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Legal Guide on Agricultural Land Investment Contracts

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FOREWORD

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LIST OF CONTRIBUTORS

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LIST OF ABBREVIATIONS AND ACRONYMS

CDA - Community Development Agreements
CESCR - UN Committee on Economic, Social and Cultural Rights
CFS - Committee on World Food Security
CFS-RAI Principles - CFS Principles for Responsible Investment in Agriculture and Food Systems
CISG - United Nations Convention on Contracts for the International Sale of Goods
CSO - Civil Society Organisation
CSR - Corporate Social Responsibility
EU - European Union
FAO - Food and Agriculture Organisation of the United Nations
FPIC - Free, prior and informed consent
ICESCR - International Covenant on Economic, Social and Cultural Rights
ICJ - International Court of Justice
ICSID - International Centre for Settlement of Investment Disputes
IFAD - International Fund for Agricultural Development
IFC - International Finance Corporation
IIA - International Investment Agreement
ILC - International Law Commission
ILO - International Labour Organisation
ISO - International Organisation for Standardisation
IUCN - International Union for Conservation of Nature
MOU - Memorandum of Understanding
NCP - National Contact Point
NGO - Non-Governmental Organisation
OECD - Organisation for Economic Co-operation and Development
OHADA - Organisation for the Harmonisation of Business Law in Africa
RAI-KN - UNCTAD/World Bank Knowledge into Action Note
RSPO - Roundtable on Sustainable Palm Oil
SDG - Sustainable Development Goals
UN - United Nations
UNCITRAL - United Nations Commission on International Trade Law
UNCTAD - United Nations Conference on Trade and Development
UNECA - United Nations Economic Commission for Africa
UNECE - United Nations Economic Commission for Europe
UNESCO - United Nations Educational, Scientific and Cultural Organisation

UNIDROIT - International Institute for the Unification of Private Law

UPICC - UNIDROIT Principles of International Commercial Contracts

VGGT - Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security

WB - World Bank

WFP - World Food Programme

EXECUTIVE SUMMARY (including a short list of issues)

[Placeholder]

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PREFACE

I. OVERVIEW AND PURPOSE

Preface 1. *Introduction.* The UNIDROIT/FAO/IFAD Legal Guide on Agricultural Land Investment Contracts (the Guide) provides detailed guidance to improve such contracts so that they promote respect for legitimate tenure rights, equitable access to land and responsible agricultural investment more broadly. The guidance provided is consistent with and elaborates upon the international consensus reflected in principles and standards for land tenure, agricultural investment and related areas, which are the result of broad and extensive consultations and are set out in the following key instruments:

- the UN Guiding Principles on Business and Human Rights (UN Guiding Principles), which were endorsed by the UN Human Rights Council in May 2011 and seek to prevent, address and remedy human rights abuses committed in business operations; the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security (VGGT), which were endorsed by the Committee on World Food Security (CFS) in May 2012 to promote secure tenure rights and equitable access to land, fisheries and forests as a means of eradicating hunger and poverty, supporting sustainable development and enhancing the environment; and
- the CFS Principles for Responsible Investment in Agriculture and Food Systems (CFS-RAI Principles), which were endorsed by the CFS in October 2014 and promote responsible investment to improve food security and nutrition, thus supporting the progressive realisation of the right to adequate food.

Preface 2. *Context.* For investors, governments and local communities planning an agricultural investment, as well as for any legitimate tenure right holders that might be affected, preparing, negotiating and implementing that investment so that it is fully consistent with these instruments can be challenging. Indeed, there are many important considerations, including possible investment models, different applicable legal frameworks depending on the investment's location and gaps in such frameworks or their implementation, as well as the investment's potential impact on tenure rights, food security and the progressive realisation of the right to adequate food, livelihoods and the environment. The failure to understand and address these considerations increases investment risks and may generate significant negative impacts for the investor, the government, local communities and legitimate tenure rights holders. That failure, moreover, is inconsistent with current trends with respect to corporate social responsibility (CSR) and responsible business conduct.

Preface 3. *Investment options.* At the outset, however, it is important to recognise that investments involving transactions of tenure and related rights to investors are not the preferred option for setting up an agricultural project, and the Guide does not promote such transactions. Instead, consistent with the VGGT and CFS-RAI Principles, the Guide promotes investments both by and with smallholder farmers, as well as partnerships with them and local communities, such as through responsible contract farming or other supply arrangements.¹ As described in the Introduction, the various forms and models of investment are not necessarily mutually exclusive, and they are to be considered as an alternative to an investment involving a transaction of tenure and related rights or for possible use in connection with such an investment (e.g. a nucleus estate with contract farming arrangements in place with local farmers).

¹ The UNIDROIT/FAO/IFAD Legal Guide on Contract Farming (LGCF) provides detailed guidance on responsible contract farming models, which is – as a policy matter – a preferred model because it does not entail the transfer of tenure rights and was accordingly the first instrument adopted in the UNIDROIT/FAO/IFAD collaboration in the area of private law and agricultural development.

Preface 4. *Focus and guidance.* The Guide focuses on agricultural land investment contracts involving a transaction of tenure and related rights for a specified period of time between investors and the grantors of those rights. In practice, various entities and individuals can be grantors, such as governments, local communities or private landowners. The Guide, however, focuses on contracts between investors and governments and investors and local communities and, in doing so, places particular emphasis on protecting and respecting the rights of legitimate tenure right holders. The Guide provides guidance on those contracts – that is consistent with the UN Guiding Principles, the VGGT and CFS-RAI Principles and builds upon UNIDROIT’s private law expertise, as set forth in the UNIDROIT Principles of International Commercial Contracts² and the UNIDROIT/FAO/IFAD Legal Guide on Contract Farming – with respect to (1) the legal framework; (2) parties, contractual arrangements, due diligence and formation; (3) rights and obligations of the parties; (4) contractual non-performance and remedies; (5) transfer and return; and (6) dispute resolution. To this end, the Guide highlights key themes, describes common contract terms, discusses issues that might arise in different legal systems and contexts and illustrates how they might be addressed in a way that promotes responsible and sustainable investment while avoiding or minimising negative impacts. The Guide also makes clear that contracts might not be able to address all possible issues and that, in many instances, it is preferable for certain issues to be dealt with primarily or exclusively in domestic law.

Preface 5. *Purpose.* With that focus, the guidance may be relevant to investments of different scales and to those of both domestic and foreign investors. The Guide, however, does not promote the large-scale transfer of tenure rights and excludes sales of agricultural land from its scope. Instead, the Guide acknowledges that many contracts are being negotiated with limited consultation, transparency or accountability, often leading to contractual arrangements that violate legitimate tenure rights or fail adequately to address the social, environmental or economic dimensions at stake. Where agricultural land investment contracts continued to be used, the Guide – in seeking to improve the contracting process and the contracts themselves – discusses how to identify and involve equitably all relevant parties and stakeholders and to structure and draft the resulting contracts so that they operationalise the international consensus reflected in the UN Guiding Principles, the VGGT and the CFS-RAI Principles. In particular, the Guide responds to the need for greater and more responsible investment in agriculture, which incorporates necessary safeguards to enhance food security and nutrition and to protect legitimate tenure right holders, human rights, livelihoods and the environment and, in turn, reduces investment risks. The Guide also supports capacity development within governments and the raising of awareness among legitimate tenure right holders and local communities regarding their rights.

II. APPROACH AND HOW TO USE THE GUIDE

Preface 6. *In general.* Drawing upon UNIDROIT’s private law expertise, in particular in the area of contract law, and FAO’s and IFAD’s legal and policy expertise in the areas of land tenure and agricultural investment, the Guide’s legal discussion and analysis follows a concrete approach based upon contract principles and practices, actual investment operations and input from experts in contract law, land tenure, responsible agricultural investment, human rights and international law. While the Guide does not provide a comprehensive comparative law analysis, it illustrates to the extent possible not only applicable mandatory rules with which parties must comply, but also principles, standards and practices with which parties should comply, even if not mandatory, because they reflect the international consensus on land tenure, agricultural investment and related areas and are supportive of responsible and sustainable investment. The Guide includes models or practices as useful examples or possible solutions arising under domestic contract law, contract types which may be directly applicable or by analogy, relevant legislation, industry standards and studies and recommendations from development agencies and NGOs.

² The Guide refers to the 2016 UNIDROIT Principles of International Commercial Contracts (UPICC) as representative of general principles of contract law, not intending to refer necessarily to their direct application. It should be noted that in applying the UPICC, parties to an agricultural land investment contract or judges or arbitrators addressing a dispute arising from such a contract might wish to take into consideration the Model Clauses for Use by Parties of the UNIDROIT Principles of International Commercial Contracts (8 May 2013).

Preface 7. *Generality.* In taking a concrete approach, the Guide maintains a certain level of generality regarding the various issues that might arise in contractual practice. Indeed, agricultural land investment contracts depend upon numerous factors (e.g. applicable laws and regulations, including whether they are implemented or sufficient; the nature of the tenure holder(s) concluding the contract; and location of the land and the agricultural commodity to be produced). There are many options to consider, and no contract contains the same provisions or addresses all issues in an identical fashion.

Preface 8. *References.* As an editorial and policy choice, the Guide refrains from making specific references to States, identifying particular domestic legislation, citing case studies or quoting contract clauses. Instead, the Guide refers to international instruments (e.g. the UN Guiding Principles, the VGGT, the CFS-RAI Principles, the UPICC and the Legal Guide on Contract Farming) and related guidance documents promulgated by inter-governmental Organisations (e.g. the FAO Governance of Tenure Technical Guides³ and the OECD-FAO Guidance for Responsible Agricultural Supply Chains (the OECD-FAO Guidance)⁴). In making these references, the Guide seeks to be comprehensive, while avoiding duplication of existing guidance. In addition, the resources that supported the Guide's development are listed in Annex II.⁵

Preface 9. *Target audience.* The Guide is targeted to legal professionals involved in the preparation, negotiation, implementation and review of agricultural land investment contracts, including for investors, governments, legitimate tenure right holders and local communities. The Guide might also be useful for other actors and in other settings, including by legislators, policymakers, judges, arbitrators, notaries, public-interest legal service organisations, community organisations, law societies and international development organisations. The guidance is not meant to promote transactions of tenure and related rights to investors, nor is it to interfere with mandatory domestic rules or provide a model for, or encourage the adoption of, special legislation by governments. To the extent that the Guide identifies problems and offers possible solutions, however, it could provide useful information to be considered when adopting regulatory or legislative provisions dealing with agricultural land investment contracts and related aspects. It could also help to address capacity constraints of State governments, raise awareness of the rights of legitimate tenure holders and other stakeholders, and support protection of those rights by governments and respect of those rights by investors.

Preface 10. *Using the Guide.* Besides reading from cover to cover, there are a number of different ways in which readers may benefit from the Guide. Such ways, for example, include:

- referring to a particular chapter, part, or section via the table of contents at the beginning of the Guide;
- browsing through the text, following references to further treatment of topics of interest both within the Guide and in other international instruments and guidance documents;
- consulting the checklist of issues contained in Annex I, which refers readers to the treatment of particular issues within the Guide; and
- using the list of resources in Annex II for further or more detailed treatment of particular issues.

³ The FAO Governance of Tenure Technical Guides (VGGT Technical Guides) are part of FAO's initiative to help develop capacities to improve tenure governance and to assist with the implementation of the VGGT.

⁴ The OECD-FAO Guidance is intended to "help[s] enterprises observe standards of responsible business conduct to ensure that their operations do not lead to adverse impacts and contribute to sustainable development".

⁵ UNIDROIT's webpage for the Guide, which is available at [\[insert link\]](#), also identifies those additional resources, and they are keyed to the various chapters and paragraphs within the Guide.

INTRODUCTION

I. THE ROLE OF AGRICULTURAL LAND INVESTMENT CONTRACTS IN RESPONSIBLE AGRICULTURAL INVESTMENT

Intro. 1. *The need in general.* More responsible investment is needed to achieve the Sustainable Development Goals. An estimated 140 billion USD in additional annual investment – including from public authorities, private sector investors and in, by and with smallholder farmers – is required for agriculture and rural development in order to achieve, among others, Sustainable Development Goals 1 (No poverty) and 2 (Zero hunger).¹ An increase in responsible investments is also expected to stimulate growth and generate employment and livelihood opportunities.²

Intro. 2. *Forms and impacts.* That need for an increase in the quantity and quality of investment relates to different segments of agricultural value chains (e.g. inputs, production, aggregation, processing and distribution). Investments themselves can intervene at different points in those chains and take many different forms (e.g. contract farming and joint ventures). Although such an increase in agricultural investments is needed in many countries to enhance sustainable development, some types of investment can be problematic, having various shortcomings (e.g. structural or contractual) and resulting in more negative impacts than positive ones. In seeking agricultural investment, some governments and local communities have entered into agricultural land investment contracts transferring – in some instances by sale but more commonly by long-term lease – large parcels of land to investors and granting them extensive tenure and related rights.³ Such contracts have given rise to intense debates. Some point out that their possible positive impacts (e.g. job creation, greater public revenues, technology transfer or infrastructure development) outweigh negative ones. Others, however, criticise them as “land grabs” that fail to generate promised positive impacts, dispossess users of that land or their tenure rights and cause other negative impacts (e.g. on the environment, access to water or social aspects).

Intro. 3. *Protection of tenure rights.* There are a plethora of possible business models, ultimately with various contractual configurations (e.g. contract farming, management contracts, joint ventures and partnerships, sharecropping and cooperatives). Some models and configurations may pose less of a direct threat to tenure rights than others, and each of them have different advantages and disadvantages. The VGGT and CFS-RAI Principles promote, in particular, investments both by and with smallholder farmers, as well as partnerships with them and local communities. Accordingly, business models and contractual configurations that sustain investments by and with such farmers and communities are to be preferred. Where possible, such models and configurations are to be used instead of agricultural land investment contracts involving transactions of tenure and related rights to investors or, at a minimum, in conjunction with them. Indeed, the various models and contractual configurations are not necessarily mutually exclusive.

¹ The total amount of additional annual investments (including non-agricultural sectors and social protection) required to achieve SDGs 1 and 2 is an estimated 265 billion USD. See FAO, IFAD and WFP. 2015. *Achieving Zero Hunger*, pp. iv-v, 13.

² See, CFS-RAI Principles, Background and Rationale, para. 1 (“Responsible investment in agriculture and food systems is essential for enhancing food security and nutrition and supporting the progressive realisation of the right to adequate food in the context of national food security. Responsible investment makes a significant contribution to enhancing sustainable livelihoods, in particular for smallholders, and members of marginalised and vulnerable groups, creating decent work for all agricultural and food workers, eradicating poverty, fostering social and gender equality, eliminating the worst forms of child labour, promoting social participation and inclusiveness, increasing economic growth, and therefore achieving sustainable development”).

³ The term “large” is not an absolute one, and what may qualify as a “large-scale” land investment depends, *inter alia*, on the relevant State within which the investment is made and the context of that investment.

Intro. 4. *Role of agricultural land investment contracts.* In situations in which agricultural land investment contracts are being negotiated or already in place, such contracts can play an important role in ensuring *responsible* and sustainable investment. The contracts, however, are often negotiated or implemented in a way which fails to involve all holders of tenure rights or properly balance various policy goals (e.g. promoting food security, nutrition, and gender equality; safeguarding the rights of legitimate tenure right holders; protecting the environment; and stimulating economic growth). Actions in preparation for and during the initial phases of an investment, moreover, are critical to generating a positive outcome from that investment.

Intro. 5. *Improving contracts.* To ensure that agricultural land investment contracts can play that important role and be consistent with the UN Guiding Principles, the VGGT, the CFS-RAI Principles and other international instruments, prospective or contracting parties have various steps to take and issues to consider, including the following examples. In doing so, those parties can contemplate and, as needed, incorporate safeguards into the contract in order to enhance the likelihood that anticipated benefits are realised and that negative impacts are avoided or mitigated.

- *Legitimate tenure right holders:* Parties are to consult legitimate tenure right holders to seek their consent. In some instances, the government retains the right to sell or lease land and does not adequately protect the rights of legitimate tenure right holders with respect to that land. Holders of such rights may be indigenous peoples, who might be governed by customary rules and systems of tenure. The failure to identify, consult and seek participation from any legitimate tenure right holders and, where applicable, obtain free, prior and informed consent (FPIC), is inconsistent with international principles and standards and may undermine those holders' rights, the investment and even the tenure system itself, particularly when it is based on commons. The parties, instead, are to conduct the necessary due diligence and consultations in this regard, to involve legitimate tenure right holders in the preparations and to work in partnership with them, for example, by investing together with such holders in a balanced way⁴ or by sharing the investment's benefits with them.
- *Gaps in the legal framework:* Parties are to assess and address gaps in the legal framework, which is generally made up of the State's domestic laws and regulations, international treaties and agreements (e.g. on human rights, trade, environment and investment) and the agricultural land investment contract itself. A State's law might not address a particular issue and, even if that issue is addressed, the law might not be implemented or might fail to offer necessary protections. Environmental laws and regulations, for example, might lack provisions requiring impact assessments to be performed or water quality to be protected from agricultural runoff, including fertilisers, pesticides and livestock waste. Labour laws and regulations, as another example, might not adequately protect employees from poor working conditions or discrimination, such as gender or age discrimination. Optimally, there would not be any gaps in the State's law but, where gaps exist, the agricultural land investment contract may be a means to fill in some or all of those gaps while the State works towards filling them.
- *Transparency:* The parties' preparation, negotiation and implementation of an agricultural land investment contract is to be as transparent as possible, in particular with respect to legitimate tenure right holders and local communities. The resulting contract, moreover, is to be made public, subject to a limited exception to redact confidential information, in a language or languages understood by those affected. A lack of transparency can generate mistrust between the parties and among stakeholders and fuel corruption concerns, and the parties should share information and disclose contractual terms.
- *Grievance mechanisms:* The parties are to establish sufficient mechanisms for addressing concerns of those who are affected by the agricultural land investment contract, but not a party to it. A State's judicial system and its domestic law, as well as the agricultural land investment contract itself, might not provide adequate mechanisms. A well-functioning and effective grievance

⁴ See CFS-RAI Principle 9, para. 29(iii).

mechanism facilitates consultation and handling of employee or local community concerns in a timely manner, absent which tension and other risks could arise.

- *Dispute resolution:* Similarly, the parties are to establish sufficient dispute resolution mechanisms for resolving disputes that arise. A well-functioning dispute resolution procedure can help to ensure that any disputes are resolved in a fair and timely manner, absent which the land at issue might lie fallow and employees might be out of work.

Intro. 6. *Complexity.* The examples above are illustrative, both of common issues which can arise under agricultural land investment contracts and the important role that such contracts can play as part of the applicable legal framework. Preparing, negotiating and implementing the contracts in an inclusive and responsible way, in particular by incorporating necessary safeguards, can support the realisation of benefits and avoidance or mitigation of negative impacts. At the same time, it is essential to recognise that agricultural investment and land tenure issues are complex, not only technically but also socio-politically. It might not be possible, for example, to fill some gaps in the applicable legal framework with contractual provisions. Accordingly, there may be some issues that cannot be adequately addressed through agricultural land investment contracts and, in these instances, *careful* consideration should be given to whether a particular investment should proceed. Indeed, if an investment fails to protect and respect the rights of legitimate tenure right holders, it should not proceed.

II. SCOPE OF THE GUIDE

Intro. 7. *In general.* Agricultural land investment contracts can vary significantly, involving different forms and sizes of investment. As a general matter, the Guide addresses such contracts involving transactions of tenure and related rights for a specified period of time and not sales, for at least two reasons. First, in some jurisdictions foreign investors are prohibited from owning land generally or agricultural land specifically, and these prohibitions may account in part for the greater prevalence of transactions for a specified period. Second, unlike sales, such transactions entail ongoing obligations between the investor and the grantor of the tenure and related rights, and the investors which receive those rights in exchange for payment and other obligations. These ongoing obligations allow for the incorporation of contractual safeguards and for the monitoring of them.

Intro. 8. *Roadmap.* In order to better define those contracts and related aspects falling within the Guide's scope, the following introduces: (a) different possible contractual arrangements; and (b) the usual parties and possible stakeholders to such arrangements.

A. Contractual arrangements

Intro. 9. *Diversity of possible arrangements.* The Guide covers diverse contractual arrangements (e.g. investment contracts, concession agreements, or community development agreements (CDAs)). An agricultural *project*, for example, might entail a single contract or a series of interrelated contracts. In the latter situation, the contracts may relate to various steps in the investment process, generally in sequence (e.g. memorandum of understanding (MOU), establishment convention or investment contract, land lease, water convention, etc.), and may include related agreements.

Intro. 10. *Alternative and mixed models.* In promoting business models that are inclusive of local communities in conjunction with transactions involving tenure and related rights to agricultural land, the *Guide* covers those possible models to the extent feasible. Such models include, for example, nucleus estates with outgrower schemes, contract farming, joint ventures and various types of partnerships.⁵

⁵ Recognising the importance of responsible contract farming as an inclusive business model, users may wish to refer to the LGCF. See, e.g., Preface, note 1 (regarding the LGCF).

Intro. 11. *Sharing of benefits.* The Guide also includes guidance on arrangements that share the investment's benefits with legitimate tenure right holders and the local community, whether as provisions in the agricultural land investment contract or in related agreements. They include CDAs or trusts, *local* employment provisions, content or procurement requirements, as well as outgrower schemes in which, as a general matter, farmers on or next to the investment area engage in contact farming with the investors.

Intro. 12. *Key terms.* With respect to contractual arrangements, the Guide employs the following key terms, for which *summary* descriptions are provided below.

- *Tenure* refers to the way that land is held or owned by individuals, families, companies or groups and can encompass one or more rights within a "bundle of rights" (e.g. the right to occupy, use, develop, enjoy and withdraw benefits from the land; the right to restrict others' access to the land; or the right to manage, sell or bequeath the land).⁶ This Guide does not presume that land holding has to be formally recognised in the written law of the domestic legal system. Some legitimate tenure right holders, for instance, may have their rights to and over land recognised in customary law. For ease of reference, land in this context can also refer to other natural resources such as water and trees, though the Guide generally does not cover subsurface resources unless expressly stated otherwise.
- *Agricultural land investment contract* refers to a contract or series of interrelated contracts involving a transaction of tenure and related rights for a specified period of time, in particular between investors and grantors (e.g. investment contracts, concession agreements or leases), as well as related agreements (e.g. community development or other agreements). Within the Guide, "investment contract" and "contract" are often used as shorthand for the term "agricultural land investment contract". While that term in practice would ordinarily refer to sales of agricultural land as well, for purposes of the Guide, it does not cover sales.
- *Related agreement* refers to various possible agreements – between one or all of the parties to an agricultural land investment contract and legitimate tenure right holders or local communities which are not included in that contract – that are meant to share the benefits of the investment (e.g. outgrowers, revenue sharing, community development and social infrastructure agreements).

B. Parties and stakeholders

Intro. 13. *Diversity of possible parties.* The parties to agricultural land investment contracts may include – depending upon the applicable law and the particular context – investors, governments, local communities, indigenous communities, legitimate tenure right holders and private landowners.

Intro. 14. *Focus of Guide.* The Guide focuses on contracts between investors and governments and investors and local communities. In focusing on these two sets of contracts, the Guide places particular emphasis on protecting and respecting the rights of legitimate tenure right holders, who are to be consulted in the preparation, negotiation and implementation of such contracts. Depending on the *circumstances*, such holders may be parties to agricultural land investment contracts or related agreements or may stand to benefit from those contracts as third party beneficiaries with certain rights even though they are not parties to the contracts.

Intro. 15. *Broader applicability.* Although agricultural land investment contracts between investors and private landowners – to the extent that such owners are not local communities – generally fall outside the Guide's scope (see, e.g., the Guide's description of the key term "grantor" below), the guidance may nevertheless be applicable to those contracts. As a general matter, such contracts might not require safeguards for tenure rights if the land is transacted through the market by a private owner, the parties are informed and not coerced, and there are no other holders of tenure rights with respect to that land. Where assessment indicates, however, that there are legitimate tenure right holders that might be impacted

⁶ VGGT Technical Guide No. 5, p. 19.

negatively by a transaction of tenure and related rights from a private owner or there may be other negative impacts (e.g. environmental, social or economic), the Guide could prove to be useful, in particular with respect to possible contractual safeguards to avoid or minimise those impacts.

Intro. 16. *Key terms.* With respect to parties and stakeholders, the Guide employs the following key terms, for which summary descriptions are provided below.

- *Investor* refers to private sector entities (e.g. general investment or holding companies or specialised agribusinesses) and to certain public sector entities (e.g. sovereign wealth funds and State-owned enterprises), that seek and enter into agricultural land investment contracts, as well as becoming party to existing contracts (e.g. through a merger or other acquisitions).
- *Grantor* refers to the government or local community, including traditional authorities, which grant tenure and any related rights with respect to particular agricultural land to the investor in exchange for payment and other obligations under an agricultural land investment contract.
- *Government* refers to the public authority or authorities that are legally mandated to grant tenure and related rights to land within a given State. Public authorities whose mandate covers agricultural land investment contracts, for example, can include the presidency or the ministries of agriculture, land, environment, trade, economy, industry or foreign affairs, and regional or local governmental subdivisions, as well as traditional authorities if they have formal authority under domestic law.
- *Local community* refers to a group of people living next to, near or on particular agricultural land. The community may be a legal or legitimate tenure right holder itself with respect to that land or represent such holders. The community may also involve indigenous peoples (e.g. making up all or parts of the community), traditional authorities or systems of tenure. For purposes of the Guide, the term does not refer to local governmental subdivisions, which are covered by the term “government”.
- *Traditional authority* refers to a customary leader or groups of leaders which may have either formal or informal authority over land, allocation of benefits and other investment-related decisions that impact the local community.
- *Legal tenure right holder* refers to a holder whose rights to land – including ownership and customary rights – are recognised by the domestic law.⁷
- *Legitimate tenure right holder* refers not only to a holder whose rights to land are formally recognised by the domestic law, but also to a holder whose rights, while not currently protected in the formal written law, are informally recognised and considered to be socially legitimate in local societies.⁸ In some instances, the rights may be communal or overlapping (e.g. some hold rights to use the land for pasture or agriculture or to use trees or collect firewood in the forest, while others hold rights to travel across the land or to drive cattle across it to obtain water at a river). Some may hold temporary use rights (e.g. tenants farming on land owned by the State or others) or seasonal rights (e.g. pastoral communities who graze their livestock in the area on a seasonal basis).⁹ In using this term, consistent with the emphasis on protecting and respecting the rights of legitimate tenure right holders, the Guide is most often referring to such holders whose rights are not recognised in the formal written domestic law. Legitimate tenure rights are in some jurisdictions recognised under unwritten customary laws and practices.

⁷ *Id.*

⁸ *Id.*

⁹ VGGT Technical Guide No. 7, p. 17; see also VGGT Technical Guide No. 5, pp. 19 *et seq.* (discussing social and legal legitimacy and legitimate tenure rights).

CHAPTER 1 - THE LEGAL FRAMEWORK

1.1. Overview. An appropriate and effective legal framework can foster responsible agricultural investment and incorporate necessary safeguards to protect legitimate tenure right holders, human rights, livelihoods, food security and the environment. The legal framework applicable to an agricultural investment is made up of the law of the State in which the land is located, international law (e.g. treaties, custom and principles of law), and the agricultural land investment contract, of which the State's law is the most important component.

1.2. *Interplay between domestic law and the contract.* At its best, domestic law creates a level playing field for all comparable investments, reflects policy choices made through democratic processes, and establishes transparent and public terms. In those situations, an agricultural land investment contract might only need to address a narrower set of issues (e.g. location of the land, rental rates, community development aspects). In other situations, however, the law might not address critical issues, or there might be gaps in its implementation. In these instances, an agricultural land investment contract could include provisions addressing, to the extent possible, such issues or gaps. Under either scenario, the agricultural land investment contract plays a significant role in the legal framework applicable to an agricultural investment.

1.3. *Freedom of contract.* As a general matter, parties are free to enter into a contract and to determine its content how they see fit, based on the freedom of contract.¹ In transactions involving governments and local communities in an area as critical to food security, human rights and environmental protection as agricultural investment, however, that freedom is subject to various mandatory rules, which restrict the parties' freedom of contract.

1.4. *Mandatory rules.* The agricultural land investment contract must comply with mandatory rules whether of national, international or supranational origin. Mandatory rules of national origin are those enacted by States autonomously (e.g. legislation or judicial decisions), while mandatory rules of international or supranational origin are those derived from international conventions (e.g. human rights conventions), custom and principles of law or adopted by supranational organisations (e.g. EU competition law). The Guide's notion of such rules is meant to be broad. In some domestic systems, for example, mandatory rules may also derive from general principles of public policy (e.g. prohibition of corruption, protection of human dignity, prohibition of discrimination on the basis of gender, race or religion).² If the parties' contract fails to comply with those rules, it runs the risk of being unenforceable and overturned, thereby undermining the agricultural investment.

1.5. *Importance of assessing legal framework.* Legal professionals involved in agricultural land investment contracts should assess in a timely manner the legal framework to ensure compliance with mandatory rules and to identify gaps in that framework. Such assessments should be done before the investment is made, as well as periodically during the investment's life. Compliance with mandatory rules is not by itself sufficient to ensure a responsible and sustainable agricultural investment. A State's law might not, for instance, incorporate or otherwise take into account the customary land rights of legitimate tenure right holders and the local community. The failure to comply with customary rights – even if such compliance is not mandatory – could expose the investment to various risks (e.g. financial, political, conflict or reputational). Legal professionals, moreover, are to undertake due diligence to the best of their ability (e.g. in evaluating the legal framework or in taking other preparatory steps (see Chapter 2.IV)), regardless of

¹ See UPICC, Art. 1.1.

² *Id.* Art. 1.4.

whether it is specifically requested.³ In many States, this responsibility likely overlaps with standards of professional responsibility, including to uphold the rule of law.⁴

1.6. *Roadmap.* The Chapter assists with understanding and evaluating the applicable legal framework in order to support responsible and sustainable agricultural investment. It emphasises the importance of the domestic law of the State in which the investment is or will be made and supports the identification of issues or gaps in that law that might need to be addressed in the agricultural land investment contract, as well as those issues or gaps which cannot be adequately addressed and would necessitate careful consideration whether a particular investment should proceed. The Chapter is broken into two parts. The first examines the possible sources of a State's law to better understand how those sources fit together to form the legal framework applicable to the investment. The second identifies various relevant areas of law that parties should assess in order to ensure compliance with mandatory rules and to identify issues or gaps that could be addressed in the agricultural land investment contract.

I. SOURCES OF LAW

1.7. *Introduction.* The law of the State in which the land is located is the most important component of the legal framework applicable to an agricultural investment. Understanding that State's legal system and sources of law – in order to ensure the agricultural land investment contract is compliant – is thus essential to the success, or failure, of that investment.

1.8. *Domestic legal system in general.* A State's legal system is typically based on its constitution, which may or may not be written and establishes fundamental rules and rights with which all legislation must comply. A State's constitution may recognise various legal orders within that State's boundaries. In federal systems, for example, contract regulation often lies with the political subdivisions, but may be shared with the central government. Many States, moreover, recognise legal pluralism, by which the right of certain regions or communities to be regulated by specific rules is applicable on the grounds of legal tradition or personal, ethnic, territorial or religious criteria. The scope and applicability of each particular legal order, and the manner in which possible conflicts between the various autonomous legal orders are to be solved depends on the State's constitutional system.

1.9. *Sources of law.* A State's legal system may have various domestic and international sources of law, with differing levels of importance, that set forth legal and customary rules applicable to an agricultural investment.

A. Domestic sources

1.10. *Legal rules.* The legislative branch of government usually passes "primary" legislation (e.g. statutes or acts) and the executive branch of government usually adopts "secondary" legislation, such as regulations, which implement the "primary" legislation and must comply with that legislation and the constitution. The executive branch, in particular government agencies, might also issue regulations or other documents to implement or provide further guidance on that law. The judicial branch, depending on the legal system, might also be able to create law or establish interpretations of legislation in issuing judicial decisions. Judicial decisions, which in some systems are referred to as case law, can play a particularly significant role in domestic law. Previous decisions, for example, may further define that law with respect to various aspects of agricultural investment and may involve similar factual circumstances as an existing or planned investment.⁵

1.11. *Customary rules.* While legal professionals are likely familiar with the roles of legislation, regulations and judicial decisions in various legal systems, often there is not the same level of familiarity with customary

³ 2012. VGGT, para. 12.13 ("Professionals who provide services to States, investors and holders of tenure rights to land, fisheries and forests should undertake due diligence to the best of their ability when providing their services, irrespective of whether it is specifically requested"); FAO. 2019. Due diligence, tenure and agricultural investment.

⁴ VGGT Technical Guide No. 5, pp. 17-18.

⁵ *Id.*, pp. 30-31.

rules. Such rules may play a significant role in some legal systems, and they often derive from practices, traditions and religion, may be neither codified nor written, and may deal with matters such as personal status, family relationships, inheritance, governance and use of land and other natural resources, rights over livestock or seasonal rights to land for the grazing of livestock. Those latter rights may also be collective and pertain to the whole community. With respect to agricultural land investment contracts, customary rules may deal with who is entitled to hold rights to land, the capacity of persons to enter into an agreement, the validity of agreements, issues of form and evidence, or performance and sanctions for non-performance. Such rules may be exclusionary and inconsistent with human rights, for example by prohibiting women from owning or inheriting land or from entering into contracts.

1.12. *Recognition of customary rules.* Customary rules are recognised in certain States, by the State's constitution, statute or judicial decision. The applicability and scope of these rules, how they are recognised, and how possible conflicts between the various autonomous legal orders are to be solved, depend on the particular features of each State's legal system. In other settings, customary rules may be applied by courts as local customs or usages,⁶ and these two concepts are often conflated. Even when a particular practice or tradition does not legally amount to a custom, the parties to an agricultural land investment contract should carefully take them into account in their dealings, especially when the relationship has a strong social, cultural and personal dimension. In this regard, the parties should also keep in mind that there may be differences, for example, between how a State's court interprets and applies a local community's customary rules and how those communities interpret and apply them.

B. International sources

1.13. *International treaties.* There are a range of international treaties which may be part of a State's legal system and thus applicable to agricultural land investment contracts, including international conventions and covenants and investment treaties.

- *International conventions and covenants:* These treaties include, for example, various human rights⁷ and environmental treaties.⁸ In this regard, depending on the location of the investment, the parties should also be aware of regional conventions and covenants.⁹ If the State in which the land is located is a Party to a particular convention or covenant and, if necessary, implementing legislation has been adopted, then the rules set forth in that convention or covenant are binding in that State. Conventions and covenants are important even if not binding, and the parties should, in any event, ensure that the contract and their conduct is consistent with those instruments. While a particular rule in those instruments might not be binding, failing to conform would expose the parties and the agricultural investment to different types of risks (e.g. reputational, financial, or security risks) and could ultimately undermine the investment. These instruments should serve, if not as mandatory rules, as essential reference points.
- *Investment treaties:* It is estimated that there are over 3000 investment treaties (e.g. a bilateral investment treaty or regional trade agreement with an investment chapter). They generally set forth standards and protections intended to promote and liberalise investment, and are binding between the Parties to those agreements. The parties should be aware whether any such agreements are in force between the investor's home State and the State in which the investment is located (i.e. host State), and, when applicable, whether the particular investment would fall within the scope of such agreements. In those instances, depending upon the obligations established in the agreement, the

⁶ Regarding usages and practices in international trade, see, e.g., UPICC, Art. 1.9.

⁷ See, e.g., International Convention on the Elimination of All Forms of Racial Discrimination (1965); International Covenant on Civil and Political Rights (1966); International Covenant on Economic, Social and Cultural Rights (1966); Convention on the Elimination of All Forms of Discrimination against Women (1979); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984); Convention on the Rights of the Child (1989); and International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.

⁸ See, e.g., UN Framework Convention on Climate Change (1992); Convention on Biological Diversity (1992).

⁹ See, e.g., the African Charter on Human and Peoples' Rights (1981); American Convention on Human Rights (1969); European Convention on Human Rights (1950).

investor and its covered investment might, among other things, have to be treated as favourably as the host State treats its own investors and investments or those from any third State throughout the life of the investment, be protected from expropriation unless a specified standard of compensation is satisfied, and have the right to submit a covered dispute with the host State to international arbitration (see Chapter 6.III.C). In addition, a State may have adopted domestic investment legislation, often known as a national investment code, by which that State may unilaterally undertake commitments (*e.g.* establishing standards of treatment and consenting to investor-State arbitration) similar to those found in international treaties.

1.14. *Custom and general principles.* Whereas obligations arising from international treaties are expressly written and recognised, international custom and general principles of law are unwritten sources which may nevertheless bind States. Custom – also known as customary international law – refers to obligations arising from established practices of States and results from a general and consistent practice of States that they follow out of a sense of legal obligation. Such law may relate to agricultural land investment contracts in various ways. As noted in the previous paragraph, human rights treaties, for example, are not ratified by all States. Yet, it is generally accepted that some fundamental human rights are recognised under customary international law (*e.g.* the prohibition on slavery), and that States have an obligation to comply with those obligations. General principles of law are legal principles that are applied in domestic legal systems around the world, such as the international and contract law principles of *pacta sunt servanda*¹⁰ and good faith.¹¹

1.15. *Judicial decisions:* Issued by international (*e.g.* the International Court of Justice (ICJ) or regional courts, such decisions may only be binding in limited circumstances (*e.g.* between the parties to a particular case), but they often – at a minimum – inform the interpretation of the law. These decisions are influencing important trends with respect to responsible and sustainable agricultural investment (*e.g.* respect for human rights; performance of impact assessments; promoting CSR). These trends are making investors take more responsibility for ensuring sustainable development within the local community and the local ecological and social environment, and parties should be aware of such decisions and their role in the system.

1.16. *Inter-governmental instruments.* More and more, there has been a growing trend by inter-governmental Organisations to adopt instruments – other than conventions and covenants – that set forth principles, rules, recommendations, standards of conduct or other voluntary commitments, which generally do not have any legally binding force and are often referred to as soft-law instruments. Such instruments include the UN Guiding Principles, the VGGT, and the CFS-RAI Principles all of which were designed to be consistent with and implement international human rights obligations and standards. These instruments were the result of widely consultative processes and include principles with which – while not mandatory – parties should comply to avoid and mitigate negative impacts, minimise investment risk and to achieve responsible and sustainable agricultural investments.¹² For its part, the Guide is intended to assist parties with such compliance by offering contractual and related guidance – building upon the Legal Guide on Contract Farming and the UPICC¹³ – that is consistent with and furthers the implementation of those principles.

1.17. *International guidance documents.* Consideration should also be given to international guidance documents prepared by civil society organisations, non-governmental organisations and private sector entities. Such documents, like the soft law instruments discussed above, promote the implementation of the broad global consensus contained in inter-governmental instruments as well as on the rights of legitimate tenure right holders.

¹⁰ See UPICC, Art. 1.3.

¹¹ *Id.*, Art. 1.7.

¹² Again, as with regional conventions and covenants, the parties should be aware of regional soft law instruments (*e.g.* AU, ADB and UNECA. 2014. Guiding Principles on Large Scale Land Based Investments in Africa), which might also set forth principles and standards applicable to agricultural land investment contracts in that region.

¹³ See, *e.g.*, UPICC, Art. 1.1, UPICC.

II. RELEVANT AREAS OF LAW

1.18. *Introduction.* Mandatory rules may arise in various areas of law and will limit the parties' freedom of contract. In many instances, such laws are intended to protect important public interests, including sustainable agricultural development and safeguarding rural populations. While a particular rule or practise might not necessarily be mandatory under the law of the State in which the investment is located, it may nevertheless be advisable to comply with that rule or practise, for example, to avert or minimise potential negative impacts (e.g. complying with the FPIC principle). This part briefly provides a non-exhaustive list of relevant areas to assist parties with identifying both limitations on their freedom of contract and issues or gaps in the applicable law that could be addressed in their contract.

1.19. *Land tenure and administration.* A State's property law governs the various forms of ownership and tenancy in land – including ownership, possession, and security interests – and generally establishes principles and rules on acquisition and transfer of land, as well as restrictions. Optimally, the property law of the host State would reflect acceptable international standards, contain adequate provisions on the ownership and use of land and buildings, as well as movable and intangible property. The State's overall land administration system – which refers to the way in which land tenure rules are applied and made operational – may affect the planning and operation of an agricultural investment in many ways. Such a system involves the recording of tenure (e.g. land registration), land valuation and taxation, spatial planning and, to varying extents, adjudication or determination of land tenure rights and what limitations are applied to those rights.¹⁴ An efficient land administration system provides tenure security to those who have legal or legitimate tenure rights and supports the operation of land markets and other mechanisms for the transfer of land.¹⁵ In assessing whether there are any issues in these respects, investors should be aware that, under a particular State's legal system, the government might hold legal title to the agricultural land that could be used for an investment. Both generally and in these instances of State-owned land in particular, the parties should put in place a process to identify and consult all legitimate tenure right holders and conduct risk and impact assessments (see Chapter 2.IV) so that all necessary safeguards can be put into place (see generally Chapter 3). In this regard, investors should also be aware of the various ways in which tenure right holders may be structured or organised (e.g. individual, company, collective or co-operative, traditional authority), and the parties should take such structure and organisation into account in planning an investment.

1.20. *Unsolicited bids, tendering and investor screening.* The grant of tenure and related rights to investors may be subject to a tendering process or result from a proposal by an investor, often referred to as an unsolicited bid. Tendering involves a competitive process, through which investment proposals are solicited and screened on the basis of certain criteria in order to identify the most suitable proposals and at the end of which the rights are granted (e.g. in the form of a concession). Unsolicited bids, although not submitted in response to a particular solicitation of investment, may also be subject to a review process and screened on the basis of certain criteria. The parties should ensure that all such processes and criteria are followed (see V. CONTRACT FORMATION). Where they are inadequate or fail to prevent corruption, parties should be aware of the OECD Convention on Combatting Bribery of Foreign Public Officials in International Business Transactions, as well as any other laws and regulations which may have extraterritorial effects, and proceed with caution.

1.21. *Finance.* The applicable tax and finance regime plays an important role in the planning of a possible agricultural investment and in the achievement of that State's sustainable development including, *inter alia*, the overall fiscal regime and accounting standards.

¹⁴ For more information on recording land tenure rights, spatial planning (i.e. defining purposes for which land – including buildings and other structures – and other natural resources may or may not be used) and property valuation, see VGGT Technical Guide No. 4 pp. 35-37; see also VGGT Technical Guides No. 9 and 10 on Recording and Registration of tenure rights; and VGGT Technical Guide No. 11 on Valuation of tenure rights.

¹⁵ VGGT Technical Guide No. 4, p. 35, box 9 (stating that good land administration: "[g]uarantees ownership and security of tenure"; "[s]upports land and property taxation"; "[p]rovides security for credit"; "[d]evelops and monitors land markets"; "[p]rotects State lands"; "[r]educes land disputes"; "[f]acilitates land reform"; "[i]mproves urban planning and infrastructure development"; "[s]upports environmental management"; and "[p]roduces statistical data") (citing UNECE. 1996. Land administration guidelines).

