group then discussed the preliminary draft outline – examining it in detail, flagging issues, noting potential references to the VGGT and CFS-RAI Principles and other sources, and proposing revisions – in order to prepare an initial draft outline of the future guide on agricultural

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<sup>6</sup> See UNIDROIT 2017 - Study 80B – Doc. 1 rev., ann. 1.

land investment contracts. It was agreed that the initial draft outline, which is attached as Annex 3, and the initial list of possible resources, which is attached as Annex 4, would remain subject to ongoing review and further development. It was also agreed that that outline would serve as the basis for work going forward, on the understanding that – apart from the main parts and headings – much of the structure and terminology was notional and the content could be reviewed and reorganised. The following – which is to be read together with the outline in Annex 3 – summarises the Working Group’s discussion of the outline and notes related observations.

63. With respect to the ***preface***, it was said that it should be similar to the preface in the Legal Guide on Contract Farming and briefly set out the overview and purpose of the guide and its approach and how to use it. First, regarding the overview and purpose, it was to provide a brief summary of the guide and include a statement on the guide’s intent, in particular that the guide sought to respond to the need for greater investment in agriculture for food security and nutrition and to support responsible agricultural investment, which incorporated necessary safeguards. It was observed that this statement was important to make clear that, by preparing a guide on agricultural land investment contracts, it was not to be understood that such contracts were the only model of agricultural investment and that other models of agricultural investment (e.g. contract farming) were to be considered and could be preferable. It was further observed that such a statement could be used to promote alternatives to land acquisitions while, at the same time, recognising that such acquisitions were taking place and that there was a need for the relevant contracts to be much fairer, enforceable and in line with the VGGT and CFS-RAI Principles. It was emphasised that the statement could draw upon the language used in paragraph 12 et seq. of the VGGT, which treated investments. Second, regarding the approach and how to use the Guide, it was to provide legal guidance on agricultural land investment contracts, the incorporation of necessary safeguards into them, and the implementation and monitoring of them in six stages – the legal framework; negotiation and formation; obligations of the parties; non-performance; transfer, renewal and termination; and dispute resolution – for which there would be a chapter on each. The guide was also to further the implementation of the VGGT and CFS-RAI Principles by serving as a reference tool for legal counsels, in particular those for investors, and was to contain references to practical operations, contract practices and international instruments (e.g. VGGT; CFS-RAI Principles; UPICC).

64. With respect to the ***introduction***, it was said that it should set the stage for the legal guidance to be provided in the following chapters – while not necessarily delving into the details of the various issues at stake – in three ways. First, it was to provide a general introduction to agricultural land investment contracts, setting out the notion of such contracts, why they were important and issues that have been identified with them. In this regard, it was observed that the introduction should describe tenure rights in general and touch upon the issues of legitimate tenure holders’ rights not being respected and difficulties in identifying such holders, as well as possible gaps and difficulties in the implementation of domestic laws with respect to agricultural investments. Second, the introduction was to set out the guide’s scope, describing various agricultural land investment contracts in practice and identification of those contracts – including primarily leases and concessions/investment agreements, but also other contracts to the extent feasible – falling within the guide’s scope. It was observed that this portion should identify the types of contracts with which the guide would deal while distinguishing those types of contracts from others (e.g. management or production contracts). It was also observed, in recalling the Working Group’s earlier discussion of the notion of agricultural land investment contracts, that this portion could state: (a) the key parameters of the contracts to be covered, including the length of the relationship and conditions attached to the transaction; (b) that leases and concession or investment agreements would primarily be covered; and (c) that, in very limited circumstances (e.g. where the land could revert to the seller if relevant obligations were not met), the few purchases meeting those parameters could be covered as well.

65. With respect to ***chapter one (the legal framework)***, it was said that this chapter should have two main parts. The first part was to deal with the legal regime applicable to the agricultural land investment contract which, in other words, was to address the legal framework applicable to

the contract itself and the rights and obligations arising from it. The second part was to deal with the broader regulatory framework. It was observed that, in this way, the chapter could deal with the private and public law dichotomy because the first part could generally focus on private law aspects and the second part could generally focus on public law aspects, though there might be overlap. It was further observed that, in each part, domestic sources and international sources could be treated. It was then cautioned, however, that this chapter should not simply provide a few paragraphs on each of the possible sources, but flag important steps or messages for the target audience such as: (a) with respect to domestic law, the problem of gaps in such law or the need to be mindful that any rights acquired would be shaped by such law; or (b) with respect to international law, the need to comply with international human rights instruments. It was said in reply that drafting the chapter in such a step-by-step way might be difficult to do in a manner that could feasibly address the various contract types to be covered by the guide. In discussing the various areas of law and regulatory aspects to be addressed in each of the main parts, it was pointed out that some international human rights instruments might fall into the first part, while others would fall into the second part. In this regard, the importance of the CFS-RAI Principles, the VGGT, and international human rights instruments was emphasised, and it was said that an initial draft of the chapter should be prepared and could be reviewed to see whether the division between the two parts worked properly.

66. With respect to **chapter two (negotiation and formation)**, it was said that this chapter should have five parts, in particular on the identification of the possible parties to the contract and relevant stakeholders, feasibility studies and risk assessments, impact assessments, the tender process and contract formation. Regarding the identification of the parties to the contract, it was observed that the parties and relevant stakeholders could include investors, legal tenure right holders (e.g. private holders or the government), legitimate tenure right holders, and other possible parties or stakeholders (e.g. local officials or public notaries). It was further observed that this aspect of the guide would be very significant as it was often difficult to identify legitimate tenure right holders, including confirming the legitimacy of those who might be representing them, and gender issues could be addressed in this context as well. It was recognised that agricultural land investment contracts could involve multiple parties and be broader, for example, than a contract between an investor and the government. In this regard, the importance of free, prior and informed consent and of community development agreements – the latter of which could be introduced at this point and further developed later in the guide – was emphasised. It was then queried whether much of the necessary content in this area had already been provided by the VGGT Technical Guides, such as the VGGT Technical Guide for investors (No. 7) that contained helpful checklists of possible parties and issues, to which reference could be made. It was asked in reply how many other instruments users of the future guide would be expected to consult. It was then said that, for some issues, cross-references could be made to the VGGT Technical Guides, while other issues, in particular those related to the preparation and formation of a contract consistent with the VGGT and CFS-RAI Principles, should be addressed in the future guide. It was also said that, as this subpart would address the identification of the parties, it could deal as well with the delivery of notices under the contract.