- *Fiscal regime:* Apart from an assessment of the impact of rents and taxation on the potential investment and any available incentives, the parties may wish to consider the overall fiscal regime, including the discretion exercised by taxation authorities and the clarity of guidelines and instructions issued by those authorities. The various taxes to be paid could be, *inter alia*, on profits earned in the host State, payments made to suppliers and contractors, and any treatment at the investment's conclusion. The potentially applicable taxes are to be considered in the negotiation of an agricultural land investment contract because they are an important component of the bargain agreed in the contract which includes not only financial aspects but also economic, social and environmental aspects. In any event, in instances where the tax regime has deficiencies, such deficiencies are not to be exploited, as public revenues are essential to the host State's ability to provide public services and contribute to inclusive sustainable development (see Chapter 3.II).
- *Accounting standards:* In many States, companies are required by law to adhere to standard accounting practices that are internationally accepted and performed by professional accountants and auditors. If such a requirement is lacking in the applicable law, the agricultural land investment contract should – in reflecting the host State's right to monitor compliance – identify an appropriate standard (see Chapter 3.V.B).

1.22. *Human rights.* Various human rights instruments establish civil, cultural, economic, political and social rights. States have a duty to respect, protect and fulfil such rights,¹⁶ and investors have a corresponding responsibility to respect human rights and to identify, assess and remedy any negative impacts they have on such rights.¹⁷ There are various areas of human rights law that might be affected by agricultural investment including, *inter alia*:

- *Food security and the right to food:* Ensuring food security for all and the progressive realisation of the right to adequate food are central tenets of the VGGT and the CFS-RAI Principles.¹⁸ In accordance with the VGGT and CFS-RAI Principles, a host State's legal framework may contain laws or regulations that seek to ensure food security, for example, by temporarily banning the export of food if there is a threat to food in that State. Because an agricultural investment could negatively affect food security and a perceived threat to food security could provoke strong local opposition to a possible agricultural investment, it is essential that a risk assessment be conducted in this regard (see Chapter 2.IV.B.2).
- *Gender:* Consistent with the VGGT and CFS-RAI Principles, all stakeholders in agricultural investments, including investors, have a role in promoting gender equality.¹⁹ Investors should consider whether the State's legal framework creates opportunities for the socio-economic empowerment of women. The parties should consider a possible investment's impact on gender, ensure that women are consulted and include in their business plans – or even in the contracts – measures to address women's empowerment, such as reporting on gender participation and local employment initiatives (see Chapter 3.II.B).
- *Youth:* Several international instruments identify youth as a priority for State action,²⁰ in order to stem the tide of youth migration away from rural agriculture and into industrial and service-related sectors in urban areas. The State may, for instance, have programmes in place to create

¹⁶ VGGT, para. 3.1; CFS-RAI Principles, para. 32.

¹⁷ *Id.*, para. 3.2.

¹⁸ *Id.*, Preface (stating "the overarching goal of achieving food security for all and to support the progressive realisation of the right to adequate food in the context of national food security"); CFS-RAI Principles, para. 1 ("Responsible investment in agriculture and food systems is essential for enhancing food security and nutrition and supporting the progressive realisation of the right to adequate food in the context of national food security"); see also ICESCR, Art.11 (recognising a human right to adequate food).

¹⁹ VGGT, para. 3.B.4; CFS-RAI Principle 3.

²⁰ See, e.g., CFS-RAI Principle 4.

opportunities for youth as employees and entrepreneurs.²¹ The parties should consider an investment's impact on youth, for example, in the area of employment and job creation (see Chapter 3.II.B).

- *Labour:* Labour law, consistent with any applicable international instruments, governs the treatment of employees and other labourers. Relevant international instruments include – but are not limited to – the International Labour Organisation's (ILO) fundamental conventions on the freedom of association, right to organise and collective bargaining, forced labour, child labour, equal remuneration and discrimination. All ILO Member States, moreover, are bound to uphold ILO's Fundamental Principles and Rights at Work.

1.23. *Social issues.* In connection with human rights obligations, companies may undertake commitments or activities to not only respect human rights but to achieve broader social objectives, often as part of their corporate social responsibility efforts or to achieve and maintain a "social license to operate". In the area of agricultural investment, such commitments or activities often involve local communities, and it is widely recognised that community relations are a critical factor in an investment's ultimate success. In this regard, State law may establish certain limitations or requirements, for example, with respect to hiring local employees or using local suppliers. It is important to assess what incentives and protections States might already have in place and to consider possible safeguards in this respect which could be incorporated into the agricultural land investment contract or a related agreement (see Chapter 3.II).

1.24. *Environment.* All States, to varying extents, have laws and regulations in place to protect the environment in various ways (e.g. requiring impact assessments; preventing air, water or soil pollution; and protecting natural resources). Where the framework for environmental protection is adequate, such laws and regulations are likely to require an environmental impact assessment, approval of the agricultural investment and ongoing monitoring for obtaining and maintaining a permit or license to operate, assurances that environmental standards will be maintained and commitments to report any environmental issues and to remedy them in a timely manner. Further to a State's domestic environmental laws, there are numerous international environmental instruments, many of which are legally binding and relevant to agricultural investment. These areas include, among others, biological diversity, biosafety, soil management, hazardous chemicals and pesticides, transboundary movements of hazardous wastes, protection of endangered species and certain habitats, climate change and desertification.²² Environmental impact assessments are to be performed and any negative impacts are to be avoided or mitigated consistent with any applicable domestic laws and these international instruments (see Chapters 2.IV.B.2 and 3.II).

1.25. *Protection of investment and regulatory autonomy.* A State's legal framework may include laws and regulations specifically intended to promote and protect investment, including foreign investment. For investors, whether planning an agricultural investment or intending to provide financing for one, the degree of protection afforded to that investment by the State is of obvious concern. In this regard, it is necessary that an investment be protected from nationalisation or dispossession without judicial review and appropriate compensation. At the same time, host-States have an interest in preserving their regulatory autonomy, which may be essential for the protection of the rights of its people and to the achievement of domestic

²¹ See, e.g., Convention concerning Freedom of Association and Protection of the Right to Organise (1948); Convention concerning the Application of the Principles of the Right to Organise and to Bargain Collectively (1949); Convention concerning Forced or Compulsory Labour (1930); Convention concerning the Abolition of Forced Labour (1957); Convention concerning Minimum Age for Admission to Employment (1973); Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (1999); Equal Remuneration Convention (1951); Convention concerning Discrimination in Respect of Employment and Occupation (1958).

²² See, e.g., Convention on Biological Diversity (1992) and the Cartagena (2000) and Nagoya (2010) Protocols; International Treaty on Plant Genetic Resources for Food and Agriculture (2009); FAO. 2017. Voluntary Guidelines on Sustainable Soil Management; Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (1998); Convention on Wetlands of International Importance (1971); UN Convention to Combat Desertification (1994); UN Framework Convention on Climate Change (1992) and Kyoto Protocol (1997).

policy objectives. The parties should consider whether the legal framework establishes the proper balance between investment protection and regulatory autonomy (see Chapter 3.IV).

1.26. *Monitoring, transparency and compliance.* Agricultural investments may have significant implications for States and their citizens, yet they are often negotiated in a non-transparent manner and, when implemented, lack sufficient monitoring and compliance. Such a lack of transparency may create unnecessary risk for the parties, including criminal liability where that lack of transparency is exploited to engage in bribery,²³ as well as opposition from the public, who are left unaware about a proposed investment. The VGGT and the CFS-RAI Principles call for improving transparency, in particular with respect to markets.²⁴

- *Transparency:* There are various aspects of transparency that the parties should consider. First, it is important that a host State's laws and regulations are publicised and readily available for all to access. Second, all market values and transactions should be transparent and widely publicised, including any host-State government tendering process for the lease of State lands, which should be competitive, inclusive and transparent. Third, all essential information related to a lease of agricultural land – other than that which is legitimately commercially sensitive – is to be made available to the public, including information about the contract and regular reporting. And, fourth, any disputes which arise should be settled in a transparent manner – again subject to redaction of commercially sensitive information – by, for example, publishing any decisions resulting from dispute resolution mechanisms.²⁵ To the extent that these aspects are not satisfactorily addressed by the applicable framework, they may be addressed in the agricultural investment contract (see Chapter 3.V.B).
- *Monitoring and compliance:* These aspects can be essential to an agricultural investment's success. Compliance, for example, may involve host State laws on recording-keeping, insurance requirements or the conservation of the leased land. To verify compliance and to track various outputs and impacts, the host State's law may require investors to establish internal rules or to self-report and may allow for inspections by government officials or designated third-parties. Such rules under host State law should be assessed and – to the extent that compliance and monitoring are not adequately addressed or there is, for instance, a lack of resources for their implementation, they may be addressed in the agricultural investment contract (see Chapter 3.V).

²³ See, e.g., OECD. 2011. Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.

²⁴ VGGT, paras. 10.5, 11.4, 11.7, 12.3, and 12.11; CFS-RAI Principle 1, para. 21(iii).

²⁵ See, e.g., UNCITRAL. 2014. Rules on Transparency in Treaty-Based Investor-State Arbitration.

CHAPTER 2 - PARTIES, CONTRACTUAL ARRANGEMENTS, DUE DILIGENCE AND FORMATION

2.1. *Overview.* This Chapter provides guidance on the formation of an agricultural land investment contract (the “contract”) or review of an existing one, including the parties to that contract (the “contracting parties”) and any related agreements, as well as due diligence processes involved in such formation or review. Part I provides a brief introduction to legitimate tenure right holders, a unique group of stakeholders whose rights are to be taken into account in the contracting process, as well as possible contracting mechanisms for protecting and respecting their rights. Part II introduces the contracting parties as well as other stakeholders who, while not contracting parties, play an important role in the formation of the contract. Part III provides an overview of the various contractual arrangements. Part IV describes key due diligence processes, including the consultation process, stakeholder mapping, identification of the land, examination of the investment’s feasibility and assessment of the impacts of that investment. Part V provides an overview of contract formation, including tendering and bidding processes, negotiation, and the contractual form, content and conditions.

I. LEGITIMATE TENURE RIGHT HOLDERS

2.2. *Introduction.* Agricultural land investment contracts typically involve a bilateral relationship between: (a) an investor looking to acquire tenure and related rights for purposes of *carrying* out an agricultural investment; and (b) a grantor of those rights, who is the legal tenure right holder¹ and seeks to transfer those rights to the investor in exchange for payment and other obligations. However, on the ground realities in the jurisdictions in which many agricultural investments take place involve potentially distinct individuals or groups – called legitimate tenure right holders – whose rights and interests should be taken into account.

2.3. *Legitimate tenure right holders.* Legitimate tenure right holders are individuals or *communities* who live on, work on, or otherwise occupy the land being transacted, and whose rights or occupancy claims are considered to be socially legitimate in local societies.²

2.4. *Relation to legal tenure right holders.* In some cases, legitimate tenure right holders also possess formal legal rights to the land they occupy or use. In these cases, such holders are also the legal tenure right holders, and an investment contract in this context could be a bilateral agreement between the investor and the legal/legitimate tenure rights holder. In some jurisdictions, legitimate tenure holder rights such as those of occupation and use are protected under unwritten customary rules and practices. Agricultural investments may also occur alongside overlapping legal structures, incomplete land registration, or overlapping land claims and uses. These factors result in individuals or groups of people who live or work on the land for which tenure rights are being transacted, and whose claims to that land are considered socially legitimate, but who do not hold legal title to the land. These people are legitimate tenure right holders but not legal tenure right holders. Nevertheless, current contracting practice and various international instruments indicate that the rights of these legitimate tenure right holders should be taken into account, in addition to the rights of the legal tenure right holders.

¹ Legal tenure right holders are those whose rights to land – including ownership and customary rights – are recognised by law. These rights may include but are not limited to: ownership rights of individuals, families, and groups; use rights, including leases, sharecropping and license agreements; and servitudes and easements. See Introduction, Part II.B (containing descriptions of key terms in the Guide, including “legal tenure right holder”).

² See *id.* (describing the key term “legitimate tenure right holder”).

2.5. *Protecting and respecting legitimate tenure rights.* Responsible investment in agriculture and food systems respects legitimate tenure rights to land, fisheries, and forests.³ The VGGT call for States to recognise and respect all legitimate tenure right holders and their rights; to take reasonable *measures* to identify, record and respect legitimate tenure right holders and their rights, whether formally recorded or not; to refrain from infringement of tenure rights of others; and to meet the duties associated with tenure rights.⁴ Therefore, the concept of “legitimate tenure rights” calls for counsel to broaden the range of the tenure rights they take into account when analysing the form, formation, and contents of an agricultural land investment contract, as well as the parties thereto.⁵

2.6. *Involving legitimate tenure right holders in the contracts.* As a means of protecting and respecting the rights of legitimate tenure right holders, those holders may be involved directly in the *contracts* or related agreements. Such holders may be included in various ways – including in (a) multi-party contracts, (b) multi-party transactions through related agreements,⁶ and (c) investor-grantor contracts as third party beneficiaries – all of which are discussed in more detail in Part III.B below.

2.7. *Importance of due diligence and consultation.* While legitimate tenure right holders may *ultimately* not be included in the contract or a related agreement, they should always be consulted and involved in the performance of due diligence, whether in the formation of an investment contract or when a new investor acquires an existing contract (see generally Chapter 5.I regarding transfer of the investor). Part IV identifies best practices for incorporating such holders into the due diligence and consultation processes.

II. CONTRACTING PARTIES AND OTHER STAKEHOLDERS

A. Investors

2.8. *In general.* One of the contracting parties will be the investor. Investors are primarily *private* sector entities, such as general investment or holding companies or specialised agribusinesses, but can also be public sector entities such as sovereign wealth funds and State-owned enterprises.⁷ They may have complicated financial and management structures, particularly in the context of a foreign investment, as many States require the investor to establish a domestic entity in order to be able to receive the grant of tenure and related rights.

2.9. *Corporations.* A private investor may be a wealthy individual or group of individuals, but more likely a corporation. The corporation may specialise in agribusiness, or may have holdings *across* industries. In the latter case, the corporation may make the investment through an affiliate specifically dedicated to agricultural investments, or an affiliate (*e.g.* a subsidiary or a special purpose vehicle) especially created for the *purposes* of this particular investment.

2.10. *State-owned enterprises and wealth funds.* The investor may also be a State-owned enterprise or a sovereign wealth fund. A state-owned enterprise is a business enterprise in which the State has significant ownership or control. A sovereign wealth fund is a State-owned vehicle established for investing money derived from a country’s reserves, and set aside for the purposes of benefiting that State’s economy and citizens, as well as for the purpose of fiscal stabilisation. Sovereign wealth funds are funded from central bank reserves, revenue generated from exports of natural resources and other commodities, or from other State owned or controlled assets. Sovereign wealth funds are a quickly-growing investment vehicle, in both market share and number. State-owned enterprises and sovereign wealth funds are both highly regulated in their home States; an investment involving these vehicles may trigger additional regulatory and legal requirements, as well as potential diplomatic and policy considerations for the government of the State in which the investor is investing or seeking to invest and the investor’s home State, if different.

³ CFS-RAI Principle 5, referencing FAO. 2012. VGGT, Ch. 12.

⁴ VGGT para. 3A.1; 12.4.

⁵ VGGT Technical Guide No. 5, p. 20.

⁶ See Introduction, Part II.B (describing the key term “related agreement”).

⁷ See Introduction, Part II.B (describing the key term “investor”).

2.11. *Domicile.* The investor may be domiciled domestically (i.e. in the State in which the land is *located*) or internationally. Foreign domicile may involve restrictions on owning or leasing land, will certainly have tax and liability implications, and may draw in additional bodies of governing law, such as bilateral investment treaties, as well as different dispute resolution options. A private corporation wishing to make an agricultural investment abroad may wish to establish a local subsidiary to be the contracting party. Alternatively, a multinational corporation might enter into the contract itself, while establishing a local subsidiary to operate the investment. Parent companies are not traditionally held liable for the debts of their subsidiaries. Under common law, however, a court may "pierce the corporate veil" of the parent if it finds an appearance of impropriety through questionable share transfers or other fraudulent means of avoiding the subsidiary's liabilities.

2.12. *Corporate organisation.* The investor should disclose a complete and accurate statement of its corporate organisation, most often as an exhibit in the contract or, depending on regulatory requirements, a filing with the relevant regulatory body in the investor's home State. The statement of corporate organisation will identify the Directors and Senior Officers of the company, as well as each person who is the beneficial owner of more than a specified percentage of the company's shares or voting rights.⁸ Most jurisdictions specify the interval at which the investor must review this exhibit (e.g. annually) to ensure the information contained therein is accurate (See Chapter 3.II.A). Most jurisdictions also require that the investor disclose immediately any change of control that occurs leading up to the investment or during the life of the investment (See Chapter 5.I.C).

2.13. *Affiliates.* The investor should disclose the identity of each of the investor's affiliates, the *relationship* of the affiliate to the investor, and the jurisdiction in which the affiliate is organised. An "Affiliate" is defined as an entity that directly, or indirectly through one or more intermediaries, controls, is controlled by, or is under common control with the investor. "Control" means the possession, directly or indirectly, of the power to direct or cause the direction of the management or policies of an entity, whether through the ability to exercise voting power (often but not always through ownership of more than 50% of the share capital of a company), by contract or otherwise. The investor should also disclose any transactions with affiliated parties, as well as the nature and amount of such transaction. The investor must review these disclosures periodically (e.g. annually) to ensure the information contained therein is accurate.

B. Grantors

2.14. *In general.* The grantor is the legal tenure right holder that transfers tenure and related *rights* to the investor for a specified period of time. While agricultural land investment contracts take many forms and can involve multiple parties, the Guide focuses on contracts between investors and governments and between investors and local communities.⁹

2.15. *Government as grantor.* There are several reasons why it is common for the government to be the grantor. First, in many States where large-scale agricultural land investments take place, the State is the legal owner of all or most of the land. In other States, while private land ownership exists, the land identified for foreign agricultural investments is often held in State land banks. In still other cases, transfers of land larger than a certain acreage, or transfers to foreign investors, may only be undertaken by the State.

2.16. *Governmental authority.* The signatory on behalf of the government is most often an official within the specific ministry or administrative body charged with the responsibility of allocating land.¹⁰ Common examples include the Ministry of Land, the Ministry of Finance, the Ministry of Agriculture, the Ministry of Forestry, the Ministry of Environment, or an Investment Promotion Agency. This body will represent the

⁸ Beneficial ownership thresholds are determined in compliance with domestic regulatory requirements. For example, in some States, the beneficial ownership threshold is 5%, whereas in others that threshold is 25%.

⁹ See Introduction, Part II.B (describing the key term "grantor").

¹⁰ It should be noted however that while these ministries may be the contract signatories on behalf of the Government, other administrative bodies – such as the public land registry – may be in charge of granting specific authorisations and approvals.

government as contracting party, and the government's representative or representatives should be identified in the contract.

2.17. *Levels of government.* The investment, however, need not be made at the national level. The contracting party may be a member of the District or Municipal government, or a traditional authority such as a Chief.¹¹ Several government entities operating at different administrative levels may be listed as parties to the contract. If the contracting party is a sub-national actor, then the contract must be made in accordance with domestic law, and vice versa. Likewise, the government shall respect and enforce agreements made at the sub-national level, so long as they comport with domestic law.

2.18. *The local community and private landowners as grantors.* If the government is not the *legal* tenure right holder for the land in question, then the grantor is often either a local community¹² holding the land or a private landowner.¹³ They may have freehold rights to the land in question, or long-term occupancy rights that allow for transfers. If the grantor is a local community or private landowner, then the contract would be a private transaction between two parties, one being the investor and the other being the individual grantor, or an organisation or association representing the community grantor. However, even when the legal tenure right holder is a private individual, group or community, the government will often play a role in the investment by facilitating contact and arrangements between investors, local officials, and members of the community impacted by the investment. The government may also play the role of verifying the legitimacy of the legal tenure right holder's claim to the land (e.g. through title search) and may be helpful in ascertaining legitimate tenure right holders or any other affected parties.

C. Legitimate tenure right holders

2.19. *In general.* Legitimate tenure right holders, even if not legal tenure right holders with *respect* to particular land,¹⁴ may hold a multitude of rights — including freehold rights, long-term occupancy rights, lease rights, easements, or seasonal use rights — within the footprint of the proposed investment. Investors must identify and consult with legitimate tenure right holders prior to making an investment, and legitimate tenure right holders may be included as contracting parties.

2.20. *Organisation.* Legitimate tenure right holders may hold the rights to land individually, *communally*, through family ownership structures, or through a combination of structures. Furthermore, the land in question may be administered by parties other than the legitimate tenure right holders themselves (e.g. the land may be administered by a community organisation, or by a Chief or other traditional authority).

2.21. *Lack of protection and risk.* Legitimate tenure right holders may not be adequately *protected* by domestic law, and in many cases their land holdings are undocumented and difficult to ascertain. As a result, the investor and grantor risk not sufficiently consulting, obtaining consent where necessary, and involving legitimate tenure right holders in their contract as parties to that contract or a related agreement or as third party beneficiaries. In addition, if the legitimate tenure right holders include indigenous peoples, the principle of FPIC applies.¹⁵ The failure to identify, consult and seek participation from any legitimate tenure right holders and to obtain FPIC from indigenous peoples who might be affected can create tension and conflict, may be in violation of the government's legal obligations or against the standards or policies applicable to the investor, and can negatively impact other legitimate tenure right holders and local communities (see Part IV.A.2(b) below regarding FPIC). In fact, in many jurisdictions the use of FPIC is becoming customary not just with indigenous peoples but with any local community members.

¹¹ See Introduction, Part II.B (regarding "traditional authority").

¹² *Id.*

¹³ *Id.*, para. 18.

¹⁴ See Part I above (describing legitimate tenure right holders and describing the relationship between them and legal tenure right holders).

¹⁵ VGGT Technical Guide No. 3.

D. Other stakeholders

2.22. *In general.* In addition to the contracting parties, an agricultural investment often involves *several* other stakeholders. While these stakeholders may not be signatories to the contract, it is important to understand their rights and interests in the context of the investment. This section discusses in brief a few prominent stakeholder groups of which the parties should be aware. Part IV below provides further information on how to identify and properly consult with these stakeholder groups.

2.23. *Local community.* The local community refers to a group of people living on or near the *land* considered for investment. The local community may be a legal or legitimate tenure right holder itself and may be a grantor (see paragraph 18 above), or it may simply reside within or near to the footprint of the investment, without having any rights to the land in question. However, even if the local community does not have formal, customary or other legitimate tenure rights to the land, it may be impacted by the investment. In such cases, the investor and the grantor should identify members of the local community (see Part IV.A.1 regarding the identification process). The investor and the grantor should also consult the local community prior to finalising the investment, and in some cases could enter into related agreements with the local community or grant them rights under the contract as third party beneficiaries. Consistent with best practice, even if members of the local community are not indigenous, the investor should consider following the FPIC principle (see Part IV.A.2(b) regarding FPIC).

2.24. *Indigenous peoples.* In particular, if members of the impacted local community include *indigenous* peoples, the FPIC principle applies. According to that principle, indigenous peoples must be consulted and affirmatively provide consent before the establishment of any project that directly affects their lands or resources (See Part IV.A.2(b) regarding FPIC).

2.25. *Government agencies.* While the contract may be signed by a single government agency, it will most likely implicate multiple agencies at various levels of government. These agencies may be responsible for granting permits, conducting environmental and other assessments, acting as liaisons between the investor and local communities, or providing investment-related services such as electricity. The parties should have a clear understanding of which agencies are impacted by various components of the investment, and which agencies have the authority to sign the investment contract or any related agreements on behalf of the government.

2.26. *Other stakeholders.* Other third parties may include, *inter alia*: contractors or *subcontractors*; various service providers; affiliates; banks or other creditors; notaries; insurers; certification providers; and supply chain participants.

III. CONTRACTUAL ARRANGEMENTS

A. Investor-grantor contracts

2.27. *In general.* The contract can take many forms and follow different models. However, it is most common for the rights and obligations relating to a land investment – particularly a large land *investment* – to be documented in a contract or series of contracts involving a transaction of tenure and related rights for a specified period of time, in particular between investors and grantors (*e.g.* investment contracts, concession agreements or leases).

2.28. *Transactions for specified period of time.* It is common for the contract to involve a grant of tenure and related rights for a specified period of time, as opposed to a sale of such rights, for at least three reasons. First, some States prohibit foreign investors from owning land generally or agricultural land specifically, and these prohibitions account in part for the greater prevalence of grants of rights for a specified period. Second, such grants of rights may be preferable for a government reticent to sell away permanently its land. Third, unlike sales, such grants entail ongoing obligations between the contracting parties. These ongoing obligations allow for the incorporation of contractual safeguards and for the monitoring of them in order to mitigate negative impacts.

B. Contracting with legitimate tenure right holders

2.29. *General notion.* It is critical that the contract take into account the rights of legitimate tenure right holders, even if such holders are not the grantor. Such holders are generally involved contractually in one of three manners: (a) as an contracting party (e.g. through a multi-party contract); (b) as parties to a related agreement to the contract, such as a Memorandum of Understanding (MOU) or a Community Development Agreement (CDA); or (c) as a third party beneficiaries of the contract. Multi-party contracts and related agreements allow the legitimate tenure right holders to negotiate directly with the investor, agree upon mutually beneficial commitments, and create a mechanism for enforcing those commitments. Contracts in which the legitimate tenure right holders qualify as third party beneficiaries confer certain rights upon those holders and provide access to remedy in the event of a violation of those rights.

1. Multi-party contracts

2.30. *Legitimate tenure right holder as a contracting party.* Legitimate tenure right holders may be included as contracting parties, in addition to the investor and the grantor. Legitimate tenure right holders may be represented by a single legal entity, for example a community body, a landowners association, a customary governance structure, or an elected representative. Or, individual legitimate tenure right holders may be listed as parties to the contract, either in place of or in addition to the representative body.

2.31. *Representation.* If the legitimate tenure right holders are represented by a single legal entity, that legal entity may have pre-dated the investment, or may have been created specifically for the purposes of the investment. In either case, it is common for there to exist a separate document laying out the rights and obligations between the legitimate tenure right holders and their representative. Such a document will formally designate the legal representative, and may stipulate the scope of the representative's authority and the manner in which the representative consults with and informs the land right holders it represents. The agreement may be documented by way of a contract or, if the legal representative is a community or customary body, by way of a board or council resolution.

2.32. *Tripartite contracts.* A tripartite contract will typically contain rights and obligations sections for the investor, the grantor (i.e. legal tenure right holder) and the legitimate tenure right holder respectively. The obligations of the legitimate tenure right holders may include, for example, compliance, non-interference, and similar covenants aimed at ensuring cooperation between the legitimate tenure right holders and the investment.

2.33. *Equity stakes.* A tripartite contract may also be relevant in cases in which legitimate tenure right holders have an equity stake in the investment (e.g. through "Land for Equity" schemes or joint ventures). In such cases, the tripartite contract will typically set out the financial terms and structure of the relationship, as well as any corporate governance implications (e.g. legitimate tenure right holders may be entitled to a Board seat).

2. Multi-party transactions through related agreements

2.34. *Legitimate tenure right holder as a party to a related agreement.* A second way in which legitimate tenure right holders are brought into the contract is through a related agreement, such a CDA or an MOU. A related agreement is often concluded directly between the legitimate tenure right holder and the investor, though the grantor may be involved as well. The related agreement typically sets out the rights and obligations of the investor vis-à-vis the legitimate tenure right holder. Breach of the related agreement may constitute, in turn, a breach of the contract.

2.35. *Link between the contract and the related agreement.* The related agreement should be explicitly referenced in the contract, often in a sub-section titled "Community Development Agreement", within the "Investor Obligations" or "Company Obligations" section.¹⁶ Similarly, the related agreement should reference

¹⁶ If the MOU has not been completed by the investment contract signing date, then the investment contract will reference an MOU "to be concluded" within a certain number of days of the Effective Date of the investment contract.

the contract, most often in the Recitals or similar section containing the “Whereas” clauses at the beginning of the related agreement.

2.36. *Purpose.* The purpose of the related agreement is most often to stipulate the rights and *obligations* of the investor vis-à-vis the legitimate tenure right holders, and in particular to stipulate the economic and social benefits due to such holders in exchange for access to the land and resources to which they have rights, and for other community support for the investment. The benefits provided to the legitimate tenure right holder are determined through the consultation and negotiation processes described elsewhere in the Guide (see Parts IV-V below respectively). As described in Chapter 3.II below, benefits will often, *inter alia*, include: financial remuneration (e.g. payment per hectare of land used), with the contract describing the method of disbursing such funds and the parties to whom the funds are due; training or employment of local community members as part of the investment; and the provision of certain social infrastructure and services (e.g. building and staffing a school or a recreational centre).

2.37. *Negotiation of a related agreement.* Due to information and power asymmetries often at play between the legitimate tenure right holder and the investor, it is critical that all consultations and negotiations with respect to community development agreements and other related agreements follow the same best practices as those defined for consultation and negotiation of the contract.

2.38. *Content of the related agreement.* The related agreement may begin with a description of the relationship envisioned between the investor and the legitimate tenure right holder, setting the tone for the rest of the agreement. The related agreement, for example, may state that the relationship is based on principles of cooperation, mutual respect, and good faith. The related agreement may set out the relationship between the different parties to the agreement, as well as these parties’ representatives. For instance, if the legitimate tenure right holders are represented by bodies such as community councils or associations, the related agreement may describe the nature of such representation, and the functions of such representative body. The related agreement may then describe the structure of the ongoing relationship created between the investor and the legitimate tenure right holder, including frequency and form of communications and information sharing, and process for making any joint investment decisions. The related agreement may describe the rights and obligations of each party, including the rights of the investor to access the land and resources referenced in the contract, and the benefits due to the legitimate tenure right holder.¹⁷ The related agreement may also stipulate party rights and obligations with respect to monitoring, evaluation, and dispute resolution.

2.39. *Multiple related agreements.* It is possible for an agricultural land investment contract to involve more than one related agreements. For example, the investor may enter into separate MOUs with different groups of legitimate tenure right holders, particularly if the benefit arrangements negotiated with these groups differ from one another. It is also possible for a related agreement to exist even in cases in which the legitimate tenure right holders are parties to the contract by way of a tripartite contract structure.

3. Contracts with legitimate tenure right holders as third party beneficiaries

2.40. *In general.* Contracts may confer rights onto third parties. These third parties – referred to as third party beneficiaries – are not signatories to the contract, but stand to benefit if the contract is fulfilled and, under certain circumstances, have the legal right to enforce the contract or seek remedy in case the contract is breached.¹⁸

2.41. *Recognition and rights.* In jurisdictions that recognise the third party beneficiary principle, the investor and the grantor may enter into bilateral contracts that create rights for legitimate tenure right

¹⁷ Sometimes the MOU will be the place in which the selection of such land/resources, and detailed conditions of access and use, are described. Other times, this information will be contained in the Investment Agreement itself, or a third linked contract dealing specifically with transfer of land.

¹⁸ According to the UPICC, for example, a third-party beneficiary must be identifiable with adequate certainty by the contract, but need not be explicitly named in the contract, nor in existence at the time the contract is made. See UPICC, Art. 5.2.2.

holders as third party beneficiaries.¹⁹ These rights can relate, *inter alia*, to compensation, social benefits, consultation or provision of information, easements or other rights of way, and compliance with certain environmental standards. These rights, moreover, may be made subject to any conditions or limitations stipulated by the contracting parties, and included in the contract.²⁰ In general, if the investor breaches the provision granting third party rights, the third party beneficiary has a direct contractual right and can make a claim for specific performance and damages, as if it were a party to the contract (see Chapter 4.III.C). However, in order to enforce such a promise, the legitimate tenure right holders may be required to demonstrate that the contractual provision in question was primarily for their benefit.²¹ The third party beneficiary may also renounce the right conferred upon it, however since it is usually in their advantage, third parties generally have no incentive to do so.²²

2.42. *Governments and third party beneficiaries.* The fact that the government is a party to *many* contracts may make it easier for legitimate tenure right holders to show that certain provisions of that contract were entered into for their benefit. Some courts, for example, have held that if the government is a party to a contract entered into for their benefit, then its citizens may have rights as third party beneficiaries.

2.43. *Investors and third party beneficiaries.* Several recent international instruments, most *prominently* the VGGT and the CFS-RAI principles, recognise that investors are responsible for respecting legitimate tenure rights and equitable access to land in the context of agricultural investment. More generally, the UN Guiding Principles recognise that investors have a responsibility to respect human rights. Taken together, these instruments create the implication that agricultural land investment contracts should respect the rights of legitimate tenure right holders specifically and local communities more generally and, subject to the applicable law, may support treating such holders and communities as third party beneficiaries of contracts to which they are not parties. Identifying and accounting for such holders and communities is now part of the due diligence that those advising investors undertake to avoid disputes, unrest and protests that may arise from failing to take into account fully the rights of those holders and communities.

2.44. *Resources as public goods.* Domestic legislation may treat land and natural resources as *public* goods in which the population has a direct interest. Some State constitutions recognise, for example, that natural resources belong to the people and that the people are entitled to their revenues. Such provisions may pave the way for legitimate tenure right holders to claim third party beneficiary status, and sue if their rights to the land in question are impinged upon.

2.45. *Human rights considerations.* Even if legitimate tenure right holders are not parties to the *contract* nor contemplated in the contract, it is possible that such holders could seek remedy by citing certain human rights principles. Various international and regional courts (*e.g.* the Inter-American Court of Human Rights, African Commission on Human and Peoples' Rights (ACHPR)) have recognised the rights of indigenous and non-indigenous groups to their lands and natural resources, and have used this recognition to award damages to aggrieved local communities.

IV. DUE DILIGENCE

2.46. *Introduction.* The conduct of due diligence – with respect to identifying possible parties and stakeholders, locating the land in question, examining the feasibility of the investment and the assessment of potential impacts from that assessment – are an essential part of responsible and sustainable investments. Such conduct allows for the involvement of legitimate tenure right holders and *local* communities and for the incorporation of necessary safeguards, both of which in turn support the realisation of the investment's benefits and mitigation of its negative impacts. In discussing due diligence aspects, this Part discusses the identification of (a) the possible parties and stakeholders and (b) the land and potential impacts.

¹⁹ See UPICC, Art. 5.2.1.

²⁰ *Id.*, Art. 5.2.5.

²¹ See, *e.g.*, UPICC, Arts. 5.2.1 - 5.2.3.

²² See UPICC, Art. 5.2.6.

A. Identification of the possible parties and stakeholders

2.47. *Importance of identification.* Depending on its size and location, an agricultural *investment* can affect many people, directly and indirectly. Therefore, at the outset of the contracting process, it is important to identify the stakeholders involved, whether as potential contracting parties or stakeholders who will need to be consulted or included in due diligence.

2.48. *Identification of stakeholders.* In some instances, it may be difficult to ascertain the identity of these stakeholders for various reasons, including: a lack of clear, accurate, and up to date land records; inaccurate survey boundaries; or a multitude of overlapping ownership and use claims, some of which may not be formally recorded. However, it is important to understand their identity, as well as the location and nature of their rights and obligations related to the land in question. *Understanding* who will be affected and the range of likely impacts is a prerequisite for an effective impact assessment (see Part IV.B.2 below) and may also be required if the investment affects indigenous peoples or involves resettlement.²³

2.49. *Bad faith occupants.* Individuals may take advantage of a foreign investor's lack of familiarity with the local context by moving into an investment area shortly after the investment is *announced*, and attempting to seek compensation. For this reason, it is important that the investor conducts a thorough stakeholder mapping, including constructing a historical timeline of the use and occupancy of the land in question.

1. Stakeholder mapping

2.50. *In general.* The process of gathering this information is sometimes called stakeholder mapping. A stakeholder is a person – with an interest or concern in something – who can be primary (i.e. they are directly affected by the investment) or secondary (i.e. they are indirectly affected). In the case of agricultural land investments, common stakeholders include: legal landholders (as derived from official records); legal landholders whose holdings may not have been registered; customary landholders; seasonal or temporary landholders (e.g. pastoralists); renters; seasonal workers; easement or right of way holders (e.g. communities who traverse the land in question to access water sources); farmers cooperatives or other organised groups; traditional authorities; statutory government officials; men and women who live outside the investment area but have claims to resources in the area; adjacent landholders whose property value or ingress/egress may be impacted by the investment; and men and women who may have spiritual or cultural ties to the investment area, particularly if they are indigenous (see Part IV.2(b) below regarding FPIC).

2.51. *Conducting stakeholder mapping.* It is important to conduct stakeholder mapping with the help of trusted local advisers who are familiar with both customary and statutory land tenure arrangements, and familiar enough with the local community to gather and provide accurate and up to date landholding information. These parties must be trusted enough that the information they provide is authoritative and, ideally, undisputed. Such local advisers may be trusted members of the local community (e.g. Village Council or Chief) or civil society organisations that work in or with the local community. In addition, in performing such mapping and generating the related data, the parties should comply with any applicable data protection and privacy regulations.

2.52. *Representation.* Due to informational and power asymmetries inherent in many local communities, the local authority or leader may not represent the interests of all potential legitimate tenure right holders or the broader local communities, in particular those of vulnerable populations. Therefore, it is important to meet with various stakeholders representing different concerns, including women, youth, elders, indigenous groups, pastoralists, or other groups who use land in non-traditional ways. A trusted local adviser can help to identify the full range of stakeholders, all of whom might not be evident to the parties. The local adviser, together with the parties, should be able, to the extent necessary, to research historical and ethnographic information with respect to the land in question.

²³ See IFC. 2012. Performance Standards on environmental and social sustainability; 5, 7 (regarding resettlement and indigenous people respectively).

2.53. *Key questions.* It is important not only to identify the stakeholders involved, but also what their interests are, and how they relate to one another. Key questions to ask during stakeholder mapping *include*:

- Have all stakeholders with interest in the land and resources been listed?
- Have the interests of all stakeholders been clearly identified?
- Have all parties with legal rights to the land been identified? Have all parties with legitimate rights to the land been identified?
- What records exist that document the land rights in the project area? Do they document customary and secondary rights? Which rights are undocumented?²⁴
- Do any of the parties' interests in the land conflict? If not currently, have they in the past? What is the risk of future conflicts arising, and in particular, what is the risk of the investment exacerbating these conflicts?²⁵
- How do the stakeholders value the land (e.g. in economic, social, spiritual terms) and what do they consider fair value for the land?
- How will the contemplated investment affect each stakeholder's interests in the land? What are stakeholders' key concerns in this regard?
- What are the expectations, needs, or desires of stakeholders regarding the land?

In answering the above questions, it is useful to construct a timeline of the use and ownership of the land in question.

2. Consultation

2.54. *In general.* The principle of consultation is enshrined in the VGGT as follows: "engaging with and seeking the support of those who, having legitimate tenure rights, could be affected by decisions, prior to decisions being taken, and responding to their contributions; taking into consideration existing power imbalances between different parties and ensuring active, free, effective, meaningful and informed participation of individuals and groups in associated decision-making processes".²⁶

2.55. *Purpose.* The purpose of consultations in the context of a land investment contract is to gather the concerns and desires of stakeholders who will be affected by the investment, to align expectations of all parties and, as necessary, to make adjustments to the investment generally and to the contract specifically, for example by including safeguards sought by those stakeholders. The investor should consult all stakeholders, including legitimate tenure right holders and the local community, even if these stakeholders are not contracting parties.

2.56. *Requirements.* Several international instruments – including the VGGT and International Finance Corporation's (IFC) Performance Standards 1, 5, and 7 – call for community consultations.²⁷ Consultation laws and guidelines vary from State to State. Some States legally require the government or the investor to consult with the local community in certain situations, such as when government or investor actions threaten to interfere with local lands, livelihoods, and traditional practices. Local counsel can advise on the consultation standards and guidelines relevant to that particular *State*. External standards, such as those

²⁴ Unwittingly impinging on legitimate but undocumented land rights of local communities has the potential to pose significant risks to the investment. Therefore, if the answer to this question is "no" then the Investor should commission an independent participatory mapping process to identify all such rights. If no reliable maps exist, and the investor does not feel it can conduct such mapping, the Investor should strongly consider cancelling or moving the project.

²⁵ Existing land conflicts pose significant risk to the investment. If these conflicts are unable to be resolved, the investor should strongly consider cancelling or moving the project.

²⁶ VGGT, Principle 3b.6.

²⁷ *Id.*, Principle 3b.6, Ch. 9.9; IFC. 2012. Performance Standards; 1, 5, 7.

imposed by certification schemes or by financial institutions, might also require either consultation with, or attaining the consent of, local communities.

(a) Principles of meaningful consultation

2.57. *Meaningful consultation.* The UN Guiding Principles state that businesses should engage in “meaningful consultation with potentially affected groups and other relevant stakeholders, as appropriate to the size of the business enterprise and the nature and context of the operation”.²⁸ In general, “*meaningful*” consultations are: voluntary; inclusive; collaborative; equitable; timely; and transparent. The use of an independent third party facilitator with experience conducting consultations can significantly improve the process and outcomes of consultations.

2.58. *Voluntary.* A consultation is voluntary if it is conducted free of coercion, manipulation, undue influence, or pressure. For example, in the context of land-based investments, governments may place *pressure* of communities to arrive at decisions quickly. The concept of “voluntary” is incorporated strongly into the FPIC principle, which applies to investments that affect indigenous peoples (see also Section 2(b) below regarding FPIC).

2.59. *Inclusive.* A consultation is inclusive if it involves all relevant parties whose rights may be impacted by the investment, as well as decision-makers with authority over the investment. It is important to note that the range of parties involved in consultations will likely be broader than the parties ultimately included in the contract. For example, local community members should be consulted, even if they are not ultimately legal tenure right holders or legitimate tenure right holders, and therefore not included in the contract. The stakeholder mapping process (See Section B.1 above) will help to identify parties relevant to consultation. A representative list of stakeholders relevant to consultation include but are not limited to: all landholders and land users who would be impacted by the investment (including both legal and legitimate landholders); national, regional, and local authorities; local or religious leaders who represent the community impacted by the investment; and vulnerable groups (e.g. women’s groups, pastoralist groups, indigenous groups) whose interests may not be well represented by formal or informal leaders.

2.60. *Collaborative.* A consultation is collaborative if it facilitates dialogue and exchange of information, instead of consisting of a one-way communication by the investor to the community. This means that a consultation should present opportunities for meaningful feedback and questions about the investment. The investor or the government should develop a formal mechanism to collect such feedback and respond in a timely manner.

2.61. *Equitable.* A consultation is equitable if all parties have access to the same information as well as similar tools and capacities to conduct the consultation. Often, significant informational asymmetries exist between the investor and the government on one hand, and local landholders and impacted *communities* on the other hand. Local communities may lack complete and timely information about the investment’s location, size, scope, timeline, operational model, projected revenue, projected costs, risks, benefits, and milestones, and there may be informational asymmetries within the communities themselves. The investor, by contrast, will have learned all of this information during project due diligence. At the outset of consultations, the community must be provided access to this information, excluding any information deemed to be commercially sensitive or otherwise confidential (see 3.V.B.3 regarding confidential information). The local community may also lack the legal support or capacity to fully appreciate the risks and benefits of the investment, as well as key terminology to be used in the contract or related agreement. The investor or the government, or the parties collectively, should ensure the community has full understanding of the proposed investment as well as the legal support necessary to conduct meaningful consultation, including by financing a neutral third party lawyer to represent the community and by providing consultation documents in a language and medium communities can access.

2.62. *Timely.* A consultation is timely if it occurs with enough time for its results to be taken meaningfully into *account* in the context of contract negotiations and other investment-related decisions. In addition,

²⁸ UN. 2011. Guiding Principles on Business and Human Rights, Principle 18(b).

consultation is not a one-time occurrence but rather an ongoing process throughout the lifecycle of the investment. The investor should view community consultation as part of a consistent and sustained set of actions for obtaining and maintaining a social license to operate in the community.

2.63. *Transparent.* A consultation is transparent if it is based on complete, unbiased, and shared information about the investment, including the terms, risks, benefits, and other aspects of the investment. All consultations should be public and well-documented, and consultation documentation should be made available to all parties involved, in a medium and language that they can access.

2.64. *Link to negotiations.* Community consultations will often lead to negotiations that result in enforceable community-based agreements (see Part V.B regarding negotiations). The results of consultation *may* be documented through a MOU or CDA, which is generally negotiated prior to the signing of the land investment contract, and incorporated therein (see Part III.B.2 above regarding multi-party transactions through related agreements).

(b) Free, prior, and informed consent

2.65. *In general.* If the investment impacts indigenous peoples, the principle of “free, prior, informed consent” (or FPIC) is relevant. As stated in Article 10 of the UN Declaration on the Rights of Indigenous Peoples: “[i]ndigenous peoples shall not be forcibly removed from their lands or territories. By *implication*, no relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return”.²⁹

2.66. *Elements.* The basic elements of FPIC are defined as follows: free implies no coercion, intimidation, or manipulation; prior implies consent that is sought far enough in advance of any authorisation or commencement of activities, and respecting the time requirements of indigenous consultation and consensus processes; informed implies that all information relating to the activity is provided to the indigenous peoples, in an objective, accurate, and understandable manner; and consent implies that indigenous peoples have agreed to the activity that is subject to the consultation.

2.67. *Application.* As applied to consultation, the FPIC principle elevates the obligation of the investor or government, from simply following a consultation process to having to obtain consent prior to embarking on an investment. If the principle is applicable, it means that indigenous communities in the *investment* area must affirmatively provide consent before the establishment of any project that directly affects their lands or resources. By implication, this gives indigenous communities a veto – the right to say no – to a project being implemented in their territory.³⁰

B. Identification of land and potential impacts

2.68. *In general.* Conducting feasibility studies, preparing business plans and impact assessments is now recognised as a good practice for investors in agricultural land, in particular to identify specific *land* for an investment, to study that investment’s feasibility and to assess potential impacts of that investment. They are essential components of the due diligence process.

2.69. *Purposes.* Feasibility studies, business plans and impact assessments generate the information and evidence base that is essential for drafting contracts, particularly in new as opposed to existing *acquisitions* of land, for agricultural investment. The information gathered in feasibility and business plans enables all

²⁹ UN Declaration on the Rights of Indigenous Peoples (2007), Art.10; Convention Concerning Indigenous and Tribal Peoples in Independent Countries (1989).

³⁰ VGGT Technical Guide No. 7, p. 34; see also FAO. 2016. Free Prior and Informed Consent Manual, p. 13 (“FPIC is a specific right that pertains to Indigenous Peoples and is recognised in the United Nations Declaration on the Rights of Indigenous Peoples. It allows them to give or withhold consent to a project that may affect them or their territories. Once they have given their consent, they can withdraw it at any stage. Furthermore, FPIC enables them to negotiate the conditions under which the project will be designed, implemented, monitored and evaluated. Organisations contributing to this manual hold the view that all project-affected peoples have the right to be part of decision-making processes in ways that are consistent with the principles underlying the right of FPIC”).

the actors involved to make informed decisions in a manner that assures transparency in the contractual process.

2.70. *Regulatory requirements.* Feasibility and business studies as well as impact assessments are discussed in the Guide primarily because they are often required under domestic or international law and are important tools to manage risks that investment contracts may pose to the environment or to legitimate tenure rights holders and local communities. Collectively they provide important foundations for contractual provisions and – because they go beyond merely providing milestones, timelines, and possible impacts – they also play a significant role in discouraging speculative acquisitions of land where it is clear that the type of risks posed by such acquisitions to stakeholders and to the environment far outweigh the benefits of a project. World Bank research, for example, shows there is a high failure rate for agribusiness projects that were not preceded by the careful scrutiny and caution that is accompanied by feasibility studies.³¹

2.71. *Creating mutually beneficial outcomes.* When agricultural land investments underestimate the value of agricultural land to local communities, indigenous peoples and vulnerable groups including women and youth, the likelihood of undesirable impacts increases. Such impacts include forced evictions, hunger and poverty when agricultural investments results in loss of homes, and sources of livelihoods like lands fisheries and forests.³² This could in turn trigger disputes that could undermine *project* feasibility and result in economic and reputational risks for investors. The purpose of conducting feasibility studies, preparing business plans and impact assessments is “not only to avoid negative social and environmental impacts, but also to create mutually beneficial economic relationships with the affected communities”.³³

2.72. *Feasibility Studies.* Feasibility studies provide technical, economic and financial information to enable an investor and a grantor to understand and evaluate the economic, commercial and non-economic opportunities and challenges of an agricultural land investment. By examining the legal, operational, financial and other factors, a feasibility study helps to determine a project’s viability and lays *the* foundation for producing a business plan and important information to be considered in negotiations on an agricultural land investment contract. A feasibility study may help an investor to identify the potential influence of factors such as the rights of legitimate tenure right holders or other stakeholders who, while not holding legal tenure rights, have legitimate claims on the land by virtue of customary, indigenous, occupational rules or practices or by the operation of another source of claim over the land.

2.73. *Business plans.* A business plan organises the information gathered from a feasibility study as part of the project’s marketing, operating, management and financing strategies. A lot of this information is incorporated in various contracts an investor enters into with those financing the project, as well as in *contracts* an investor may enter into with local communities, indigenous groups or legitimate tenure holders outlining its obligations to these stakeholders within the project. Depending on the investment’s nature, a business plan may also include the services, production techniques, markets and clients, human resources, organisation, requirements, financing, and source of funds for an investment project.

2.74. *Impact assessments.* Impact assessments are an essential part of managing risks associated with potential negative impacts of an investment.³⁴ There are different types of impact assessments that may need to be performed, depending on the investment’s particular nature, size and context, *meant* to identify such impacts, for example, on human rights, the local environment and the economy. Performance of such assessments allows for the parties to take their findings into account and to take steps to avoid or mitigate negative impacts.

³¹ The practice of conducting feasibility studies does not imply that investors have pre-investment obligations rather it reflects an internationally agreed practice that investors engage in to protect the value of their investment. However, as noted below, in some States feasibility studies are required under domestic law. In addition, VGGT Technical Guide No. 4 on Safeguarding land tenure rights, notes (p. vi) that agricultural land investments may be negatively impacted where “Legitimate tenure rights have been overridden, families have lost of their homes and livelihoods ... [and] disputes over tenure rights have escalated to violent conflicts resulting in deaths and political unrest”. Such protests may not only affect project success, but may also result in reputational and economic harm for the investor.

³² See VGGT, Preface, p. V.

³³ VGGT Technical Guide No. 7, p. 6.

³⁴ *Id.* pp. 6, 18.

2.75. *Roadmap.* This first section addresses land and feasibility matters, including (a) suitable land availability and *valuation*, (b) access to resources and (c) business plans. The second section addresses impact assessments.

1. Land and feasibility

2.76. *In general.* A feasibility study helps the investor assess the commercial and technical viability of a project, as well as the risks agricultural land investment contracts may pose to the environment or to *stakeholders* such as legitimate tenure rights holders, local communities or indigenous groups. For a feasibility study to be reliable, an investor should hire independent third parties with specialised knowledge and skills with regard to each of these aspects of an investment contract. When properly conducted, a feasibility study gives an investor an “independent opinion of risks and potential mitigation measures”.³⁵

2.77. *Rationale.* A feasibility study is necessary for several important reasons. First, it forms an important basis for government approvals. Second, it provides information that could play a significant role in discouraging speculative acquisitions of land where it is clear that the type of risks posed by such acquisitions to stakeholders and to the environment far outweigh the benefits of a project. Third, a feasibility study is important because the information it produces is often included in the contract between an investor and the grantor. Fourth, a feasibility study is recommended as a good practice to mitigate risks such as dispossession of individuals or communities from their land, and to avoid or mitigate other adverse impacts. For this reason, a feasibility study therefore also helps to determine a project’s viability. A feasibility plan, for example, can help to establish the appropriateness of planting particular crops in the right agronomic zones or whether an investment is based on unrealistic assumptions. Sometimes, domestic law requires feasibility studies as a precondition for signing an agricultural land contract.³⁶ Even where domestic law does not require them, feasibility studies and business plans may be required where investors and governments have third party funding.

2.78. *Typical steps.* Some typical steps in a feasibility study include: (a) compilation of all relevant data; (b) analysis of alternatives to achieve the goals of the projects; (c) detailed examination of costs and benefits of project effectiveness, but also the risks particularly those relating to possible harms to legitimate tenure right holders and to the environment; (d) preliminary design; and (e) detailed risk assessments including those relating to environmental and social impacts. Section 2 below discusses a variety of impact assessments in the context of agricultural land investments.

(a) Suitable land availability and valuation

2.79. *In general.* To ensure viable agricultural investment projects, the prospective parties have to ensure that land suitable to the particular type of investment identified in the feasibility study is available.³⁷ The CFS-RAI Principles provide some ideal benchmarks with regard to identification of suitable land. First, attention and respect should be paid to legitimate tenure rights to land, fisheries and *forests* as well as existing and potential water uses.³⁸ Second, investments should sustainably manage natural resources by preventing, minimising and, as appropriate, mitigating impacts on air, land, soil, water, forests and biodiversity.³⁹ Third, there should be respect for cultural heritage and traditional knowledge and support for genetic diversity. This includes respecting cultural heritage sites and systems and recognising the role of indigenous property and local communities in agriculture and food systems.⁴⁰

³⁵ VGGT Technical Guide No. 4, pp. 56-57.

³⁶ Weak enforcement and monitoring of domestic laws *ex ante* should not discourage investors from conducting feasibility and business plans because of the benefits they provide. Notably, Principle 23(a) of the UN Guiding Principles provides that businesses should “comply with all applicable laws and respect internationally recognised human rights, wherever they operate”.

³⁷ VGGT, pp. 30-31.

³⁸ CFS-RAI Principle 5.

³⁹ *Id.*, Principle 6.

⁴⁰ *Id.*, Principle 7.

2.80. *Valuation.* Under the VGGT, States should ensure that appropriate systems are used for the fair and timely valuation of tenure rights.⁴¹ In addition, policies and laws should ensure that valuation systems consider non-market values, such as those relating to social, cultural, religious, spiritual, and environmental dimensions.⁴² This is particularly important in the acquisition or expropriation of customary rights to land that may not amount to formal legal title. Land investment projects that are particularly invasive of cultural heritage, religious, aesthetic, or symbolic interests and benefits in land ought to explore alternative sites.

2.81. *Challenge of non-market valuation.* Estimating the non-market value of tenure rights, including those interests and benefits in land, is a challenging but vital undertaking.⁴³ Non-market valuation is usually done during expropriation of tenure rights to estimate compensation.⁴⁴ According to the VGGT Technical Guide on Valuation, there is no need to estimate monetary values for non-market values when the tenure rights are not transferred or where there is no significant change in the use of land.⁴⁵ When tenure rights are subject to transactions, the valuation of non-market assets is a challenging and often highly subjective task because there is no comparable evidence upon which to draw.⁴⁶

2.82. *Involving affected stakeholders in non-market valuation.* As a starting point in non-market valuation, valuers should recognise that money is not the means of exchange or value.⁴⁷ A key task is gathering evidence on which to base the estimation.⁴⁸ Under a contingent valuation approach, participants are asked to state their willingness to pay for a non-market tenure right or willingness to accept compensation. In-person interviews and questionnaire surveys are often utilised with framed questions to identify society's perception of value, rather than the individual's perception of value. The costs for compensating natural resources and related rights of access and use for local communities and indigenous groups should be reflected in the monetary obligations to be borne by investors in agricultural land investment contracts (see Chapter 3.II.A regarding monetary obligations).

2.83. *Best practices.* Recommended best practices for establishing the value of land slated for an agricultural investment includes conducting due diligence to establish who the tenure or legitimate tenure holders are.⁴⁹ Such due diligence should include collecting and documenting tenure rights, such as land titles, tax records, maps and photos, boundaries of villages and communities, number of people who are landowners or users, resources available and in use, cultural sites, and current activities on each parcel of land.⁵⁰ Such collection and documentation can occur in connection with stakeholder mapping and consultations (see Part IV.A above).

2.84. *Expropriation in general.* Expropriation, or compulsory acquisition in some States, is the act of a government or relevant authority that acquires tenure rights for a public purpose without the willing consent of those holders.⁵¹ It is an act which may be necessary, for example, for social or economic *development* (e.g. to build roads or hospitals) or for environmental protection (e.g. to build sewage facilities or to create preserved areas). The Guide is referring, in this due diligence context, to the expropriation or compulsory acquisition of tenure rights to land in order to grant those or similar rights to an investor, where the expropriation or compulsory acquisition of an investor's investment, agricultural land investment contract, or certain rights thereunder, as well as related protections, are dealt with in Chapter 3.IV.A.

⁴¹ VGGT, para. 18.1; *Id.*, p. 30.

⁴² *Id.*, para. 18.2; *id.*, p. 30.

⁴³ VGGT Technical Guide No. 11, p. 4.

⁴⁴ *Id.*, pp. 13, 58.

⁴⁵ *Id.*, p. 67.

⁴⁶ *Id.*, p. 68.

⁴⁷ *Id.*

⁴⁸ *Id.*, pp. 68-69.

⁴⁹ VGGT Technical Guide No. 4, p. 56.

⁵⁰ *Id.*, p. 58.

⁵¹ VGGT Technical Guide No. 5, p. 51.

2.85. *Expropriation and due diligence.* Although expropriation falls within a government's regulatory mandate, planning or making an agricultural investment on land that is to be expropriated or has already been expropriated – as a result of which or for which people are evicted – should prompt a *responsible* investor to reconsider that investment. Indeed, evictions and resettlements have been identified as high-risk factors indicating that an investment should not proceed.⁵² Further, forced evictions even where the land is owned by the government would be inconsistent with the obligations of the right to housing for States that have ratified the International Covenant on Economic, Social and Cultural Rights.⁵³ Article 10 of the UN Declaration on the Rights of Indigenous Peoples States (UNDRIP), moreover, provides that indigenous peoples shall not be forcibly removed from their lands or territories. Further, it provides that no relocation shall take place without FPIC and after agreement on just and fair compensation and, where possible, with the option of return.⁵⁴ These recurring issues in expropriation of land for investment should be reflected in agricultural land investment contracts to safeguard the interests of all stakeholders.

2.86. *Expropriation and valuation.* The VGGT provides extensive guidance on expropriation and the related obligation to provide compensation, including *inter alia*: expropriating rights only where required for a “public purpose”, clearly defining that term in law and allowing for judicial review; ensuring that the planning and process for expropriation is transparent and participatory and minimises disruptions to livelihoods, in particular those of the poor or vulnerable; ensuring a fair valuation of the expropriated rights and prompt compensation; where expropriated land goes unused, first offering it back to original tenure right holders; endeavouring to prevent corruption; and where evictions are *considered* to be justified for a public purpose, exploring feasible alternatives in consultation with those affected, taking appropriate measures to provide adequate alternative housing, resettlement or access to productive land, and conducting evictions and relocations in a manner that is consistent with a State's duty to respect, protect and fulfil human rights.⁵⁵ The loss of land and property as well as any partial or complete relocation should be compensated.⁵⁶

(b) *Access to resources*

2.87. *In general.* In addition to tenure rights such as those relating to access, possession and control of agricultural land, the prospective parties should consider any related rights to the land on which the *project* will be based or the land that surrounds that project. Examples of such rights include rights to use existing infrastructure on and around the land, such irrigation or water supply systems or rights of way through adjoining lands (see Chapter 3.I.B.2 regarding related rights and obligations). Domestic law and policy often governs whether an investor is entitled to these additional rights, and if so, under what conditions the investor would have access to them. Investors can only have access to these rights through a contract with the grantor. Access to resources other than the land on which the project will be based could also include rights to use specified resources, like clay and stones. In return for related rights, the investor could be required to make payments to the grantor, which may include fees, rents, and taxes (see Chapter 3.II.A regarding monetary obligations).

2.88. *Investor obligations.* The grantor may also require the investor to commit to obligations that will define the parameters of their activity. Those obligations could include requirements to maintain books and records, to provide financial and non-financial benefits to local communities, and to restrict use of unsustainable practices such as the use of certain chemicals. These obligations are discussed further in Chapter 3 of the Guide. In cases where indigenous or other affected communities have pre-existing rights over the contract area, the investor should act in accordance with FPIC principle, prior to proceeding with the project (see Part IV.A.2(b) above regarding FPIC). The investor may also be *required* to acknowledge their rights by specifying that these indigenous peoples and others in occupation and use of the land may

⁵² VGGT Technical Guide No. 7, p. IX (including, among other high-risk factors, that “[t]he government originally acquired the land by expropriation, or the project requires expropriation to make it available for development, causing, in either case, local people to be evicted” and that “[t]he project design requires the large-scale transfer of land rights from local people, possibly resulting in many people being involuntarily or even voluntarily resettled”).

⁵³ CESCR. 1997. General Comment No. 7: The right to adequate housing (Art.11.1).

⁵⁴ See UN Declaration on the Rights of Indigenous Peoples (2007).

⁵⁵ VGGT, paras. 16.1-16.9.

⁵⁶ VGGT Technical Guide No. 11, p. 65.

remain in the area, or that they shall continue to have rights of access to such resources. In addition, the investor should recognise the traditional knowledge these communities may have in relation to natural resources and consider their important role for biodiversity conservation.

2.89. *Water usage.* It is notable that in the case of surface and groundwater channels, including rivers, lakes, aquifers, and reservoirs, domestic law often governs their protection. Because large-scale commercial agriculture typically involves heavy water usage, domestic law and investment contracts may *include* restrictions on water usage. Such restrictions could include quantity control, mechanisms to review long-term water availability and usage, as well as limits to water rights to ensure adequate water supply for local people, or limits to the development of water infrastructure and should be included in the contract. If a project's operations affect trans-boundary watercourses, the investor may be obligated to comply with any watercourse agreements between the host State and neighbouring States, or under international law.⁵⁷

2.90. *Governance of water.* To illustrate how access to water resources requires heightened vigilance in agricultural investment projects, it is important to note that there could be multiple legal regimes that govern water allocation in the context of farmland investments. In most States, water rights are directly linked to land rights. When an investor obtains a tract of land for agricultural production, they may or may not automatically gain unfettered access to the available water resources. This is because it will depend on whether under the domestic law of that host State (i.e. the State in which the land is located), rights to water are obtained expressly or implicitly through the contract with the host State. Investors and grantors may adopt internationally recommended eco-efficiency *indicators* that establish a methodology for the accounting of the treatment of water use.⁵⁸ In addition to the contract, domestic law may require investors to apply for permits for water extraction and to pay fees for water use. Furthermore, grantors ought to find out if investors may obtain additional water rights protection under investment treaties into which the host State has entered. Investors ought to also find out if local communities have informal rights to water use and these ought to be recognised in contracts in which the investor obtains water rights. Under international freshwater law, a State may have additional obligations where an investment takes place on or near transboundary basins. In such a situation, a host-State is obliged to notify other states before authorising a farmland investment on or near a shared water system.

2.91. *Addressing water rights.* The right to water (e.g. to safe drinking water and sanitation) is essential for securing an adequate standard of living.⁵⁹ A good practice to ensure adequate protection of water rights for all stakeholders in agricultural land investments is taking into account "water tenure is a legitimate type of tenure that needs to be taken as seriously as land tenure". This is necessary to prevent users such as small- and medium-scale farmers with the lower water tenure security from being disenfranchised in land investment projects. That is why it is important to explicitly protect *their* water tenure rights in agricultural land investment contracts. There may also be other ways including regulation that may be necessary to protect water tenure rights in agricultural land investments (see Chapter 3.III.B regarding water rights and obligations).

(c) *Business plans*

2.92. *In general.* As noted above, a business plan organises the information gathered from a feasibility study as part of the investment project's marketing, operating, management and financing strategies. Much of *this* information underpins various contractual provisions – including those relating to the financing of the project or to the commitments between investors and legitimate tenure right holders or local communities in relation to the project – which are more fully discussed in Chapter 3. Depending on the nature of the agricultural land investment, a business plan may also include the services, production techniques, markets and clients, human resources, organisation, requirements, financing, and source of funds for an investment project⁶⁰. A business plan should also address the project's contributions to the social, environmental and

⁵⁷ For example, see the Convention on Environmental Impact Assessment in Transboundary Context (1991).

⁵⁸ UNCTAD. 2004. A manual for the preparers and users of eco-efficiency indicators, p. 20-28.

⁵⁹ CESCR. 2003 General Comment No. 15: The right to water (Arts. 11 and 12).

⁶⁰ UNCTAD. 2002. How to prepare your business plan, p. 3.

sustainable development of the host State in general or the local community in particular. Some funding agencies require investors to prepare a business plan because such a plan helps to establish its viability and profitability.

2.93. *Importance.* As noted with respect to monetary obligations (see Chapter 3.II.A), for some types of investment projects, a contract may require an investor to provide verified periodic reports such as profit and loss statements. Providing these types of reports ought to be anticipated in a business plan for various reasons. First, it would alert the grantor if the investor is experiencing financial stress and may therefore be unable to meet its obligations. Second, new investments or start-ups may experience financial *stress* before becoming viable and profitable enterprises, and such stress ought to be anticipated in the business plan. Such planning can help an investor lower the risk of project failure. In this sense, business plans are “perhaps the most important step in launching any new venture”.

2.94. *Link with impact assessments.* A business plan done in conjunction with an appropriate impact assessment (see Section 2 below on impact assessments) can help modify a project to avoid harms associated with evictions and expropriation of land that might not have been foreseen had it not been for well-designed *business* plans and the performance of impact assessments. For example, an alternative investment model with no large-scale transfer of rights such as a lease or rent structure could be considered instead of an acquisition that causes evictions or expropriations that might result in reputational harm and affect project success. It may also inform the need to reduce the amount of land used or to make provision for legitimate tenure holders to continue use some of the land.⁶¹

2. Impact assessments

2.95. *Four types.* There are four types of impact assessments relevant to agricultural land investment contracts: (a) environmental (b) social (c) human rights and (d) economic.

2.96. *Importance.* These assessments ought to be conducted *ex ante* by independent experts. Each of these assessments are underpinned by domestic or international law. They are also increasingly recognised as a best practice for investors, even where they are not required by law, in order to avoid adverse impacts on legitimate tenure rights to land, soil, water, biodiversity, fisheries and forests. Many multinational corporations now routinely conduct human rights impact assessments as part of their enterprise risk management.⁶² The International Standards Organisation, for example, has developed ISO 31000, which addresses enterprise risk management and provides that companies have to manage risks, including a company’s “relationships with, and perceptions and values of external stakeholders”.

2.97. *Complementary role and accountability.* Impact assessments complement corporate social responsibility initiatives particularly in areas in which investors and States have legal obligations. Impact assessments are also a useful tool for avoiding the reputational, legal and economic risks that result from disputes that could have been foreseen and been mitigated.⁶³ Making impact assessments public makes it possible for investors and States to be held accountable.⁶⁴ Indeed, impact *assessments* that are independently and transparently conducted and that involve all stakeholders promote accountability in a variety of ways.⁶⁵ They provide baseline data to monitor and measure impacts. They also identify measures to prevent negative impacts and outline plans to implement remedial or compensatory actions. They also

⁶¹ VGGT Technical Guide No. 7, p. 14.

⁶² The Commentary to Guiding Principle 7 of the UN Guiding Principles provides that “[h]uman rights due diligence can be included within broader enterprise risk management systems, provided that it goes beyond simply identifying, managing material risks to the company itself, to include risks to rights holders”.

⁶³ The UN Guiding Principles, in Guiding Principle 24, provide that “where it is necessary to prioritise actions to address actual and potential adverse human rights impacts, business enterprises should first seek to prevent and mitigate those that are most severe or where delayed response would make them irremediable”.

⁶⁴ Notably, some information such as financing in a business plan may constitute confidential business information and may under applicable law be exempt from disclosure. See UN Guiding Principle 21 (providing that “companies cannot be expected to disclose commercially sensitive information, including information that is legally protected against disclosure”).

⁶⁵ CFS-RAI Principles, p. 18.

provide an investor with an opportunity to assess necessary changes to their project and to communicate the results to stakeholders.

2.98. *Guidance.* The VGGT call for independent impact assessments to be conducted in large-scale agricultural land investments with a view to safeguarding tenure rights, food security and the progressive realisation of the right to adequate food, livelihoods and the environment.⁶⁶ In particular, investors ought to identify existing legitimate right holders, such as those of small-scale producers, women and indigenous communities; to consult all affected parties and to ensure that existing tenure rights are not compromised by the investment. Principle 10 of the CFS-RAI Principles, moreover, recommends that responsible investments should incorporate mechanisms to assess economic, social, environmental, and cultural impacts, especially on vulnerable actors.⁶⁷

2.99. *Essential elements.* For an impact assessment to serve its purpose, it must not be conducted as a “box-ticking” exercise. The essential elements of an impact assessment related to land investments should include the following:

- identification of all legitimate tenure holders likely to be affected;
- establishing mechanisms for ensuring participation of those affected;
- putting in place monitoring and evaluation plans, including those for mitigating possible negative impacts;
- identification of actors liable for redress;
- establishing agreements between the investor and those affected and a review and appeal process;⁶⁸ and
- stakeholder identification, consultation and participation are a core element in impact assessments because projects that do not typically do so incur substantially higher costs.⁶⁹ Ignoring local legitimate tenure rights, for example, can result in significant financial harm for an investor.⁷⁰

2.100. *Flexibility.* It is not necessary, depending on an investment’s particular context, to perform all the types of impact assessments discussed below. For example, under the UN Guiding Principles, *although* all enterprises have a responsibility to respect human rights, “the scale and complexity of the means through which enterprises meet that responsibility may vary according to these factors and with the severity of the enterprise’s adverse human rights impacts”.⁷¹ Further, Principle 24 of the UN Guiding Principles provides that business enterprises prioritise the prevention and mitigation of those adverse human rights impacts that are the “most severe or where delayed response would make them irremediable”.⁷²

⁶⁶ VGGT, para. 10.12 providing that “when investments involving large-scale transactions of tenure rights, including acquisitions and partnership agreements, are being considered, States should strive to make provisions for different parties to conduct prior independent assessments on the potential positive and negative impacts that those investments could have on tenure rights, food security and the progressive realisation of the right to adequate food, livelihoods and the environment. States should ensure that existing legitimate tenure rights and claims, including those of customary and informal tenure, are systematically and impartially identified, as well as the rights and livelihoods of other people also affected by the investment, such as small-scale producers”).

⁶⁷ CFS-RAI Principles, p. 18.

⁶⁸ *Id.*, p. 56.

⁶⁹ VGGT Technical Guide No. 7, p. 29.

⁷⁰ *Id.*, p. 15.

⁷¹ UN Guiding Principles, Principle 14.

⁷² This prioritisation is also reflected in the OECD, FAO. 2016. Guidance for Agricultural Supply Chains which recommends that enterprises establish strong management systems to identify, assess and prioritise adverse environmental, social and human rights impacts and to categorise risks by low, medium or high risk depending on the context and type of enterprise. This in turn sets the stage for designing and implementing strategies to respond to the risks so identified.

(a) Human rights

2.101. *Purpose.* A human rights impact assessment allows an investor to focus on the risks to the human rights of individuals or communities who may be affected by or work on a project. By prioritising the *human* rights impacts on individuals and communities, a human rights impact assessment seeks to promote accountability for violations of these rights by the duty bearers of these rights. Human rights impact assessments therefore foreground a rights-based approach that proceeds by identifying who the right-holders and duty *bearers* are. By making human rights an explicit basis for their assessment, human rights impact assessments broaden the range of impacts measured further than in other types of impact assessments, particularly on those who are most vulnerable and disadvantaged. The advantage of such an approach is that it would disaggregate impacts along lines such as “sex, age, location, ethnicity, participation in the informal economy, or other relevant factors”.⁷³

2.102. *Importance.* The VGGT strongly recommend the conduct of human rights impact assessments “because all human rights are universal, indivisible, interdependent and interrelated [and because] the governance of tenure of land, fisheries and forests should not only take into account rights *that* are directly linked to access and use of land, fisheries and forests, but also all civil, political, economic, social and cultural rights”.⁷⁴

2.103. *State duty to protect human rights.* States have a duty to respect, protect and fulfil human rights and to provide remedies for negative impacts. States should take additional steps to protect against any abuses of these rights by non-State actors that receive substantial support or service from the State. Under the UN Guiding Principles, the State’s duty in this regard includes making sure that private actors do not violate these rights on their territory.⁷⁵ This also means that States have a duty to ensure that private actors respect human rights.⁷⁶

2.104. *Investor responsibility to respect rights.* Under Principle 11 of the UN Guiding Principles, investors have a responsibility to protect human rights. The principle that business enterprises should respect human rights means that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved”.⁷⁷

2.105. *UN Guiding Principles and their endorsement.* The UN Guiding Principles are the “authoritative framework and methodology for advising business clients on how to mitigate or avoid involvement in adverse human rights impacts”. The UN Guiding Principles, which were the result of broad stakeholder participation including from the business community, are internationally accepted standards of business responsibility for human rights that actors can use to *develop* their own strategies to meet these commitment. The International Bar Association, for example, has endorsed the UN Guiding Principles’ treatment of human rights due diligence under which businesses map their human rights risks in their activities and business relationships. In addition, FAO has endorsed the UN Guiding Principles in various ways, including through its

⁷³ UNECA. 2017. Report: The Continental Free Trade Area (CFTA) in a human rights perspective, p. 14

⁷⁴ VGGT, Provision 4.8. See also FAO. 2015. Technical Guide No. 4, p. 59. Further, Principle 19 of the UN Guiding Principles provides that “in order to prevent and mitigate human rights impacts, business enterprises should integrate the findings from their impact assessments across relevant internal functions and processes and take appropriate action...[which]...will vary according to: (i) Whether the business enterprise causes or contributes to an adverse impact, or whether it is solely because the impact is directly linked to its operations, products or services by a business relationship; (ii) the extent of it leverage in addressing the impact”.

⁷⁵ UN Guiding Principles, Principle 1 provides that “States must protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises. This requires taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication”.

⁷⁶ Under the UN Guiding Principles: (a) States’ have obligations to respect, protect and fulfill human rights and fundamental freedoms; (b) The role of business enterprises as specialised organs of society performing specialised functions, are required to comply with all applicable laws and to respect human rights; (c) and third, there is a need for rights and obligations to be matched to appropriate and effective remedies when breached.

⁷⁷ *Id.*

guidance document entitled “Due diligence, tenure and agricultural investment: A guide to the dual responsibilities of private sector lawyers advising on the acquisition of land and natural resources”⁷⁸.

2.106. *Need for clarity.* The Commentary to the UN Guiding Principles notes that States ought to ensure “greater clarity in some areas of law and policy, such as those governing access to land, including entitlements in relation to ownership or use of land, is often necessary to protect both rights-holders and business enterprises”. Such clarity would be part of a State’s due diligence duty which if fulfilled would help to avoid infringing on the human rights and legitimate tenure right holders.⁷⁹ Thus *human* rights impact assessments ought to be incorporated as part of the due diligence an investor needs to conduct so that it can conform with its responsibility to respect human rights, as well as the State’s duty to respect, protect and fulfil human rights.⁸⁰

2.107. *Rights covered.* Human rights impact assessments can be used to measure impacts on a specific rights such as those to property⁸¹ and the right to food and, or even on the rights of indigenous peoples.⁸² In addition, a human rights impact assessment can include issues such as gender equality and poverty.

2.108. *Benefits of human rights assessments.* Human rights impact assessments put human rights issue on the parties’ agenda, which has many benefits. First, it helps to strengthen governmental and investor accountability for human rights. Second, by creating greater knowledge of the risks to human rights for *rights* holders, a human rights impact assessment helps investors in agricultural land as well as their “lenders and insurers to lower their risk-reward trade-offs they have to make when deciding whether to support a project”. Third, unlike other types of impact assessments predicated on avoiding and reducing risks for activities over which an investor and government have control, a human rights impact assessment is not similarly limited. For example, contracts with the government through which the investor seeks changes in domestic law or even exemptions for the project may have consequences for human rights and as such “can pose material risks to the company and its stakeholders”. Stringent contractual conditions on the timing of project finance, for instance, may constrain an investor’s ability to respect human rights (see Part V.C below regarding conditions). This may arise because such time constraints to deliver a project may inform decisions that impose controls over suppliers and contractors in a manner that might violate worker rights. In short, a human rights impact assessment puts human rights risks on the same footing as social, environmental, technical and economic risks that are measured in other types of impact assessments, business plans and feasibility studies. However, unlike other types of impact assessments in which trade-offs between various risks and benefits of a project may be proposed, a human rights impact assessment proceeds from the view that “human rights are not merely another topic” which could be set off against other interests.

2.109. *Collection of information affecting human rights.* Through performance of human rights impact assessments information is collected on how proposed business activities might affect human rights.⁸³ The types of rights that might be affected by the project could be civil and political rights (e.g. the right to life; freedom from torture and slavery; privacy; fair trial; religion; expression; and assembly) and economic and social rights (e.g. rights to a fair wage; safe and healthy working conditions; trade unions; *education*; health; food and housing; and participation in cultural life). A human rights impact assessment can measure impacts

⁷⁸ FAO. 2019. Due diligence, tenure and agricultural investment, p. 22.

⁷⁹ Commentary to Principle 1.3 (States must protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises) of the UN Guiding Principles.

⁸⁰ Human rights impact assessments are therefore not merely an aspect of enterprise risk management.

⁸¹ For example, the African Charter on Human and Peoples Rights (1981), provides in Article 14, “the right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community”; in Article 21(1) that “all peoples shall freely dispose of their wealth and natural resources”; in Article 21(5) that “States parties to the present Charter shall undertake to eliminate all forms of foreign economic exploitation particularly that practiced by international monopolies so as to enable their peoples to fully benefit from the advantages derived from their national resources”; and in Article 22(1) that “All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind”.

⁸² A variety of rules of international law protect the rights of indigenous peoples including the UN Declaration on the Rights of Indigenous Peoples (2007).

⁸³ VGGT Technical Guide No. 4, pp. 58-59.

on social rights and livelihood,⁸⁴ as well as quality of life. Impacts on the latter can be measured by socio-economic indicators such as income and employment levels as well as by infrastructure and service provision. The cultural impacts of a project on values, belief systems, customary laws, languages, customs, social organisation, traditions can also be considered in an impact assessment, particularly where indigenous communities would be impacted by an investment project.

2.110. *Access to food.* A human rights impact assessment can also assess the extent to which agricultural investments affect local access to food, especially if an investment project causes them to lose access to land on which *they* grow their food.⁸⁵ Principles 1 and 2 of the CFS-RAI Principles encourage responsible investments to contribute to food security and nutrition.⁸⁶ This includes supporting the right to adequate food. An investment that does not undermine the right to food would ideally have the following effects: increased sustainable production and productivity of safe and nutritious food; reduced food waste; improved income and reduced poverty; enhanced fairness, transparency, and efficiency in the markets; enhanced food utilisation through access to clean water, sanitation, energy, technology, childcare, healthcare, and education. Further, a food impact assessment may help to meet the VGGT's goal of encouraging States and investors to acknowledge that sustainable investments are essential to improving food security. Such an impact assessment may provide information about whether States are promoting responsible investments in land, fisheries, and forests that not only protect the right to food, but also safeguard against dispossession of right holders and environmental damage, and that support local communities, create employment and diversify livelihoods.⁸⁷

(b) *Environmental*

2.111. *Environmental assessments.* The CFS-RAI Principles encourage States and investors to consider environmental impacts arising from investments in land, fisheries, forests, and water uses.⁸⁸ They further encourage States and investors to conserve and to manage sustainably natural resources, increase resilience, *and* contribute to reducing environmental disasters.⁸⁹ States and investors can do this by taking the following steps: preventing or minimising negative impacts on air, land, soil, water, and forests; conserving biodiversity and restoring ecosystems; reducing waste; increasing resilience of systems and habitats to effects of climate change; and reducing or removing greenhouse gas emissions and integrating traditional and scientific knowledge.

2.112. *Other environmental impacts that may be measured.* For projects funded by the IFC, for example, the IFC's Performance Standard 1 recommends that investors adopt an environmental and social management system (ESMS) approach to managing environmental and social risks and impacts on an ongoing basis.⁹⁰ To do so, they should consider other entities involved, respect human rights,⁹¹ and identify risks and impacts, and the type and scale of the project will guide the identification process. The *types* of risks to consider include greenhouse gas emissions, climate change and adaptation, and transboundary effects (e.g. air pollution, international waterways). The investor ought to identify the area of influence, disadvantaged or vulnerable groups, as well as impacts on any associated infrastructure (e.g. railways, roads, utilities). In response to these potential impacts, investors ought to prepare management programs that create operational procedures, practices, plans, and legal agreements to address risks and impacts. These ought to include environmental and social action plans with measurable targets as well as procedures

⁸⁴ *Id.*, p. 60.

⁸⁵ VGGT Technical Guide No. 7, p. 53.

⁸⁶ CFS-RAI Principles, p. 11.

⁸⁷ VGGT, Provision 12.4, *id.*, p. 21.

⁸⁸ CFS-RAI Principles, p. 14.

⁸⁹ *Id.*

⁹⁰ IFC. 2012. Performance Standards, p. 2.

⁹¹ Investors should identify and evaluate environmental and social impacts of the project; adopt a mitigation hierarchy; promote clients' performance through management systems; ensure community grievances are responded to; and to promote adequate and ongoing engagement with community.

for monitoring and review as well as for stakeholder engagement (see Chapter 3.III.B regarding rights and obligations of the parties with respect to the environment).

(c) *Social*

2.113. *Purpose.* Social impact assessments (SIAs) are less common but are growing in practice. Social impact assessments can help States and investors recognise rights of landowners, indigenous populations, rights to continue utilising land for subsistence purposes (e.g. livestock, water, crops, game), and avoid or *minimise* displacement.⁹²

2.114. *Design.* Social impact assessments can contribute to sustainable and inclusive economic development and the eradication of poverty.⁹³ Social impact assessments can be designed to establish whether an *investment* project has been designed to make such contributions by measuring, for example, whether it will respect fundamental principles and rights at work; support the implementation of international labour standards; create new jobs; improve work conditions; improve income, foster entrepreneurship, and equal opportunities; contribute to rural development; empower small stakeholders; and whether it would promote sustainable patterns of consumption and production.

(d) *Economic*

2.115. *Economic assessments.* Economic impact assessments are the final type of assessments covered in the Guide. Such assessments may be used to determine whether a project will help to achieve common *interest* objectives, such as generating a net increase in wealth. The VGGT and the CFS-RAI Principles recommend that all major investments in land should be subject to an economic analysis.

2.116. *Key concepts and criteria.* There are four key concepts on how to evaluate an agricultural project in terms of their societal benefits.

- *The general interest as means of analysing a project's effects:* Different social groups in each society often have contradictory interests. The State has the responsibility to decide which development choices best serve the greatest number of people, and such decisions are more legitimate if made by democratically. These benefits may include job creation, food security, and sustainable natural resource management.
- *The evaluation should identify the advantages and disadvantages generated by a project:* A certain advantage for one stakeholder may have different impacts on another segment of the community in which the project is located.
- *The evaluation should include a list of the direct, indirect, and knock-on effects of the projects:* Direct effects are those that affect the project implementers and beneficiaries. Indirect effects are those that affect agents up and downstream in the value chain and in competing sectors that adapt to project implementation. Knock-on effects are those that affect the new distribution of incomes resulting from the direct and indirect effects, such as an entrepreneur investing the profit in other projects.
- *The monetary value of the foreseeable effects should be quantified by comparing situations "with" and "without" the project:* This comparison involves calculating the differential between all the values gained and lost in the situation with the project and the situation without it. It should not be confused with "before" and "after" because the "with" and "without" analysis focuses more on probable changes in agriculture.

2.117. *Economic evaluation.* To evaluate the extent to which a project contributes to the general interest, there are two main methods of economic evaluation. First, the "reference price" method focuses on measuring the benefits to the community by calculating the impact of the project on net growth in income

⁹² *Id.*

⁹³ *Id.*, p. 12.

based on theoretical prices of the goods produced and means of production consumed. Second, the “effects” method focuses on how the project’s additional value is distributed between economic agents. Economic evaluations of large-scale development projects are useful decision-making tools for implementation.

V. CONTRACT FORMATION

2.118. *Introduction.* The process of contract formation is essential to building the contractual relationship. It consists of a series of stages and aspects, including preliminary exchanges of information, ongoing *consultations* and negotiations. This process shapes the rights and obligations that are set forth in the contractual documents and will bind the parties over the contract’s duration.

2.119. *Importance of good faith.* As a common best practice, the whole contract formation process should be *carried out* in a fair and transparent manner and in good faith.⁹⁴ Good faith, while not universally accepted as a principle of contract formation, may involve applying (or refraining from adopting) certain conduct,⁹⁵ and may also have implications for the level of information that should be communicated during the negotiation phase.⁹⁶

2.120. *Roadmap.* This Part briefly addresses key aspects of formation in the context of agricultural land investment contracts, including (a) reviewing investor proposals, (b) negotiations and (c) form, content and related issues.

A. Investment proposals

2.121. *In general.* Investors typically seek a grant of tenure and related rights by making a proposal to a prospective grantor, whether a government or a local community. That proposal – often known as a bid – may have been solicited by the grantor or may have been unsolicited. Once received, depending on the grantor and the applicable law, that bid may be subject to varying levels of screening, which can be very important to ensuring the proposed project’s success. The failure to review and screen sufficiently investment proposals can lead to the acceptance of investors who might not have the necessary financial means, technical expertise or willingness to avoid or mitigate negative impacts through safeguards, thereby reducing the likelihood of a reasonable and sustainable project.