67. Regarding feasibility studies and risk assessments, it was pointed out that different types of studies and assessments could be performed, such as with respect to suitable land availability and valuation, food security, availability of water and other natural resources. In this regard, it was pointed out that there was a forthcoming VGGT Technical Guide on valuation, which could be cross-referenced. It was also pointed out that the importance of developing a business plan could be addressed in this subpart, as such a plan was a key step in planning an agricultural land investment contract, and reference could be made to that plan in the resulting contract or contracts.

68. Regarding impact assessments, it was pointed out that, in addition to environmental, social, and human rights assessments, there could also be an assessment of the impact on legitimate tenure rights. It was then pointed out that the Ghana Commercial Agricultural Project (GCAP) Model Lease

contained guidance on an environmental impact assessment, as well as a social impact assessment and action plan.

69. Regarding the tender process, it was said that it could not be taken for granted that some States might not have a formal process and that the guide should address briefly this aspect, because competitive, inclusive and transparent tender processes were an important part of ensuring that fair and equitable agricultural land investment contracts were developed and implemented. It was suggested that this subpart could address the basic criteria for awarding contracts with respect to natural resources, and it was pointed out that the highest bidder might not be the best criterion as other aspects of the bids, including respect for human rights and past performance were to be considered as well. It was said in reply that, if the target audience for the guide was legal counsels to investors, then it might be best not to get into the details in this area and that it might be a subpart which could contain various cross-references, including to the UNCITRAL Model Law on Public Procurement, the UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects, and to the UPICC, the latter of which in particular with respect to possible duties to share relevant information and to pre-contractual liability. In this regard, it was said that the draft contract should be disclosed but that, with respect to pre-contractual liability, at least on the part of the bidding investor, a structured tenure process typically included some form of guarantee, such as a bid bond, that would have to be provided, thereby dealing with such possible liability.

70. Regarding contract formation, it was felt that this subpart should address capacity and consent, the role of those who intervened or assisted in contract negotiation, and the possibility that there might be a required contract form and content, as well as the consequences for breach of those possible requirements. In this regard, it was pointed out that references could be made to the Legal Guide on Contract Farming, which contained a similar section, and to the UPICC, in particular Chapter 2 on formation and authority of agents.

71. With respect to **chapter three (the rights and obligations of the parties)**, it was observed that it would provide the bulk of the guidance on the content of the contract or contracts. It was further observed that the introduction to the chapter should recognise that there were various types of contracts in this area – such as contracts between governments and investors, local communities and investors, or even tripartite contracts between governments, legitimate tenure right holders and investors – and that not all contracts would require or include clauses on all of the issues to be addressed, depending on the type of contact, the parties to that contact, and other circumstances.

72. Regarding the purpose of the investment, it was said that the guide could offer guidance, at the outset, on setting out in a general manner how the land was to be used. In this regard, the importance of an indicative business plan was emphasised, and it was said that there could be cross-references in a clause on the purpose of the investment to such a plan and to other more detailed provisions in the contract. It was further said that such a business plan might need to be flexible for various reasons (e.g. planting of different crops; climate change) and could also address related activities, such as processing and development obligations.

73. Regarding the location and description of the land, it was recognised that guidance should be offered on identifying the land (e.g. total size; boundaries; geospatial data). It was noted that the GCAP Model Lease contained clauses on the option for lease of additional lands and for the right of first refusal for additional land. It was then said that such clauses might not be necessary and might allow investors to get access to too much land. It was said in reply, however, that use of an option clause might actually help to ensure that investors did not try to get access, at the outset, to more land than they could feasibly use for agricultural production.

74. Regarding the duration of the contract, it was pointed out that the contract should address anticipated start and end dates. It was further pointed out that there was not one standard duration for these types of contracts, as different crops and activities might require longer or shorter

investment periods. It was said that, in the context of infrastructure projects, some States might set standard durations, such as fifty years, by law for all projects. It was further said that such standardised durations or limitations on the possible investment period could have drawbacks, which could be addressed in the guide.

75. Regarding conditions, it was said that there should be a discussion of suspensive and resolutive conditions, drawing upon the UPICC. It was further said that permits and licenses, which could be a condition of the agricultural investment's operation, should be addressed in this subpart. It was noted that the guidance on permits and licenses should make clear that investors might be required under domestic law to obtain permits and licenses and that governments should not unreasonably withhold them.

76. Regarding the rights granted to the investor, it was said that this subpart should be divided into providing guidance on the grant of tenure rights and the grant of related rights. With respect to the former, it was stated that the tenure rights portion could address rights of use (e.g. to land; water; and underground resources), rights of entry and control (e.g. who owns improvements and fixtures); and rights withheld (e.g. limitation on exclusivity and rights of way). For water rights in particular, it was emphasised that the contract could actually be quite detailed, including specification of water commitments and of how to deal with drought events. For rights withheld, the importance of possible limitations on the rights of use, entry and control was emphasised, as such limitations might be mandatory in order to allow for continued access to water, other resources and infrastructure for local communities. With respect to the grant of related rights, it was said that such related rights – which might not even be related to the land in particular – could include rights to access and use utilities (e.g. water; electricity; gas), to import supplies and equipment, and to market, transport and export the agricultural production. It was further said that such rights were often very important for ensuring the success of the investment and that many agricultural land investments involved not only agricultural production, but also processing and related activities. It was noted in this context in particular that these various rights were connected to the indicative business plan and that not all of the provisions providing the rights described in this subpart would be needed in every contract.

77. Regarding obligations on the investor, it was observed that there were many possible obligations that could be placed upon the investor – including development obligations, financial obligations, social obligations and environmental obligations – and that it should be understood that there could be trade-offs. It was further observed that that understanding should be set out in the introduction to this subpart because, for example, putting in place extensive social obligations might, in turn, require lower rental fees. With respect to development obligations, it was said that such obligations could include a time limit for development of the land by the investor and specify, for example, that processing was to take place locally. For the possible time limit for development, it was cautioned that delays might occur, such as a drought or a delay by the State in providing electricity, which would prevent, for example, planting and growth within a strict period. It was also cautioned that such a time limit might be better addressed in the chapter on non-performance – perhaps in connection with risks and changes in circumstances – and could, in addition, be addressed in the indicative business plan. It was pointed out that the discussion in this regard had demonstrated the need for a clause on periodic review. For processing, the importance of offering guidance on incentives for local processing was emphasised, as such processing could promote economic development. It was further pointed out that guidance could also be offered, both with respect to time limits and processing, on incentives and key performance indicators, together with a possible cross-reference to the chapter on transfer, renewal and termination.

78. For financial obligations, it was observed that guidance could be provided on the timing and form of monetary payments, interest accrual on late payments, and capitalisation requirements. Such payments could include rental fees, various taxes, customs duties and royalties, but all of these different types of payments would not be used in each contract, depending on the fiscal model

adopted. Indeed, the nature of the parties would have a fundamental bearing on the contracts which would result, including with respect to payments. It was then clarified that what was intended by the term “payment” was monetary payment, and it was suggested that other forms of non-monetary obligations could be dealt with elsewhere, for example, in the context of development obligations. In this regard, reference was made to the GCAP Model Lease’s provision on financial compensation. It was also observed that, in longer-term leases, periodic review was very important with respect to rental fees as well. It was suggested that the portion of the guide addressing periodic review could cross-reference to the guidance on rental fees. With respect to capitalisation requirements, it was pointed out that there could be debt to equity ratio requirements under domestic law and that the OECD Guidelines for Multinational Enterprises or the ISLP/CCSI Guide could be useful resources in this regard. It was emphasised with respect to the OECD Guidelines that, as a broader point which could perhaps be placed in an introduction to this subpart, investors should not seek exemptions to the overall fiscal regime or the tax regime that were not contemplated by domestic law.

79. For social obligations, it was observed that this subpart could cover various possible obligations. Regarding compensation rates for crops, structures or other items existing on the land, and periods for which compensation should be provided (e.g. on entry, annual, at exit), it was queried whether such rates were properly categorised as social obligations. It was noted that this subpart could be dealt with initially in the portion on social obligations and that, upon drafting, it could be seen whether this subpart might fit better in the subpart on financial obligations.

80. Regarding local or domestic food security, it was queried whether a food security-related obligation – for example to provide part of the agricultural production in the event of a food shortage – should apply locally or domestically (i.e. State-wide). It was said in reply that it could be situation-specific and that, for example, such an obligation could require setting aside part of the leased land for local food production. It was further said that a legal provision setting forth such an obligation could be needed when the agricultural land was located very close to a local village in order to ensure that that investment would not create a local food security issue. It was then suggested that a buffer zone between the investment and the local village could be established to make sure that that town or village would not become isolated from agricultural land or other towns and villages. It was questioned, however, whether such an obligation should be addressed in the guide, whether it should be tied to domestic food security instead of local food security, whether it actually should be addressed in the subpart on feasibility studies, and whether it would be better to advise an investor to begin a dialogue with the host State in this regard. It was said in reply that, if the guidance was framed in a limited and specific way to address a particular food security issue, then a contractual clause setting out an obligation in this regard would not be particularly onerous. It was repeated that the guidance to be provided on various clauses would make clear that not every clause would be necessary in all instances and that there would be trade-offs in this regard.

81. Regarding employment, it was observed that, while generally creating jobs for local communities was important, gender and youth aspects were important as well. Women and youths, and not just men in local communities, should have a meaningful opportunity to become part of the investor company and have access to training and skills development. It was further observed that agricultural land investment contracts should contain more than simply a number of jobs to be generated, by requiring, for example, that skilled jobs and not just unskilled ones be given to local residents.

82. Regarding procurement, it was said that there was likely an abundance of contractual practice available in this regard. It was further said that requiring procurement from local suppliers and providing incentives for local or domestic procurement were good examples of the trade-offs that were at stake in negotiating the obligations to be placed upon the investor. It was observed, for instance, that if local procurement was required, then lower rental fees might be applied, otherwise the investment might not be fiscally feasible. It was also observed that one of the suggestions that had been received by the Secretariat was that the guide could provide guidance on contracts with

local suppliers, which could be dealt with in this subpart or, if dealt with more expansively, in an annex to the guide.

83. Regarding outgrower arrangements, such as contract farming with farmers on adjoining land or tenant farmers subletting the leased land, it was pointed out that the guide could perhaps provide guidance on an overarching framework setting key parameters to be applied in this regard. It was further pointed out that such parameters could relate to minimum safeguards, for example for price, including internationally available indices, indebtedness, or other aspects. It was observed that reference could be made to the Legal Guide on Contract Farming and that gender aspects could be addressed, for instance, by promoting outgrower contract farming or subletting arrangements with women, who might not otherwise be able to hold tenure rights over land in a particular community.

84. Regarding communications and agreements with local communities, it was said that the guide could provide guidance on communications with local communities and on the substantive content of community development agreements. It was further said that this subpart could be cross-referenced to the initial discussion on such agreements which would feature in the second chapter and in the introduction to third chapter, in particular with respect to the portion clarifying that there were various types of contracts and possible trade-offs to be considered. It was noted that the Working Group had been provided with a working paper prepared on the topic of community development agreements by a group of students in the University of Washington School of Law's Sustainable Development LLM programme, which was observed to be a very useful and helpful contribution and could be further taken into consideration in the drafting of this subpart. It was also observed that, with respect to communications, the guidance in this subpart would be distinct from guidance regarding transparency and contract disclosure.