2.122. *Unsolicited bids.* Having identified particular land suitable for an agricultural project, investors may approach, on their own initiative, a government or local community to express interest in a grant of tenure and related rights to make an investment in that area or to go ahead and submit an initial investment proposal. An initial expression of interest should lead to the submission of an investment *proposal*. The investor’s proposal should reflect a range of information – including the investor’s financial situation and expertise (e.g. agricultural and management); the suitability of the land and feasibility of the project, including the local community’s views; and the proposed project’s alignment with development priorities in that State or community – in order to allow for further due diligence, screening and negotiations.

2.123. *Solicited bids.* A government and local community may issue a call for investment to solicit proposals from investors. *That* call should be made in a transparent manner, together with an identification of the selection procedure, which screens the proposals that are received in order to select the proposal that is most likely to result in a responsible and sustainable investment and culminate in the grant of tenure and related rights. For governments, such a call and selection procedure may be part of a tendering process.

2.124. *Applicability of tendering.* Tendering typically refers to a process through which governments invite proposals for projects, screen them and ultimately make a selection, typically resulting in the grant of tenure and related rights in the form of a concession agreement. The law applicable to tendering, as well as the

⁹⁴ See UPICC, Arts. 1.7 and 2.1.15.

⁹⁵ See, e.g., *Id.*, Art. 1.8.

⁹⁶ See, e.g., *Id.*, Art. 2.1.15, Comment 2.

specific processes, vary from government to government.⁹⁷ Tendering, moreover, has been more commonly used in other industries (e.g. infrastructure projects, extractives) and, despite increasing application to the agricultural investment context, unsolicited bids remain more common.

2.125. *Investor screening.* Regardless of whether an investment proposal is solicited or unsolicited, to the extent that proposal may move forward, it should be subject to screening. Although screening in a tendering process is likely going to be more detailed and the stages and criteria may vary, there are several common stages of screening. A first stage involves screening the investor's initial proposal, including by considering its alignment with development plans, the proposed site and the investor's financial situation and expertise (e.g. capitalisation, previous experience with infrastructure projects), as well as the initial views of any legitimate tenure right holders and local communities.⁹⁸ A second stage involves screening the investor's business plan and identifying due diligence requirements (such as impact assessments).⁹⁹ A third stage involves screening compliance with those requirements and ultimately concludes with the negotiation and signing of the contracts.¹⁰⁰ Various tools and guidance are available to those involved in the screening process, both in general¹⁰¹ and for agriculture¹⁰² and infrastructure¹⁰³ specifically.

2.126. *Importance of transparency.* Transparency and sharing of information is very important in the screening and selection processes, and there is a growing trend to make them more transparent. Where public information regarding such processes is lacking, it has the potential to harm relations between the investor and legitimate tenure right holders and local communities from the beginning.¹⁰⁴ Openness in these processes can help to avoid such harm and to combat corruption.¹⁰⁵ Information about the investor, impact assessments and mitigation plans, as well as any contracts and related *agreements*, should be made available to legitimate tenure right holders and local communities. The sharing of that information, including publication of contracts and related agreements, may be subject to the redaction of confidential information, which is addressed further in Chapter 3.V.B in connection with monitoring and reporting obligations.

B. Negotiations

2.127. *In general.* Negotiations involve two or more prospective parties who discuss and seek agreement on the terms which will regulate their relationship, including means for communication and notice, the various *rights* and obligations of the parties, mechanisms for monitoring compliance and plans for raising complaints and resolving disputes.

2.128. *Participation.* As a general matter, the negotiations should include not just investors and the owners of the land, in particular the prospective grantors (e.g. government or local community), but also – whether through invitation to negotiations or other consultation and engagement – any legitimate tenure right holders who use and have rights to the land for which tenure and related rights are to be granted. As a result, negotiations are inherently linked with the conduct of due diligence, including the *identification* of possible parties and stakeholders and the land and potential impacts (see Part IV above). All participants should have proper legal representation, including not just formal representation but counsel and advice, and access to the information generated by impact assessment and related due diligence exercises.

⁹⁷ See VGGT Technical Guide No. 4, p. 62, table 5 (showing an "Example of an investment approval process" including the various phases, outputs and approval authorities).

⁹⁸ UNCTAD, WB. 2018. RAI-KN into Action Notes No. 6, pp. 3-4.

⁹⁹ *Id.*, p. 4.

¹⁰⁰ *Id.*

¹⁰¹ See UNCITRAL. 2011. Model Law on Public Procurement; UNCITRAL. 2014. Guide to Enactment of the UNCITRAL Model Law on Public Procurement; and related guidance.

¹⁰² UNCTAD, WB. 2018; RAI-KN, No. 7.

¹⁰³ UNCITRAL. 2001. Legislative Guide on Privately Financed Infrastructure Projects, pp. 61 *et seq.*

¹⁰⁴ UNCTAD, WB. 2018. RAI-KN, No. 6, p. 3 (screening prospective investors); see generally UNCTAD, WB. 2018. RAI-KN No. 10 (public transparency).

¹⁰⁵ See generally OECD. 2016., Preventing Corruption in Public Procurement.

2.129. *Parameters and process.* To ensure that the negotiations are conducted in a transparent and inclusive manner, participants should generally agree on the process, including the location, language, and timing for meetings, as well as the overall timeframe. The negotiations may proceed in different ways with, for example, various phases of negotiations resulting in a sequence of contracts or more extended negotiations resulting in a comprehensive main agreement, both of which may also involve any *related* agreements with legitimate tenure right holders. As noted in Part V.A above, tenure and related rights granted by a government may be subject to a tendering process.

2.130. *Entire agreement.* As the negotiations and timeline for the investment may result in a series of contracts, some parties opt to include an “entire agreement” clause in the final contract in that series. Such a clause is meant to state that the parties’ entire agreement is reflected in the contract and, subject to its specific terms, operates to exclude any separate contracts and provisions. The purpose of such *clauses* is to enhance certainty and predictability with respect to the parties’ rights and obligations under the contract. To ensure that such clauses fulfil that purpose, they should be considered very carefully and, if used, the final written document should indeed reflect the parties’ entire agreement. In situations in which multiple contracts are used, the parties should similarly ensure that those contracts are coherent and consistent in order to minimise the possibility for misunderstandings and disputes.

2.131. *Key issues.* Two key negotiations issues in building the contractual relationship and forming the contract include (1) validity and (2) representation and assistance in negotiations. This section addresses each of those issues in turn.

1. Validity

2.132. *In general.* In seeking to ensure that the contract or series of contracts, as well as any related agreements, are valid and enforceable, the parties should be aware of validity requirements under the domestic or otherwise applicable law. The following briefly discusses common validity requirements.

2.133. *Capacity and consent.* The parties, whether natural persons or legal entities, must have legal capacity to enter into agricultural land investment contracts and related agreements and to consent to them. Domestic law provisions governing legal capacity are usually mandatory. The parties, moreover, must give valid consent at the time of contract formation. Consent defects and relative remedies are also governed by mandatory provisions of domestic law. In this regard, a potentially sensitive issue relates to *whether* all of the parties had a sufficient understanding of the contractual terms and their implications when entering into a contract or related agreement. Lack of informed consent may amount to a defect in consent (*e.g.* it may be interpreted as a mistake, either of fact or of law, or fraud, making the contract avoidable or allowing for other remedies). Because illiteracy and language barriers are common obstacles in this regard, the circumstances of the parties’ dealings – including, for example, whether contracts, agreements and related information were made available in a local language or whether there were facilitators to assist (see Section 2 below) – will play a determining role in assessing whether informed consent was indeed absent, what particular grounds can be invoked under the applicable law, and the consequences regarding the contract and the available remedies.

2.134. *Fraud and mistake.* With a view to building successful long-term relationships, good practice would recommend that the *parties* act in a transparent manner and provide each other prior to the conclusion of the contract or related agreement with information which is relevant not only regarding performance but also implications and risks. Contracts and agreements induced by mistake or fraud may also be voidable under domestic or otherwise applicable law by the aggrieved party. With respect to mistake, the erroneous belief must relate to the facts or the law existing at the time of contract formation, not to a party’s prediction or judgement about the future.¹⁰⁶ Thus, an incorrect judgement regarding, for instance, future production yields and related revenues does not give rise to a mistake rendering the agricultural land investment contract voidable. Moreover, the mistake must be of such seriousness (*i.e.* not immaterial or minor)¹⁰⁷ that

¹⁰⁶ See UPICC, Art. 3.2.1.

¹⁰⁷ See *Id.*, Art. 3.2.2.

enforcement of the contract as it would not be acceptable or the other party does not deserve protection because of its involvement in the mistake.¹⁰⁸ Similarly, with respect to fraud, a representation by one party may indeed be fraudulent if it is intended to lead the other party into error and thereby to gain an advantage to the detriment of the other party.¹⁰⁹

2.135. *Duress and undue influence.* Improper pressure during the negotiations in the form of threats, duress or undue influence may also render the contract void or voidable. Subject to the requirements of the domestic or otherwise applicable law, a threat that presents to the aggrieved party no reasonable alternative but to consent to the bargain could emanate from the other party or from an entity external to the negotiations.¹¹⁰ In some instances, economic duress or business compulsion may qualify as an improper threat. However, if the other contracting party is unaware of the improper pressure and has *acted* in material reliance upon the contract or related agreement, avoidance by the aggrieved party is precluded. Undue influence may arise in situations in which one party is under the domination of another or, by virtue of the relationship, it may be reasonably assumed that the aggrieved party had engaged in negotiations inconsistent with its own welfare. In the agricultural context, for example, situations in which the government seeks to grant tenure and related rights to land with the active support of the military but without the support of legitimate tenure right holders and the local community could undermine the contract's validity. Changing market conditions, for example, could in certain circumstances, lead to claims of economic duress. The party claiming duress must generally demonstrate that its acceptance of contract terms was involuntary, and that the circumstances provided no alternative and were the result of the other party's wrongful acts. Wrongful acts may include threats to deprive one of a livelihood, or threats to institute criminal or regulatory actions, in order to secure a private benefit. Claims are very context-specific, in terms of the domestic law (e.g. claims may be only for avoidance in some countries while in others, the judge may adapt the contract; in the case of gross disparity, the UPICC envisage both claims), the parties and stakeholders (e.g. what constitutes duress for a government will be much different than for a local community), and the particular circumstances of the land, proposed project and negotiations.

2. Representation and other assistance in negotiations

2.136. *In general.* As discussed in Part II above, different parties and stakeholders may be involved in the contract, have an interest in the project's operation, and be otherwise involved or affected. In the context of negotiations, it is important that the roles of the various parties, stakeholders and their respective *legal* counsel are understood and that any conflicts of interest be avoided (e.g. counsel for an investor also advising legitimate tenure right holders regarding their rights and interests).

2.137. *Consent and representation.* In connection with capacity and consent, those who represent the parties or stakeholders in *negotiations* must be properly authorised, including if they are to provide consent on behalf of others.¹¹¹ Depending on the requirements of domestic law, documentation typically designates the legal representative, describes the scope of the representative's authority and the manner in which the representative consults with and informs the tenure right holders represented (see Part IV.A above). The representative's authority should be clearly established, and investors in particular should be sure that those with whom they are negotiating properly represent and can provide consent on behalf of the other parties or stakeholders.

2.138. *Inclusivity.* Representation could be a sensitive issue for governments, local communities and legitimate tenure right holders. For government, it may not be clear which ministry, ministries or even level of government should be included in the negotiations and which one is empowered to consent to the contract.¹¹² In addition, whereas one ministry may be empowered to consent to the contract, that might not necessarily mean that another ministry will issue a required permit (see Chapter 3.V.B.1 regarding permits

¹⁰⁸ See *Id.*, Art. 3.2.2, and comments.

¹⁰⁹ See *Id.*, Art. 3.2.5.

¹¹⁰ See *Id.*, Art. 3.2.6.

¹¹¹ For general rules and commentary on the authority of agents and representation, see UPICC, Ch. 2.2.

¹¹² See VGGT Technical Guide No. 4, p. 27, table 4 (providing an overview of [g]overnment authorities and their potential roles).

and licenses). For legitimate tenure right holders and local communities, there may be customary rules, for example, that restrict the rights of women and youth to be involved and share their views in consultations and negotiations. Local communities, as another example, may be made up of various groups and members who do not share the same views on the project. The parties should ensure that all voices are represented in the consultations and negotiations process because the project's success will depend on the backing of a diverse range of stakeholders (see Part IV.A above).

2.139. *Investors.* In assembling a negotiation team, investors' legal counsel should include local counsel, which can provide valuable assistance navigating and interpreting the domestic legal system (see Chapter 1). Investors should be aware, however, that not all local counsel may be familiar with customary rules for *allocating* land and resource rights in all areas in that State and, in such instances, investors should engage other experts, including land tenure experts familiar with the investment area. Such experts could be key not only to supporting the investor's understanding, but also an ongoing consultation process.

2.140. *Governments.* In negotiating an agricultural land investment contract with an investor, the government should ensure that its negotiation team includes legal counsel representative of the various ministries and levels of government who may be involved in the transaction, including which entity and counsel leads the negotiations (e.g. Attorney General, development agency).¹¹³ There should be coordination across those ministries and levels, and a clear negotiating mandate, including the limits of that mandate, should be established. For such contracts, the government should work with the investors to ensure ongoing consultations with legitimate tenure *right* holders and local communities, whose involvement may be facilitated by the government or a public-interest legal service provider (e.g. NGOs or CSOs that provide legal services) and could result in those holders and communities becoming a party to the contract or a related agreement, or a third party beneficiary. For contracts between investors and local communities, the government can similarly support consultations and ultimately the negotiations. In both contexts, however, the interests of the government may not align with those of local communities, so assistance from a public-interest legal service provider may be preferable.

2.141. *Local communities.* Before entering into negotiations with an investor, a local community should ensure that its negotiation team includes legal counsel, absent which they may not receive sufficient advice on the process and proposed terms or could feel forced into signing contracts. In such situations a local community may receive support from the government or a public-interest legal service provider. In the lead up to negotiations, legal service providers can inform community members about their rights to FPIC, as may be applicable, and about impact assessments. Legal service providers can also help *members* of local communities to screen the investor, to arrive at a shared position on whether to accept or reject the investment, to develop the terms they want and to seek particular benefits. During negotiations, legal service providers can support a local community's consideration of the contractual terms as well as the impact assessments that inform the design of those terms. Such providers can also help a local community to make submissions in public hearings for permits and licenses and, if needed, for seeking judicial review of decisions in that regard. After negotiations are complete, legal service providers can ensure that the contract is written down in the form of a contract that can be enforced or voided according to domestic law. Legal service providers can also help to set up mechanisms and accounts for the management of any payments received from the investor, as well as oversight of those mechanisms and accounts.

C. Form, content and conditions

2.142. *Form.* Given the complexity of agricultural land investment contracts, such contracts should always take the form of a written agreement, either as a single comprehensive contract or a series of contracts relating to *various* steps in the investment process, generally in sequence. As a matter of good contracting practice, concise contracts are encouraged as a means to improve the clarity, completeness, enforceability and effectiveness of the parties' agreement. Care should be taken to reduce complexity where possible and to ensure that parties and stakeholders with limited literacy skills fully understand the terms.¹¹⁴ This in turn

¹¹³ *Id.*

¹¹⁴ See UPICC, Art. 3.2.7(1)(a).

promotes transparency, open communication and close collaboration, which are key tenets not only at the contract formation stage, but also throughout the contractual relationship.

2.143. *Content in general.* The widely recognised principle of freedom of contract provides that parties are free to enter into a contract and to determine its specific content.¹¹⁵ That freedom, however, is limited by mandatory rules (see Chapter 1), which may restrict party autonomy.¹¹⁶ It is in the parties' interest to address *issues* relevant to their contractual relationship in a complete and detailed manner, and a checklist of issues for them to consider is included in Annex 1.

2.144. *Content, interpretation and avoidance.* The parties' freedom of contract may also be overshadowed by the lack of economic freedom to negotiate specific terms or reject a lawful, yet economically unbalanced contract. There is a concern that non-negotiable contracts of adhesion are often drafted in the stronger party's favour. Accordingly, domestic rules on contract interpretation¹¹⁷ may entail that any ambiguity will *be* construed against the contract drafter.¹¹⁸ Conversely, where a literal-minded reading of a contractual term would give a party more than is reasonable with respect to the contract as a whole, the applicable law may permit a more liberal interpretation. In instances of gross disparity, when accepted by the applicable law, the affected party may avoid the contract or ask a court to modify it in accordance with reasonable commercial standards of fair dealing.¹¹⁹ Of course, the economic efficiency and the practical meaningfulness of *ex post facto* (i.e. after the fact has occurred) protection of the grantor through litigation is highly questionable in view of limited practical accessibility to the courts and, especially for local communities and legitimate tenure right holders, the discounted value of relief available (see para.135 above regarding duress).

2.145. *Conditions.* The parties may make their contract or one or several obligations arising under it dependent on the occurrence or non-occurrence of a future uncertain event. A provision to this effect is called a condition.¹²⁰ A condition may be imposed by law, such as a public permit or license requirement (e.g. water use). The parties may introduce a provision making the contract or their contractual obligations arising under it dependent upon a permit or license being granted, which qualifies as a condition. In general, there are two types of conditions of which parties should be aware: suspensive and resolutive conditions. For the former, the contract or contractual obligation is made to depend upon the occurrence of a future uncertain event, so that it takes effect only if the event occurs. In some systems, this type of condition is known as "condition precedent". For the latter, the parties to the contract agree that one or both of them may, under certain circumstances, have the right to terminate the contract. When a contract subject to a resolutive condition comes to an end as a result of the fulfilment of the resolutive condition, the parties will often have performed, fully or in part, their obligations under the contract. The question then arises whether and, if so, under which rules, the parties have to make restitution of what they have received.¹²¹

2.146. *Conditions and good faith.* Whether a party is under an obligation to use all reasonable efforts to bring about the fulfilment of a condition is a matter of interpretation. The parties themselves may expressly provide for the observance of the principle of good faith as regards all the events upon which completion of the transaction is conditional or go beyond this minimum standard and impose a duty to use "their best efforts to bring about the fulfilment of the conditions as soon as practicable". If this duty is breached, the available remedies (see Chapter 4 regarding the right to performance or damages) are determined in accordance with the contractual provisions, the particular circumstances of the case and the general rules

¹¹⁵ See *Id.*, Art. 1.1.

¹¹⁶ See UPICC, Art. 1.4.

¹¹⁷ For general rules on interpreting international commercial contracts, see UPICC, Ch. 4.

¹¹⁸ See UPICC, Art. 4.6.

¹¹⁹ See *Id.*, Art. 3.2.7.

¹²⁰ In some systems, "condition" means a major term of the contract but that is not the sense in which the term "condition" is used. A condition, moreover, is not what civil law systems call "terms", which designate the amount of time (or the precise date) during which the contract will be operative.

¹²¹ See, e.g. UPICC, Arts. 5.3.5, 7.3.6, 7.3.7.

on *remedies* that are applicable according to the law which governs the contract.¹²² A party who, contrary to the duties of good faith and fair dealing or cooperation, prevents the condition from being fulfilled may not rely on the non-fulfilment of the condition.¹²³

2.147. *Consequences of breach of required form or content.* Where the applicable law establishes particular form *and* content requirements, such law typically also specifies the consequences of non-compliance with such requirements. Breach of those requirements may result in various sanctions depending on the applicable law, ranging from avoidance of the contract as a whole to civil or even criminal penalties. Some systems may allow for revision of the contract by a court.

¹²² See, e.g. *Id.*, Art. 5.3.3.

¹²³ See, e.g. *Id.*, Art. 5.3.4.

CHAPTER 3 - RIGHTS AND OBLIGATIONS OF THE PARTIES

3.1. *Overview.* Agricultural land investments are often associated with promises of financial benefits, job creation, and infrastructure, and with reassurances about how any adverse impacts would be addressed in effective ways. All too often, however, reality has fallen short of expectations, leading to adverse impacts on livelihoods and the environment, and to disputes that delayed or even stalled project implementation. Depending on the context, addressing these issues may require fundamental changes to the ways in which investments are made – including, in legal terms, the nature of the contracting parties, the structure of the contracting process, and the extent to which those who stand to be most directly affected can shape the events. In this process, a key component of the proposed project's success is defining the parties' rights and obligations in any contracts and related agreements in a way that achieves the proper balance of the parties and stakeholders' interests.

3.2. *Contractual content in general.* The content of agricultural land investment contracts can have a bearing on whether any promises made are likely to be honoured. Broadly speaking, agricultural land investment contracts involve an exchange: the grantor allocates resource rights to the investor in return for certain commitments. Properly thinking through these commitments is an important step towards integrating the project's key parameters into its core contractual and institutional arrangements – as opposed to corporate philanthropy at the fringes. Well-crafted contracts can help ensure that the expectations of all actors are properly aligned, translate promises into enforceable obligations, and ultimately provide a more solid foundation for mutually beneficial investment.

3.3. *Role of domestic law.* In addition to the contract, the law applicable to the project – for example, domestic legislation on land, labour, tax and the environment – will also influence the rights and obligations of the parties. Compared to fully negotiated contracts, generally applicable law tends to be better suited to systematically address socio-economic issues across all relevant investments. This role of domestic law is particularly prominent with regards to setting minimum standards that all investments must comply with – for example, to respect land rights and comply with labour law. At its best, domestic law creates a level playing field for all comparable investments, reflects policy choices made through democratic processes, and establishes transparent and public terms.

3.4. *Supplementing domestic law.* In many contexts, however, contracts can play a useful role not only in giving effect to domestic law, but also in supplementing it. This is particularly the case where domestic legislation falls short of international standards, as the contract can require the investor to comply with international normative instruments. Circumstances may also require the parties to negotiate certain socio-economic obligations that are tailored to the nature of the investment – for example, with regards to any investor commitments to carry out specified processing activities in the country.

3.5. *Relationship between due diligence and applicable law.* The project's feasibility study and its social and environmental impact assessment, as well as consultation with legitimate tenure rights holders and other affected people including FPIC where relevant, should provide the foundations of any contractual provisions (see Chapter 2.IV). Generally applicable law affects the bounds of what the parties can negotiate,¹ and any contractual arrangements would need to comply with domestic law and be tailored to the particular legal context (see Chapter 1).²

3.6. *Roadmap.* The Chapter broadly organises the various rights and obligations set forth in agricultural land investment contracts and related agreements in accordance with the areas of law relevant to agricultural

¹ Besides any domestic law provisions having a bearing on this issue, the OECD Guidelines for Multinational Enterprises state that enterprises should "[r]efrain from seeking or accepting exemptions not contemplated in the statutory or regulatory framework related to human rights, environmental, health, safety, labour, taxation, financial incentives, or other issues" (OECD. 2011. OECD Guidelines for Multinational Enterprises, para. II (5)).

² VGGT, para. 12.8.

investment, including: (I) land tenure; (II) social and economic issues; (III) environment; (IV) protection of investment and regulatory autonomy; and (V) monitoring, transparency and compliance.

I. LAND TENURE

3.7. *Introduction.* Given that land involves issues that go beyond the simple question of investment, the rules relating to land tenure are generally established by the laws in force in the State in which the land is located (i.e. host State law). These rules, however, may not provide for all the details and sometimes do not address specific aspects. The investment contract is an important instrument for *addressing* these aspects in that it allows the parties an opportunity to recall or specify the legal rules and to ensure the accuracy of all details, absent which the investment could be compromised or otherwise give rise to disagreements or disputes. With respect to land tenure aspects, the contract should recall or specify rules or otherwise contain information regarding: (a) the location and description of the land; (b) tenure and related rights; (c) project development; and (d) duration and renewal.

A. Location and description of the land

3.8. *In general.* The land for which the tenure and related rights are to be granted for a specified period of time should be clearly and accurately identified in the contract (e.g. total size; boundaries; geospatial data). As that land may have been used not only by the grantor but also by others, there could be various holders of tenure rights with respect to that land. Locating and describing the land, in a transparent way, allows the parties and stakeholders to have a clear understanding of the land for which rights are granted.

3.9. *Identifying the land in the contract.* To locate and describe the land in a precise manner, the land should be identified by a clear delineation process involving both qualified professionals and the local community. The contract should indicate the acreage granted, the location where the granted area is located, and all *necessary* elements allowing for the land to be located easily. In some States, for example, there are defined plans for agricultural development by which the lands to be allocated are predefined and made available to investors by the government or local community, which in turn allocates the land to investors based on proposals, screening and the government or community's development objectives. In other States, as another example, the preliminary identification of the land may be a part of the application, in that investors specify the particular land in which they are interested and request tenure and related rights to it, and the government or local community then reviews that application. Under either approach, there are various processes that should be followed, including physical, legal and social processes:

- *Physical process:* Identifying the land is, above-all, physical, particularly by establishing boundaries or other physical markers. This delimitation process is subject to host State law, given the essential territorial nature of the matter. It is generally an operation carried out by an attested public official, typically a surveyor, in the presence of the investors and grantors, as well legitimate tenure right holders.
- *Legal process:* The delimitation should then be processed by an official representative, specifically through the materialisation of the land on a contractual document, which should be made available to the public (see Chapter 3.V.B). In States that do not have a land registration system, the contract is the only instrument of delimitation, thus it is important to identify clearly the relevant parcel of land therein. In those States in which land registration are the only means for identifying land rights, even if the land registers are legally recognised places of delimitation, it remains important to ensure the land is identified in the contractual documents to prevent different parties and stakeholders from having to refer to the those registers to find the coordinates of the land. Whatever mode of legal delimitation is used, it would be advantageous for the contract to reflect the land for which tenure and related rights are granted so that the parties and stakeholders can have a clear idea of the parcel of land.

- *Social process:* In identifying the land, any holders of legitimate tenure rights with respect to that land should also be identified, consulted and able to participate (see Chapter 2.IV.A above). Depending on host State law, such holders may have a right to be involved in these processes according to the procedures defined in that State's law but, even if not required, they should be involved generally if the process is to comply with international standards.

3.10. *Additional land.* The land for which rights are granted or to be granted may be part of a larger parcel with a high economic value to which the investor does not have immediate access. The parties, provided that a project is developing in a responsible and sustainable manner, may wish to expand that project. For various reasons, the parties may wish to consider whether the contract should address the possibility that the area of land may be expanded. Investors generally request broad portions of land, thus having an assured basis for the future extension of activities. Considering the possibility of a *contractual* clause regarding additional land, such as an option or preference clause, may help to ensure that a project does not take up more land than it can feasibly use and allows for (a) legitimate tenure right holders, if any with respect to that additional land, to continue using it and (b) the additional land to be granted only if the investment project is progressing successfully (see Section C below regarding project development). Such clauses, however, should not have the opposite result, specifically additional adjoining land being held for potential expansion of a project, thereby excluding legitimate tenure right holders from using it.

3.11. *Option clause.* With an option clause, the parties agree that the investment project can be expanded to additional land at the investor's option if, *inter alia*, the project has been developed in accordance with the business plan, the interests of any legitimate tenure right holders, key performance indicators, and the project's overall timeline. For such a clause, the parties should specify the type and timing of notice to be provided and the terms for the rights to additional land to be granted.

3.12. *Preference clause.* With a preference clause, which may also be known as a "right of first refusal" clause, the parties agree that the investor may have priority over all other applicants if the grantor decides to make available tenure and related rights to an adjoining parcel of land, provided that the investor pays additional rent or takes on other obligations (e.g. financial, economic or social). If the interests of all parties and stakeholders are taken into consideration and balanced, the clause may be a useful means of expanding a successful project. Such an option might also disincentivise the investor from trying to obtain rights to more land than it can feasibly use. Similar to an option clause, the parties should specify the procedure and the terms for the rights to additional land to be granted.

B. Tenure and related rights

3.13. *Overview.* The grant of tenure and related rights generally lays out how the investor may use the land, as well as any other resources (e.g. water, minerals and timber) and infrastructure, and how the investment project operates. In some agricultural land investment contracts, the grant of rights may be rather general, but parties are encouraged to negotiate carefully the grant of rights and to specify the various rights in the contract as the failure to do so often gives rise to conflict between investors, grantors and legitimate tenure right holders. Because there may be such holders with respect to the land for which tenure and related rights are granted or to be granted to an investor, it is essential that the due diligence conducted with respect to those rights and possible impacts (see Chapter 2.IV) be taken into consideration. As a safeguard for such holders, the parties may expressly grant, withhold or reserve rights for legitimate tenure right holders (e.g. for continued access to the land for passage, water, pasturing or collection of fruits) – either as parties to the contract or a related agreement or as third party beneficiaries (see Chapter 2.III.B) – in order to ensure protection of and respect for those holders' rights.

1. Tenure rights

3.14. *In general.* In granting tenure rights (e.g. rights of possession, use, and access), the parties should consider not only land aspects, but other resources and any existing facilities or ones that may be built for the project. Being more comprehensive in this regard may help to prevent misunderstandings, grievances and possible disputes.

3.15. *Land use.* The contract should state when the land is to be made available to the investor, the type of investment or activity for which the land has been granted, and the permitted uses of the land, including construction of facilities on that land itself. Once specified, the conclusion of the contract generally has, together with obtaining any necessary permits and licenses (see Chapter 3.V.B.1), the effect of granting the investor the right to possess and use the land for agricultural activities. The investor *typically* holds those rights of possession and use throughout the contract's duration, provided that the limits of that grant of rights are respected and the parties fulfil their other obligations (see Part V below). The rights of possession and use should take into account the rights of any legitimate tenure right holders, for example, by being limited in certain ways (e.g. through a grant of rights to such holders in the contract – either as a party or a third party beneficiary – or by withholding rights to safeguard those holders).

3.16. *Land access and control.* When tenure and related rights in land are granted temporarily to an investor – and the land is not sold to the investor – the investor's rights are limited by the right of the grantor to make sure that the investor's access and use does not infringe certain fundamental rights. The grantor has an interest in knowing if the investor is meeting its commitments regarding the manner in which the land is used (e.g. whether the investor is respecting use constraints or growing the agreed crops). It is thus important for the contract to define rights of access, including the right of the grantor or possibly others to inspect the land (see Part V.C).

3.17. *Rights to other resources.* The contract should address the extent to which the investor can use other resources in the project area, including resources above ground (e.g. timber), resources below ground (e.g. oil, gold) and water, as well as fisheries. In some instances, broad grants of rights to investors have unknowingly or mistakenly included broad rights to resources on the land, which can lead to *negative* impacts on local communities who might need those resources or on the environment (e.g. extraction of oil). Grantors should ensure that only those resource rights that are intended to be granted are indeed conveyed to investors.

3.18. *Resources above ground.* The contract should specify the investors' rights to use resources above ground, including forests, which may still be used by legitimate tenure right holders for hunting or other sources of food and livelihoods. Use of forests for timber, in particular, is an issue that the parties should consider and, if applicable, address in the contract consistent with domestic law. Indeed, some *purported* agricultural investments have actually served as a means for investors to gain access to forests, which can then be harvested to sell the timber for significant profits. Considering timber issues can prevent such situations and allow the parties to specify in the contract whether an investment project may use timber found in the investment area for facilities or other purposes.

3.19. *Resources below ground.* A general grant of rights to land might create confusion with respect to rights to underground mineral resources (e.g. oil, natural gas, metals), which may be very valuable and the extraction of which can generate negative impacts. In some States, all resources below ground belong to the government, whereas in others, they belong to the owner of the land above. In all instances, the contract should address for clarity rights with respect to underground mineral resources. One option is to include an exclusion clause specifying that the grantor reserves all rights with respect to such resources and stating the modalities of notice and compensation for loss of land due to exploitation of such resources. If the parties intend to allow for investors to extract resources below ground in connection with an agricultural investment, safeguards should be put in place (e.g. for legitimate tenure right holders, local communities and the environment).

3.20. *Water.* Water is essential to agricultural production, and the project's use of water can have significant impacts on legitimate tenure right holders, local communities and the environment. Where the grantor is a *government*, which has responsibility for governing natural resources, the contract should (a) specify the extent of the right of use of surface water, ground water or both according to the needs determined by the project's feasibility studies and impact assessments (see Chapter 2.IV.B); and (b) indicate the modalities of water usage, the necessary quantities, and specify the corresponding fees, procedure for adjustments and protections that must be in place (see Part III.B regarding water protections). Where the grantor is a local community, that community might not have responsibility for water governance, yet the

parties should consider the water sources and quantities to be used in the contract in order to minimise confusion and avoid grievances and disputes with members of that community.

3.21. *Rights withheld.* The parties should consider whether the grantor would like to continue using the land in certain ways or having access to it. The parties should similarly consider how any legitimate tenure right holders or local communities are using the land in question, whether before an investment project is undertaken or as part of an existing project. In consultation with such holders and communities, the parties can expressly withhold or reserve certain rights in the contract to safeguard for particular uses (e.g. growing crops in a specific area) or access (e.g. passage, access to water, fisheries or pasturing) by those holders and communities. Another option would be to grant these particular rights to those holders and communities (i.e. in the contract or a related agreement with them as a party or as third party beneficiaries). Respecting legitimate tenure rights in this way can help to ensure the project's smooth operation and to minimise or avoid any negative impacts.

3.22. *Facilities.* In granting rights of use, the parties should contemplate how any existing facilities are to be used or whether they may be removed, as well as whether the investor will have rights to construct new facilities. For existing facilities, the parties should consider installations or buildings, such as those that might hamper use of the land or that are being used by legitimate tenure right holders, and specify any rights of use and any rights withheld with respect to those facilities, as well as issues of maintenance. With respect to building rights, the parties should consider any facilities that may need to be constructed for the project, including any rights of use, rights withheld and maintenance responsibilities. Facilities may need to be built, for example, for processing of the agricultural production, which could in turn create jobs for legitimate tenure right holders or local communities (see Part II.C regarding local content and processing). The parties should also consider how the various facilities may be transferred or returned (see Chapter 5).

2. Grant of related rights

3.23. *In general.* Related rights are those that are not directly linked to the land for which tenure rights are granted, but those which are necessary to consider and address for the project to function. Such rights may include rights, *inter alia*, (a) to access utilities; (b) to use and build infrastructure; and (c) to import goods, *export*, transport and market production.

(a) Access to utilities

3.24. *In general.* The parties should consider how the investment project will access water and electricity and process any waste that is generated and whether any related rights are needed in this regard (e.g. to construct electrical lines or pipes to access local utilities systems). In doing so, the parties should similarly consider how much water and electricity the project can use, as well as how much waste it is expected to produce.

3.25. *Utilities clauses.* The parties should consider rights to essential utilities, such as water and electricity, which may involve the investor's use of public or private water and electrical systems. The contract could contain clauses relating to:

- The installation of passage ways necessary to access the project site, the installation of water pump systems, electricity networks or water supply pipes;
- The modalities of passage of water supply pipes; and
- The installation modalities of channels or any element necessary for a better operation of the project in accordance with the feasibility studies and impact assessments.

The parties should ensure that the contract contains any needed clauses to provide relevant information or specify ways of overcoming difficulties. Indeed, the local water or electrical systems, may not offer solutions to cover all the difficulties and could hamper the investment activity, in which case these issues should be clearly regulated in the contract. In some instances, water or electrical systems may need to be installed across adjoining land in order to those utilities to reach the project area, or the systems may generally be inadequate. Where such access is needed or the systems are inadequate, the parties should also contemplate

these issues and provide solutions in the contract as necessary. Building and improving infrastructure, moreover, is dealt with in greater detail in the following section.

(b) *Infrastructure*

3.26. *In general.* Access to adequate infrastructure plays a critical role in the sustainability of an agricultural investment. Infrastructure includes both general infrastructure (e.g. public roads and water, electricity and waste utilities) and investment-specific infrastructure (i.e. that which is built to support the investment project). If an investment serves as an impetus for infrastructure improvements, whether of a general or investment-specific nature, those improvements can benefit local communities if properly planned, constructed and managed. The contract should address the rights and obligations of the parties with respect to existing infrastructure and to the construction of new infrastructure, though the extent to which they can be addressed may depend on the grantor. If the grantor is the government, for example, the parties could likely consider infrastructure needs and uses extensively, because the government generally maintains responsibility for infrastructure and public works, whereas a local community might not have such responsibility. In the context of contractual negotiations, the feasibility studies and impact assessments should inform the parties' needs in this regard, including to protect and respect the rights of any legitimate tenure right holders.

3.27. *Existing infrastructure.* The parties should endeavour to put to effective and good use existing infrastructure systems (e.g. roads, water, irrigation, waste), whether those systems are publicly or *privately*-held. At the same time, parties should be cognisant of how that use will impact that infrastructure and its current users and seek to avoid or minimise any negative impacts. Accordingly, the investors' rights of use should be defined with respect to specific sets of infrastructure, such as the quantity of water that the investment can use or maximum weight of trucks that may use particular roads. In addition, the parties should consider, if needed, whether and how improvements could be made to existing infrastructure.

3.28. *New infrastructure.* The investment project may require new infrastructure to be built to function properly. The right to build should be clearly defined in the contract in a manner that addresses any necessary limitations and safeguards. Parties should identify who owns any newly constructed infrastructure (e.g. the investor, government or local communities), including whether a co-ownership structure could be agreed. The ownership rights should be defined to specify the owner, the duration of ownership, and the circumstances in which ownership may lapse. Where the infrastructure is to be co-owned, it is essential to settle on the legal vehicle (e.g. company, cooperative, trust) for that co-ownership. As ownership may not be indefinite and could revert with end of the contract, the parties should address issues of ownership with respect to transfer (e.g. to a new investor), reversion of the land at the contract's end or upon termination. In some situations, it may be necessary to offer compensation to the investor for infrastructure-related investments on compulsory acquisition, reversion or termination. Other matters to be considered include the potential need for land acquisition in connection with that construction (see Chapter 2.IV.B.1) and the requirement to use local content (see Part II.C below), the importation of equipment whether wholly or partially, and the corresponding obligations with respect to the maintenance and repair of the infrastructure.

3.29. *Maintenance, repair and fees.* The parties should consider maintenance, repair and fee obligations with respect to infrastructure. For government-owned infrastructure, the government could charge fees to cover, *inter alia*, maintenance and repair costs for the provision of that infrastructure. Where commercial rates are applicable for electricity, water, and other supplies, they ought to be well defined for the investor's information and considered in connection with the investor's business plan. The parties may wish to consider whether fees could be waived by the government in exchange for a commitment by the investor to invest in infrastructure. Private-sector infrastructure financing may involve the charge of user fees to cover investment, operations and maintenance costs. It may be advisable, for example, to charge fees for use of the infrastructure and to use all or part of those fees to hire local employees to maintain and further develop the infrastructure. Capacity development and training in infrastructure operations and maintenance should also be included. When agreeing to the construction of new infrastructure, the parties should also agree on responsibility for the maintenance and repair of such infrastructure.

3.30. *Access rights.* In addition to defining the rights of the investor and grantor, the parties should consider the rights of legitimate tenure right holders and local communities to existing and new infrastructure (e.g. to travel on an existing or new road that would be within the project area; to use water resources). As needed, the parties should ensure that those rights are incorporated into the contract, whether the legitimate tenure right holders and local communities are party to the contract or a related agreement, or are third party beneficiaries (see Chapter 2.III.B).

3.31. *Third party financing.* Third parties such as development funds focused on promoting responsible agricultural investment may provide capital for infrastructure development, subject to certain requirements. The *rights* and obligations of any third party financiers should, like that of the overall investment project, be properly aligned with the project's responsible and sustainable investment approach.

3.32. *Development obligations and social infrastructure.* Infrastructure construction and improvements may be just one part of broader project development and social infrastructure clauses. For the former, the infrastructure aspects of those clauses could also be subject to key performance indicators (see Section C below). For the latter, the contract may contain a clause requiring the investor to build or otherwise support what is known as social infrastructure, such as contributing to the development of a school or hospital for the local community (see Part II.E below).

3.33. *Monitoring and compliance.* Infrastructure-related obligations, as with other obligations under the contract, should be monitored and subjected to compliance checks, including with respect to acquiring and maintaining the necessary permits or licenses (see Part V). The parties should consider the permits or licenses from governmental authorities, organs, and administrative bodies (e.g. environmental authorities, roads management authorities, planning and construction departments, public works departments) that may be needed and specifies those needs in the contract for clarity. Subject to compliance with the permit and license requirements, the process should be handled in a timely manner, and the permits and licenses should not be unreasonably withheld. To achieve a level of certainty in this regard, the parties should outline all prerequisites and future obligations associated with the receipt of permits and licences.

3.34. *Liabilities, non-performance and dispute resolution.* Parties should clearly define the bearer of liabilities and the indemnifications involved for the infrastructure. Where necessary third parties bear liabilities and indemnifications, they should be involved in the contractual phases. Insurance for specific sets of infrastructure needs to be settled, and the responsible parties identified. A party's failure to meet its contractual obligations with respect to infrastructure may give rise to a breach of contract and a remedy for the aggrieved party or it may be excused (see Chapter 4). In order to promote a sustainable relationship, the parties should consider potential non-performance situations that could arise in connection with the various infrastructure rights and obligations and address them in the contract. Similarly, the parties should consider mechanisms to resolve disputes relating to shared infrastructure (see Chapter 6).

(c) *Import, export, market access and transport*

3.35. *In general.* Consideration of import, export, market access and transport issues are important to ensuring an investment project's success by allowing, *inter alia*, the necessary inputs to be obtained for establishing the agricultural production and for transporting and ultimately getting that production to market for sale. If the grantor is the government, the parties could likely address these issues in detail, because *the* government generally has responsibility for such issues, whereas a local community might not. Where the grantor does not have such responsibility, the parties could discuss them with a government representative and should nevertheless consider the extent to which the applicable domestic law could be clarified with respect to these issues.

3.36. *Import.* The contract should specify ways of sourcing seeds and other imported goods (e.g. equipment and materials). Investors typically require equipment and machinery, which is often imported. The duty costs may constitute a serious obstacle to its activity. Most governments seeking agricultural land investments have specific legislation for facilitating importation, exempting investors' operations from duty tax, and the issue should be considered during contract negotiations. Accordingly the parties may wish to address it as early as the negotiation phase and to include the points of agreement in the final contract document.

3.37. *Export.* Some domestic laws may establish incentives or other means for facilitating the export of agricultural products from investors operating within that State, generally through an investment incentive law. When such incentives or other means are not provided for by law, it is advisable for investors to *negotiate* with the government the export conditions for the products of their activity, which generally has responsibility for investment incentives and other means (e.g. taxes). In the context of that negotiation, the parties should specify in the contract particular limits or limitations on export if a food security situation were to arise (see also Chapter 4.II regarding excuses for non-performance).

3.38. *Market access.* What often poses a problem is access to local markets in light of restrictions that apply in some States. Although rights to land may be granted to agricultural investors, those investors may be denied access to local markets in order to protect local producers. This is not a problem for *investors* that are only interested in places to grow their products with a pre-determined, foreign market. Market access restrictions, however, may be detrimental to investors that do not have one. It is important for the parties to take market access interests into consideration to ensure an end market for the agricultural production.