85. Regarding environmental obligations, it was noted that domestic law could address environmental issues in detail, though such law might not be implemented or enforced in all cases. It was further noted that the IISD Model Contract included a clause obliging the investor to comply with the environmental laws of the host State. It was observed, in this regard, that agricultural land investment contracts provided an opportunity to identify specifically the applicable environmental laws in order to avoid confusion, to address any gaps in those laws, and to complement those laws, such as by building upon them with contractual clauses regarding international standards or other possibilities (e.g. rotational cropping, climate smart cropping, and best available science). It was also observed that it might be best for States to adopt robust environmental laws and regulations instead of providing for them in agricultural land investment contracts, which might result in different standards applying under different contracts. It was further observed that overly stringent environmental obligations might render an investment fiscally unfeasible. It was said that, as there were many subtopics in this regard, the narrative format of the guide would be useful because such topics could be described together with the various trade-offs. Regarding the specific topics to be considered, it was observed that various ones could be addressed, including: environmental impact assessment and management, which could be connected with the relevant portion of chapter two; pesticides; pollution prevention and remediation; soil management and degradation, for which reference could be made to the Voluntary Guidelines for Sustainable Soil Management; water use and depletion; protection of biodiversity, for which the Roundtable on Sustainable Palm Oil's principles and criteria could serve as a useful resource; cultural heritage; and waste management. It was further said that CFS-RAI Principle 6 would be helpful as this subpart was to be developed in fulfilment of that principle.

86. Regarding infrastructure, it was observed that it was important to offer guidance on being clear about the ownership of infrastructure that might be developed for an agricultural investment project and about who would be liable for it should any claims arise.

87. Regarding compliance obligations, it was noted that such obligations might be different in contracts between an investor and a host State and an investor and a private holder. The difference

between the topics to be treated under the compliance subpart and those to be treated under the conditions subpart was then queried. It was said that, while a contract might not come into force until a particular condition is fulfilled, compliance obligations related to those obligations that had to be met and maintained throughout the life of the contract, including, for example, insurance, recordkeeping and audits, conservation of premises, and circumstances under which the lessor could enter the property to inspect the investor's activities and monitor compliance.

88. Regarding physical security, it was noted that such security was to be distinguished from legal security, which should be addressed in a separate subpart. It was further noted that the UN Principles for responsible contracts could serve as a useful resource or be cross-referenced in this regard.

89. Regarding security of rights, the importance of legal security for bankability was emphasised. It was pointed out that stabilisation clauses could be dealt with in this subpart as well. Although such clauses could be controversial, it was said that the guide should address them, including by offering guidance in a neutral way which would note that investors might seek the inclusion of such a clause, whereas governments might wish not – or might not even be able – to agree to such inclusion. It was further said that the UN Principles for responsible contracts dealt with stabilisation clauses and could serve as a useful resource or be cross-referenced in this regard as well.

90. Regarding monitoring, it was recognised that it was essential to ensuring the proper implementation of the contract, and various aspects to be addressed by the guide were identified. With respect to performance guarantees, reference was made to the UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects, which addressed such guarantees and could serve as a useful resource. With respect to reporting requirements and access to information, the importance of transparency was recognised, as making information available about the contract could keep various stakeholders apprised of developments and enable better understanding and monitoring of the investment project. It was clarified that disclosure of information should be addressed in two subparts – both as between the parties and as between the parties and the public – and that confidential information should be protected. It was observed in this regard that the guidance would have to be nuanced because some companies might wish to protect certain information for competition purposes and, more generally, transparency initiatives were still emerging in this field. It was further observed that reference could be made to the VGGT and the VGGT Technical Guides, as well as to the UN Principles for responsible contracts, which had addressed public disclosure and transparency. Reference was also made to the Liberia Extractive Industries Transparency Initiative, which had made concessions, contracts and agreements in those industries in Liberia publicly available online. With respect to amendments and periodic review, it was said that periodic review was a significant aspect of monitoring and implementation of the contract, in order for the contract to be regularly assessed (e.g. every five years), for example on the basis of variations of certain indexes or key performance indicators, and for it to be amended as necessary.

91. Regarding representations and warranties, it was said that the guide could treat these topics, as well as related topics of indemnification and anticorruption, with the specific terminology to be determined. It was further said that, for example, a possible clause could warrant that the investor had not engaged in any illegal payments relating to the negotiation, agreement and implementation of the agricultural land investment contract and could agree to indemnify for any violations.

92. With respect to **chapter four (non-performance)**, it was observed that this chapter should begin with a general discussion of risks and changes in circumstances and then deal with excuses and remedies for breach. It was emphasised that agricultural investments were inherently risky and that risk should be addressed in framing the chapter. It was said that parties should understand that there would be risks – a point that could also be made in the introduction to the guide and in the subpart on risk assessments, both of which could be cross-referenced – and that the parties should take steps to identify, discuss and address those risks in negotiating and drafting the contract. It was further said that, in this way, responsible agricultural investment could be incentivised, which

was one of the guide's aims. It was then queried whether a change in government would constitute force majeure, and it was said in reply that a mere change in circumstances did not necessarily rise to the level of force majeure. It was further said that changes in government policies, for example, could be linked to the discussion on stabilisation clauses and an internal cross-reference could be used. It was then observed that, as the contracts would be governed by domestic law, it would be such law, in the absence of an applicable contractual provision, that determined whether a change in circumstances would qualify as a force majeure event. For this reason, it was said that parties should be advised to draft carefully the applicable contractual clauses in this regard. It was clarified that, while a change in circumstances might make an investment less profitable or lead to hardship, it did not necessarily constitute an impediment to performance of the contract. Reference was made to the UPICC, to the Legal Guide on Contract Farming's treatment of changes in circumstances and force majeure, as well to the UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects, the latter of which dealt with these topics – as part of its treatment of general contractual arrangements – as changes in conditions, exempting impediments and breach and remedies.

93. Regarding excuses, it was said that this subpart should address force majeure, qualifying events, including a possible link to renegotiations and periodic review, and consequences, but should not cover general changes in circumstances, which would be distinguished from force majeure and covered in the first subpart to this chapter. It was further said that this subpart should draw upon the UPICC, as well as other instruments.

94. Regarding remedies for breach, it was observed that an overview of possible remedies should be provided and then breaches by the investor and by the lessor could be respectively addressed. With respect to remedies, it was clarified that use of the term "remedies" was not intended to mean only damages, and reference to the UPICC was emphasised in this regard, in particular with respect to the various remedies provided therein and to penalty clauses. It was also said that breaches or conduct negatively affecting legitimate tenure right holders would have to be taken into account as well.

95. With respect to **chapter five (transfer, renewal and termination)**, reference was made to the UPICC, which contained relevant provisions that could be drawn upon. Regarding transfer of rights and obligations and assignment, it was clarified that transfer could refer to the assignment of rights to a third-party or to the return of the land to the lessor. It was said that the latter should be dealt with in the following subpart. The importance of transferability was emphasised, in particular for the bankability of an investment, and it was pointed out that broad transferability could be subject to a need for approval, for example, by the host State government.

96. Regarding the end of the contract and return of the land, it was said that this subpart should deal with any stipulations concerning the condition of the land when it was to be returned, such as replanting obligations (e.g. maintenance of tree crops, subject to or in line with the business plan). It was also said that the guide should offer guidance on the winding up of an investment and address liabilities for deterioration of the land. Reference was made in this regard to the UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects, which addressed the winding up of an investment. It was then clarified that winding up in this context meant the end of the agricultural lease contract and not necessarily that the company that had invested was going out of business.

97. Regarding renewal, it was said that this subpart could address renewal of the contract – including terms for extension, key performance indicators, and incentives for renewal – and be linked to the related discussion with respect to development obligations in the chapter on the rights and obligations of the parties.

98. Regarding termination, it was said that the guide could address the scope of termination, termination clauses and the definition of default events, termination procedure, and notice of termination, as well as the effects and consequences of termination. It was pointed out that this

subpart should distinguish between judicial and non-judicial termination, the latter of which might only be available in some systems, and that the parties could be advised to insert a termination clause in the contract. It was further pointed out that this subpart could address the interplay between termination clauses in the applicable contracts and domestic law. It was then observed that the UPICC could be particularly helpful in developing this subpart as well.

99. With respect to **chapter six (dispute resolution)**, it was said that it should address disputes arising under agricultural land investment contracts, non-judicial dispute resolution, judicial dispute resolution, and enforcement of settlements or decisions resolving a dispute. Regarding disputes arising under agricultural land investment contracts, it was said that an important aspect of this chapter would be access to justice. It was further said that, in some States, investors might not have such access, so the contract should be drafted in a way which would ensure that the parties and possible stakeholders had a suitable means for the resolution of grievances and disputes. Reference was made to the UN Principles for responsible contracts, which addressed these issues. It was then stated that, with respect to the possible means for dispute resolution, the guide should address them, but also recognise that it might not be necessary to provide for all of them in an agricultural land investment contract.

100. Regarding non-judicial dispute resolution, it was said that this subpart should address various forms of such resolution, in particular: (a) grievance mechanisms, including for local communities; (b) expert determinations, for example with respect to the price of processing or of crops, in the event that the project involved processing or an outgrower arrangement respectively; (c) negotiation and conciliation; (d) mediation; and (e) arbitration. With respect to arbitration in particular, it was said that the guide's discussion could identify factors to be considered, such as what investors might seek and what host States might oppose. It was further said that that discussion could address considerations with respect to transparency of proceedings – with reference being made to the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration – and with respect to governing law. For the latter, it was observed that governing law issues in this field were contentious and should not be treated in a separate section, but could be discussed briefly in connection with arbitration, including noting first that in nearly all instances host State law would apply to agricultural land investment contracts. It was further observed that even the possibility of supplementing host State law with another State's law or non-State law was contentious and that this issue should be navigated very carefully. Indeed, it was said that the principle should be application of the host State's law, and it was pointed out that the GCAP Model Lease contained a governing law provision in this regard. It was said in reply that, in some instances, it might be possible to apply another State's law or non-State law, with reference being made to the UPICC and the Hague Principles on Choice of Law for International Contracts. It was then said that, as the contracts concerned land, it was difficult to envision another State's law or non-State law being applied. It was observed in reply that this topic could be addressed more broadly as choice of law issues and that, pursuant to a *dépeçage* approach, the host State's law could govern certain aspects of a particular contract, such as land aspects, while other law could be chosen to govern other aspects, such as contractual ones. Reference was also made to Article 42 of the ICSID Convention, according to which ICSID tribunals were to decide disputes, in the absence of an agreement on the applicable law by the parties, by applying the law of the Contracting State to the dispute, including its rules on conflict of laws, and such rules of international law as might be applicable. It was then emphasised that, as the guide would focus on leases of land and lease rights were contractual rights, it would be difficult to distinguish between land aspects and contractual aspects.

101. Regarding judicial dispute resolution, it was said that access to justice could be pointed out again, with a cross reference to the initial subpart of the chapter. It was then said that this subpart

should distinguish between domestic and international contracts as they related to judicial dispute resolution.

102. Regarding the enforcement of settlements or decisions resolving a dispute, it was observed that the Legal Guide on Contract Farming had briefly addressed this topic. It was said that it might be useful to address the topic in the future guide as well, though its usefulness could be reassessed in the drafting of the guide.

103. With respect to ***possible annexes or future steps***, it was said that the guide could include possible annexes – or the Working Group could consider future steps – to provide model contractual provisions or more detailed guidance on community development agreements, local supply contracts, or on other aspects.

## **6. Organisation of future work**

104. The Working Group discussed two main aspects to the organisation of future work: (a) the preparation of the guide; and (b) stakeholder engagement.