3.39. *Transport.* The parties should consider transport-related issues, in particular the means (e.g. road, rail) by which the investment project's production is to be delivered to markets and to warehouses and ports for distribution and, if necessary, export, as well as related costs. Transport rights should be specified in the contract, together with any infrastructure commitments in this regard (see Section 2(c) above *regarding* infrastructure).

C. Project development

3.40. *In general.* Agricultural land investment contracts typically grant the investor the exclusive right to conduct specified commercial agriculture operations within the designated land area. However, the contract can provide that members of the communities living on or around the concession still have the right to use certain resources consistently with traditional custom and practice, or to conduct agricultural activities on unutilised lands. Investments that are not duly implemented can frustrate expectations and create opportunity costs – because the land could have been used for other *purposes*, or other operators could have better developed the same project.

3.41. *Grantors' interest.* Therefore, grantors have an interest in discouraging speculative acquisitions and establishing clear milestones and timelines for project implementation. Some grantors also wish to *regulate* the nature of land use activities in order to pursue certain goals. Where the grantor is a public authority, for example, it may wish to specify the crops the project will produce, as part of a public policy to meet domestic demand for a given commodity.

3.42. *Establishing parameters.* In allocating rights to resources, agricultural land investment contracts should also establish clear parameters for project implementation. Well-crafted clauses require the investor to implement the project according to a specified development plan, and they establish clear timelines for compliance as well as sanctions for non-compliance. This may include, for example, clauses that set quantitative targets to incrementally expand the cultivated land area or build and operate a processing facility.

3.43. *Targets.* For these provisions to be effective, they should complement any input-based targets (e.g. on capital contributions) with output-oriented ones (e.g. based on volume or sale value of production). *The* targets should be aligned with the findings of the feasibility study and the content of the investment's development plan (see Chapter 2.IV.B.1). Further, the clauses should be assisted by commensurate reporting requirements (see Part V.A.2), where relevant by performance-related bonds or other means to promote compliance (see Part V.B.3), and powers for the grantor to carry out inspections and sanction non-compliance.

3.44. *Compliance timeframes.* Some domestic land laws provide that investors only acquire tenure and related rights if they comply with certain project development commitments within a specified period of time (e.g. two to five years). Such provisions respond to a policy objective to promote productive land use. But they tend to be a blunt instrument for long-term investments the duration of which vastly exceeds the statutory period. In these situations, the contract should identify implementation milestones, timelines and

reporting requirements, as well as sanctions for non-compliance, throughout the duration of the project (see also Section D below regarding duration and renewal).

3.45. *Implementation issues.* Depending on the nature of the investment, additional provisions may be needed to address implementation issues that arise in the final phase of the project. In an agroforestry plantation where tree ownership is transferred to the grantor at contract expiry, for example, arrangements may be needed to ensure that towards the end of the contract the investor has continued incentives to manage the farm sustainably, including through ongoing replanting. Project closure also raises distinctive issues that, depending on applicable domestic law, may require devoted contractual provisions (see Part III.B).

3.46. *Indicators of performance.* In addition to quantitative targets, project development clauses should also provide qualitative indicators of performance. Many contracts only do so in very general terms, for example by requiring the investor to adhere to “good farming practices”. While potentially helpful in manifesting the parties’ expectations, such clauses raise questions about their precise meaning and implications. The more effective clauses link qualitative performance indicators to specified international standards whenever these are available.

3.47. *Incentives.* Besides sanctioning non-compliance with key project development targets, some contracts also create incentives for the investor to comply with desirable parameters. For instance, some clauses condition certain benefits to the investor’s meeting the relevant targets within deadline. One example of relevant benefit would be favourable consideration of any investor requests to extend the project area, or the duration of the contract.

3.48. *Coordination with other provisions.* Project development clauses need to be coordinated with other relevant contractual provisions. Duration and renewal clauses, if used together with project development clauses, should be consistent (see Section D below). Escape clauses should deal with situations in which the investor does not comply with the agreed development plan due to certain events materialising (see Chapter 4.II.A regarding force majeure). Other relevant clauses partly depend on the objectives that underpin the project development clauses. For example, if the grantor wishes the contract to specify *the* nature of permitted economic activities (e.g. the crop produced) in order for the project to help meet local demand for a given commodity, the contract should also regulate the terms under which the investor can export the produce. In addition, the parties should take into consideration in their negotiations related matters such as monitoring (see Part V below) and the various remedies for breach by the investor (see Chapter 4.III.C).

D. Duration and renewal

3.49. *Duration in general.* The optimal duration of a grant of tenure or related rights to land may depend on various factors, such as the particular circumstances of the investor and the grantor, how the investment would *affect* the rights of legitimate tenure right holders, the crops to be planted, current and expected market prices for those crops and the time needed for the investor to repay its debts and amortise the initial investment. For example, certain nut trees (e.g. for pistachios or pecans) take more than five years, or even longer, from the time of planting to achieving levels of commercial production. In such situations, restricting the duration to a very short period might prevent responsible agricultural investments in such crops. Some legal frameworks contain certain statutory limits that the contract must follow. Absent those limits, it is generally the contract that establishes the duration, as well as the terms for renewal.

3.50. *Statutory duration.* The laws of some States contain provisions restricting the overall duration of grants to tenure and related rights to State-owned land to a certain number of years or establishing an initial limit at the end of which a project can be assessed and the duration extended. Such restrictions, for example, may establish a general limit for all concessions (i.e. where the government is the grantor) or *specific* limits for projects in particular sectors, such as agriculture, in order to avoid the land being reserved without use and to monitor for negative impacts. Although a statutory limit may be rather short (e.g. five years), such limits vary. If one is in place, the parties, in following applicable law, are to comply with that limit and should refer to it in the contract for clarity.

3.51. *Contractual duration.* As long as the duration of the grant is consistent with domestic law, the parties are free to determine the duration in the contract, which will differ based on various circumstances. In *practice*, some may both reach 99 years and be renewable, though such extended terms may effectively constitute sales and are thus inconsistent with the Guide's purpose and scope. The parties are advised to establish in the contract a sufficient duration taking into account any applicable law, the production cycles and types of activities in order to allow full debt repayment and to achieve a sustainable and responsible investment. The parties should clearly define the investment's duration, consistent with domestic law and any project development (see Section C above) or periodic review (see Part V.C below) clauses. The duration should be indicated by start and end dates. The start date – in other words, the day the contract takes effect – may, for example, be the date on which all of the parties sign the contract or the date when certain conditions have been fulfilled (see Chapter 2.V.C regarding conditions).

3.52. *Renewal in general.* At the end of the applicable duration of the grant of tenure and related rights, the contract either ends (see Chapter 5.II) or is subject to renewal in accordance with the contract's terms. In practice, the end of such contracts typically does not mean the end of the activity, which may have become significant and sustainable. In preparing the contract, the parties can anticipate potential difficulties relating to the end of the contract's duration and perhaps avoid protracted renegotiations by including a renewal or extension clause. With such clauses, the parties can set out both the process and requirements for renewal and extension. For the process, the parties should specify how and by when *the* parties should provide notice to one another of an intention to renew or extend the contract, how long that renewal or extension might last, how many times the contract can be renewed or extended, and whether any of the other contractual terms (e.g. rental fees) would be different during the renewed or extended period. For the requirements, the parties should consider making renewal or extension contingent on satisfaction of all of the contractual obligations or on the basis of specified key performance indicators.

3.53. *Renewal and return.* If some of the granted land remains unused at the time of renewal and is unlikely to be used, the tenure and related rights to that particular portion could be returned to the legal and *legitimate* tenure right holders (see generally Chapter 5). The expiration of an initial limit, however, should not be used as a means for the government to retake control of a successful project (see Part IV.A below).

3.54. *Renegotiations.* If the parties do not include a renewal clause or that clause does not anticipate a particular issue that arises, the parties' desire to extend or renew a contract may involve renegotiations. Those renegotiations should be conducted in good faith and in a timely and inclusive manner (see Chapter 2.V.B) in order to avoid protracted negotiations and disagreements and ensure that the agricultural investment remains productive, sustainable and responsible.

II. SOCIAL AND ECONOMIC ISSUES

3.55. *Introduction.* This Part discusses the contractual provisions that determine the rights and obligations and rights of the parties in social and economic matters. While recognising the interrelatedness of different legal *instruments*, and the role of domestic and international law in setting investment-related rights and obligations, the analysis focuses on contractual arrangements. Two caveats are in order.

- *The issues covered are vast and complex, and contractual practice differs widely:* Such variation reflects diversity in the relevant commodities, the business configurations, applicable law and other contextual factors. For example, the contractual provisions that determine the rights and obligations of the parties in social and economic matters will differ considerably depending on whether the business involves a long-term lease, a joint venture or a processing facility that primarily sources from small-scale rural producers. Contracting parties also often have different preferences. As a result of this complexity and diversity, the discussion is inevitably synthetic: the aim is to identify key issues to bear in mind, rather than providing detailed guidance.
- *While to achieve greater clarity the section discusses different issues separately, in practice those issues are often closely interlinked, and trade-offs can arise between different potential areas:* For

example, investor obligations to develop social or public infrastructure could have reverberations for the financial package – in effect, with the parties agreeing that part of the economic benefits are provided in kind rather than in the form of revenues. These trade-offs require considered choices, and contracting parties may legitimately take different approaches. However, domestic and international law sets parameters the parties cannot derogate from, for example concerning respect for human rights. These parameters limit the discretion of the parties as they negotiate the contract.³

3.56. *Roadmap.* This Part considers those practices, issues and trade-offs that can arise with respect to not only social and economic matters specifically, but to agricultural land investment contracts more generally. In doing so, it addresses possible contractual provisions and related guidance with respect to: (a) monetary *contributions*; (b) employment creation, access to jobs and labour rights; (c) local content and processing; (d) contract farming, outgrower schemes and supply chain relations; and (e) community development funds and social infrastructure.

A. Monetary contributions

3.57. *In general.* Monetary contributions are one possible type of economic consideration in agricultural land investment contracts. They can take different forms, depending on the nature of the contract. Land rental fees are a common type of revenue stream. They can be calculated based on a flat rate, which the investor must pay to the grantor irrespective of project performance (fixed-income models); as a share of production or *profits* (revenue- or profit-sharing models); or as a combination of both fixed-income and revenue sharing components. In joint ventures, the grantor may be entitled to dividends from the joint-venture company. Depending on the circumstances, other monetary contributions may also apply to relations between the investor and the grantor.

3.58. *Revenues.* In addition, the investor will in most cases be required to contribute revenues to public authorities. This may include fees related, for example, to water abstraction and to environmental and other permits. *It* also usually includes taxes such as corporate income tax and duties on the importation and exportation of inputs and produce. Where the government is the grantor, these multiple revenue streams – from land rental fees to taxes – are folded into the same financial package.

3.59. *Domestic law.* Domestic law tends to play a prominent role in governing monetary obligations. This is particularly the case for taxation: even where the government is the grantor and the contract deals with tax issues, domestic legislation will determine important parameters. In some jurisdictions, domestic law *also* regulates non-tax payments such as rental fees – including mechanisms to determine their amount, payment modalities or periodic revisions.

3.60. *Contractual provisions.* In spite of this role of domestic law, agricultural land investment contracts often do contain *provisions* dealing with monetary obligations. These provisions can help clarify applicable payments as determined by domestic law. They can also enable the parties to tailor their rights and obligations to the specific circumstances of the project. When it comes to taxation, however, applying domestic law – rather than negotiating tailored fiscal regimes – creates a level-playing field, increases transparency, and reduces room for corruption. And while many contracts do provide exceptions from generally applicable tax law, it is widely recognised that the contract should not grant exemptions that are not contemplated by domestic law.⁴

3.61. *Various solutions.* There is no one-size-fits-all solution when it comes to designing monetary obligations. Commodity sectors and domestic jurisdictions differ, and the contracting parties may have different preferences. Where the grantor is a public authority, wide-ranging policy issues may be at stake beyond revenues alone. For example, water fees could affect incentives for the investor to use water

³ UN. 2015. Principles for Responsible Contracts Integrating the Management of Human Rights Risks into State-Investor Contract Negotiations.

⁴ OECD. 2011. Guidelines for Multinational Enterprises, para. II (5).

efficiently. This circumstance calls for integrated consideration of both monetary and non-monetary *dimensions*.

3.62. *Trade-offs and need for expertise.* Different combinations of revenue streams may lead to different results in terms of distribution of revenues over time, sharing of risk between the parties, and ease of revenue *collection*. The resulting trade-offs need to be addressed through informed choices that reflect the specific context and the parties' preferences. Lawyers may not have the training or expertise to handle these difficult issues. Therefore, financial modelling and economic expertise are necessary to inform contract negotiations.

3.63. *Fixed-income methods.* Compared to revenue- or profit-sharing models, for example, fixed-income arrangements tend to be easier to administer, and are often more transparent. They also provide the grantor with an income irrespective of investment performance. Revenue or profit sharing tends to be more risky for the grantor because payments depend on successful production and sale. But these risks vary depending on whether sharing arrangements are based on profits or gross revenues.

3.64. *Profit sharing.* Profit sharing tends to be particularly tricky – because the venture may not be profitable during the period necessary to recoup the investment costs, and because of the risk of profit shifting. Where the sharing is based on gross revenues rather than profits, payments would be linked to turnover *irrespective* of profitability. In successful projects, forms of revenue sharing could enable the grantor to receive greater income over the project duration. Some contracts combine use of both fixed-income and revenue-sharing streams.

3.65. *Joint ventures.* A stake in a joint venture company could enable the grantor not only to receive dividends, but also to have representation in the company's board of directors – and with that, access to information and possibly influence over management. However, dividends depend on the company's *profitability*, and empirical studies on agriculture-related community-investor joint ventures have pointed to limited effectiveness of board representation or lack of dividend payments in some cases. Joint-venture arrangements are inherently complex. As such, they require careful thinking through and targeted measures to address imbalances in the information, resources and capacity of the parties.

3.66. *Timing and form.* In addition to the amounts due, the rights and obligations of the parties would also determine the time and form of monetary contributions, including interest accrual on late payments. Where the grantor is a state, the contract covers tax matters and domestic legislation does not adequately deal with *abuse* of transfer pricing,⁵ the contract should establish safeguards to ensure that taxes due are indeed paid – including by requiring transactions between the investor and affiliated companies to be at an arm's length basis, and the investor to keep and disclose accurate contemporaneous data and records.

3.67. *Capitalisation.* To ensure that the investor has adequate resources to operate the investment and shoulder any associated liabilities, the more effective contracts also require minimum levels of capitalisation – that is, the amount of own capital that a company has for its operations. For example, the contract *may* provide that the ratio of the investor's debt to equity must not at any time exceed a specified value.

3.68. *Link with periodic review.* Further, contractual clauses should also provide for periodic revisions of the parties' monetary obligations. Periodic review clauses are particularly important in long-term projects, to adjust payments to changing economic circumstances and ensure the continued relevance of the financial package (see Part V.B.5 regarding notice and periodic review). The more effective clauses specify the timing of the period reviews, require the parties to negotiate revised payments in good faith, and identify

⁵ Transfer pricing refers to pricing in transactions that occur between companies belonging to the same business group ("affiliates"). Transactions may include the sale of goods such as inputs or produce; the supply of services such as construction, management or marketing; the licensing of intellectual property rights such as patented technology; or loans between the local subsidiary and other companies belonging to the same business group. In large groups with many subsidiaries, these intra-corporate transactions are part of ordinary business life. But transfer pricing offers opportunities for tax avoidance. Every cost that the firm allocates to operations in the host country has the effect of reducing the tax base in that country. And by manipulating prices for goods, fees for services, royalties on patents, or interests on loans, the investor can shift profits away from the locally incorporated company to affiliates located in jurisdictions where taxation is lower.

arrangements to determine revisions if the parties cannot agree – for example, through determination by an independent expert jointly appointed by the parties.

B. Employment creation, access to jobs and labour rights

3.69. *In general.* Jobs are often one of the most prominent benefits that investors promise. Yet many agricultural land investments have failed to live up to the expectations they created, and jobs cannot offset loss of land. Indeed, *depending* on the context, land and natural resources may confer collective benefits to rural people, while jobs typically involve opportunities for individuals. It is often impossible for investments to provide jobs to all those who lose land.

3.70. *Importance of quality jobs.* Further, land transfers typically involve the loss of a permanent asset, but jobs are often seasonal, limited to a specified period of time (e.g. in the construction phase), or subject to *changes* in economic conditions. And while emphasis is often placed on the number of jobs the project would create, jobs can only be beneficial if quality is assured in employment conditions and labour rights are upheld.

3.71. *Purpose of employment provisions.* Contractual provisions governing employment aim to ensure that promised benefits materialise. They are more commonly used in contracts where the grantor is the government or a public authority. But they are also often found in contracts concluded directly with local *communities*. Contractual clauses often cover three interrelated issues: employment creation; access to jobs; and labour rights and employment conditions.

3.72. *Employment creation.* It is often difficult to predict the precise number of the different types of jobs that the project will create over its duration – not least because external and not always foreseeable economic factors can have significant impacts on the project. Contracts alone cannot ensure the creation of jobs *that* are difficult to sustain in economic terms. As a result, job creation commitments are often hard to translate into specific contractual clauses. That said, contractual practice has emerged that seeks to address these issues.

3.73. *Job targets.* In some contracts, the investor “declares” that it “envisages” employing a given number of people. While such a formulation does not create enforceable obligations, inserting figures in the contract can help clarify the shared expectation of the parties and provide a useful reference for project *monitoring*. One alternative is for the contract to create more specific commitments on the part of the investor to employ specified numbers of people, and establish opportunities for periodic revisions in the light of evolving economic circumstances.

3.74. *Safeguard regarding job targets.* It should also be possible for the parties to craft clauses to compensate for situations where employment creation falls significantly below expectations. This could be the case, for example, if *technological* innovation enables increased mechanisation, thereby reducing the number of staff employed by the project. In such situations, the contract could require the parties to negotiate alternative benefits such as increased monetary payments or social infrastructure.

3.75. *Access to jobs.* Besides employment creation, access to jobs is another recurring challenge in agricultural investments. People who lose land to project implementation often struggle to access the employment opportunities the project creates. Some contracts require unskilled positions to be filled by local *nationals* – or even people from within the project area or in its vicinity – whenever possible. Such provisions presuppose that a local workforce is available to take up the jobs.

3.76. *Priority for local workers.* Some contracts also provide that, all else being equal, local nationals – or possibly people from within the project area or in its vicinity – should be prioritised in recruitment, training opportunities, and promotions for skilled (for example, managerial and technical) positions. To give bite to these clauses, some contracts set percentage-based skilled labour targets for local nationals, and establish sliding scales, whereby the local employment percentage targets for skilled positions increase during the duration of the project.

3.77. *Improving jobs.* In these contractual set-ups, in the early stages of project implementation local workers may be predominantly in unskilled positions, but ambitious sliding scales coupled with capacity-

building requirements aim to increase the numbers of local employees in technical and managerial positions. For these sliding scales to work, contracts would need to establish realistic targets in the light of *prevailing* socio-economic conditions; specific requirements for both educational and on-the-job training, including timelines and where relevant minimum annual financial commitments; and effective reporting and monitoring arrangements.

3.78. *Gender and social differentiation.* Gender and other social differentiation are important issues in agricultural labour relations, *partly* due to occupational segregation. In agricultural plantations, for example, women are often recruited as temporary workers, without contract and on piece-work. This means that labour law protections may not apply, and women may be paid low wages and exposed to discriminatory practices. In many States, the constitution and labour legislation prohibit discrimination on the basis of sex, pregnancy and marital status in recruitment, training, remuneration, employment conditions, promotion and dismissal. But these provisions are often ineffective in dealing with entrenched gender-discriminatory socio-economic practices.

3.79. *Reducing occupational segregation.* Contracts can add to these general requirements through measures to reduce occupational segregation – for example, ensuring that any targets for access to employment (including skilled positions) and training opportunities are disaggregated by gender. A similar approach can be taken in relation to other locally significant sources of social differentiation, for example ethnicity (ensuring that a particularly impacted group has access to a fair share of employment and training *opportunities*) or age (facilitating access to opportunities for youths who may have limited land of their own).⁶

3.80. *Employment conditions.* A third set of issues concerns ensuring respect for internationally recognised labour rights, and health, safety and other workplace standards.⁷ Most states are legally required to do so by virtue of their membership of the International Labour Organisation (ILO) or their ratification of relevant ILO *conventions*. In addition to international instruments, domestic labour law plays a key role in addressing labour rights issues. This includes, for example, legislation governing freedom of association and collective bargaining, minimum or living wage legislation, regulations on strikes, employment conditions, health and safety, and protection against unfair dismissal.

3.81. *Addressing labour law in the contract.* The contract can clarify that the project must comply with domestic law, and it can address specific labour rights issues that arise in the investment project. For example, it can determine the nature and modalities of any service provision to employees and their dependants (e.g., medical care, housing, or education). It can also regulate or restrict the use of specific *toxic* chemicals, or require the investor to train workers on how to use protective equipment. Where domestic law falls short of international standards, the contract can also help bridge the gap.

3.82. *Adherence with international instruments.* One approach is for the contract to require adherence to ILO instruments, though these are primarily directed at states rather than investors. The contract could also refer to soft-law instruments such as the OECD Guidelines on Multinational Enterprises where relevant, or Performance Standard 2 of the International Finance Corporation (IFC). The latter sets basic *requirements* like compliance with domestic law, fair treatment, and non-discrimination in labour relations, health and safety, and prohibition of use of forced labour. Whenever contracts refer to international standards it is essential that the parties have the institutional and human capacity to monitor compliance with those standards.

3.83. *Link to monitoring.* To assist with monitoring, the contract should require the investor to keep accurate data and records on *employment* creation, access to jobs and respect for labour rights, and to report progress on a regular basis. It should also provide the grantor with commensurate powers to monitor compliance, including the right to inspect the premises.

⁶ E.g. CFS-RAI Principle 4, para. 24, on access to employment and training for youths.

⁷ 2012. VGGT, para. 12.4; CFS-RAI Principle 2, para. 22.

C. Local content and processing

3.84. *In general.* Ensuring that the project promotes inclusive economic development in the project area or in the country at large is often a key consideration for the grantor – especially where this is a government or other public authority.⁸ Yet a recurring challenge in resource-based investments is that they may create inadequate linkages with the local economy. As a result, investments may contribute to the domestic economy at the macro level, for example in terms of GDP or balance of payments, but *have* limited poverty reduction impacts. Several States have adopted laws that seek to maximise positive linkages with the local economy. Depending on the circumstances, contractual clauses have also been used for similar ends.

3.85. *Considerations.* This issue presents several dimensions. One relates to processing. To reduce or avoid dependence on exports of raw materials, many states have adopted policies to promote domestic value addition – requiring or encouraging firms to conduct at least part of the processing within the country. The ways in which these policies are translated into contractual practice depends on the *circumstances* of the relevant agricultural investment.

3.86. *Local processing.* In some cases, agro-industrial processing forms part of project design from the start. This may be the case for perishable commodities that require processing soon after harvest, and for ventures that target the domestic market. For example, many sugarcane projects involve the development of a processing facility for the production of sugar or ethanol. In such situations, effective contracts can set clear parameters, based on the project's feasibility study, for the construction and operation of the processing plant – including development plans, specific targets based on sale value, related timelines, and monitoring arrangements.

3.87. *Encouraging local processing.* In other situations, project design as originally proposed by the investor involves agricultural production to the exclusion of any significant local processing. This may be particularly relevant to non-perishable commodities that can be transported over medium to long distances. Even in such situations, however, the grantor may negotiate for the contract to require that at least a certain portion of the produce be processed locally. Contractual clauses then define the parameters of such local processing requirements. National legislation has also been deployed to encourage or require local processing.

3.88. *Incentives for processing.* In other situations, the contract creates incentives for the investor to include local processing at a later stage, for example through detailed provisions that require the investor to assess the viability of processing locally, condition contract extension to a specified share of produce being processed in the country within a specified period of time, or require the investor to sell a percentage of its *produce* to processing facilities that may be established in the country by third parties in future. While there is space for legal ingenuity in these areas, ultimately economic viability is bound to be an important consideration.

3.89. *Local content.* Another relevant issue concerns the sourcing of goods and services necessary for the implementation of the project. This could range from equipment to catering services. Some laws or contracts contain "local content" clauses that require the investor to source or accord preference to goods and *services* sold by local businesses. This may involve, for example, requiring the investor to give priority to local goods and services if the cost, quality, or time of delivery are comparable internationally. Some contracts require that priority be given to local suppliers even if this increases project costs within a specified percentage of alternative suppliers available internationally.

3.90. *Performance requirements.* The empirical evidence on the effectiveness of such "performance requirements" is mixed, and generally speaking legal provisions are unlikely to have significant effect if there is no local capacity to take up the business opportunities created. Therefore, making businesses more competitive is essential in promoting positive economic linkages, whether local content clauses are used or *not*. However, many states have historically used performance requirements extensively in their efforts to

⁸ See also CFS-RAI Principle 2, para. 22, on inclusive economic development.

industrialise, including many States that are currently classified as high-income. Performance requirements form part of the policy arsenal available to public authorities governing agricultural land investments.

3.91. *Considerations for performance requirements.* Where performance requirements are used, they should be well thought out if they are to have effect. For example, some contracts require the investor to contribute to strengthening local business capacities in critical service and supply areas, and to restructure procurement over time in order to make local provision of goods and services more feasible. As investments often involve long chains of contractors and sub-contractors, best contractual practice also clarifies that performance requirements apply to economic activities run by contractors and sub-contractors, and extends reporting requirements to these operators. Some contracts require the *investor* to take specified proactive steps to disseminate information to potential suppliers and contractors.

3.92. *Local content targets.* Local content provisions can also specify any targets for the investor to source from particular types of businesses, such as small and medium scale enterprises, or from businesses that are owned or managed by particular groups, such as women or youths. Local content and processing requirements should be accompanied by commensurate reporting and monitoring arrangements. For example, the contract may require the investor to submit annual plans on the performance of any *processing* facility or progress towards local content targets. In using performance requirements, states would need to be mindful of the obligations arising from their membership of the World Trade Organisation (WTO), where relevant, and from any performance requirements clauses contained in international investment treaties they may have ratified.

D. Contract farming, outgrower schemes and supply chain relations

3.93. *In general.* The VGGT call on States to “support investments by smallholders as well as public and private smallholder-sensitive investments”.⁹ They also state that responsible investments “should be made working in partnership with [...] local holders of tenure rights”, and that “states should consider promoting a range of production and investment models that do not result in the large-scale transfer of tenure *rights* to investors, and should encourage partnerships with local tenure right holders”.¹⁰ Comparable provisions encouraging collaboration with small-scale rural producers are contained in the CFS-RAI Principles.¹¹

3.94. *Sourcing of produce.* In practice, many agribusiness companies opt to source farm produce from independent growers, including small-scale farmers. In some cases, the company buys most or even all of the produce from the growers, and focuses its own operations on aggregation, processing or distribution. In others, the company runs its own plantation, and sources additional produce from independent *growers* as a more flexible arrangement to increase its capacity.

3.95. *Variety of contract farming arrangements.* Relations between the company and the growers are extremely diverse – from spot transactions, possibly mediated by a chain of traders and intermediaries, through to tightly coordinated contract farming arrangements. Contract farming is itself extremely diverse, including in its degree of formalisation and the nature of the parties involved. Some contract farming schemes rest on a bilateral arrangement between the company and the farmers, who may trade *individually* or via cooperatives; while other schemes are multilateral arrangements that also involve lenders, insurers or other service providers. And while in many cases the farmers cultivate land they own or access independently, in others the company sublets concession land to the growers.¹²

3.96. *Supply chain relationships.* Supply chain relations go beyond purely contractual matters and interrogate structural features of the relevant value chain, business considerations and policy choices. Further, collaborative arrangements linking agribusiness and small-scale agricultural producers can provide

⁹ 2012. VGGT, para. 12.2.

¹⁰ *Id.*, paras. 12.4 and 12.6.

¹¹ CFS-RAI Principles, para. 4.

¹² On contract farming contracts, see LGCF.

livelihood *opportunities*; but they can also expose farmers to exploitative arrangements and significant risks, for example linked to indebtedness and unfair pricing arrangements.

3.97. *Domestic law and the contract.* In several States, domestic legislation regulates supply chain relations and protects farmers' rights. International guidance is also available on addressing land, labour and other issues in agricultural supply chains.¹³ Contracts also influence the terms of any supply chain relations. Multiple contracts will be at stake beyond the agreement between the investor and the grantor. In many cases, this will include direct contracts between the investor and individual farmers or farmer *cooperatives* – though more informal arrangements are also common. The different contracts are interrelated and need to be considered in integrated terms; but this guide focuses on the provisions of the investor-grantor agreement.¹⁴

3.98. *Encouraging an outgrower scheme.* Depending on the situation, the contract between the investor and the grantor can encourage or even require the investor to develop contractual arrangements with small-scale rural producers. The parties must avoid that outgrower schemes end up being imposed on unwilling producers, however. Any mandatory contractual provisions should be grounded not only in the *project's* feasibility study but also in community consultation and, where relevant, FPIC (see Chapter 2.IV.A.2(b)).¹⁵

3.99. *Assessing investment models.* Depending on the context and applicable legal frameworks, for example, a Memorandum of Understanding authorising the investor to carry out a feasibility study could require the study to assess investment models that involve collaboration with small-scale rural producers, based on *consultation* and, where relevant, consent of legitimate tenure rights holders and small-scale agricultural producers; data from the study may then be used to inform the negotiation of the investor-grantor contract.

3.100. *Contractual requirements regarding outgrowers.* Where an outgrower scheme responds to local demand, this contract may require, in mandatory terms, that the investor develops such a scheme according to certain specifications and timelines, specifying that the implementation of these provisions must also be based on consultation with affected communities. The investor-grantor contract can also facilitate access to opportunities in the outgrower scheme for specific groups, such as women and youths. Where the contract requires the investor to set up an outgrower scheme, it should also identify monitoring arrangements and sanctions for non-compliance – for example, by clarifying that failure to develop the outgrower scheme according to specification would constitute a material breach of the contract and a ground for contract termination.

3.101. *Minimum parameters.* Acknowledging the asymmetries in negotiation power than may exist between the investor and small-scale rural producers, and to mitigate the risk of unfair arrangements, the investor-grantor contract should also set minimum parameters with which any subsequent investor-*farmer* agreements should comply. Besides establishing a floor for the content of farming agreements, this approach provides the grantor with a contractually defined role in monitoring and enforcing compliance – an important consideration given that it is often difficult for farmers to legally enforce their farming agreements.

3.102. *Key aspects to be addressed.* Key parameters for the investor-grantor contract to establish include the obligation to purchase produce from farmers up to specified production levels, subject to quality standards generally considered to be reasonable within the industry; investor obligations to provide training and capacity support for the farmers, and related modalities and timelines; standards of quality applicable to the inputs (e.g. seeds, agro-chemicals) supplied by the investor; and the price of produce *purchased* from local farmers, based on minimum internationally pegged reference prices, and of inputs the farmers purchase from the investor.

¹³ E.g. OECD, FAO. 2016. Guidance on Responsible Agricultural Supply Chains.

¹⁴ For guidance on investor-farmer contracts, see LGCF.

¹⁵ VGGT references to consultation/participation and to FPIC; also references to the UN Declaration on the Rights of Indigenous Peoples (2007) and the Convention concerning Indigenous and Tribal Peoples in Independent Countries (1989).

3.103. *Outgrowers and sideselling.* Where relevant, the grantor-investor contract should also deal with side-selling, a recurring challenge in many contract farming arrangements, by encouraging the parties to remain committed to *the* relationship while also protecting farmers against disproportionate sanctions.

3.104. *Outgrowers' protections.* If the outgrowers cultivate the land granted to the investor, the contract should also establish safeguards to secure their tenure rights, so they cannot be arbitrarily evicted in case of default. If the company is to provide credit to farmers, the investor-state contract should regulate credit conditions, for example with regard to interest rates or payment deductions and rescheduling, so as to mitigate *the* risk of farmer indebtedness. The investor-grantor contract should require the investor to establish a grievance mechanism to hear complaints from outgrowers.

E. Community development funds and social infrastructure

3.105. *In general.* Many contracts require the investor to provide monetary or in-kind contributions for social infrastructure and community projects in the investment area or its vicinity. Where the grantor is the local *community* or a local authority representing it, this element may constitute a particularly important part of the investor's overall economic obligations. Where the grantor is the state, obligations concerning community development funds and social infrastructure constitute one vehicle to ensure that the project benefits local groups according to their development priorities.

3.106. *Revenue sharing.* In these latter contexts, and depending on constitutional and administrative set-ups, the investor's contractual obligations may be tied to the arrangements that govern the distribution of economic benefits between central and local government bodies. There is also growing experience with community-investor agreements that complement the grantor-investor contract and specify the nature of the *investor's* obligations. Such community-investor agreements may cover several issues discussed in the previous sections – for example, in relation to employment or outgrowers. Depending on the preferences of the parties, they also commonly include investor obligations in relation to establishing and financing a community development fund, or providing and ensuring the continued operation of social infrastructure such as schools or clinics.

3.107. *Variety of contractual practice.* Contractual practice in this area is extremely varied, partly reflecting the diversity of situations and contractual configurations. If community development funds or social infrastructure commitments *are* included in the contract between the grantor and the investor, or in separate community-investor agreements, any contractual provisions should be based on community consultation and, where relevant, FPIC.¹⁶ The provisions should also establish clear, specific, enforceable and time-bound obligations, as well as related reporting and monitoring requirements, and provide effective sanctions for non-compliance – including termination of the main contract in case of material breach not cured within a specified period of time.

3.108. *Matters to be addressed.* Where the contract provides for a community development fund, depending on the situation it should also clarify how those funds are to be managed – for example, through establishing a committee and clarifying its membership and functioning, including effective representation of different local stakeholder groups. Particular attention should be given to issues of gender and social differentiation – for example, ensuring proper representation of women and disadvantaged groups in any committee established to manage the community development fund.

III. ENVIRONMENT

3.109. *Introduction.* Agricultural land investment relies significantly on natural resources availability and quality. These investments, however, are often associated with environmental risks and impacts related to the pollution of natural resources (*e.g.* water, soil, air), the degradation of forests and loss of biodiversity. Environmental risks and impacts vary according to the type of local ecology, the type of agricultural crops

¹⁶ VGGT references to consultation/participation and to FPIC, also references to the UN Declaration on the Rights of Indigenous Peoples (2007) and the Convention concerning Indigenous and Tribal Peoples in Independent Countries (1989).

and the environmental management system. Besides creating environmental challenges, these issues *present* social dimensions, because environmental resources provide the basis for the livelihoods and cultural identity of millions of people worldwide. The investment project may have consequences not only for the environment per se but also for the exercise of the human right to a safe, clean and healthy environment. Despite these possible negative consequences, agricultural land investments can also produce positive impacts if conducted in a responsible and sustainable way. The use of natural resources should be optimised, and environment protection should be included as a part of the agricultural land investment contract and related agreements and not considered in isolation from them.¹⁷

A. General considerations

3.110. *Applicable domestic law.* As briefly noted in Chapter 1.II, domestic law plays a key role in establishing the rules, institutions, and processes for the protection of the environment. As discussed in Chapter 2.IV.B.2, for example, environmental laws typically require an environmental impact assessment for proposed projects that may have significant effects on the environment, and they define key substantive and procedural parameters. Domestic law will also define the environmental rules with which an investment project must comply, such as restrictions on the use of certain chemicals or requirements for certain working methods or techniques to be used. Special rules may apply in environmentally sensitive areas. Government institutions adopt regulatory measures, issue environmental permits, monitor compliance and sanction non-compliance.

3.111. *Applicable international and regional law.* International law, for its part, requires States to take environmental measures. Several environmental declarations and treaties, for example, require States Parties to ensure that an *environmental* impact assessment is conducted before authorising activities that are likely to have a significant environmental impact.¹⁸ While treaties can clarify specifics and procedures, international courts increasingly require States to conduct and demand an environmental impact assessment for activities within their jurisdiction that are likely to cause environmental harm to other States. In addition, environmental protection and human rights are interdependent and environmental impact assessments may be required by international Human Rights instruments and court decisions. Many regional law instruments also address the protection of the environment and may serve as a useful source of inspiration to require environmental sustainability in agricultural land investment contracts. For example, regional treaties call for access to information, public participation in decision-making and access to justice in environmental matters.¹⁹

3.112. *Relevant corporate social responsibility instruments.* Even though international law does not directly establish binding environmental obligations on enterprises, many of its non-binding (“soft law”) instruments aim to influence enterprises’ behaviour and encourage the integration of sustainability into business activities. As discussed in Part V of this Chapter, legislation and standards, including private standards, related to CSR *increasingly* require more transparency and non-financial reporting of economic activities. In this sense, many instruments that address CSR encourage the use of contracts for environmental protection.²⁰ Furthermore, the OCDE-FAO Guidance for Responsible Agricultural Supply Chains have been encouraging enterprises to observe existing international standards for responsible business investment in agricultural supply chains. Private standards and multi-stakeholder certification schemes also define international best practice. For the specific field of agriculture, in the oil palm sector, the standards of the Roundtable for Sustainable Palm Oil (RSPO) involve a scheme for the protection of High Conservation Value (HCV) lands.

¹⁷ In accordance with Principle 4 of the UN Rio Declaration on Environment and Development (1992).

¹⁸ *E.g.* Principle 17 of the UN Rio Declaration on Environment and Development (1992); Article 14 of the Convention on Biological Diversity (1992); and Convention on Environmental Impact Assessment in a Transboundary Context (1991).

¹⁹ Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (1998); and Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean (2018, not yet in force).

²⁰ See *e.g.* OECD. 2011. Guidelines for Multinational Enterprises; the UN. 2011 Global Compact. Guiding Principles on Business and Human Rights; UN. 2015. Principles for Responsible Contracts; and IFC. 2011. Performance Standards.

3.113. *Role of contracts for environmental protection.* The agricultural land investment contract, as one of the sources of applicable law, can acquire an important role for environmental protection by filling in regulatory gaps. This may involve different types of contractual clauses. Some contracts may require the project to comply with applicable domestic laws, both present and future, and some may 'top up' applicable environmental safeguards by mandating compliance with international standards. In other words, contracts can strengthen environmental obligations already required by domestic and international laws as well as establish new obligations that draw on the multiplicity of environmental issues related to agricultural land leasing. The exercise of due diligence and consideration of environmental sustainability should therefore constitute a non-derogable and mutual objective of the contracting parties.

B. Issues and obligations

3.114. *Introduction.* Domestic, regional and international environmental law adopted and applied in each national jurisdiction differs, and the parties to the contract may have different preferences in relation to environmental obligations. However, based on general notions and principles of environmental law (e.g. environment impact assessment, prevention, precaution, polluter-pays, access to information *and* non-regression), this section provides a non-exhaustive set of environmental issues and best environmental practices that should be adopted on an ongoing basis, before, during and after the implementation of agricultural land investment contracts.

3.115. *Environmental impact assessments and contractual obligations.* As previously mentioned in the Guide, an environmental *impact* assessment should be considered as a precondition to the contract and as part of the due diligence obligation (see Chapter 2.IV.B.2) to be undertaken ideally before the agricultural land investment begins, as a *sine qua non* practice. The signature of the contract may be postponed until the environmental impact assessment is completed and its information is transparent and widely disseminated. The findings of the environmental impact assessment can be included as binding contractual obligations to clarify, qualify and quantify the environmental issues that need to be monitored during the lifetime of the investment project. Besides clarifying the timelines for conducting the environmental impact assessment and identifying who prepared it (e.g. investors or an independent environmental expert), this contractual clause can also set out other requirements, such as: the disclosure of information and public participation in the environmental impact assessment process; the development of environmental management plans to implement the measures identified by the environmental impact assessment; the elaboration of periodic environmental reporting preferably scrutinised by competent institutions and accessible to all interested public and concerned stakeholders.

3.116. *Preventing pollution.* Some States may require investors to internalise all pollution costs and adopt measures to reduce pollution from agriculture during the entire investment project. Based on the polluter-pays principle,²¹ investors in agricultural land are responsible for environmental damages due to the use of *chemicals* and release of pollutants, such as ozone depleting substances,²² and should bear the costs of preventing, controlling, and cleaning up pollution, as well as be prepared to repair and compensate. Contractual best practices to avoid agricultural related pollution of water, air and soils are underlined in the following paragraphs.

3.117. *Protecting water.* Parties should take water concerns and challenges into account by negotiating contractual provisions that specify and limit the water rights granted to the investor. For example, water access and abstraction in irrigated agricultural projects can be addressed as a related right of the investor (see Part I.B.2(a) above) to be reviewed during the lifetime of the contract according to present and future environmental conditions and to the needs of legitimate tenure right holders and affected communities. Best practice involves the adoption of an ecosystem approach to ensure the integrated *management* of land, water and living resources.²³ Contractual clauses should highlight that the investors' right to water is limited

²¹ Principle 16 of the UN Rio Declaration on Environment and Development (1992).

²² For the list of substances, see the Montreal Protocol on Substances that Deplete the Ozone Layer (1987).

²³ For more information on the ecosystem approach, see Convention on Biological Diversity (1992).

and should not interfere with the water supply of other groups or individuals, other farming activities and watering places for animals. The VGGT specifically mention that “States have the power to raise revenue through taxation related to tenure rights so as to contribute to the achievement of their broader social, economic and environmental objectives”.²⁴ Thus, water-use permits and water fees can be applied for agricultural land investment contracts especially when infrastructures that involve water consumption (e.g. sink boreholes, irrigation systems, reservoirs) are required. An effective clause on this matter would precisely mention the volume of water that can be used by investors, for instance, per year. Furthermore, parties can consider adding a clause that, *inter alia*: organises re-allocation of water rights whenever necessary during the contract; specifies the type of water that can be used (such as from surface or groundwater, from river or sea, etc.); and controls the pollution and discharge management to ensure that, during the activities, all employees and residential communities are supplied with clean and safe drinking water.

3.118. *Preventing soil degradation.* The control of soil quality should be addressed by parties to ensure responsible agricultural land investment. The need to prevent soil erosion and pollution can be achieved by adopting crop rotation, *intercropping* practices,²⁵ and agro-ecological farming options that can improve soil biodiversity. Desertification issues should also be considered. The adoption of contractual provisions that require the restoration of drylands and degraded lands, especially when agricultural land investments occur in Africa, constitutes best practice encouraged by the UN Convention to Combat Desertification (UNCCD).