105. With respect to the preparation of the guide, the Working Group confirmed that work should first be undertaken on drafting a legal guide, with additional work on model provisions or more detailed guidance on other aspects to be considered later, in light of how the initial work progressed. The Working Group then agreed that the Secretariat would prepare the revised outline in accordance with the expert input provided and, in doing so, would add references to the VGGT, the CFS-RAI Principles and other instruments to ensure coverage of – and consistency with – the relevant aspects and to avoid duplicate work. The revised outline would then be circulated to the Working Group for review and comment and attached to the report for the session. The Working Group further agreed on an initial division of drafting responsibilities, with initial portions of certain chapters expected to be drafted by the second meeting. It was understood that, while experts would be responsible for drafting particular chapters or subparts, the future guide would ultimately be a collective product to be recommended by all of them to the UNIDROIT Governing Council for adoption.

106. With respect to stakeholder engagement, it was understood that, following the initial meeting, the Working Group could be supplemented with additional experts and stakeholders, who would be invited to join the second meeting, which was scheduled to take place on 13-15 September 2017. In addition, it was contemplated that a side event or informal meeting could be organised in coordination with FAO – during the Committee on World Food Security's next plenary session on 9-13 October 2017 or in connection with events linked to the 5<sup>th</sup> anniversary of the VGGT around that time – in order to build upon the prior year's informal meeting and to establish and gain input from a broader consultation group.

## **7. Any other business**

107. Seeing no requests for the floor with respect to any other business, the Chairman, Mr Moreno Rodríguez, closed the meeting, thanking the experts and representatives for their participation and contributions.

**ANNEX 1****LIST OF PARTICIPANTS****First Meeting of the UNIDROIT Working Group  
on agricultural land investment contracts****Rome, 3-5 May 2017****WORKING GROUP MEMBERS / EXPERTS**

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

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

Mr Daryono DARYONO  
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*(remote participation)*

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Présidente du réseau Trans Europe Experts  
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Professor of Law  
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**FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS (FAO)**

Ms Margret VIDAR  
Legal Officer  
Development Law Branch  
Legal Office

Ms Rachel ZUROFF  
Intern  
Development Law Branch

**INTERNATIONAL FUND FOR AGRICULTURAL DEVELOPMENT (IFAD)**

Mr Charles FORREST  
Senior Legal Counsel

**OTHER INTERGOVERNMENTAL ORGANISATIONS****International Land Coalition**

Ms Cristina TIMPONI CAMBIAGHI  
Thematic Coordination Manager

Mr Luca CHINOTTI  
Global Policy Advisor

**World Farmers' Organisation**

Mr Paul BODENHAM  
Legal Counsel

**Private Sector**

Mr Brian BALDWIN  
International Agri-Food Network  
Secretariat for the Private Sector Mechanism of the UN Committee on World Food Security

**UNIDROIT Secretariat**

Mr José Angelo ESTRELLA FARIA, Secretary-General  
Mr Neale Bergman, Legal Officer

**ANNEX 2****First Meeting of the UNIDROIT Working Group  
on agricultural land investment contracts****Rome, 3-5 May 2017****AGENDA**

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. Notion of agricultural land investment contracts
  - C. Alignment of the work on agricultural land investment contracts with existing initiatives
  - D. Co-operation with the UN agricultural development agencies, non-governmental organisations, the private sector and other stakeholders
  - E. 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

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\* 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.

**ANNEX 3****INITIAL DRAFT OUTLINE**  
**for UNIDROIT's future guide on agricultural land investment contracts****PREFACE** [see, e.g., Legal Guide on Contract Farming, Preface]

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

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

- I. General introduction to agricultural land investment contracts
  - A. The notion of agricultural land investment contracts, including why such contracts are important and being treated in the Guide
  - B. Issues that have been identified with respect to such contracts
    - Tenure rights in general [see, e.g., Munro-Faure and Palmer, An Overview of the Voluntary Guidelines on the Governance of Tenure, LAND TENURE JOURNAL (2012)]
    - Rights of legitimate tenure right holders not being respected, including difficulties in identifying such holders

- Gaps and difficulties in the implementation of domestic laws

## II. Scope of the Guide

- A. Description of various agricultural land investment contracts in practice, such as leases, concessions/investment agreements, purchases (i.e. a more technical discussion than in Part I.A above)
- B. Identification of those contracts falling within the scope of the Guide, including primarily leases and concessions/investment agreements, but also other contracts to the extent feasible

## CHAPTER 1 – THE LEGAL FRAMEWORK

### I. The legal regime applicable to the agricultural land investment contract (i.e. applicable to the contract itself and the rights and obligations arising from it)

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

- Rules and principles of law (e.g. contract law; property law; company law)
- Customary rules and usages

#### B. International sources

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

### II. The regulatory environment

#### A. Domestic sources

- Land administration / land reform
- Environmental protection
- Promotion and protection of investment
- Finance (e.g. accounting rules and anticorruption measures)
- Other potentially applicable domestic sources

#### B. International sources

- Food security
- Human rights
- Gender

- Environmental law
- Labour law
- Transparency
- Other potentially applicable international sources

## CHAPTER 2 – NEGOTIATION AND FORMATION

- I. Identification of the possible parties to the contract and relevant stakeholders
  - A. Parties and relevant stakeholders [CFS-RAI Principle 5; VGGT para. 12.1 et seq.; UN Principles for responsible contracts, nos. 1-2, 7; VGGT Technical Guide No. 5 at 20 et seq.; VGGT Technical Guide No. 7 at 38; ISLP/CCSI Guide, part 2.2]
    - Investor(s)
      - Corporate organisation [GCAP Model Lease, Section 16]
      - Change of control [ISLP/CCSI Guide, part 2.17]
    - Legal tenure right holders (e.g. private holder(s), government)
    - Legitimate tenure right holder(s) [VGGT, paras. 3.2, 9.1]
      - Common challenges in identifying legitimate tenure right holders, as well as the challenge of legitimacy of those representing them [VGGT Technical Guide No. 7 at 16-36]
      - Free, prior and informed consent [UNDRIP; ILO C169; VGGT, paras. 3B.6, 9.9, 12.7; VGGT Technical Guide No. 3]
      - Introduction to community development agreements [cross-reference to Chapter 3.VI.C below]
    - Other possible parties or relevant stakeholders (e.g. local officials or public notaries)
  - B. Delivery of notices [GCAP Model Lease, Section 21; ISLP/CCSI Guide, part 2.25]
- II. Feasibility studies and risk assessments [GCAP Model Lease, Appendix 1; IISD Model Contract, para. 6.1]
  - A. Suitable land availability and valuation [VGGT, para. 18.1 et seq.; VGGT Technical Guide No. 4 at 37; VGGT Technical Guide on valuation (forthcoming)]
  - B. Food security [CFS-RAI Principles 1-2; VGGT, paras. 12.1, 12.4, 12.12]
  - C. Availability of water and other natural resources [CFS-RAI Principles 5-6]
  - D. Development of a business plan

- III. Impact assessments [CFS-RAI Principle 10; VGGT paras. 3.2, 12.10; IFC Performance Standard 1; Right to Food Guidelines, para 17.2; VGGT Technical Guide No. 4 at 56 et seq.; VGGT Technical Guide No. 7, parts 2-3, 6; IISD Model Contract, para. 6.2]
  - A. Human rights
  - B. Legitimate tenure rights
  - C. Social and livelihood
  - D. Environmental [GCAP Model Lease, Appendix 2]
- IV. Tender process [CFS-RAI Principle 9; VGGT Technical Guide No. 4 at 47 et seq., 61 et seq.]
  - A. Need for a competitive, inclusive and transparent process
  - B. Draft contract publication/disclosure [VGGT, para. 11.7; UN Principles for responsible contracts, no. 10; IISD Model Contract, para. 12.0]
- V. Contract formation [Legal Guide on Contract Farming at 57; UPICC, Chapter 2]
  - A. Capacity and consent
  - B. Role of those who intervene or assist in contract negotiation
  - C. Required contract form and content and consequences for breach of such requirements

**CHAPTER 3 – [RIGHTS AND] OBLIGATIONS OF THE PARTIES** (introduction to this chapter to recognise that not all contracts would require or include clauses on all of the topics identified below, depending on the type of contract, the parties to that contract, and other circumstances)

- I. Purpose of the investment [VGGT Technical Guide No. 4 at 87]
  - A. Identification of use
  - B. Indicative business plan
- II. Location/description of the land [GCAP Model Lease, Section 3; ISLP/CCSI Guide, part 2.4]
  - A. Identification (e.g. total size; boundaries; geospatial data)
  - B. Option for additional land and right of first refusal for such land
- III. Duration of the contract [GCAP Model Lease, Section 4; IISD Model Contract, para. 5.1]
  - A. Start and end dates
  - B. Drawbacks of limitations on period [UNCITRAL PFIP Guide at 151 et seq.]
- IV. Conditions [UPICC, Chapter 5.3]
  - A. Overview, including suspensive and resolutive conditions [ISLP/CCSI Guide, part 2.3]

- B. Permits and licenses [GCAP Model Lease, Sections 5, 14]
- V. Rights granted to the investor [GCAP Model Lease, Section 5; IISD Model Contract, para. 5.1; ISLP/CCSI Guide, part 2.5]
- A. Grant of tenure rights
    - Rights of use (e.g. land; water, including specification of water commitments and drought events; and underground resources)
    - Rights of entry and control (e.g. who owns improvements; fixtures; etc.) [UNCITRAL PFIP Guide at 108 et seq.]
    - Rights withheld (e.g. limitations on exclusivity/use; rights of way; continued access, etc.) [UNCITRAL PFIP Guide at 111 et seq.]
  - B. Grant of related rights
    - Right to access and use utilities [GCAP Model Lease, Section 11]
    - Rights to import (e.g. supplies; equipment)
    - Rights to market, transport and export (e.g. agricultural production)
- VI. Obligations on the investor (introduction to this subpart to recognise that there are trade-offs here, such as putting in place extensive social obligations may, in turn, require lower rental fees, etc.)
- A. Development obligations [GCAP Model Lease, Section 11]
    - Time limit for development by the investor
    - Timing and form of non-monetary obligations
    - Processing (e.g. whether to take place locally, including incentives, or elsewhere) [IISD Model Contract, para. 8.3]
  - B. Financial obligations [GCAP Model Lease, Section 6; IISD Model Contract, para. 7.0 et seq.; ISLP/CCSI Guide, part 2.11]
    - Timing and form of monetary payments, and interest accrual on late payments
      - Rental fees, including frequency of rent revisions and method of calculating adjustments to the rent and possible use of scales based on land development
      - Taxes (e.g. income; assets; exports) [VGGT, para. 19 et seq.]
      - Customs duties
      - Royalties

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

C. Social obligations [GCAP Model Lease, Section 7; ISLP/CCSI Guide, part 2.13]

- Compensation rates for crops, structures or other items existing on the land, and periods of compensation (e.g. on entry, annual, at exit) [note that this could be moved to financial obligations]
- Local/domestic food security [CFS-RAI Principles 1-2; VGGT, para. 12.12]
- Employment, including gender and youth aspects (e.g. meaningful opportunity to become part of the company, and training and skills development) [CFS-RAI Principles 2-4; GCAP Model Lease, Section 7; IISD Model Contract, para. 8.1 et seq.]
- Procurement, including guidance on contracts with local suppliers and incentives for local or domestic procurement [CFS-RAI Principle 2; IISD Model Contract, para. 8.4]
- Outgrower arrangements, such as contract farming with farmers on adjoining land or tenant farmers subletting land, for which overarching framework could set key parameters (e.g. price, including internationally available indices; indebtedness) [CFS-RAI Principles 1-2, 8; GCAP Model Lease, Section 7; IISD Model Contract, para. 8.2]
- Communications and agreements with local communities (e.g. guidance on substantive content – linked back to discussion in Chapter II and in the introduction to Chapter III) [CFS-RAI Principle 9; GCAP Model Lease, Sections 8-9; IISD Model Contract, para. 8.5]