3.119. *Conserving biodiversity and safeguarding ecosystem services.* Environmental safeguards should be established to prevent and minimise degradation and loss of biodiversity.²⁶ Some lands are identified as being suitable for agriculture and others need to remain intact. Domestic and international environmental law specify protected areas where agricultural land investment should be avoided.²⁷ Biosafety and access to *genetic* resources can become a controversial issue and affect the way the agricultural investment may be carried out.²⁸ Some States have banned the use of genetically modified seeds and organisms, as well as the use of some chemicals and pesticides to protect their biodiversity and avoid risks to human health. Contractors should adopt the precautionary approach²⁹ to protect biodiversity whenever there is reasonable suspicion of harm and scientific uncertainty. Agricultural land investment contracts may recall the need to avoid the introduction of invasive alien species, the use of genetically modified organisms, the overuse of agricultural chemicals,³⁰ and the risk of threatening endangered species.³¹ In addition, based on the results of the environmental impact assessment, the adoption of green bonds for sustainable land use and forest conservation may also be required by some States, legitimate tenure right holders and local communities. Furthermore, to operationalise CFS-RAI Principle 7, contractors should consider involving equitably all relevant stakeholders and consider the expectations of interested parties by adopting clauses that require respect and protection of traditional knowledge and cultural heritage of legitimate tenure right holders, local communities and indigenous peoples. The connections between cultural diversity, biological diversity and environmental sustainability should be analysed before adopting agricultural land investment contracts. It

²⁴ 2012. VGGT, para. 19.1, p. 31.

²⁵ For further guidance see: FAO. 2017. Voluntary Guidelines for Sustainable Soil Management.

²⁶ 2012. VGGT, p. 24.

²⁷ See for example: Convention on Wetlands of International Importance (1971); the protected areas identified by the International Union for Conservation of Nature (IUCN); and the UNESCO Biosphere Reserves.

²⁸ Beyond respecting the requirements of domestic law, contractors can consider the requirements of the Convention on Biological Diversity (1992) and its related Cartagena Protocol on Biosafety (2000) and Nagoya Protocol on Access and Benefit-Sharing (2010); as well as the provisions of the International Treaty on Plant Genetic Resources for Food and Agriculture (2009).

²⁹ The importance of the precautionary approach is recognised under Principle 15 of the UN Rio Declaration on Environment and Development (1992), and under many environmental treaties.

³⁰ The FAO. 2014. International Code of Conduct on the Distribution and Use of Pesticides can be used as reference, as well as the Stockholm Convention on Persistent Organic Pollutants (2001) and Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (1998).

³¹ See for more information: Convention on International Trade in Endangered Species of Wild Fauna and Flora (1973) and the IUCN Red List of Threatened Species.

is therefore important to consult if legitimate tenure right holders and affected communities, which depend on the natural environment for their subsistence and cultural practices, have any customary rule for environment protection or any concern or priority related to biodiversity that may require contractors to adopt specific conservation obligations.

3.120. *Mitigating and adapting to climate change.* The intersections between climate change and agriculture should be considered when negotiating and implementing agricultural land investment contracts. Higher temperatures and extreme weather events (e.g. storms and droughts) caused by climate change affects crops and livestock production. The Paris Agreement on Climate Change recognises the important role for agriculture especially for the management of direct and indirect “land use, land use change and forestry (LULUCF)”.³² For this purpose and to effectively implement the responses to climate change for which the VGGT calls,³³ it is advisable that contractors aim at climate-resilient agricultural land *investment*. Contractual clauses can be agreed based on agricultural best practice and include, among other, the following obligations: the adoption of climate-sensitive agro-ecological approaches and climate-smart livestock farming practices (which include low to zero tillage, multi-cropping to increase mulching to reduce evapotranspiration and soil erosion); the provision of technical support and capacity development related to climate-smart technologies and the obligation to reduce, monitor and report on greenhouse gas (GHG) emissions.

3.121. *Adopting sound management of waste.* Waste management is essential to minimise the potential contamination of natural resources such as water, soil, and air. To address this issue, investors and those who grant them tenure and related rights to agricultural land should consider the types and amount of waste disposal during the lifetime of the contract,³⁴ as well as adopt approaches to reduce consumption and recycle production materials.

3.122. *Monitoring and reporting environmental protection.* Transparency and access to information are crucial for effective environment protection. Parties have the duty to cooperate³⁵ during the monitoring of contractual obligations (see Part V.A below), including with respect to environmental obligations. The monitoring and disclosure of environmental information can be implemented by contracting parties as well as by others, such as through private certification schemes. It is a duty and a right of the grantor to monitor environmental impacts.³⁶ Parties may previously agree which authorities will have these rights as well as decide if prior notification is required.³⁷ The adoption of environmental audits is considered common practice and should, therefore, be incorporated into agricultural land investment contracts for effective environmental monitoring.

3.123. *Project closure and restoration of the environment.* Best practice involves the adoption of a decommissioning clause, transfer of environmental obligations to new investors and the stipulation of conditions in which the land is to be returned to the grantor (see Chapter 5.II). Environmental bonds and *insurances* (see Part V.C), as well as clean-up and replanting obligations may be applied. According to the polluter-pays principle, investors shall bear the cost of environment reparation and if restoring to previous conditions is not possible, a duty to compensate the grantor of the land for their loss may apply.

3.124. *Failure to comply with environmental obligations.* Non-compliance may amount to a material breach of the contract. The type of environmental legal liability applied to prevent and remedy environmental harm will depend on the law that governs the contract. The contractual relationship may be suspended until the *activities* are made compatible with the environmental obligations, or the parties may decide to terminate the contract when, for instance, non-performance of an environmental obligation that is essential

³² UN Framework Convention on Climate Change.

³³ 2012. VGGT, Ch. 6.

³⁴ The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (1989) lists certain types of wastes that should receive special disposal attention.

³⁵ UPICC, Art. 5.1.3.

³⁶ CFS-RAI Principles, para 50; VGGT, para 12.12

³⁷ This is a common practice in contract farming. See LGCF, p. 109.

substantially affects the legitimate expectations of one of the parties (see Chapter 4). Non-compliance with contractual environmental obligations can shift the burden of proof to the investor based on the precautionary principle. Non-judicial mechanisms, such as environmental grievance mechanisms,³⁸ may include important tools for the identification and resolution of the non-performance of environmental obligations (see Chapter 6).

IV. PROTECTION OF INVESTMENT AND REGULATORY AUTONOMY

3.125. *Introduction.* States, which have a duty to protect human rights and to regulate in the public's interest,³⁹ have traditionally had broad autonomy to deal with matters of public policy with respect to food security, land tenure and administration, agricultural investment and trade. In seeking to attract investment, however, governments may offer investors various protections, which may constrain the government's mandate to take *certain* actions. Investors, moreover, may actively seek those protections to support a secure investment climate.

3.126. *Context.* To seek investment, particularly foreign investment, governments may offer investment protections that go beyond basic ones provided by customary international law (e.g. for due process, against expropriation) in three main ways. First, they may legislate domestic investment codes, which set out incentives and protections to promote or facilitate such investment. Second, they may enter into international *investment* agreements (IIAs), which offer protections to investors from another State Party to that agreement making investments in their territory in exchange for reciprocal protections for their investors making investments in that State's territory. Third, they can agree to provide certain protections in the agricultural land investment contract with the investor. With each of these ways, governments may include a consent to arbitrate, thereby providing investors with the right to bring claims directly against them. Absent such consent, investors would be reliant on other forms of dispute settlement (see Chapter 6).

3.127. *Scope.* A local community might be able to provide some protections for investors, such as consenting to arbitration, depending on its particular authority and context. Given the government's role in *determining* investment policy generally and protections specifically, however, the guidance in this Part is oriented towards agricultural land investment contracts between investors and government.

3.128. *Supplementing applicable law and the importance of balance.* The parties can supplement applicable law, such as any applicable investment codes or IIAs, and include contractual clauses providing additional investment protections (e.g. expropriation and physical and legal security) and consent to arbitrate (see Chapter 6). The use of such clauses, however, should be carefully considered to ensure the right balance between the desire of the investor for a predictable legal environment that makes their investment more secure and the need of the grantor government to act in the interest of the public or its members, including to protect human rights and food security.⁴⁰ Failing to achieve a proper balance between the two heightens risk and may lead to disputes. Indeed, even in instances in which a government exercises its regulatory mandate in the public interest (e.g. by legislation or modification of regulations), investors may perceive that exercise as intrusive, insensitive, costly or uncertain. In some instances, investors may attempt to challenge that exercise (e.g. by claiming that it constitutes a regulatory taking of its investment in violation

³⁸ Grievance mechanisms that can be used to deal with environmental complaints include, for example, at the international level: The World Bank Inspection Panel, the International Finance Corporation (Compliance Advisor Ombudsman) and the OECD National Contact Point.

³⁹ See CFS-RAI Principles, para. 33 ("States should ensure, to the extent possible, that actions related to responsible investment in agriculture and food systems both at home and abroad, are consistent with their existing obligations under national and international law, and international agreements related to trade and investment, with due regard to voluntary commitments under applicable regional and international instruments. States should maintain adequate domestic policy space to meet their human rights obligations when pursuing business-related policy objectives with other States and business enterprises, for instance through investment treaties or contracts, in line with the UN Guiding Principles"), see also UN Guiding Principles, Foundational Principles ("States must protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises. This requires taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication").

⁴⁰ UN Guiding Principles, Principle 9 (calling on States to "maintain adequate domestic policy space to meet their human rights obligations" when negotiating investor-State contracts).

of an international investment agreement), potentially resulting in costly arbitration, a chilling effect on regulation and the failure of the investment.

3.129. *Roadmap.* Three issues to be considered in seeking to achieve the right balance between investment protection and regulatory autonomy are briefly discussed below: (a) expropriation; (b) physical security; and (c) stabilisation *and* legal security.

A. Expropriation

3.130. *In general.* Governments have the right, in certain circumstances, to expropriate (i.e. take) property. As noted in Chapter 2.IV.B.1(a), governments may expropriate rights to land in order to be able to grant them to investors for an investment project. This section, however, deals with the protections investors have against expropriation of their investment. This section addresses what may be covered by those protections, how *expropriation* is defined in this regard, as well as the conditions for lawful expropriation and compensation.

3.131. *Coverage.* Expropriation protections, depending on the particular language of the provision, generally cover investments. An applicable international investment agreement, for example, may provide an expropriation protection and define specifically what investments are covered (see Chapter 1.I.B). Many *international* investment agreements include contracts or rights arising thereunder, such as an agricultural land investment contract, as covered investments.

3.132. *Definition.* The definition of an expropriation and the investments covered by an expropriation protection vary among investment codes, IIAs and agricultural land investment contracts. The definition is particularly important because disputes arise not only in situations in which the government formally takes title to the investment (i.e. direct expropriation), but now more often in situations in which the government is alleged to have interfered with an investor's rights without formally taking title to the investment (i.e. indirect expropriation or regulatory taking). Most international investment agreements refer to indirect expropriation (e.g. by covering "measures tantamount to expropriation" or similar) but, even when expressly included, determining whether an indirect expropriation has occurred may be difficult, and the consequences can be significant. For governments, a determination that the enactment of a law or regulation for legitimate public policy objectives (e.g. environment or public health) has constituted a taking of an investment can constrain regulatory space and have a chilling effect on further enactments. For investors, a determination that that enactment has not constituted a taking means there generally is not an entitlement to compensation.

3.133. *Circumstances.* Not every failure by a grantor government to meet certain obligations under an agricultural land investment contract will amount to an expropriation. Nor will every government action affecting an investment contract between a foreign investor and local community amount to an expropriation. Indeed, governments can exercise its expropriation right lawfully under certain circumstances. In general, the expropriation must be done for a public purpose, on a non-discriminatory basis, and with payment of prompt, adequate and effective compensation. Among these circumstances, compensation aspects are most often at issue.

3.134. *Compensation standard.* Compensation standards may vary depending on the applicable provision, but a common standard is that of "prompt, adequate and effective" compensation. The requirements of "prompt" and "effective" compensation are generally without controversy, as they require compensation to be paid without undue delay and in a convertible currency respectively. Determining "adequate" compensation, however, is more difficult, even if the standards in international investment treaties generally require fair market value of the expropriated investment. Indeed, there are various ways in which such value can be quantified (e.g. discounted cash flow method, book value, replacement value), and some ways may be more appropriate in particular circumstances.

3.135. *Contractual clauses.* If there is an applicable IIA with expropriation protections, the parties may not need to include a contractual clause on expropriation in their contract. If such an agreement is not applicable or if its provisions are in some way insufficient, the parties should consider including a clause *specifying*, as

needed, the coverage, definition, circumstances and compensation standard, with the aim of balancing protection for the investor and regulatory space for the government grantor.

B. Physical security

3.136. *In general.* Physical security for agricultural land investments entails physically protecting the investment's operations. This may involve a commitment by the government to provide adequate security to protect the investment *or* allow for the investor to hire basic security to monitor the premises and prevent vandalism or theft.

3.137. *Security clauses.* Contractual clauses on physical security may define a range of security activities, including hiring and training requirements for security hired by the investment, reporting and monitoring requirements, and *coordination* requirements with local law enforcement. They should include an affirmative obligation to adhere to the Voluntary Principles on Security and Human Rights, which were developed among certain governments, private sector companies, and civil society groups to help companies ensure the safety and security of their operations while maintaining respect for human rights.⁴¹

3.138. *Considerations.* These issues should be carefully considered, and the clauses carefully drafted in order to avoid and mitigate any related human rights risks and remedy any abuses and misappropriation that do occur, including through a credible grievance mechanism (see Chapter 6.I). An inclusive, responsible and *sustainable* agricultural investment should not demand security arrangements beyond those ordinarily provided by the government. Indeed, if an investment project has to be militarised through extensive security arrangements, that is a red flag indicating that the project should not go forward or otherwise continue.

C. Stabilisation and security of rights

3.139. *In general.* To mitigate the risk of arbitrary unilateral action, investors have in the past sought to negotiate contractual clauses that provide for *the* long-term stability of applicable law and the security of their rights. There is great diversity in the formulation of these "stabilisation clauses". Some clauses purport to "freeze" applicable law to the norms in force at a specified time, excluding the application of subsequent legislation. On the other hand, economic equilibrium clauses link adverse changes in law to requirements that the grantor restore the contract's economic equilibrium – for example, via contract renegotiation or possibly payment of compensation. Hybrid clauses combine freezing and economic equilibrium elements.

3.140. *Concerns about stabilisation clauses.* Concerns have been raised that stabilisation clauses could constrain the implementation of deserving social, environmental or economic measures. More stringent rules on *community* consultation, labour relations, health and safety, and environmental protection – to name but a few potentially relevant examples – could adversely affect investments and trigger the application of stabilisation clauses. The concern is that States may have to exempt projects from the new measures; or else that, if States must bear the costs those measures cause, they may be discouraged from acting in the first place, particularly where public finances are under strain.

3.141. *Regulatory space and stabilisation.* An annex to the UN Guiding Principles contains a set of Principles for Responsible Contracts, which provide more detailed guidance on regulatory space and stabilisation clauses. Those *Principles* state that: "[c]ontractual stabilisation clauses, if used, should be carefully drafted so that any protections for investors against future changes in law do not interfere with the State's bona fide efforts to implement laws, regulations or policies, in a non-discriminatory manner, in order to meet its human rights obligations".⁴²

3.142. *Stabilisation clauses not required.* Stabilisation clauses raise major issues. There should be no presumption that the contract should feature a stabilisation clause. In fact, use of these clauses should be discouraged. *If* an investor decides to seek a stabilisation commitment anyway, it should be asked to

⁴¹ See the UN Declaration on Human Rights Defenders (1999).

⁴² UN. 2015. Principles for Responsible Contracts, principle 4.

demonstrate its need, and the government should seriously consider whether it can assuage investor concerns in other ways. The parties can explore alternative ways to mitigate regulatory risk, such as insurance and involvement of multilateral lenders. If a grantor agrees to enter into a stabilisation commitment, it may seek to compensate the reduced regulatory risk for the investor with higher economic benefits, for instance in the form of greater public revenues.

3.143. *Considerations.* The formulation of a stabilisation clause matters a great deal. Freezing clauses are particularly inflexible, and their enforceability may be doubtful in some domestic legal systems. For these *reasons*, contractual practice has tended to shift towards the more flexible economic equilibrium clauses. The wording of any stabilisation commitments should be properly circumscribed, and public-interest action in social and environmental matters should not be covered. The duration of the stabilisation clauses should also be limited to what is actually needed – e.g. to enable the investor to recover costs and generate a minimum level of returns, or to reassure lenders for the duration of their loans.

V. MONITORING AND IMPLEMENTATION

3.144. *Introduction.* Well-balanced agricultural land investment contracts and responsible and sustainable investment projects involve long-term relationships between the parties themselves and with stakeholders. This is because, depending on the circumstances, it may take time for the investor to develop the project, recover costs and generate returns. Contractual provisions would need to be implemented and monitored throughout the duration of the project, and information about the project would need to be shared between the parties and with stakeholders. In addition, external circumstances such as commodity prices could change significantly over the project's duration, and the venture itself may experience different phases in the opportunities and challenges it faces.

3.145. *Making arrangements and cooperation.* Thus, the parties should consider and set out in contractual provisions arrangements for administering their relationship throughout the duration of the project. Relevant issues include ensuring proper implementation of the parties' obligations through monitoring, not *only* of those obligations but of the project's ongoing impacts (e.g. through updated impact assessments), reporting requirements and periodically revisiting the parties' obligations in the light of changing circumstances. To this end, it is essential that each contracting party cooperate with any others throughout the contract's duration when such cooperation may reasonably be expected.⁴³

3.146. *Importance of open communications.* At a basic level, the contract should identify arrangements to facilitate communication between the parties, as well as between the parties and local communities, ranging from simple clauses that merely provide the parties' respective contact points to more structured *arrangements* such as joint committees. A failure in communication between the parties can lead to a breakdown in relations, and the parties should ensure that clear channels of communication exist between those involved for the sharing of reports and other information and for discussing concerns and grievances (see Chapter 6.I). Options for facilitating communications include contractual provisions defining: points of contact; communications plans, which specify processes for sharing information; and community land management committees, which serve various functions related to the sharing of information and consideration of concerns and grievances. In establishing communication plans and community committees, the parties should take steps to ensure that women, youth and other members of the community who might not traditionally be involved in such discussions are able to access the information and participate.

3.147. *Roadmap.* To assist parties in considering and addressing these issues, this Part (a) provides an overview on monitoring, including monitoring arrangements and the importance of transparency and reporting; and (b) covers key implementation issues, including insurance, performance guarantees, *environmental* performance bonds, and notice and periodic review.

⁴³ See, e.g., UPICC, Art. 5.1.3 (stating that "[e]ach party shall cooperate with the other party when such co-operation may reasonably be expected for the performance of that party's obligations" and providing commentary between parties in the context of long-term contracts).

A. Monitoring

3.148. *In general.* Problems can even arise under a perfectly drafted contract if the parties fail to monitor its implementation, specifically to evaluate the parties' compliance with the contractual obligations and any other applicable law, as well as any the project's impacts. Monitoring is essential to ensuring that an *agricultural* land investment contract and any related agreements lead to a successful project both for the investor and the grantor and that the anticipated benefits of the investment are realised, including for any legitimate tenure right holders and local communities. Monitoring, however, is a complex and difficult exercise, in particular because monitoring can be time-consuming and may occur over a significant duration. This section describes (1) general monitoring arrangements (e.g. matters, methods and those involved) in order to enhance contract monitoring and (2) the importance of transparency and reporting in those arrangements.

1. Arrangements

3.149. *Matters to be monitored.* In general, there is a broad range of matters that may be monitored. What is necessary to monitor is linked to the various obligations and key performance indicators that are set forth in the contract (see Chapter 3), as well as to possible social and environmental impacts, which may be linked with impact assessments and any mitigation plans that were initially performed and established respectively (see Chapters 2.IV.B and 3.III). The matters include compliance with not only the broader regulatory framework but also the specific obligations in the contract, as well as any related agreement, such as:

- the grantor's obligation to grant the tenure and related rights to investors, as well as the investor's obligation to respect any rights withheld or reserved to ensure continued access to local communities (see Chapter 3.I.B), to protect natural resources and, as applicable, to maintain or pay fees for existing infrastructure or to construct new infrastructure;
- land and project development obligations, which may involve particular targets and timeframes (see Chapter 3.I.C);
- monetary obligations, such as payments, profit sharing and capitalisation (see Chapter 3.II.A);
- social obligations, including with respect to employment creation and labour rights; local content and processing; contract farming, outgrowers and supply chain relations; and community development funds and social infrastructure, including gender and differentiation aspects (see Chapter 3.II.B-E);
- environmental obligations, including to protect water, prevent soil degradation, conserve biodiversity, to mitigate and adapt to climate change and to manage waste (see Chapter 3.III); and
- physical security obligations, in order to ensure that any arrangements are not resulting in negative impacts on legitimate tenure right holders, local communities and the investment project itself (see Chapter 3.IV.B).

3.150. *Methods and standards.* There are various methods for monitoring compliance and for collecting the requisite *data*, including monitoring by the investor, the government and an independent auditor or local organisation. In this regard, the parties may wish to specify in the contract which methods are to be used for which obligations, as well as the indicators or other aspects that are to be monitored.⁴⁴ With respect to indicators in particular, the parties should consider adopting certification standards issued by certification bodies, which may be public or private entities and could, in turn, be involved in the monitoring. In order to facilitate monitoring and enforcement under the contract and prevent confusion, the methods and indicators should be clearly defined.

⁴⁴ VGGT Technical Guide No. 4, p. 72 (identifying possible documentation for monitoring and reporting), *id.* Table 7 (showing documentation for monitoring and reporting).

3.151. *Investor self-monitoring.* Whether under domestic law or the agricultural land investment contract, investors should be obligated to self-monitor and to self-report on an agreed timeframe. The internal self-monitoring tools put in place may include invitation of independent third parties to assess the level of compliance, as well as possible risk and compliance exposures.

3.152. *Grantor monitoring.* As the government often acts as the grantor under the contract, it can subject that contract or its renewal to the investor's compliance with the obligations. That is, if an investor does not fulfil an obligation, the government may be entitled to seek remedies (see Chapter 4.III). Even in instances in which the government is not the grantor, it may have a responsibility to monitor the project in accordance with the applicable legal framework through legislation and implementing regulations. Monitoring, however, is not an easy task for many governments or local communities as the time and resources needed to monitor properly can be significant. Another challenge could be the fragmented, sector-specific approach to monitoring that may involve various government ministries and agencies (e.g. lands, environment, agriculture), each of which might have its own area of interest and responsibilities. In these situations, it might not be possible to consolidate monitoring for all aspects of the project, but it is essential to carry out monitoring in a coordinated manner which allows that project to proceed with minimal to no interference.

3.153. *Independent monitoring.* Both investor and grantor monitoring have risks, including non-reporting or over-reporting and a lack of resources respectively, and independent (i.e. third party) monitoring is considered to be best practice. As a result, the parties should consider, depending on the size of the project, supporting monitoring key obligations by an independent auditor or a neutral local organisation, such as a civil *society* organisation. The costs for this service could be taken into consideration by the parties in negotiating the overall bargain set forth in the contract, and one possibility could be setting aside a specified percentage of the project's revenues.

2. Reporting and transparency

3.154. *Introduction.* Effective monitoring is impossible without sufficient transparency and reporting. Transparency and reporting are key tools in the area of investment for fighting corruption and protecting human *rights*, and are part of a growing trend towards greater transparency in business generally and these types of investments specifically. Given the confluence of issues and impacts that may arise from an agricultural investment project, the preparation and sharing of reports may be critical to the success of a responsible and sustainable project.

3.155. *Context.* Agricultural land investment contracts can have a significant impact upon the public, in particular legitimate tenure right holders and the local community. They can result in benefits for local communities, but also *have* negative impacts, depriving people of their tenure rights or resulting in environmental harm (e.g. soil degradation due to excessive farming). It is also important for the wider public to be aware of how commercial enterprises are being undertaken and implemented, so as to hold the parties accountable.

3.156. *Roadmap.* In addressing issues related to transparency and reporting, this section divides such issues between (1) investors and (2) grantors. It then concludes with a brief discussion of (3) confidential information, *which* may be protected from disclosure (e.g. through redactions of such information in documents).

(a) Investors

3.157. *In general.* Reporting obligations for investors may be applicable under domestic law and, if the investors are foreign, under the law of the investor's home State. The parties should be aware of investors' reporting obligations under the applicable law and should identify such obligations in the contract and provide any *further* specifications. Because investors may resist extensive reporting obligations, the grantor should be clear regarding what precisely is required and expected, including with respect to the types of reporting and applicable standards.

3.158. *Reports in general.* Reports should be accessible, understandable, and presented without undue delay in accordance with the applicable law and contract. Parties should also not bombard others with lengthy

reports that *end* up obfuscating the pertinent information, as this could constitute a deliberate frustration of transparency and reporting obligations.

3.159. *Reporting on financial and non-financial obligations.* The investor should be responsible for maintaining, at an office near the investment area or otherwise in the State in which that area is located, accurate accounting records in accordance with international financial reporting standards (e.g. the International Financial Reporting Standards (IFRS)). In connection with those records, investors are typically responsible for providing the grantor with audited financial statements, generally at the expense of the investor. Investors should also comply with non-financial reporting standards consistent with, for example, ISO 26000, which provides guidance on social responsibility.

3.160. *Periodic reporting.* The investor should also be responsible for preparing and providing activity reports at specified intervals (e.g. annually; biannually) that lay out summaries of key information regarding the project. The activity reports could, *inter alia*, address: project operations (e.g. production amounts, acreage planted, development updates and timelines); compensation paid to the grantor and, if *applicable*, to legitimate tenure right holders and local communities; and any social or environmental impacts, as well as any mitigating steps taken (e.g. water usage). In light of the specific obligations set forth in the contract, the parties may agree to reporting standards for particular issues, such as for social responsibility or sustainability, together with obtaining agreed certifications.

3.161. *Availability of reports and related information.* While reports are to be shared between the parties, the parties should consider what reports and related information should be made available more broadly. In addition to disclosure of the agricultural land investment contract and any related agreements as part of contract negotiation and formation (see Chapter 2.V), the parties should include a contractual clause making certain documents (e.g. impact assessments and management plans; activity reports) available to the public and open to inspection (e.g. at an accessible office or online),⁴⁵ subject to the protection of confidential information (see paragraph Section 3 below). Further to this disclosure, the parties could ensure that those documents or summaries of them are also made available in local languages and that regular meetings continue to be held with local communities and other stakeholders to facilitate ongoing engagement and sharing of information.

(b) Grantors

3.162. *In general.* Grantors play a key role in ensuring transparency with respect to agricultural land investment contracts and the related projects. Grantors need to ensure that information relevant to the investment's establishment and *operations* is with investors, as well as legitimate tenure right holders and any local communities which may be impacted.

3.163. *Investors.* In order for grantors to be transparent with investors, they too should accurately report relevant information in an accessible format. For governments and local communities, this includes changes regarding the investment area (e.g. change of title, environmental findings, conflict, *infrastructure* projects that may affect the land). For governments in particular, this information also includes:

- relevant laws (e.g. laws on real property, commercial laws, tendering and procurement procedures, contract law, indigenous title, international treaties that are in force), which can be made available on the government's website;⁴⁶ and
- accurate fiscal information (e.g. an annual budget, disclosure of the balance of payments, national debt, credit rating, State assets), which can be compiled in accordance with relevant government accounting standards and also made available on the government's website.

3.164. *Legitimate tenure right holders, local communities and the general public.* Grantors should seek inclusion of a contractual clause making certain reports and related information available, subject to the

⁴⁵ See UNCTAD, WB. 2018. RAI-KN 10, p. 3, Table 1 (containing a list of documents that could be categorised as private between the parties and as public).

⁴⁶ See 2012. VGGT, para. 3B (8).

protection of confidential information (see Section 3 below). In addition, grantor governments in particular can *ensure* that local communities and the general public have access to relevant information regarding the investment project by establishing within domestic law clear requirements for the disclosure of reports and related information. Different levels of government, moreover, may be responsible for monitoring different aspects of the investment project, and it is important to ensure that legitimate tenure right holders, local communities and the general public have access to relevant information at those various levels.

3.165. *Mechanisms for sharing information.* There are various mechanisms by which grantors can make information available to investors and the general public, including through meetings, on websites if any, and through media. The government, for example, can make information available on its website and keep it up to date, facilitate meetings with the investor and legitimate tenure right holders, provide press *releases* and other information to the media, ensure that interested stakeholders can participate in the procedures relating to permits and licenses for the project (see Chapter 3.V.1) and be responsive to freedom of information requests pertaining to the project.

(c) *Confidential information*

3.166. *In general.* In considering transparency and related disclosure obligations – including making the agricultural land investment contract publicly available – some investors may be concerned with the protection of commercially sensitive information, which could be used by competitors to gain an advantage. In accordance with emerging transparency and disclosure practices, confidential information may be redacted from documents that are to be made available to the public. What constitutes confidential information may be defined by domestic law and, in the absence of such a decision, could be defined by the parties in a contractual clause. Greater precision with respect to what qualifies as confidential information may reduce the likelihood of disputes about redactions, which are meant to be limited and should not be used to effectively protect entire documents from disclosure.

3.167. *Defining confidential information.* The UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration could serve as an example for parties interested in better defining confidential information. Article 7 of those Rules provides a basic definition for confidential or protected information:

- confidential business information;
- protected against being made available to the public under the treaty;
- protected against being made available to the public by relevant laws; and
- information that would impede law enforcement if it were disclosed.

3.168. *Redactions.* Investors and grantors can simply redact information that qualifies as confidential information. For the procedure, the UNCITRAL Rules on Transparency also provide guidance. They stipulate that the arbitral tribunal will consult with the parties to determine a cooperative procedure for redactions and will ultimately decide whether particular information should be redacted if the parties are unable to reach agreement. To do this, procedures for ensuring prompt identification and redaction of confidential information are put in place. The parties could follow a similar procedure, in which a neutral third party assists them in coming to an agreement about what is confidential or protected information, setting time limits for giving notice of their proposed redactions, and ensuring that the procedure as a whole is prompt and efficient in order to make the information available to the public in a timely manner.

3.169. *Unauthorised disclosure.* Depending on the applicable law and any relevant provision in the contract, unauthorised disclosure of specific information that is confidential may breach a confidentiality obligation. *Provided* that the party's whose information was disclosed can make the requisite showing of potential harm or actual harm, that party may be entitled to damages or other remedies (see Chapter 4.III.B).

B. Implementation

3.170. *Introduction.* Compliance, notice and review of the contract's implementation are, like transparency and reporting, important to an investment project's success. This section briefly discusses some key compliance issues – including (1) permits and licenses, (2) insurance, (3) performance guarantees, (4) environmental performance bonds – and addresses important aspects related to (5) the parties ongoing relationship, specifically notice and periodic review of the contract and its implementation.

1. Permits and licenses

3.171. *In general.* Permits or licenses, which authorise particular activity, may be required by domestic law or by contractual provision in order for the investment project to be established or for it to operate. Permits or licenses are generally granted by public authorities (e.g. ministries of agriculture or environment), and may be required for various reasons including, for example, certain agricultural *activities*, use of natural resources, construction of facilities or infrastructure and for environmental impacts.

3.172. *Contractual clauses, coordination and issuance.* In assessing the legal framework (see Chapter 1), the parties should contemplate and identify which permits are necessary for the investment project's establishment or operation. For clarity, such identification could be done expressly in the contract, *including* pointing out those that might be a condition for the project's establishment (see Chapter 2.V.3 regarding conditions). Where the government is the grantor, the contract may state the instances in which the government may suspend relevant permits or licenses, such as when there is a significant risk of damage to the environment. Where the government is not the grantor, the parties should coordinate with government officials in order to ensure that any contractual provisions in this regard are consistent with domestic law and to understand and ultimately satisfy any requirements. Governments in particular should ensure that permits or licenses are issued and renewed in a timely manner and are not unjustifiably withheld.

2. Insurance

3.173. *In general.* Insurance can play an important role mitigating many of the project's risks. It may cover many hazards (such as fire, theft, disease or natural calamities, damage to property or injury to individuals), as well as *the* life or health of the investment's employees. In certain States, it may be mandatory for the parties to take out a particular insurance coverage, and agricultural land investment contracts and related agreements may provide specific obligations in this regard.

3.174. *Provision.* Insurance products are typically provided by private entities. They may also be offered by large cooperative or mutual entities, which can render insurance more affordable. Public policy schemes also exist in *certain* States, providing guarantee mechanisms to private insurance services or subsidising minimum insurance coverage, generally linking it to credit granted under public schemes. Beyond insurance schemes, large-scale natural calamities may be covered by special State interventions offering some level of compensation for agricultural losses.

3.175. *Contractual clause.* Some contracts may provide insurance obligations. In such cases, the contract should in the first place specify which party has the obligation to obtain insurance, and indicate which type of insurance should be purchased. Merely obliging a party to take insurance, with no further clarification (*such* as simply requiring the purchase of "adequate insurance"), may not guarantee the necessary coverage. Insurance clauses should at least state the main minimum coverage requirements, such as the risks to be insured (e.g. fire, theft, disease or hail) and the amounts to be covered. For liability insurance, the contract should specify the minimum limits of guarantee and, for life insurance, the amount to be covered. Special care should be taken to verify that the insurance clause conforms to the requirements of the applicable law.

3. Performance guarantees

3.176. *In general.* In any major project, including agricultural land investments, parties seek assurances that the other party will perform its contractual obligations, and if not, that they will not be at a loss.

Performance guarantees, commonly used in construction and infrastructure projects, provide a possible solution to this issue.

3.177. *Types.* There are two main types of performance guarantees – (1) monetary performance guarantees and (2) performance bonds – though they vary from investment to investment. First, for monetary performance guarantees, the guarantor (e.g. a financial institution) undertakes to pay the government or relevant authority a stated, limited, amount of money to satisfy the liabilities incurred by the contracting authority as a result of the investor's failure to perform. A monetary performance bond can be a contract form, a standby-letter of credit, or an on-demand guarantee. Second, for performance bonds, the guarantor can either (a) rectify or complete the performance itself (e.g. fix or finish a road that was built poorly or not at all); or (b) organise for another contractor to do this, and then compensate for the losses caused by the original contractor's non-performance. The guarantor, however, reserves the right to comply with its obligations through payment of money alone.⁴⁷

3.178. *Potential applicability.* Performance guarantees are typically used in large-scale construction and infrastructure projects, not agricultural land investment contracts. Agricultural investments are long-term, often taking at least ten years to yield any profit, whereas many infrastructure projects can be completed in that time. Yet, performance guarantees could nevertheless be useful in promoting investors' compliance with an agricultural land investment contract, as the requirement to repay the guarantee to the financial institution provides a strong incentive for the investor to *comply* with their obligations. Therefore, if the parties have a transparent and cooperative relationship, a performance guarantee may be an appropriate mechanism for promoting compliance and could be considered for the project's implementation.

4. Environmental performance bonds

3.179. *In general.* Environmental performance bonds, or environmental impact bonds, are an arrangement by which investors finance environmental projects, and governments or other financiers (e.g. development agency) repay this financing on the condition that the proposed benefit is achieved (see Chapter 3.III.B). Such bonds are thus similar to a pay-for-performance contract, with the investor assuming the risk. It *may* be an attractive option, as there can be considerable savings by effectively out-sourcing projects to the best offer. Theoretically, this mechanism creates a strong incentive to monitor the progress of the project and ensure that obligations are being met. It also encourages transparency on the part of the investor, who seeks to ensure that there is no doubt they have achieved the project outcomes and will have the bond repaid.

3.180. *Potential applicability.* Environmental performance bonds may merit consideration by parties involved in agricultural land investment contracts as they can establish objectives, a timeline, and financial rewards for complying with specified environmental objectives, not only in the development of a project but also for *conservation* or project closure purposes. Because of the focus on short-term, quantifiable and technical measures of success, such bonds may be inappropriate for dealing with longer term environmental problems (e.g. water pollution from various sources).

3.181. *Tailoring to agricultural land investment contracts.* The environmental performance bond model could be tailored to agricultural land investment contracts, thereby promoting monitoring and implementation. Investors and *governments* could agree, for instance, that certain concessions or benefits can be accrued by the investor (e.g. extra parcels of land, a tax benefit) for every specific environmental objective satisfied (e.g. rehabilitation of wildlife habitats; reduction in the fertiliser and pesticide run-off in water sources). If the investor does not meet the goal within the specified time period, they may have to return certain land tracts or start paying a tax for which they had previously been exempt. Specific goals and rewards that are delivered over discrete time periods are more likely to incentivise investors to be transparent with their efforts, and for all parties to monitor and comply with their contractual obligations.

⁴⁷ In addition, the *maintenance bond*, is a subset of performance bonds. This protects against future failures to perform during the start-up or maintenance phases of a project and guarantee that the contractor will carry out any necessary repair or maintenance work during the post-completion period.

5. Notice and periodic review

3.182. *Notice.* As noted in paragraphs 154-165 – above, open and continuous communication is essential to the investment project’s success. A notice provision identifies how parties are to communicate formally, typically in written form. This provision is linked to particular obligations in the contract for which notice, under certain circumstances, might be required. Notice may be required, for example, in connection with option clauses regarding additional land (see Chapter 3.I.B.1), renewal clauses regarding the extension of the contract (see Chapter 3.I.D), excuses for non-performance (see Chapter 4.II), the right to cure non-performance (see Chapter 4.III.B.1(d)), termination (see Chapter 4.III.B.4) and disputes (see Chapter 6).

3.183. *Periodic review.* To ensure that the contract’s terms remain relevant and appropriate in the light of changing economic fundamentals, the parties should consider scheduled revisions or periodic renegotiations of terms and establish the procedure for such revisions and renegotiations in the contract. *Periodic review* clauses should clarify: the timing (*e.g.* every five years); the scope, which may be general or restricted to specific clauses (*e.g.* rental fees); and the practical modalities for the parties to jointly review contract terms. One example would be clauses providing for the periodic adjustment of land rental fees in the light of evolving circumstances. The more effective clauses provide arrangements (see Chapter 6.III.A regarding expert determination) for situations where the parties cannot agree on the revisions.

3.184. *Amendments and renegotiations.* In connection with periodic reviews, the parties should consider specifying a procedure in the contract to allow for the contract to be amended based on the outcome of those reviews *and* the agreement of the parties. Such a procedure could expedite renegotiations (see Chapter 2.V.B) and enhance stability and sustainability.

CHAPTER 4 - CONTRACTUAL NON-PERFORMANCE AND REMEDIES

4.1. *Overview.* The parties to agricultural land investment contracts, which are typically long-term and complex contracts, are likely to encounter situations in which the obligations contemplated will not be satisfactorily performed, whether as a result of an event external to the parties' control or because of default or breach by one of the parties. The importance of sustaining contracts and mitigating risks and impacts is generally acknowledged. In many legal systems, however, there is no guidance for this and it is the parties' role to establish a contingency plan for such situations, in particular to build contractual mechanisms that can be adequately used.

4.2. *Promoting predictability, stability and flexibility.* For the sake of predictability and to preserve the stability of the relationship over the intended duration of the agricultural land investment contracts and any *related* agreements, parties are advised to anticipate the possible non-performance events and provide for the corresponding actions or steps, together with the necessary flexibility. In this context, primary importance is to be given to the potential impact of a non-performance event and of the applied remedies on legitimate tenure right holders. Such holders' available remedies or recourse will depend on their position in the overall contractual arrangements (see Chapter 2.III.B above and Part III below). Contracting parties should also be aware of potential effects of non-performance events on a broad range of stakeholders, who might not be parties to the contract or any related agreements, or third party beneficiaries.

4.3. *Applicable law.* In designing their contingency plan, in particular the various remedies, parties should be aware of the range of remedies that an aggrieved party may exercise upon a non-*performance* event under the applicable law. The grounds for exercising each of the various remedies, their content and scope, and the sequence in which they may be exercised vary between legal systems. The parties should also be aware of the flexibility provided by the applicable law, within the limits of any applicable mandatory provision. Mandatory provisions may be found in various sources including contract law, lease law, investment law, environmental law, human rights and social regulations (see Chapter 1.II). This Chapter focuses on contractual remedies, but depending on the legal system, an aggrieved party may be entitled to seek relief outside the particular contract or related agreement as well, based for example on a tort action or otherwise (see also Chapter 2.V regarding grounds for avoidance of the contract, such as defects in consent, fraud or others).

4.4. *Defining excuses and remedies.* It is important that the contract clearly defines those obligations (e.g. an obligation regarding to timing), the performance of which could be excused or the unexcused breach of which could possibly provide a basis for remedy. Contractual terms regarding non-performance may be placed immediately after the obligation to which they relate, or in a dedicated *section* on "remedies" or referring *specifically* to certain types of remedies (e.g. "Damages", "Termination", etc.). A well-designed set of excuses and remedies should enable the parties to solve problems at an early stage and avoid their escalation, potentially leading to far-reaching economic, environmental and social consequences. Ideally, a well-conceived system of remedies should not only serve as a deterrent against breach (e.g. through the threat of liability, termination or other adverse consequences) and provide the aggrieved party with redress, but should also aim to encourage performance through the facilitation of proactive error detection and correction.

4.5. *Roadmap.* Part I of this Chapter describes some general considerations in this area. Part II is devoted to excuses for non-performance. Part III provides an overview of remedies and addresses *situations* in which each of the parties to the contract is in breach, together with the remedies which may be available to the other party or parties. In doing so, Part III also addresses situations in which legitimate tenure right holders or local communities are parties to the contract or a related agreement or are third party beneficiaries.

I. GENERAL CONSIDERATIONS

4.6. *Concepts of non-performance and remedy.* Non-performance is the failure by a party to perform any of its obligations under the contract, including defective performance or late performance. Non-performance events may relate to any or several of the obligations under the contract, with more or less disruptive consequences on the overall equilibrium of the relationship. The *performance* of an obligation, and the relevant remedy in case of non-performance, varies depending upon the nature of the obligation incurred, whether it relates to a duty of best efforts with a degree of required diligence, or a specific result is promised and can be assessed.¹ Every non-performance situation provides the aggrieved party a ground for remedy. The term “remedy” refers to any legal measure provided by law or by contract to protect the interest of an aggrieved party against the consequences of another party’s non-performance.

4.7. *Excused non-performance versus breach.* Non-performance may be excused because of unexpected external event, such as a force majeure event, or by reason of the conduct of the other party to the contract. Non-performance may not be excused if it results either from intentional acts of the obligor or from events falling within the obligor’s sphere of control, amounting to a breach of contract. While some *remedies* (i.e. money damages) are exclusively designed for breach, most other remedies are available both in cases of excused and unexcused non-performance, as long as the circumstances excusing non-performance do not impair their use.

4.8. *Proportionality.* In many – albeit not all – legal systems, the remedies available to the aggrieved party have to be commensurate to the seriousness of the breach. Some legal systems limit the use of more severe remedies (e.g. contract termination) to instances in which the breach substantially deprives the aggrieved party of what it was entitled to expect under the contract, within the limits of *foreseeability*, is intentional or reckless, or is such that the aggrieved party has no reason to believe that any performance will be forthcoming.² The Guide refers to these situations of particularly serious breach, which may be known domestically as a “material” or “substantial” breach, as a “fundamental” breach. As a good practice approach, parties should apply proportionality between the breach and the remedy. While this principle is relevant to all situations, it is particularly true regarding termination, which should come as the last resort after a succession of opportunities to mitigate and cure the defect.

4.9. *Cooperation.* In dealing with non-performance situations, parties should comply with all general principles enshrined in the applicable law, such as good faith and fair dealing. Cooperation is a key principle that is especially relevant for long-term contracts,³ for example in the exchange of relevant information, allocation of additional time for performance, mitigation of damage, granting an opportunity to cure, or adapting the contract. Cooperation may also be required when the contract expires or is *terminated*, for example, to return the land in the agreed condition (see Chapter 5.II regarding return of the land).

4.10. *Monitoring.* Even when the contract deals with remedies, it is likely that the parties will be not be able to cover every detail of the many possible non-performance situations that may arise. Therefore, a sound *management* of non-performance events would define in the contract a set of generally applicable or specific remedies, having in mind the available remedies under the applicable law. In addition, parties are particularly advised to set a mechanism which will monitor non-performance and remediation, as a logical continuation of monitoring contract performance (see Chapter 3.V). In this context, mechanisms aiming at monitoring contract performance should not only evaluate the parties’ compliance with the applicable law and the contractual obligations but could usefully also provide guidance regarding an appropriate remediation response (e.g. through mitigation and corrective action). Parties may organise in different ways cooperative mechanisms to monitor and manage non-performance events and remedies (e.g. by establishing

¹ See UPICC, Art. 5.1.4.

² For international commercial contracts, the UPICC reserve the remedy of termination to instances of fundamental breach (see UPICC, Art. 7.3.1). For international sales contracts, the UN Convention on Contracts for the International Sale of Goods (2010) takes the same approach (see Art. 25, CISG).

³ See UPICC, Art. 5.1.3.

procedures and monitoring boards) and envisage mechanisms leading if necessary to a renegotiation or revision of the contract (see also Chapter 3.V.C regarding periodic review).

4.11. *Connection to dispute resolution.* The inability of parties to manage non-performance in an orderly manner, or a failure of the attempts to do so, is likely to escalate into a “dispute” (see Chapter 6). Parties *should*, to the extent possible, prioritise starting with amicable forms of resolution (e.g. negotiations and mediation) before resorting to adjudicatory forms of resolution, either in arbitration or before a State court. Amicable forms of resolution can be seen as a continuation of the cooperative remedies for non-performance and could conceivably be organised by the parties under the same mechanisms. Grievance mechanisms, moreover, may likewise serve to address non-performance situations at an early stage and seek an appropriate solution.

II. EXCUSES FOR NON-PERFORMANCE

4.12. *In general.* Over the duration of an agricultural land investment contract, certain events external to the parties’ control may occur that will totally impede or drastically hamper the performance of the contract. These supervening events draw particular attention because they may provide legal excuses for non-performance or may trigger other legal consequences. All legal systems provide for situations of excused non-performance. They differ widely, however, regarding the events providing a valid ground for excuse (i.e. the “qualifying events”), their particular definition and scope, and their actual legal consequences on the parties’ obligations and on the contract or related agreement as a whole. Interpretation by courts play an important role as well, due to the importance of the particular circumstances in each case.

4.13. *Flexibility under applicable law.* As a general rule, domestic laws allow parties to regulate possible excuses for supervening events in their contract. Such clauses are common in international commercial practice and may serve multiple purposes, either restricting or enlarging the applicable law’s default rules that qualify supervening events and their characteristics, and may modify their effects or providing for specific situations.

4.14. *Lack of or invalid contractual clauses.* In the absence of any specific contractual clause to this effect, or if such a clause is not valid, the applicable law determines whether, and to what extent, certain events or circumstances qualify as excuses and what consequences they would entail for the parties’ obligations and their contract as a whole. It does not depend on the forum from which recognition of the event or circumstances is sought. The law of the forum may, however, come into play, either as an international mandatory rule or through the public order exception. Sometimes, the applicable law is that of the forum.

4.15. *Considerations for legitimate tenure right holders.* The consequences of an excused non-performance event on any legitimate tenure right holders warrants special consideration, especially considering that they may have given up certain rights to land or other resources in order for the investment project to be undertaken. In situations in which such holders are parties to agricultural land investment contracts or related agreements and undertake certain obligations (see Chapter 2.III.B), they may avail themselves of an excused non-performance of their obligations. As aggrieved parties, they may not be entitled to claim compensation for the investor’s excused non-performance. The same would apply if legitimate tenure right holders stand as third party beneficiaries.

4.16. *Roadmap.* This Part deals with two possible excuses, specifically (a) force majeure and (b) change of *circumstances*, as well as (c) some additional considerations in investor-government contracts.

A. Force majeure

4.17. *General notion.* The impossibility to perform a contract, most often understood as force majeure, generally refers to events arising after the conclusion of a contract, which are unpredictable, inevitable and *beyond* the parties’ reasonable control, and objectively prevent one or both of them from performing. When a force majeure event occurs, the defaulting party is excused for the non-performance.

4.18. *Applicable law.* In considering a force majeure clause, parties should be aware that inserting such a clause does not necessarily make the applicable law irrelevant. General clauses referring to force majeure without further specifications will be interpreted in accordance with the applicable law and may also depend on the law of the forum. Moreover, contractual lists of relevant supervening events *may* be construed in different ways depending on the adjudicating body and the legal system.

4.19. *Force majeure clauses.* It is advisable for parties to include in the contract a force majeure clause tailored to their *specific* needs. In addition to defining any notice and procedural requirements consistent with applicable law, the clause generally: (1) defines qualifying events; and (2) spells out the consequences of recognition.

1. Events qualifying as force majeure

4.20. *Definitional elements.* Contract clauses most often contain a general reference to “force majeure”, sometimes coupled with another term such as “fortuitous case”. Some clauses may also use the terms “adverse factors” or “adverse events”, with or without additional language, such as “alien to the will of the parties” or “beyond the control of the parties”. Sometimes the clauses expressly require that the obligation become impossible to perform, or lead to that same result. The uncontrollable or inevitable nature of the event is sometimes mitigated when the parties refer to a reasonability test. The clause may also include specifications regarding the causal link between the event and the failure to perform and address whether the impediment is permanent or temporary in nature, a distinction which also shapes the consequences of the impediment’s occurrence.

4.21. *Definitional lists.* Force majeure clauses often contain a list of qualifying events, which may be useful in interpreting the clause. The parties can make clear that the list is not exhaustive (*e.g.* by using *expressions* like “such as”, “highlighting, among other”, “including, but not limited to”; by inserting suspension points or “etc.”, or by adding a cover-all final description). The parties may prefer, for certainty’s sake, to make the list exhaustive.

4.22. *Natural and non-natural events.* Contracts with a force majeure clause containing a list of examples of natural events almost invariably include extreme weather events and calamities (*e.g.* floods, frosts, droughts, storms, fires and earthquakes), often referred to as acts of God. Epidemics and pests are also often found as qualifying events. Among the non-natural events, strikes or other labour conflicts are often expressly mentioned, sometimes including illegal or non-authorised actions. Upheavals ranging from riots to revolutions or armed conflicts, mobs and other social disturbances are additional events that often appear in force majeure clauses, as well as wars, acts of terrorism, insurrections and civil disturbances.

4.23. *Conflicts with local communities.* Conflicts with local communities hampering the performance of the contract (*e.g.* if access to necessary infrastructure is blocked by local communities) may qualify depending on the contract and the particular circumstances. When such events could have been avoided or were foreseeable, as may be the case under most contracts in which local communities have indeed been identified as affected by the contract, it is questionable whether unrests or *conflicts* could in fact amount to qualifying events because these are core issues to be appropriately addressed within the investment relationship. It may be that the inclusion of such events within the scope of force majeure could be rather amount to an exclusion or limitation of liability hidden in the force majeure provision. Parties should be aware that many legal systems impose restrictions on exclusions of liability (*e.g.* striking them down if they extend to wilful or grossly negligent behaviour of the obligor or limiting the possibility to insert them in standard contracts).

4.24. *Governmental acts.* Acts of governmental authorities, covering changes in legislation or governmental policy, are commonly referred to as qualifying events in force majeure clauses in contracts between private parties. However, this is not generally not the case when the government is a party to the contract as the act cannot be considered as being beyond the party’s control. Some additional considerations for contracts in which a government is the grantor are dealt with in Section C below.

2. Consequences of the recognition of force majeure

4.25. *In general.* The occurrence of a qualifying event entails an exemption of liability for the non-performing party to the extent of its impossibility to perform. In many situations, the impossibility will be partial, affecting only certain of the obligations due, or will apply for a limited period, involving a suspension of the contract, before leading – if at all – to the termination of the contract. Parties are advised to cooperate in dealing with the effects of the event, through information and mitigation mechanisms, and the following covers various consequences of the recognition of force majeure.

4.26. *Excuse from non-performance.* When a party's obligations are rendered impossible to perform or are otherwise significantly affected by a force majeure event, force majeure operates as an excuse (or a defence) for the non-performing party, exonerating the party from performing the obligation affected by *the* event or merely precluding the non-affected party from raising a claim for damages.⁴ Generally, the party whose performance is allegedly affected by the force majeure event bears the burden of proving the occurrence of the event, its required characteristics under the contract or applicable law, and the causal link between the event and the non-performance.

4.27. *Suspension of performance.* In some extreme cases, the impediment will prevent any further performance and lead to termination of the contract. Generally, however, the impediment will simply have a suspensive effect. Suspension is at least initially a less disruptive approach than an outright termination, and is often expressly provided for in agricultural land investment contracts. A suspension, however, cannot be expected to have an indefinite duration. Usually the contract's duration will be extended for a temporary period of time equal to the duration of the impediment. The contract may alternatively provide that performance is excused after a specified period of time has elapsed, or may give a right to the other party to terminate the contract after a period of time. Another possibility is to oblige the parties to renegotiate the terms of their agreement (see paragraph 29 below). It may be further advisable to indicate the time from which the period will start running: when the impediment arose, when the party became aware of it, or – if an obligation to provide notice exists – when notice was served on the other party.

4.28. *Termination.* Contracts, or less frequently domestic laws, may grant to either one or both parties a right to terminate the contract based on the occurrence of a force majeure event. This right may be immediately *available* or arise only after the period in which performance was suspended has expired. Termination may also automatically ensue after a specified period of time, particularly when the contract contains a list of events permitting an automatic termination and specifically includes the impossibility to perform due to force majeure events. The right to terminate the contract may also be conditioned on giving notice to the other party. Moreover, the contract may expressly determine the effects of termination, for example by limiting it to future performances (see Part III.B.4 below).

4.29. *Right or duty to renegotiate.* Parties may wish to continue their relationship even when unforeseen circumstances impede or severely restrict performance. To achieve such continuation, a clause of the initial agreement may provide a right or a duty to renegotiate its terms upon occurrence of a specified event. In the absence of a provision on renegotiation, the parties may always decide to modify their original agreement or conclude another one by mutual consent. Domestic contract laws, however, will not usually provide a right or a duty to enter into a renegotiation process following the occurrence of a force majeure event. Some legal systems, on the other hand, recognise that changes in the original circumstances existing at the time of the contract's conclusion may exceptionally give rise to such a right or duty.⁵ This may derive from an express legislative provision or from the general principles of good faith, solidarity or cooperation.

⁴ For international commercial contracts, a similar rule is stated in the UPICC Art. 7.1.7(4); and, for international sales contracts, in Art. 79(5), CISG.

⁵ See UPICC, Arts. 7.1.7 and 6.2.3.

B. Changes of circumstances⁶

4.30. *General notion.* Changing circumstances occurring over the life of the contract may go beyond the risks contemplated at the time of entering into the contract. Although not necessarily impeding performance – a situation which will amount to force majeure – situations in which they fundamentally alter the balance of the *relationship*, they constitute a frequent ground for non-performance. “Hardship” is a common term used to describe exceptional changes of circumstances that may give rise to a contractual or judicial remedy, or clauses regulating such situations.

4.31. *Diversity of approaches under domestic law.* A contract clause dealing with changing circumstances is all the more necessary in view of the great diversity regarding the recognition and treatment of hardship situations in domestic laws. Based on a strict adherence to the principle of the stability of the contract as stipulated by the parties, generally, domestic contract laws have neither adopted specific provisions nor developed ad hoc judicial solutions for such situations, and may not favour termination or judicial adaptation. In some situations, the court may either direct the parties to enter into negotiations with a view to reaching agreement on the adaptation of the contract, or confirm the terms of the contract as they stand. Few domestic laws require a preliminary renegotiation before they grant the right to go to court in order to claim for judicial adaptation or termination due to a change of circumstances.

4.32. *Hardship in domestic law.* In legal systems where hardship situations give rise to a legal remedy, strict considerations apply in assessing whether the circumstances and the effective fundamental alteration of the contract. In practice, a fundamental alteration may manifest in a substantial increase in the cost of performance, or a substantial decrease in the value of the performance received. Market disruptions, which can adversely alter a party’s financial standing or lead to global price fluctuations, are a common cause of a change of circumstances that may excuse contractual non-performance. In agricultural land investment contracts, a substantial increase in costs may, for instance, fall on the investor as a result of the introduction of new safety regulations requiring far more expensive production procedures. A substantial increase in costs may also fall on the grantor, for instance, if the grantor has agreed to provide the investor with certain facilities (e.g. water supply) and drastic changes in market conditions greatly increase the cost of providing those facilities.

4.33. *Timing and assumption of the risk.* The events causing hardship must take place or become known to the disadvantaged party after the conclusion of the contract. If that party had known of those events when entering into the contract, it would have been able to take them into account at that time. In such a case that party may not subsequently rely on hardship. The events must also be beyond the control of the *disadvantaged* party. Besides, there can be no hardship if the disadvantaged party had assumed the risk of the change in circumstances, either expressly or as a result of the very nature of the contract.

4.34. *Relevance to performance still to be rendered.* If the fundamental alteration in the equilibrium of the contract occurs at a time when performance has been only partially rendered (e.g. the investor has paid the necessary fees for the land but has not yet fulfilled its obligation to build certain infrastructure, such as an access road), hardship can be of relevance only to the parts of the performance still to be rendered. An investor may only invoke hardship with respect to the remaining years of the life of the contract.

4.35. *Consequences.* In the case of a qualifying “change of circumstances” and absent a specific hardship clause in the contract, the disadvantaged party should first request renegotiations to adapt the original terms of the contract. It is only upon failure to reach agreement within a reasonable time that either party may resort to the court with a view to adapting the contract to the changed circumstances. The request for *renegotiations* must be made as quickly as possible after the time at which hardship is alleged to have occurred. It does not by itself entitle the disadvantaged party to withhold performance, and the investor would not be allowed to stop fulfilling its own obligations.

4.36. *Dealing with changes of circumstances in the contract.* To achieve clarity, sustainability and flexibility, parties are advised to consider that changes of circumstances that may occur during the contract’s

⁶ See also UNCITRAL. 2001. Legislative Guide on Privately Financed Infrastructure Projects, p. 142, paras. 126-130; p. 199, para. 35; VGGT Technical Guide No. 7, p. VIII-X.

life and should appreciate the advantage of dealing with this issue in the contract. A hardship clause will define what circumstances constitute hardship and what consequences will ensue. Very often, hardship situations are addressed *more* generally under adaptation clauses, requiring periodical review and organising for negotiations with a view to a possible restructuring of the contract.

C. Considerations in investor-government contracts

4.37. *In general.* In investor-government contracts, certain circumstances may be claimed by a government grantor to excuse non-performance. Whether the supervening event or change in circumstances are serious enough to wholly or partially excuse the government from contractual non-performance, and for what period of time, normally depends on the applicable law. If the government validly seeks recognition of the change within its own jurisdiction, and its own law is not the law governing the contract, this law may come *into* play as a “loi de police” of the forum.

4.38. *Civil disturbances.* Governments may choose to suspend contractual performance in view of internal unrest, or in response to public sentiment accompanied by acts of violence directed at the Investor. On its own however, civil disturbance, which can range from rioting to looting to armed conflict, does not excuse a government from contractual non-performance. Governments that have signed investment treaties are obliged to *accord* full protection and security to qualifying investors. To meet this obligation, governments are required to exercise due diligence in minimising the damage caused to the investor by the civil disturbance. Government due diligence will excuse contractual non-performance. Government inaction in the face of civil disturbance on the other hand, will expose the government to a potential claim for the violation of the applicable investment treaty. Additionally, particularly serious acts of civil disturbance amounting to armed conflict, such as murder, may be attributed to the government.⁷

4.39. *Necessity situations.* As a situation of necessity, created by a “grave and imminent peril”,⁸ may be brought about by force majeure, a change of circumstances, qualifying event, or even civil disturbance, there may be some overlap between necessity and other excuses for contractual non-performance. That said, additional conditions have to be met before contractual non-performance due to necessity will not engage a government’s responsibility for internationally wrongful conduct. First, there must exist a “grave and imminent peril”. Second, contractual non-performance must be the only way for the government to address this “grave and imminent peril”. Third, contractual non-performance must not seriously impair an essential interest of the international community. And fourth, the government must not have contributed to the situation of necessity. Given the stringency of conditions attached to the defence of necessity, contractual non-performance is only excused on the ground of necessity in exceptional circumstances, such as the collapse of the national economy.

4.40. *Relation with stabilisation clauses.* Government performance of a contract may be subject to a stabilisation clause (see Chapter 3.IV.C). Whether and how a stabilisation clause affects liability for contractual non-performance by the government depends on the wording of the stabilisation clause in the contract. As a result of this link, there needs to be consistency and coherence between such clauses, if used, and excuses, and *they* should be considered carefully.

III. REMEDIES FOR BREACH

4.41. *Introduction.* When non-performance is not excused, a breach of the obligations under the contract may entitle the aggrieved party or parties to seek relief against the party or parties in breach, seeking one or several remedies among those available. As noted in the Chapter’s introduction, the term “remedy” refers to any *legal* measure provided by law or by contract to protect the interest of an aggrieved party against the consequences of another party’s non-performance.

⁷ ILC. 2001. Responsibility of States for Internationally Wrongful Acts, Arts. 4-8.

⁸ *Id.*, Art. 25.

4.42. *Roadmap.* This Part: (a) covers the role of the aggrieved party's conduct; (b) provides an overview of remedies; and (c) considers the situations arising from each party's breach (i.e. by the investor, the grantor, and, where *applicable*, the legitimate tenure right holders) and the corresponding remedies available for the aggrieved party or parties. For the latter, breaches will be reviewed with reference to the main obligations identified for each party under Chapter 3 on Rights and Obligations of the Parties, with an analysis of common defaults and concerns (including the occurrence of an interference by another party) and guidance regarding possible appropriate remedies.

A. The role of the aggrieved party's conduct

4.43. *In general.* The behaviour of the aggrieved party, depending on the applicable law, may have an influence on access to specific remedies. It may deny certain remedies or reduce their scope because the aggrieved party either has interfered with the other party's performance, has contributed to the breach or has failed to mitigate the *negative* consequences of the breach. For example, if the aggrieved party contributed to the breach, it might not be able to seek termination or specific performance, or might be required to bear part of the additional costs that the breaching party will have to incur when performing. The latter can translate into price reduction.

4.44. *Interference.* Interference generally contemplates two distinct situations.⁹ In the first situation, one party is unable to perform, either wholly or in part, because the other party's interference makes performance in whole or in part impossible. For instance, the investor bears the burden of building a learning centre but the *government* (which is the grantor) does not deliver the necessary authorisation to build the centre. Interference may result only in a partial impediment to performance by the other party. In the second situation, non-performance results from an event the risk of which is expressly or impliedly allocated by the contract to the party alleging non-performance. Such an event may, for instance, result from communities which obstruct access to facilities, or from a city council which fails to deliver the necessary authorisations to build the infrastructure, and the contract allocates the risk of such events to the government.

4.45. *Contribution to breach.* The behaviour of the aggrieved party may contribute to the obligor's breach. This is the case when the aggrieved party fails to comply with obligations that could be considered to achieve the expected output. When the aggrieved party subsequently seeks damages, its own contribution to the breach may reduce recoverable damages according to the degree of fault of each party and the *causal* link between acts or omission and defective performance.¹⁰ In order to promote cooperation and to avoid opportunistic behaviour, some systems may make only certain remedies available to the aggrieved party that contributed to the breach.

4.46. *Duty to mitigate.* In facing a non-performance situation, the aggrieved party should not remain inactive when action could avoid or mitigate the damage. Under many legal systems, the aggrieved party actually has a duty to do so, often known as the duty to mitigate.¹¹ Depending on applicable law, the failure to mitigate may *exclude* some remedies or reduce the amount of damages available. When a duty to mitigate is not recognised, some forms of cooperation by the aggrieved party may be based on general principles of contract law, like a duty to cooperate or good faith. When recognised, mitigation can result in the adoption of corrective measures by the aggrieved party or by a third party at the breaching party's expense. For instance, if the contract provides for the investor's cooperation and approval of the infrastructures, the investor's failure to inspect the infrastructure and give notice in a timely manner of any non-conformity of the infrastructure may deprive it of any remedy, including remedies in kind, price reduction and damages.

4.47. *Compliance with the duty to mitigate.* An aggrieved party's duty to mitigate the consequences of the breach is accepted by many domestic systems and in international codifications, although divergences exist. In those legal systems which do not accept such a duty, the principle of good faith may come into play to

⁹ *Id.*, Art. 7.1.2.

¹⁰ *Id.*, Art. 7.4.7.

¹¹ *Id.*, Art. 7.4.8.

sanction the aggrieved party who took no reasonable measures to mitigate the harm. Compliance with this duty normally implies the right to recover expenses reasonably incurred to mitigate the harm caused by the breach. When a duty to mitigate is recognised by law, failure to mitigate prevents the *aggrieved* party from receiving full compensation of damages or to claim those damages due to such failure. Special attention is paid to timely substitute transactions as a means to reduce the extent of increasing losses due to price fluctuations. The duty to mitigate operates not only in bilateral, but also in multiparty and related contracts. Clearly, multiparty and related contracts may require some adjustments when defining the scope and objectives of the duty to mitigate, as more parties may be in a position to take mitigation measures against the occurrence of loss.

B. Overview of remedies

4.48. *Roadmap.* Remedies can be classified into four broad categories according to their content and to the extent to which they are apt to ensure compliance with contractual commitments. This section will consider, in turn, the following remedies: (a) in-kind remedies; (b) monetary remedies; (c) renegotiation; and (d) termination and *restitution*.

1. Remedies in kind

4.49. *Introduction.* Remedies in kind aim to provide the aggrieved party with the same or equivalent benefit expected from contract performance. These may include enforcing a right to performance applying corrective measures or granting additional time for performance. The use of remedies in kind keeps the contractual relationship in place, and represents a cooperative second best solution when the initial terms of the exchange cannot materialise. They are particularly relevant for long-term relationships with impact on local communities, involving high value investments in land and infrastructure. Any other loss arising from the breach despite the application of the remedy in kind (e.g. loss for delay in performance) is covered by awarding damages to the aggrieved party.

4.50. *Withholding performance.* Depending on the applicable law, the remedy of withholding performance may either be used when one party breaches the contract before the aggrieved party has to perform pursuant to the contract schedule. In general, withholding performance represents an instrument for imposing pressure for the other party's performance. The impact of withholding performance on the development of the contractual relationship may depend on the type of performance withheld, in particular as to whether it relates to obligations instrumental to the other party's performance. The investor may, for instance, withhold payments to the grantor if access to certain facilities is not granted. In the case of non-conforming acts of performance by the investor, withholding performance may be more difficult to put into place because the grantor's performance has usually already occurred (i.e. delivery of the land). In some situations, however, the grantor may withhold other types of performance, such as delivery of physical or other inputs (e.g. technical assistance, access to the water). The remedy of withholding performance may also be used as a mere prelude to future termination (see paragraph 94 et seq.) especially when circumstances make it apparent that there will be a fundamental breach.

4.51. *Right to performance.* There is a generally accepted principle that payment of money which is due under a contractual obligation can always be demanded and, if the demand is not met, enforced by legal action before a court. Due to the binding character of the contract, each party should as a rule also be entitled to require performance of non-monetary obligations, the so-called "specific performance" (e.g. an order to take immediate action to deliver the land or to build a road within a specific time frame as *requested* in the contract). In civil law States, this is indeed possible. For instance, if the investor had promised to build certain facilities and then decides not to build them, the other party may ask for specific performance, unless it is excessively costly or otherwise an inappropriate remedy, in which case damages can be sought or a replacement solution can be used. By contrast, common law systems allow enforcement of non-monetary obligations only in special circumstances and prefer to grant damages to the party suffering from the non-performance.

4.52. *Limitations on right to specific performance.* Applicable law may restrict the use of the remedy of specific performance where it is (a) not physically possible (e.g. goods to be delivered have been destroyed);

(b) unreasonably burdensome (e.g. tons of specialty seeds, due to be segregated from ordinary seeds, have in fact been commingled); (c) legally unenforceable for its exclusively personal character (e.g. technical assistance concerning a new agricultural methodology only known by a specific provider); or (d) because the aggrieved party's request has not been timely.¹² The occurrence of harm is not a prerequisite to obtain specific performance, nor does the breach need to be fundamental. *However*, depending on applicable law, the possibility to claim replacement of goods may be restricted to circumstances where a fundamental breach has occurred.¹³

4.53. *Additional time for performance.* In a wide range of situations, one party fails to perform an obligation within the period agreed in the contract and the other party is willing to give extra time for performance, preferring a late performance to no performance at all (e.g. a delayed payment of rental fees by the investor to the *grantor*). The possibility to accept a late performance generally depends on the type of the obligation, whether fundamental or not, and the interests involved. Parties should consider how to deal with late performance in the contract.¹⁴ Granting an extension of time for performance may occur after a request for performance made on a private basis between the parties. It may also occur after a court or through an alternative dispute resolution mechanism (e.g. arbitration). Some legal systems, moreover, provide a procedure through which the party entitled to performance could give the performing party a second chance, without prejudicing other remedies, such as the right to recover damages. The procedure generally involves a notice by the aggrieved party to allow an additional period of time for performance, during which resorting to other remedies will not be possible.

4.54. *Corrective measures and the right to cure.* Corrective measures include repair, replacement or other cure of defective performance by the non-performing party at its own expense, and give the lessor what it is entitled to expect under the contract. Corrective measures are strongly advisable insofar as they favour the preservation of the contract. They may be required by the aggrieved party as part of its right to performance.¹⁵ In some legal systems,¹⁶ the breaching party, under certain circumstances, has a right to cure even after the time for performance has passed. In order to do so, it must give notice of cure, and that notice must be reasonable with regard to its timing and content as well as to the manner in which it is communicated. In many cases, this results in additional time for performance, at least for a brief period, beyond that stipulated in the contract.

4.55. *Limitations on the right to cure.* Under certain circumstances however cure may not be allowed, for instance when it would not be reasonable to permit the non-performing party to make another attempt at performance. This would not necessarily be the case only because the failure amounts to a fundamental non-performance. The non-performing party may not cure if the aggrieved party can demonstrate a legitimate interest in refusing cure. A legitimate interest may arise, for example, if it is likely that, when attempting cure, the non-performing party will cause damage to person or property. On the other hand, a legitimate interest is not present if, on the basis of the non-performance, the aggrieved party has simply decided that it does not wish to continue contractual relations. Most legal systems have a principle of full compensation for damage suffered.¹⁷ An investor who successfully cures remains liable for any harm that, before cure, was occasioned by the non-performance, as well as for any additional harm.

4.56. *Contractual clause on the right to cure.* Parties are advised to provide in the contract for an opportunity to cure in case of alleged defaults and organise the corresponding procedure. This is particularly advisable when the contemplated breach is a ground for termination. The procedure may be agreed through consultations between the parties, or set by the aggrieved party, through a notice indicating a specific time within which the cure is to be completed.

¹² *Id.*, Art. 7.2.2.

¹³ For international sales contracts, a similar rule is stated in Art. 46(2), CISG.

¹⁴ See UPICC, Art. 7.1.5.

¹⁵ *Id.*, Art. 7.2.3.

¹⁶ *Id.*, Art. 7.1.4.

¹⁷ *Id.*, Art. 7.4.2.

2. Monetary remedies

4.57. *Introduction.* There are some remedies that do not provide the aggrieved party with the same kind of expected benefit but a monetary value replacing that benefit. This is the logic, for example, behind damages as a *stand-alone* remedy or a price reduction in the case of defective or partial performance.

(a) Price reduction

4.58. *In general.* In contractual practice, a price reduction may be sought in case of breach for non-conformity or for partial delivery. In general, the remedy functions to preserve the exchange and restore the balance between the values of the exchanged performances. It is used when one of the two performances is *defective* or incomplete and the aggrieved party is not interested in or may not obtain specific performance, nor contract termination. A fundamental breach is usually not required to seek a price reduction.

4.59. *Application.* Criteria for price reduction may be contractually defined. They often include a penalty dimension with an escalating adjustment of the price depending on the seriousness of the breach. Depending on applicable law, however, a price reduction may be barred by the obligor's right to cure defects, when recognised by law.

4.60. *Examples.* In agricultural land investment contracts, price reduction may be applied when the lessor fails to fulfil all its obligations and, for instance, does not build the facilities it promised to build. In such a case, the amount of the instalments to be paid by the investor may be reduced. Price reduction may also apply when the investor has to pay the costs of some actions which increased its own costs (e.g. the irrigation system is broken and not repaired by government which owns it).

(b) Damages

4.61. *In general.* Money damages are exclusively designed for breach and could not apply as a remedy for an excused non-performance. Damages may be sought as a stand-alone remedy, or in combination with other remedies. As a stand-alone remedy, the objective is normally to put the aggrieved party in the position it would have been had the contract been performed. Damages then typically include costs incurred and lost profits.

4.62. *Prejudice.* Unlike other remedies where the breach of contract may suffice to entitle the aggrieved party to the remedy, the aggrieved party must prove that it has suffered a prejudice to be awarded damages. However, some legal systems reverse the burden of proof so that it suffices for the aggrieved party to prove the breach, and it is for the breaching party to prove that no harm has been caused or that it was not *caused* by the breach. In order to assess whether a breach has caused damages, legal systems refer to several criteria, among which full compensation, certainty, foreseeability are most common.

4.63. *Full compensation.* Full compensation is a generally admitted principle, which includes any loss incurred and any gain of which the aggrieved party was deprived. Such harm may be understood in a wide sense beyond pecuniary effects, including for instance, physical suffering or emotional distress.¹⁸

4.64. *Certainty.* Compensation is due only for harm established with a reasonable degree of certainty.¹⁹ The mere chance of profits, for example, that the investor has lost due to the delayed compliance by the grantor might fail the certainty test unless there was a concrete negotiation or even a binding contract for the purchase of the *production* with a third party. In many legal systems, loss of a chance is covered, but only in proportion to the probability of its occurrence.

4.65. *Foreseeability.* The non-performing party is normally liable only for the harm that was either foreseeable or which could have been reasonably foreseen at the time of conclusion of the contract.²⁰ Parties

¹⁸ *Id.*

¹⁹ *Id.*, Art. 7.4.3.

²⁰ *Id.*, Art. 7.4.4.

can define in detail *what* constitutes foreseeable losses. The grantor should be aware of the possibility of contractual provisions that provide for the investor's recovery of unforeseeable damages caused by the grantor's breach.

4.66. *Amount of damages.* If damages are owed, then all damages should generally be recovered, including both actual losses and lost profits.²¹ As a general rule, damages normally include the loss in value of the expected performance (though discounted for costs avoided by not having to counter-perform). This loss may not be recovered, however, if a price reduction has been obtained for the same loss in value. When the aggrieved party engages in a substitute transaction, depending on applicable law, damages normally amount to the difference between contract price and cover price (the price obtained in the substitute transaction).

4.67. *Reliance.* Some legal systems also allow a different method of damages assessment whereby the aggrieved party has a right to damages based on that party's "reliance interest". This consists of expenditures made in preparation for performance or in performance, less any loss that the party in breach can prove with reasonable certainty that the aggrieved party would have incurred had the contract been performed.

4.68. *Contractual clauses on type of damages.* Parties to a contract are normally entitled by the applicable law to determine the *type* and amount of recoverable damages through contractual clauses. Disclaimers can define liability standards or concern damages. Parties can limit recoverable damages and modify the full compensation principle by, for example, excluding or limiting consequential damages.

4.69. *Contractual clauses on the amount of damages.* Parties can predefine the amount of damages in case of breach. These clauses may help to lower litigation costs linked with the need to provide evidence and liquidate damages. At the same time, especially when clauses may incorporate values and costs that courts would not be able to assess (e.g. immaterial damages, costs of investments done in reliance of the correct execution of the contract, etc.), these clauses tend to induce compliance.

4.70. *Penalty clauses.* Penalty clauses provide for the payment of a predetermined amount of money in case of non-performance irrespective of the actual harm suffered. Depending on the clause, it may have the effect either of increasing or limiting – though in practice, this is very rare – the compensation due to the aggrieved party. While clauses intended to facilitate the recovery of damages are common practice and *generally* accepted under domestic laws, some legal systems forbid clauses that intend specifically to operate as a deterrent against non-performance by way of a penalty. Other legal systems, allow such clauses but entitle the court to reduce the amount due when it is grossly excessive under the circumstances.²²

4.71. *Interplay between damages and penalty clauses.* Depending on the legal system, the freedom to set monetary penalties resulting from a breach may face various bans, limits or review. Freedom of contract may also be limited *with* respect to the scope of disclaimers made in relation to the nature of the breach (fundamental or not) or the conduct of the breaching party (intentional or reckless).

(c) *Interest and late payments*

4.72. *In general.* In some legal systems, pecuniary obligations, including rental fees for the land or price for products or damages, are combined with the obligation to pay interest. Interest is often (though not always) provided by contract law both at the domestic and international level for delay of payment of monetary obligations, including those consisting of prices.²³ Thus, where available, the right to interest arises *whenever* the party exercises the right to demand a delayed payment. If the party opts for termination, the accrual of interest may be liquidated having regard to the delay occurred in obtaining the price payment, due to time needed for the substitute transaction. On the one hand, the payment of interest does not generally require specific evidence of loss suffered by the aggrieved party. On the other hand, it does not

²¹ *Id.*, Art. 7.4.2(1).

²² *Id.*, Art. 7.4.13.

²³ *Id.*, Art. 7.4.9.

reduce any concurrent right to claim additional damages suffered by the aggrieved party. In the latter case, the claimant is requested to provide specific evidence and the damages need to comply with the usual standards of foreseeability and certainty.²⁴

3. Renegotiation and adaptation of the agreement

4.73. *Introduction.* Long-term contracts are bound to go through various situations that the parties may not be able to contemplate at the time of contracting. While certainty in contract obligations is important for meeting *parties'* expectations, thereby supporting the principle of the stability of the contract, certain circumstances may be agreed by the parties, or provided in the applicable law, which may lead to a renegotiation or an adaptation of the agreement.

4.74. *Risk mitigation mechanisms.* To address evolving circumstances without having to engage into an overall renegotiation of the contract, parties should adopt risk mitigation mechanisms by inserting a periodic adaptation or revision clause into their contract. For example, a price revision clause may be used to limit risks (e.g. of currency fluctuations or inflation). These clauses often provide for an automatic price adjustment according to a pre-established schedule which is triggered by a depreciation or appreciation of the currency in which the price is denominated above an agreed threshold, usually expressed as a percentage of the unit price. Other price adjustment mechanisms may be used to limit the risks associated with market fluctuations.

4.75. *Renegotiations and periodic review.* Renegotiations and periodic reviews by the parties are possible during performance of the contract provided each of them agrees at that time or it is provided for in the contract. Parties may agree in the contract that renegotiation will take place, or may be considered upon the *occurrence* of certain events, and according to a pre-established procedure. Parties may also include a provision on periodic review, which can be meant to occur at periodic intervals or on the occurrence of certain events (see Chapter 3.V.B.5 on periodic review).

4. Termination

4.76. *Scope.* The term "termination" (or equivalent terms that may be used in contract practice) may cover various situations, ranging from the termination of the contract at the expiration date or earlier by the mutual agreement of the parties, or by either of the parties in the exercise of a right provided by agreement or by the law. Termination at the expiration date and by mutual agreement are dealt with in Chapter 5, which addresses, in part, the end of the contract. This section considers termination as a remedy for non-performance, whether excused or for breach.

4.77. *In general.* Termination is a drastic remedy for a breach of contract. Indeed, it may have effects far beyond the specific contractual relationship and put an end to related agreements that have been concluded with others, *particularly* with legitimate tenure rights holders or local communities. In long-term relationships, especially when several parties join the contract or when there are related contracts, parties may be well advised to agree in advance that termination may not be sought before a certain lapse of time, during which the parties will resort to cooperative remedies, including an opportunity to cure the breach by the defaulting party.

4.78. *Grounds.* Termination is a radical remedy that should only operate in case of "material" breach (also referred to as "*substantial*" breach, or "*fundamental*" breach or other terminology intended to reflect the seriousness of the breach). Some legal systems limit the use of contract termination to instances in which the breach: substantially deprives the aggrieved party of what it was entitled to expect under the contract (within the limits of foreseeability); is intentional or reckless; or is such that the aggrieved party has no reason to believe that any performance will be forthcoming.²⁵

²⁴ *Id.*, Arts. 7.4.3 and 7.4.4.

²⁵ For international commercial contracts, the UPICC reserve the remedy of termination to instances of fundamental breach (see UPICC, Art. 7.3.1). For international sales contracts, the CISG takes the same approach (see Art. 25, CISG).

4.79. *Termination and penalty clauses.* Depending on the circumstances, penalty clauses may be more appropriate and, if those clauses establish a significant penalty, they act as a real deterrent (see paragraph 70 above). Damages, moreover, can always be sought by the party which claims that there is a breach. There are a myriad of grounds for termination in agricultural land investment contracts (e.g. disputes about rights over the investment area with the local community; better public benefit; disrespect of the prescribed harvest conditions; failure to comply with the obligations of the contract within a period of time; failure to initiate the operation of the land within a period of time, etc.).

4.80. *Procedure.* The procedure needed to terminate a contract depends on the applicable law: the party seeking termination may need to file a claim in court or a written notice directed to the other party may suffice. Applicable law may allow the parties to follow an extra-judicial procedure if termination clauses are included in the contract (enabling termination by notice) or, if a notice is formally addressed to the party in breach, assigning a period of time for performance. Legal systems also differ about the time *within* which the notice of termination should be given to the party in breach. At the international level, the aggrieved party is required to provide notice within a reasonable time after becoming aware of the breach.²⁶ The use of notice is important when it is coupled with a grace period in which the party in breach may perform, thereby preventing termination from occurring, at least for that period. This last resort remedy may play an important function in long-term contracts with important investments by either party.

4.81. *Total versus partial termination.* Termination can be total or partial. Where the contract consists of a series of *obligations* (e.g. instalments) and one party fails to perform one of these obligations, depending on the applicable law, the aggrieved party may not have the right to terminate the whole contract. In instalment contracts, for instance, if one of the due instalments is grossly non-conforming, whereas all the others are conforming to contract specifications, termination could address the non-conforming instalment only. Depending on whether termination is total or partial, all obligations or only some will be affected by termination. Only performances affected by termination need to be returned. Indeed, in the case of total termination, because parties are released from all obligations, if some have already been performed, these must all be returned. In case of partial termination, obligations not affected by termination (e.g. past instalments of banana deliveries) remain in place and performances not affected do not need to be returned.²⁷

4.82. *Effects.* Contract termination generally releases parties from the obligations arising from the contract but not from any post-contractual obligations, which are provided by applicable law and may persist even after termination. For example, the parties often agree that, after the date of termination of the *agricultural* land investment contract, the investor should remove his assets located on the land that had been granted within a limited period of time. The parties may also sign related agreements (see Chapters 2.III.B.2 and 3.II.E) with legitimate tenure right holders or local communities. These development obligations (e.g. obligation to build or to maintain infrastructure) may remain in force after the termination of the contract.

4.83. *Processing obligations.* Some investment contracts or related agreements include agro-industrial processing obligations. This is notably the case for the production of perishable commodities which must be quickly processed or for ventures that target the domestic market (see Chapter 3.II.C). In such situations, it is important that the parties clearly indicate the consequences of each type of breach on the overall investment contract, and they can use contractual clauses to make these indications. The same is true if a contract requires the investor to sell a percentage of the produce locally and the investor breaches this obligation. In such a case, termination of the contract would not be appropriate, and a penalty clause would be preferable provided that such a clause is valid under the applicable law.

4.84. *Termination and damages.* When based on breach, termination does not normally preclude any claim for damages. It does not affect any provision in the contract for dispute settlement or governing the

²⁶ For international commercial contracts, a similar rule is stated in Art. 7.3.2(2), UPICC and, for international sales contracts, in Art. 64(2)(b), CISG.

²⁷ See UPICC, Art. 3.2.13.

parties' rights and obligations following termination or breach (e.g. duty to pay penalties for contract *repudiation* or duty to mitigate damages occurred from the breach).²⁸

C. Breaches and related remedies

4.85. *Introduction.* This section presents an overview of the most common breaches which may occur in connection with the various types of obligations identified in the Guide (see Chapter III). It includes a table flagging those breaches and respective obligations together with their possible corresponding remedies (see Chapter 4.III.B) under or deriving from the main investment (investor/grantor) contract, bearing in mind that applicable remedies may be designated by the parties in the contract subject to any mandatory provisions of applicable law. Absent the parties' designation in the contract, mandatory and default rules of applicable law will determine the available remedies. Parties may design and use self-executing remedies or may need to resort to legal action to enforce a contractual or legal remedy. Even without a contractual link to the investor, legitimate tenure right holders and local communities (LRH & Loc.Com) may, for example, claim rights as third-party beneficiaries (see Chapter 2.III.B) and seek to enforce those rights or may resort to grievance mechanisms (see Chapter 6.I).

4.86. The table does not address: (1) non-performance events which qualify as force majeure or other grounds for *excused* liability; (2) remedies for breaches of obligations under the regulatory framework (e.g. tax law, labour law, human rights, environment protection provisions etc.), under customary law (e.g. with regard to indigenous rights or environment protection), or under international investment agreements; and (3) remedies arising outside the contract (e.g. tort or property right claims).

1. Grantor and legitimate tenure right holders and local communities' remedies for Investor's breach of obligations

Investor's breach of obligations under investor-grantor contract	Grantor's remedies under investor-grantor contract	LRH & Loc.Com's remedies - as parties to the I/G contract * - or based on a related or linked contract with investor ** - or as third-party beneficiary ***
TENURE AND RELATED RIGHTS		
Breaches in relation to land tenure and related rights (3.15-21) - non agreed use, overuse, misuse of resources (e.g. timber, below ground resources, water ...) (3.17) - non agreed land use (e.g. crops) (3.16, 41) - infringement of LRH & Loc.Com's access rights to land, to resources or to infrastructure (3.21, 30)	<i>Depending on seriousness of the breach, in particular its possible impact on LRH & Loc.Com. and the environment</i> - Request to cure within a period of time - Withholding counter performance of supply of agreed inputs or services - Adaptation of the contract: e.g. increased monetary payments or social infrastructure, reallocation of related (e.g. water) rights - Recovery of damages - Renegotiation of the contract - Termination	- Request to cure within a period of time * - Adaptation of the contract: e.g. increased monetary payments or social infrastructure, reallocation of related rights - Recovery of damages * - Termination * - Remedies under community-investor agreements ** - Remedies resulting from the exercise of grantor's remedies ** 29 - Complaints under grievance mechanisms ***

²⁸ For international commercial contracts, a similar rule is stated in the UPICC Art. 7.3.5, UPICC and, for international sales contracts, in Art. 81(1), CISG.