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

- Opportunity to complement national legislation by contractual clauses, such as by building upon international standards or other possibilities (e.g. rotational cropping; climate smart cropping; best available science)
- Impact assessment and management
- Pesticides
- Pollution prevention and remediation
- Soil management/degradation [VGSSM]
- Water use/depletion
- Protection of biodiversity [see, e.g., RSPO Principles & Criteria]
- Cultural heritage [CFS-RAI Principle 7]
- Waste management

- VII. Infrastructure [ISLP/CCSI Guide, part 2.7]
- VIII. Compliance [GCAP Model Lease, Sections 11-12; ISLP/CCSI Guide, part 2.6]
- A. Insurance
  - B. Recordkeeping and audits [IISD Model Contract, para. 5.3]
  - C. Circumstances under which the lessor can enter the property to inspect the investor's activities and monitor compliance [IISD Model Contract, para. 5.3]
  - D. Conservation of premises
- IX. Physical security [UN Principles for responsible contracts, no. 6; GCAP Model Lease, Section 12; IISD Model Contract, para. 5.4; ISLP/CCSI Guide, part 2.8]
- X. Stabilisation / Security of rights, including the importance of legal security for bankability [UN Principles for responsible contracts, no. 4; IISD Model Contract, para. 10.0; ISLP/CCSI Guide, part 2.19]
- XI. Monitoring [UN Principles for responsible contracts, no. 8; VGGT Technical Guide No. 4 at 70 et seq.; VGGT Technical Guide No. 7 at 68-69; GCAP Model Lease, Section 13; ISLP/CCSI Guide, part 2.14]
- A. Performance guarantees [UNCITRAL PFIP Guide at 136-140]
  - B. Reporting requirements and access to information / disclosure, transparency [VGGT, paras. 6.9, 11.7; UN Principles for responsible contracts, no. 10; VGGT Technical Guide No. 7 at 45 et seq.; IISD Model Contract, para. 12.0, 16.0 et seq.; ISLP/CCSI Guide, part 2.18]
    - Between the parties
    - Between the parties and the public
    - Protection of confidential information
  - C. Amendments and periodic review (e.g. every 5 years, variations of certain indexes) [GCAP Model Lease, Section 18; IISD Model Contract, para. 13.0; ISLP/CCSI Guide, part 2.26]
- XII. Representations and warranties (and indemnification and anticorruption – terminology TBD) [ISLP/CCSI Guide, parts 2.9, 2.15, 2.22]

#### **CHAPTER 4 – NON-PERFORMANCE**

- I. Changes in circumstances in general/risks [UPICC, Chapter 6.2; UNCITRAL PFIP Guide at 140 et seq.; VGGT Technical Guide No. 7 at VIII-X; Equator Principle 1]
- II. Excuses [Legal Guide on Contract Farming, Chapter 4]
  - A. Force majeure [UPICC, art. 7.1.7; GCAP Model Lease, Section 20; ISLP/CCSI Guide, part 2.21]
  - B. Qualifying events, including possible link to renegotiations and periodic review

C. Consequences

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

A. Overview on remedies

- Interference by the other party [UPICC, art. 7.1.2]
- Withholding performance [UPICC, art. 7.1.3]
- Cure by non-performing party [UPICC, art. 7.1.4]
- Additional period for performance [UPICC, art. 7.1.5]
- Termination [cross reference to Chapter 5.IV below; UPICC, Chapter 7.3]
- Damages [UPICC, Chapter 7.4] and penalty clauses [UPICC, art. 7.4.13]

B. Breach by the investor

- Legal right holder
- Legitimate tenure right holder

C. Breach by the lessor

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

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

A. Transferability of rights

B. Need for approval

II. End of contract / return [UNCITRAL PFIP Guide at 168 et seq.; ISLP/CCSI Guide, part 2.24]

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

B. Liabilities for deterioration

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

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

A. Scope

B. Termination clauses, including definition of default events

- C. Procedure/notice
- D. Effects and consequences

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

- I. Disputes arising under agricultural land investment contracts
- II. Non-judicial dispute resolution
  - A. Grievance mechanisms, including for local communities [CFS-RAI Principle 9; UN Principles for responsible contracts, no. 9]
  - B. Expert determination (e.g. price of processing or of crops, in the event that the project involves processing or an outgrower arrangement respectively)
  - C. Negotiation/conciliation
  - D. Mediation
  - E. Arbitration (e.g. factors to consider, such as what investors might seek and what host States might oppose; considerations with respect to governing law and transparency of proceedings) [GCAP Model Lease, Section 22; ISLP/CCSI Guide, part 2.27]
- III. Judicial dispute resolution
  - A. Access to justice
  - B. Domestic versus international contracts
- IV. Enforcement of settlements or decisions resolving a dispute

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

**ANNEX 4****INITIAL LIST OF POSSIBLE RESOURCES**

AU, African Development Bank and Economic Commission for Africa, The Framework and Guidelines on Land Policy in Africa (2010),  
[http://www.uneca.org/sites/default/files/PublicationFiles/fg\\_on\\_land\\_policy\\_eng.pdf](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](http://www.uneca.org/sites/default/files/PublicationFiles/guiding_principles_eng_rev_era_size.pdf)

CFS, Principles for Responsible Investment in Agriculture and Food Systems (15 Oct. 2014),  
[http://www.fao.org/fileadmin/templates/cfs/Docs1314/rai/CFS\\_Principles\\_Oct\\_2014\\_EN.pdf](http://www.fao.org/fileadmin/templates/cfs/Docs1314/rai/CFS_Principles_Oct_2014_EN.pdf) (CFS-RAI Principles)

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

Various resources on the VGGT, <http://www.fao.org/nr/tenure/information-resources/en/>

VGGT Technical Guide No. 1 – Gender (2013),  
<http://www.fao.org/docrep/017/i3114e/i3114e.pdf>

VGGT Technical Guide No. 2 – Forestry (2013),  
<http://www.fao.org/docrep/018/i3249e/i3249e.pdf>

VGGT Technical Guide No. 3 – Indigenous Peoples (2014),  
<http://www.fao.org/docrep/019/i3496e/i3496e.pdf>

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