²⁹ For example, termination of the investor/Government-grantor contract will in principle entail the termination of the related or linked contract between investor and LRH & Loc.Com.

Project development - Breaches in relation to delivery of agreed goods or performance of agreed services e.g. failure to meet quantitative production targets, to expand the cultivated land area or to build and operate a processing facility (3.42, 85-86)	<i>Depending on type of breach (delayed - defective - failed performance) and the type of obligation and whether fundamental or not</i> - Granting additional time for performance - Request to cure within a period of time - Withholding counter performance of supply of agreed inputs or services - Legal action for specific performance [depending on legal system] - Recovery of damages - Renegotiation / adaptation of the contract - Termination	
SOCIAL AND ECONOMIC ISSUES		
- Breaches in relation to payment of monetary contributions (rental fees/revenues, taxes, utilities fees etc.) (3.57-58, 60-61, 66)	<i>Depending on type of breach: delayed, partial payment or total failure to pay</i> - Granting additional time for performance - Withholding counter performance of supply of agreed inputs or services - Legal action for payment - Recovery of damages - Termination	
Employment creation, access to jobs and labour rights - Failure to meet job targets (3.74, 76) - Failure to provide agreed services to employees (e.g., medical care, housing, or education) targets (3.81) - Failure to meet local content and processing requirements targets (3.89-92)	- Adaptation of the contract: e.g. increased monetary payments or social infrastructure - Request to cure within a period of time - Renegotiation / adaptation of the contract - Termination	- Request to cure within a specified period of time - Recovery of damages * - Renegotiation / adaptation of the agreement * - Remedies under community-investor agreements ** - Remedies resulting from the exercise of grantor's remedies ³ - Complaints under grievance mechanisms ***
Contract farming, outgrower schemes and supply chain relations - Failure to establish an outgrower scheme according to certain specifications and timelines (3.100)	- Request to cure within a period of time - Termination	- Complaints under grievance mechanisms ***
- Breach of obligations in relation to outgrower schemes (e.g. quantity, quality standards and price of produce to be purchased, inputs and capacity support to be supplied to farmers and related price, credit conditions etc.) (3.102)	- Request to cure within a period of time - Termination	- Remedies under contract farming agreements with investor ** - Remedies resulting from the exercise of grantor's remedies ³

Community development funds and social infrastructure - Failure to provide agreed monetary or in-kind contributions for social infrastructure and community projects (e.g. schools or clinics) (3.105-108)	- Request to cure within a specified period of time - Adaptation of the contract: e.g. increased monetary payments - Termination	- Request to cure within a period of time * - Remedies under community-investor agreements ** - Remedies resulting from the exercise of grantor's remedies ³ - Complaints under grievance mechanisms ***
ENVIRONMENT		
- Non agreed use, overuse, misuse of resources: water (3.17, 117) - Breach of obligations in relation to environmental protection – e.g. regarding cultivation / farming practices (3.17, 119), wastes (3.17, 121) (3.17, 124) - Infringement of LRH & Loc.Com's rights with regard to environmental sustainability, traditional knowledge and cultural heritage (3.17, 119)	<i>Depending on seriousness of the breach</i> - Request to cure within a period of time - Adaptation of the contract: e.g. increased monetary payments or social infrastructure, reallocation of water rights - Recovery of damages - Renegotiation of the contract - Termination	- Request to cure within a period of time - Recovery of damages * - Renegotiation / adaptation of the agreement * - Remedies under community-investor agreements ** - Remedies resulting from the exercise of grantor's remedies ³ - Complaints under grievance mechanisms ***
PHYSICAL SECURITY		
- Breach of agreed security activities (e.g human rights abuses and misappropriation)	- Mitigation of risks - Request to cure within a specified period of time - Recovery of damages - Renegotiation of the contract - Termination	- Complaints under grievance mechanisms ***
MONITORING AND IMPLEMENTATION		
- Failure to deliver agreed environmental, financial and non-financial reports to parties (3.122, 157-160) - Failure to make agreed financial and non-financial reports available to the public and LRH & Loc.Com's (3.161,164)	<i>Depending on type of breach: delayed reporting, partial reporting, inaccurate reporting total failure to report</i> - Granting additional time for performance - Request to cure within a period of time - Withholding counter performance of supply of agreed inputs or services - Legal action for specific performance [depending on legal system] - Recovery of damages - Termination	

2. Investor's remedies for grantor's breach of obligations

Grantor's breach of obligations under investor-grantor contract	Investor's remedies under investor-grantor contract
TENURE AND RELATED RIGHTS	
- Breach of option clause or preference clause regarding grant of additional land in (3.10-12)	<i>Depending on whether the breach is fundamental or not</i> - Recovery of damages - Renegotiation / adaptation of the contract - Termination
Breaches in relation to land tenure and related rights (3.15-21) - Regarding access / use of agreed land and agreed resources - Regarding the provision of agreed facilities (3.22, 4.60) - Regarding the provision of agreed utilities (3.24-21) Breaches in relation to infrastructure - Regarding the provision of agreed infrastructure and maintenance (3.26-21) - e.g. public roads and water, electricity and waste utilities - Or investment-specific infrastructure	<i>Depending on type of breach (delayed - defective - failed performance) and type of obligation and whether fundamental or not</i> - Granting additional time for performance - Withholding payments of rentals - Withholding counter performance of supply of agreed inputs or services - Taking action to remedy (e.g.: repair of irrigation system) - Reduction of rentals or other financial obligation - Recovery of damages - Renegotiation / adaptation of the contract - Termination
Breaches in relation to delivery of permits - Failure / delay to deliver the required authorisations, licenses and permits (3.33, 35 <i>et seq.</i> , 171)	- Granting additional time for performance - Withholding payments of rentals - Withholding counter performance of supply of agreed inputs or services - Recovery of damages - Renegotiation / adaptation of the contract - Termination
PROTECTION OF INVESTMENT	
- Failure to provide adequate security to protect the investment (3.136 <i>et seq.</i>)	- Recovery of damages - Termination
- Breach of stabilisation clause (3.139-143)	- Renegotiation / adaptation of the contract - Recovery of damages - Termination
MONITORING AND IMPLEMENTATION	
Breach of confidentiality obligation (3.169)	- Recovery of damages - Termination

CHAPTER 5 - TRANSFER AND RETURN

5.1. *Overview.* This Chapter addressed issues relating to the transfer of the investment project or rights and obligations under agricultural land investment contracts from one investor to another and the return of the land at the end of such contracts. Such issues are important to consider in order to ensure that any transfers are handled in a way which ensures that a project becomes or continues to be responsible and sustainable and that land remains productive and any rights to it are returned to those who granted them or gave them up in favour of the investment project. This Chapter first addresses issues of (I) transfer and then (II) return.

I. TRANSFER

5.2. *In general.* Rights and obligations from agricultural land investment contracts, including the investment projects' themselves, may be transferred from an investor (the original investor) to another investor (the new investor). The term "transfer", or equivalent terms that may be used in contract practice (such as "assignment", "acquisition" or "cession"), covers the possibilities for an investor to be discharged of all or part of those rights and obligations, which include, *inter alia*, rights to access or use the land, rights to transport and export agricultural products (see Chapter 3.I) as well as the duty to hire local people and the duty to provide local communities with social and economic benefits (see Chapter 3.II). The term "transfer" is to be understood in a broad sense in order to cover all of the possibilities of transferring any kind of rights and obligations after the contract has been concluded. The transfer also can refer to total transfer of the contract, transfer of specific obligations or rights and sublease, and the transfer of the investor itself.

5.3. *Rationale.* Although the right of transfer is not central to the agricultural operation, it is necessary for various reasons (e.g. to be able to obtain financing) and different situations (e.g. breach of contractual obligations by one of the contracting parties, insolvency of the investor, unprofitability of the land, etc.). The necessity of transfer could arise, for example, if an investment fails to generate expected economic benefits and causes significant negative impacts or if an investor no longer has the capability (e.g. technical expertise) to ensure a project's continued success. Therefore, such a transfer may reduce the risk of hostile termination of the contract and may increase the chance of continuing the economic operation. It may also render the operation more efficient because specific obligations may be transferred to a new specialist investor (e.g. building water infrastructure or expertise in monitoring). Finally, transfer may favour additional investment in the land (e.g. by transferring to an investor with more capital or other means for revitalising or improving a project).

5.4. *Transfer of rights, obligations and the contract.* Investors and grantors should distinguish three types of transfer.¹ First, the assignment of rights covers the cases in which a party transfers its rights for payment of a monetary sum or other performance to another person. *Grantors*, for example, are typically entitled to receive payments for the grant of tenure and related rights. This right to payment can be freely assigned to a third party (e.g. a governmental body, a local community), except if the assignment would render the obligation significantly more burdensome for the investor and if otherwise stipulated in the contract.² Second, agricultural land investment contracts may oblige a party to pay a definite amount of money or to provide a service. This party – usually the original investor – may wish to transfer this obligation to another party (i.e. the new investor). In most jurisdictions, this transfer cannot be executed freely: either the original investor enters into an agreement with the new investor with the consent of the grantor and, if applicable, legitimate tenure right holders and local communities; or the grantor directly enters into an agreement with

¹ See UPICC, Arts. 9.1.1, *et seq.*

² *Id.*, Arts. 9.1.3 and 9.1.7.

the new investor. Third, the assignment of the contract means that both rights and obligations of a party, in most cases the original investor, are transferred to a new investor. In many jurisdictions, the assignment of the contract also requires the consent of the grantor and, if applicable, legitimate tenure right holders and local communities.³ Therefore, unless otherwise expressly provided, this section will deal with the transfer of rights and obligations or the contract.

5.5. *Legal framework.* As lands are sensitive assets for grantors, domestic law often includes safeguards to prevent the acquisition of land in specific situations (see Chapter 1). These safeguards vary from State to State, usually arising from various legal orders which overlap within State's boundaries (e.g. constitutional law, domestic legislation, customary law and international law). They often deal with the nationality of the investor, the scale of the agricultural land and the *zoning* of the land. The safeguards may be effective before the contract's conclusion but also after the conclusion of the contract when an investor intends to transfer any obligation to a new investor. In some States, such a legal framework might not exist. The contract might be a means for the parties to fill this gap.

5.6. *Crossroads.* A myriad of regulations may affect the transfer of rights and obligations related to agricultural land investments, and investors should be aware that some jurisdictions have special provisions regarding agricultural lands. In most jurisdictions, the transfer of rights and obligations from such contracts is not only regulated by contract law but also by, *inter alia*, land, rural, natural resources and environmental law. Consequently, certain jurisdictions may require that the investor comply with several measures before the transfer takes place. When not provided for by domestic law, agricultural land investment contracts may include similar provisions addressing such issues. Finally, these legal sources may overlap with others: foreign direct investment, taxation, water rights and rates, etc.

5.7. *Related agreements.* Another issue to take into consideration is the existence of agreements related to the main agricultural land investment contract (see Chapters 2.III.B.2 and 3.II.E). Indeed, the contracting parties may conclude parallel agreements (e.g. community development agreements) with others such as legitimate tenure right holders or local communities to share benefits and hire local people. These related agreements usually refer to the main agricultural land investment contract signed by the grantor and the original investor. This way, the new investor who receives the land from the original investor might have rights and obligations under these related agreements. In order to enforce such rights even after the transfer, it is therefore advisable that the contracting parties consider this possible situation and include a provision that entails the automatic transfer of rights and obligations in the related agreement to the new investor. The new investor would thus assume those parallel obligations.

5.8. *Role of grantors.* The role and power of grantors vary from State to State. For instance, constitutions may provide for State ownership of all land or allow both State and private ownership.⁴ In other jurisdictions, lands owned by governments may be more strongly protected than private owned lands (e.g. Crown lands, public lands, federal lands). A government's main responsibility is for the allocation of land, including the regulation of land transfers in order to protect their citizen's rights. As a result, a government grantor may not usually assign the whole contract but part of its rights in order to retain ownership of land. In general, it is the investor that would transfer its obligations or that would be removed from the contract by the grantor.

A. Legality of transfer

5.9. *Scope of investor's right to transfer.* In agricultural land investment contracts, the contracting parties should recognise that no tenure right, including private ownership, is absolute. All tenure rights are limited by the rights of others and by the measures taken by States necessary for public purposes (see Chapters 2.IV.B.1 and 3.IV.A regarding expropriation).⁵ Accordingly, legal *safeguards* and contractual limitations may constrain the right to transfer obligations and, in some situations, transfer is not even possible. Therefore,

³ See also UNCITRAL. 2001. Legislative Guide on Privately Financed Infrastructure Projects, p. 122, para. 62.

⁴ VGGT Technical Guide No. 4, p. 33.

⁵ 2012. VGGT, para. 4.3.

the parties should ensure that any transfer is consistent with the legal framework and the provisions of their contract in order to render such a transfer effective.

5.10. *Necessity of an agreement.* In order to make a transfer of obligations effective, an agreement must be concluded between the original investor and the new investor with consent of the grantor and, if applicable, legitimate tenure right holders and local communities,⁶ or by the grantor and the new investor with consent of such holders and communities.⁷ Often, the new investor, the grantor and *other* contracting parties may conclude a new agreement. This new contract may refer to the previous contract and may expressly provide that the new investor takes over the original investor's obligations as stipulated in the previous contract. That is, the new investor takes the place of the original investor. Alternatively, the new investor and the grantor may decide to enter into a brand-new agreement that stipulates new rights and obligations. These options should be the result of the negotiation between the contracting parties in consultation with stakeholders (see Chapter 2.V.B). In addition, entering into a new agreement secures the transfer of the obligations. Indeed, the new contract certifies that the original investor is removed from the contract, that the new investor has tenure and related rights to the land and that, if applicable, the rights of legitimate tenure right holders and local communities are protected. In brief, the new agreement bears the proof of the new investor's rights and obligations and discharges those of the original investor.

5.11. *Prior notice and acceptance.* Domestic law or the contracts may include the obligation for the original investor to serve prior notice to the grantor before transferring any obligation (see Chapter 3.V.B.5 regarding notice).⁸ As a result, the grantor should generally give consent to the transfer of obligations. If not provided by law, the contracting parties should include a clause that sets out that obligation requiring prior consent of the grantor. For example, a clause may provide that any notice of a transfer of obligations should be sent by the original investor six months before enforcement and, in the event that the grantor does not answer, the response is deemed to be negative and the obligations shall not be transferred. States with decentralised governments may also require the prior approval of the transfer by a central administrative body when the transfer was decided by the local government. A mere transfer of certain rights, however, might not necessarily entail such a mechanism. For instance, the grantor's right to receive the payment for use of land may be *transferred* to a different governmental body or a local community without any prior consent of the investor. If the investor wants to transfer the tenure rights, this may change the substance of the contract itself because it is of an essentially personal character. Therefore, such a transfer may have the same effect as transferring the whole contract, and the grantor should give prior consent. It is also advisable that the parties include a non-assignment clause in the contract that limits or prohibits the transfer of tenure rights.⁹

5.12. *Legitimate tenure right holders and transfer.* The transfer of obligations should entail consultation with local communities.¹⁰ Investors and grantors should be aware of existing obligations under domestic and international law, and that the status of various land tenure rights may differ from one jurisdiction to another. In some systems, for example, customary tenure right holders may be recognised as legal tenure right holders¹¹ or registered with the relevant land registry. In other systems, by contrast, customary tenure may not be legally recognised, and legitimate tenure right holders are not *granted* legal protection (see Chapter 1). Also, there may exist multiple rights to the same land (i.e. bundle of rights).

5.13. *Legitimate tenure right holders and consent.* The legal recognition of these rights should entail consultation with the local communities affected by the transfer of obligations to a new investor. Their consent should be obtained because they hold rights to the land. When customary tenure is not legally recognised, the parties should comply with their international obligations. For example, the United Nations Declaration on the Rights of Indigenous Peoples and the International Labour Organisation *Convention*

⁶ See UPICC, Art. 9.1.7.

⁷ *Id.*, Art. 9.2.1.

⁸ *Id.*, Art. 9.2.3.

⁹ *Id.*, Art. 9.1.9.

¹⁰ 2012. VGGT, paras. 9.9 and 12.7.

¹¹ VGGT Technical Guide No. 4, p. 33.

requires FPIC with respect to indigenous peoples for the execution of the transfer (see Chapter 2.IV.A.2(b)).¹² Parties should note that, even if information is not always available, they should consult with legitimate tenure right holders and local communities, for example, for the purpose of confirming that the area is free and has no occupants. In addition, parties should note that individual and public property are not the only forms of tenure rights. Some States also recognise community titles or may have rights that overlap with others.

5.14. *Related agreements.* The parties may include provisions in their contract or in related agreements with legitimate tenure right holders and the local community to share the benefits of the investment project *through* the hiring of local workers or through the contribution to a development fund (see Chapter 3.II.C-E). For instance, local workers may directly be affected if the original investor decides to transfer the contract to a new investor who might not necessarily offer the same facilities to local populations. That is why the consent of such holders and communities is important because it may directly affect the basic obligations of their contractual relationship.¹³ This consent should be obtained by both the grantor and the original investor before the execution of the transfer.

5.15. *Subject of the consent.* If the original investor desires to transfer all or part of its rights and obligations from the agricultural land investment contract to a new investor, the former should explain to the contracting parties the reasons for the transfer. The latter should provide full information about its project in the same manner as the original investor did when it acquired the land (see Chapter 2). Furthermore, while a *grantor's* answer to the notice of transfer may be readily obtainable, the consent of legitimate tenure right holders or local communities may require supplementary involvement of the original and new investors. First, the contract should outline the terms by which a new investor should advertise its project to such holders and communities (e.g. media, language, participants, and minimum participation). Second, the result should indeed be made known in accordance with those terms.

B. Transfer of the investor itself

5.16. *In general.* In most cases, the investor is a corporate entity registered with the registry of the State in which the land is located. This situation comes from the limitations on transfer for foreigners in several systems (see paragraph 24 below). Grantors should take into consideration that the investor can *therefore* be transferred from a mother company to another, or can merge with another corporate entity, or can change its control.

5.17. *Change of control.* When it is not provided by law, it is advisable that the parties include a change of control clause. Such a clause requires the investor to inform the grantor when its shareholding participation changes to a certain point (including acquisition) or when its executive team changes. If the grantor does not accept the change, it may have the capacity to seek changes or terminate the contract. This clause can also be effective, for example, when there are changes in beneficiary ownership structures, the investor intends to transfer the land to its heirs or its affiliates, or when the investor intends to merge. An investor, for example, may seek to transfer the agricultural land investment contract to benefit from the tax incentives that are granted by a government grantor to new investors or even to avoid jurisdiction. This kind of clause may reduce the risk of abuse of law by the investor by requiring the prior consent of the grantor.

5.18. *Heirs and affiliates.* Some systems or contracts do not necessarily require prior consent of the grantor when rights and obligations are transferred to the investor's heirs or to the investor's affiliates. The contract may define these terms and should ensure that such a clause does not breach another contractual provision and would not constitute an abuse of law (e.g. by circumventing the competence of the domestic

¹² UN Declaration on the Rights of Indigenous Peoples, Art.10 (2007); and Convention concerning Indigenous and Tribal Peoples in Independent Countries, Art.16 (1989).

¹³ VGGT Technical Guide No. 4, p. 51.

jurisdictions). In contract practice, the parties often refer to the applicable law to define who are the investor's heirs and affiliates.

5.19. *Mergers*. Contracts may contain specific provisions in the case the investor engages in a merger. However, the applicable law often provides for mechanisms that cause all rights and obligations, under certain conditions, to be transferred in their entirety by operation of law.¹⁴

5.20. *Partnership*. If the investor decides to collaborate with another investor to operate the land, it may decide not to transfer all or part of its rights and obligations set forth in the agricultural land investment contract. If the investor and the collaborator enter into an agreement, the principle of privacy of the contract protects the grantor. However, the grantor should be sure that such a partnership may not affect the contractual relationship it has with the investor. If not, there is no reason for the grantor to terminate the contract.

C. Limitations on transfer

5.21. *In general*. While some contractual provisions may ease a transfer of rights and obligation, others may limit or prohibit such a transfer. These contractual provisions may come from the applicable law, but also the outcome of the negotiation between the grantor and the investor relative to environmental, social, financial, and political issues. Agricultural lands are sensitive assets, and food security, adequate nutrition, poverty, respect of legitimate tenure rights holders, local employment, sustainable development or other aspects arise with respect to agricultural land investment contracts.

5.22. *Mirror*. In many cases, legality of transfer and limitations on transfer are just two sides of the same coin. That is, if the transfer is not legal, it is not permitted, and it is therefore limited. This is the case for the obligation of obtaining the consent of the grantor or any legitimate tenure right holders or local communities. If the original investor does not obtain such consent, the transfer cannot be effective, and it is therefore limited. In many jurisdictions, however, there may be grantor measures related to limitations on transfer in specific situations, such as when the grantor holds the land itself, when the land has specific characteristics, when the investor is not a national of the State in which the land is located or when there is a change of control of the investor.

5.23. *States' lands*. As previously said, in some States, title to land is retained by the government. Therefore, agricultural land investment contracts can only take the form of grants of tenure and related rights for a specified period of time. In other States, the government may hold large tracts of land, and these lands may have supplementary protection (e.g. Crown lands, public lands and federal lands). When an investor seeks to transfer its obligations relating to the lease of such lands, it may have the same effect as when it concluded the contract with the grantor: a myriad of approvals may be needed. For instance, if the land must be held by the grantor by virtue of law, a parliamentary derogation may be needed to comply with that law. In other States, administrative approvals are needed to transfer obligations. In decentralised States, both federal and local approvals may be required.

5.24. *Large-scale land safeguards*. It must be recalled that the Guide does not endorse large-scale land transfers (see Preface). If large-scale land transfers occur, however, certain systems require specific authorisations, because such investments may be of great importance for the States' interests (e.g. environmental, social, economic interests amongst others).¹⁵ Domestic laws often base safeguards on the size or the value of the land. That is, a transfer may require such an authorisation if the size of the land exceeds the size threshold or the value ceiling.¹⁶ The authorisation may be of an administrative or legislative nature. Other legal mechanisms exist in some systems, such as the organisation of a local referendum, the first option to purchase by the grantor or even the obligation to initiate a tender. Such safeguards may also be applicable when the land has been zoned as an environmental protection area¹⁷ or when it contains

¹⁴ See UPICC, Art. 9.1.2.

¹⁵ 2012. VGGT, paras. 12.6, 12.10.

¹⁶ VGGT Technical Guide No. 4, p. 33.

¹⁷ *Id.*, p. 36.

specific natural resources (e.g. water, oil, gas, wood). When the investor desires to transfer the land, these characteristics may prevent a mere transfer of the land and may require approvals from diverse governmental bodies. For example, a particular tract of land may require a specific mode of agricultural operation with which the new investor might not be familiar and that requires an assessment by the grantor's administration. In other States, domestic laws might have very low standards with respect to the environment, local development, respect of legitimate tenure right holders, etc. Therefore, grantors may wish to include an ad hoc provision that expressly prohibits the transfer of the land because of its characteristics.

5.25. *Nationality of the investor.* As agricultural land is an economically and politically sensitive asset, some systems prohibit transfer to a person or corporate entity that is not a national of the State in which the land is located. These limitations on transfer are usually applicable to natural persons as well as legal entities. As for companies, domestic legislation may allow foreign investment through domestic majority-owned firms¹⁸ or may set a quota on the percentage of domestic agricultural land that can be foreign owned.¹⁹ In such situations, foreign investors may wish to consider entering into joint ventures with local companies.

D. Importance of disclosure

5.26. *In general.* The transfer of an agricultural land investment contract or part of it may have consequences for tenure rights. As mentioned in the VGGT, "tenure security is improved when information on tenure rights is easily available to all, because people who do not know that a tenure right exists may inadvertently do something that infringes that tenure right".²⁰ This is a reason for which each *transfer* should be communicated to the relevant authority in order to update information on the holder of rights to the transferred land. Grantors should also make this information public and communicate any effectiveness of transfer to the affected legitimate tenure right holders or local communities after they have been consulted by appropriate means (e.g. local language, appropriate media).

II. RETURN

5.27. *Scope.* The term "return" covers situations in which assets are to revert automatically to grantors upon the expiry or termination of an agricultural land investment contract. Indeed, the expiry of the contract entails the return of the land from the original investor to the grantor.²¹ Grantors are often the principal beneficiaries of the return of the land when the contract's duration ends and it is not renewed. Return can also involve legitimate tenure right holders and local communities when they hold or held rights to *the* land. Return, moreover, is not limited to return of land. All the project-related assets may revert upon expiry of the agricultural land investment contract.

5.28. *Expiry and termination.* The return of assets may be effective in various situations. The contracting parties should be aware that agricultural investment projects entail a high risk of failure and may not generate the expected revenues. For these reasons, the contract may not necessarily come to expiration, and the contracting parties should insert a termination clause within the contract to ensure timely resolution and, if necessary, return (see Chapter 4). Consequently, return may apply, for example, in case of expiry, failure to remedy a breach of the contract by one of the contracting parties, unexpected *impediments* or transfer of the contract. In many jurisdictions, the legal framework may include special provisions for the automatic transfer of assets when the contract is terminated (see Chapter 4). However, grantors also may include supplementary provisions within the contract to ensure the repatriation of land and the related assets. Grantors may, for instance, require return in cases in which the investor dissolves or liquidates.

¹⁸ See national legislation quoted in *Id.*, p. 49.

¹⁹ *Id.*

²⁰ *Id.*, p. 35.

²¹ UNCITRAL. 2001. Legislative Guide on Privately Financed Infrastructure Projects, pp. 161 *et seq.*, paras. 36 *et seq.*

Finally, return may also include the capacity for the grantor to repatriate lands which are unused by the investor.

A. Circumstances of the return

5.29. *Legal framework.* Some systems include provisions on the return of specific assets. Parties should be aware that several legal sources may apply, notably lease law and land law. Moreover, some legal systems distinguish movable and immovable assets or define real estate, and land and buildings are often considered as *immovable* assets and as real estate. Assets may also be classified as monetary and non-monetary assets.²² These definitions may have consequences on the conditions of return.

5.30. *Forecasting and supervising the return.* Assets are to revert automatically to the grantor upon the expiry of the contract. Therefore, the contracting parties should forecast this process in advance to avoid confusion and disputes. One solution to manage the return of assets can be the establishment of a common committee composed of representatives of all the contracting parties, including legitimate tenure right holders and local communities. This committee can be in charge of verifying “whether the facilities are in the prescribed condition and conform to the relevant requirements set forth in [the agricultural land investment contract]”.²³ This committee can also be the same as the committee in charge of the supervision and monitoring of the project (see Chapter 3.V.A).

5.31. *Assets to be returned.* A myriad of assets may be involved in agricultural land investment projects. Grantors usually grant access to a piece of land, and other assets may also be attached to that land. For instance, trees, buildings and infrastructure may be granted by grantors to investors in order to operate the land (see Chapter 3.I.A). Consequently, parties should value the land and inventory the related assets during the negotiation phase to ensure that the return phase will not affect a contracting party. *Besides*, the investor may have the obligation to build infrastructure on the land as part of the economic operation of that land (see Chapter 3.I.B.2). The investor may also conclude agreements with legitimate tenure right holders and local communities, for example, to share benefits of the economic operation through a local development fund or the construction of facilities (see Chapter 3.II.E). Upon the expiry of the contract, these assets may be returned. Finally, depending on the investment project, the assets to be returned may also include intangible assets such as technology and knowhow. In brief, it is advisable that the contracting parties include contractual provisions for each category of assets to ensure their return to the grantor in accordance with the applicable legal framework.

5.32. *Public and private property.* One classification that can be easily implemented by the parties within the agricultural land investment contract is the distinction between public and private ownership. Again, some jurisdictions place “particular emphasis on the [grantor’s] interest in the physical assets related to the project and generally require the handover to the [grantor] of all of them, whereas in other *States* privately financed infrastructure projects are regarded primarily as a means of procuring services over a specified period, rather than of constructing assets”.²⁴ Within the contract, the contracting parties can first define which assets are public property. They will return to the grantor at no cost and free from any liens and encumbrances. This category of assets generally serves to provide the characteristic performance of the contract (i.e. the economic operation of the land). Second, assets can be purchased by the grantor at its option. These may be assets that were acquired by the investor and are not indispensable for the economic operation of land but that can enhance productivity. Finally, some assets can remain the private property of the investor and may be freely removed or disposed by the investor.

5.33. *Land.* Depending on the contract’s characteristics, grantors may still be the owners of the land throughout the duration of the contract or may still have outstanding rights over the land for which tenure and *related* rights are granted. At a minimum, grantors are usually the final owners of the land upon expiry

²² See UPICC, Arts. 7.2.1 and 7.2.2.

²³ UNCITRAL. 2001. Legislative Guide on Privately Financed Infrastructure Projects, p. 163, para. 42.

²⁴ *Id.*, p. 109, para. 23.

of the contract, and efforts should be made so that legitimate tenure right holders regain their rights.²⁵ Therefore, unless otherwise provided, the investor may be required to return the land “free of any liens and encumbrances and at no cost to the [grantor], except for compensation for improvements made to, or modernisation of, the property”.²⁶ This necessity comes from “the purpose of ensuring the continuity of the [operation of the land]”²⁷ and also because of the special status of land. Indeed, land is of great importance for grantors, legitimate tenure right holders and local communities, and some systems prohibit private ownership of land. The term “improvement” covers the situation in which the investor undertook works on the land to improve its environmental conditions or economic productivity (e.g. drainage works). The cost of these works should be evaluated, and the grantor may compensate the investor for the accrued benefit entailed by the drainage. The corollary of that statement is that the investor may be liable for any deterioration of the land (see paragraph 40 below).

5.34. *Trees.* In forestry and arboriculture industries, trees are of great importance for the economic operation of land. Some tree species may need several years to be productive (e.g. three years for a palm tree, five years for a rubber tree, ten years for a eucalyptus, forty years for a birch tree), and therefore they may be furnished to the investor by the grantor as a characteristic asset of the land. The investor may have replanting obligations throughout the duration of the contract to preserve the environment and to maintain the economic operation of the land (see Chapter 3). Such an obligation should be monitored and supervised by the grantor and legitimate tenure right holders or local communities when involved in the contract. Upon the expiry of the contract, and except otherwise provided, the investor should return the land in the same condition as it received it (see paragraph 32 above). Therefore, the investor may have the obligation to replant the corresponding number of trees of the same characteristics (e.g. species, age, etc.). If the investor did not fulfil its replanting obligation, it may be liable for such as a deterioration of the land (see paragraph 40 below).

5.35. *Crops.* Before the contract expires, the parties should know at which stage the crops will be ready for harvest. It is advisable that the *parties* agree in advance, for instance through the common committee, who will be the beneficiary of those crops. When the contract is in force, the crops are the investor’s property because they are the outcome of the investment project. Therefore, if saplings still exist on the land at the time of the expiry, the parties may agree that the final harvest would be the investor’s property at its cost. As a consequence, the investor should compensate the grantor, legitimate tenure right holders and local communities for the period that the land cannot be used (i.e. between the expiry of the contract and the harvest of the crops). The compensation may be calculated as a delay in returning the land (see paragraph 41 below).

5.36. *Buildings and infrastructure.* Whatever the law applicable to the agricultural land investment contract, buildings and infrastructure are physically and intrinsically attached to the land. Two different categories of buildings and infrastructure must, however, be distinguished: (a) the existing assets on the land at the time of the contract’s conclusion and (b) those built by the investor throughout the contract’s duration. This distinction may have a consequence on whether compensation is required. First, as previously mentioned, grantors may provide investors with various buildings (e.g. barns, storages, housing) and infrastructure (e.g. water canals, roads) at the time of the contract’s conclusion. In most cases, these assets are leased by the grantor to the investor together with the land because they serve to provide the characteristic performance of the contract. In the same manner as for the land, these assets should be returned to the grantor because they are the State’s properties. It should also be noted that the investor may have the obligation of maintaining these assets or may be liable for deterioration of them (see paragraph 40 below). Second, the investor may build buildings and infrastructure on the land pursuant to the contract’s provisions. On one hand, the investor may have the right to build supplementary building for the purposes

²⁵ 2012. VGGT, para. 4.2 (“Where possible, the original parcels or holdings should be returned to those who suffered the loss, or their heirs, by resolution of the competent national authorities. Where the original parcel or holding cannot be returned, States should provide prompt and just compensation in the form of money and/or alternative parcels or holdings, ensuring equitable treatment of all affected people”).

²⁶ UNCITRAL. 2001. Legislative Guide on Privately Financed Infrastructure Projects, p. 162, para. 38.

²⁷ *Id.*

of the project's operation. For instance, if the economic activity of the land increases, the investor may need more storage buildings for the production and more housing for the employees. It is advisable that, for the construction of such buildings, the investor obtains the consent of the grantor and is transparent to implement a compensation plan for improvements of the land as the case may be. On the other hand, the contract may require the investor to build some infrastructure and buildings for the operation of the land or for the needs of local communities. In this case, such a contractual clause should deal with the return of these assets, in particular identifying the final holder. In most cases, the grantor and the local communities are the beneficiaries at no cost.

5.37. *Equipment.* Investors need equipment to operate the land. The term "equipment" covers all the assets that can be easily removed or disposed by the investor. It can be heavy equipment (e.g. machines, tractors, lorries) and light equipment (e.g. clothes, tools). Like the buildings, equipment can be furnished by the grantor or purchased by the investor. When the equipment is purchased by the investor, the investor may decide to keep it even after the expiry of the contract. If the grantor wants to purchase these assets, it may be advisable to include a first option to purchase clause in the contract. Two situations should be distinguished: (a) the assets were amortised as of the expiry of the contract so that the grantor may purchase them at a nominal value; or (b) the assets are not amortised as of the expiry of the contract so that the grantor may buy them at a fair market value.²⁸ If the equipment was furnished by the grantor to the investor at the contract's conclusion, these assets should be *returned* to the grantor. Indeed, machines, lorries and tools may be of great importance to continue the economic operation of the land. The contracting parties should also supervise and monitor any change of equipment. For instance, machines indispensable for the economic operation may be old or out of service. In this case, the contracting parties may find an equitable way to finance the new machines and decide who will be the beneficiary of such a machine upon the contract's expiry.

5.38. *Transfer of technology.* When the contract expires, grantors may wish to acquire the technology of the original investor to continue the operation of the land. The technology is the systematic knowledge for the application of a process or for the rendering of a service.²⁹ In the case of agricultural land investments, this knowledge may be the way of operating the machines and maintaining the land. The communication of such a knowledge is called "transfer of technology". Because the obligation of transfer of technology cannot be imposed unilaterally upon the investor by the grantor,³⁰ the parties may negotiate the terms for transfer of technology before the contract expires. One method could be the consultation of a supervisory committee which tries to conciliate the contracting parties' contradictory interests. On one hand, the grantor needs this technology to continue the economic operation of the land itself or through a new investor. On the other hand, the original investor may be reticent to give this sensitive information to another party and even more to a new investor which might be a competitor. The legal framework, moreover, may impose such obligations on the investor. The transfer of technology can therefore be a continuing obligation of the investor even after the contract is no longer in force. The investor's personnel may train and accompany grantor's experts or the new investor's personnel during the first months of the new agreement.

B. Cost and liabilities

5.39. *Responsibility for return.* In many jurisdictions, the investor may be responsible for the return of the assets upon the contract's expiry. That is, the investor should bear the costs of removing from the land or otherwise disposing of the assets that are to revert to the grantor, legitimate tenure right holders and local communities. Technically, the investor should remove all the assets it wanted to keep within the time agreed by the contracting parties in order to continue the economic operation of the land. It also *has* responsibility for rendering the land and all the relevant project-related assets to the grantor and the local communities

²⁸ *Id.*

²⁹ UNCTAD. 1985. Draft International Code of Conduct on the Transfer of Technology, Ch. 1, para. 1.2.

³⁰ UNCITRAL. 2001. Legislative Guide on Privately Financed Infrastructure Projects, p. 168, para. 51.

pursuant to the terms set forth in the contract. However, these terms should be reasonable.³¹ For instance, the grantor may oblige the investor to return the project-related machines within a reasonable time but may not impose return of them to a place far from the land that was leased. To foster legal certainty, the contracting parties should devise procedures before the expiry of the contract, and a common committee may be in charge of supervising the progress of the return.³² It may also evaluate unexpected costs and may share them between the contracting parties. Investors, moreover, should be aware that grantors may demand that all the project-related assets return directly to a new investor in order to continue the economic operation of the land.

5.40. *Liabilities for deterioration.* As a consequence of the responsibility for the return of the project-related assets in the conditions agreed by the parties, the investor should be liable for any deterioration of the land *and* the related assets. The deterioration of the land may be evaluated by the common committee based on objective criteria. Before the conclusion of the agricultural land investment contract, the contracting parties may assess the biologic, chemical and environmental characteristics of the land through feasibility studies (see Chapter 2.IV.B.1). The deterioration of the land may be considered when these standards are lowered after re-assessment by the contracting parties (e.g. through the common committee) and can be attributed to the investor's misuse of the land (e.g. utilisation of unauthorised chemicals, abuse of natural resources, etc.). Therefore, the investor may be obliged to pay compensation for such deterioration. Some jurisdictions provide that the compensation must be equal to the potential suffered loss. In addition, while the land is transferred to the grantor or to a new investor, the original investor may be responsible for mitigating risks of deterioration.

5.41. *Time to return.* The expiry of the agricultural land investment contract – whether at the end of the contract's duration or by mutual agreement – necessarily implies a period in which the investor should return the land. Many systems include a mechanism of default interest. Therefore, if the investor does not return the land and *the* project-related assets within this period of time, it may be charged interest that corresponds to the suffered loss.³³

³¹ *Id.*, p. 163, para. 41.

³² *Id.*, p. 163, para. 42.

³³ See UPICC, Art. 7.4.10.

CHAPTER 6 - GRIEVANCE MECHANISMS AND DISPUTE RESOLUTION

6.1. *Overview.* This Chapter discusses grievance mechanisms and the resolution of disputes arising from an agricultural land investment contract.¹ As the performance of a contract can have an impact beyond the contracting parties, grievance mechanisms and dispute resolution concern those parties, as well as any other stakeholders to the contract, including third party beneficiaries (“non-parties”). The contracting parties are typically the investor on the one hand and the government or local community as grantor on the other, but may also include legitimate tenure right holders. Non-parties to a contract are not bound by any contractual undertaking but may be affected by contractual performance, and may include legitimate tenure right holders as well as members of the local community.

6.2. *Parties.* Contracting parties and non-parties can choose from or participate in grievance mechanisms and different modes of dispute resolution, ranging from non-judicial proceedings to judicial proceedings. This Chapter first provides an overview of the considerations underlying grievance mechanisms and dispute resolution for agricultural land investment contracts, before elaborating on the different options for non-judicial dispute resolution. It then explains what judicial dispute resolution entails, and addresses the enforcement of settlements, awards and judgments.

6.3. *Applicable law.* A preliminary concern in dispute resolution is the applicable law. The legality of land ownership and tenure, and other land-related issues are governed by the law of the State in which the land is situated (i.e. host State law). Additionally, the substance of a dispute can be governed by a law or laws chosen by the contracting parties. As indicated in Chapter 1, the legal *framework* for agricultural land investment contracts comprises domestic and international sources of law. In the absence of express choice, the substance of the dispute may be governed by a combination of host State law and international law. When the dispute resolution mechanism involves the submission of a claim over land rights for final, binding adjudication by an impartial decision-maker, the outcome of the claim will often be guided primarily by the application of host State law.

6.4. *Situations arising from investor-government contracts.* Situations between investors and governments are likely to concern the pre-conditions to the performance of the contract, the performance or non-performance of the contract, and the unilateral termination or abandonment of the contract by one of the contracting parties. These situations may also have an impact on non-parties, *such as* local communities being displaced or being subject to pollution from investment activity. Depending on the nature of a situation or dispute arising from an investor-government contract, contracting parties and non-parties may avail themselves of a variety of resolution mechanisms. A situation or dispute that is purely factual may be submitted to expert determination, negotiation or mediation. A situation or dispute that involves both factual and legal determinations may be submitted to a grievance mechanism, negotiation, mediation, arbitration if the parties have consented thereto, domestic courts, or regional and international courts.

6.5. *Situations arising from investor-community contracts.* Situations between investors and local communities are likely to concern adequate respect from the investor for community interests, community development, and the community’s environment. The proximity and even dependence of local communities to the agricultural land used by the investors means that local communities are especially sensitive to any deviation in investor conduct that was not contractually agreed upon. Investor responsiveness to local community complaints will enable many situations to be addressed at an early stage, before they escalate into a dispute. Situations that are flagged at an early stage may benefit from submission to grievance

¹ This Chapter should be read in light of one of the basic ideas underlying the UPICC, *favour contractus*, the aim of which is to preserve the contract whenever possible and to foster continuation of the contractual relationship. See, e.g., UPICC, Arts. 6.2.1-6.2.3, 7.1.4, 7.3.1.

mechanisms. When the situation escalates into a dispute, it may benefit from submission to negotiation, mediation, arbitration if there is an arbitration clause in the contract, or domestic courts.

I. GRIEVANCE MECHANISMS

6.6. *In general.* In this Chapter, a grievance refers to an injustice felt usually by non-parties, such as legitimate tenure right holders and members of the local community, whose sense of entitlement or *expectations*, based on law or custom, has been impacted by the activities of the contracting parties.² A grievance mechanism refers to any non-judicial or judicial process where concerns giving rise to the perceived injustice can be raised by non-parties and remedies can be sought.³

6.7. *Link to impact assessments and local communities.* Agricultural land investment contracts are likely to have a significant environmental and social impact on local communities. Apart from requiring the conduct of environmental and social impact assessments as described in Chapters 2.IV.B.2 and 3.III.B, contracting parties should enhance respect for non-party rights and interests by *establishing* standing grievance mechanisms to receive, investigate, and resolve non-party complaints. Standing grievance mechanisms address failures to comply with domestic laws, failures to comply with contractual stipulations, and failures to adopt best business practices, where impact assessments are either not carried out, or inadequately monitored. In order to bring about constant and effective engagement between contracting parties and non-parties, grievance mechanisms should be equitable, have transparent and predictable procedures, involve impartial and thorough investigators, and be readily accessible to all legitimate tenure right holders and members of local communities.⁴ When non-parties are confident that a grievance mechanism will offer a cost-effective, reprisal-free and fair investigation of their complaints, as well as an early remedy, this mechanism can prevent conflict escalation between contracting parties and non-parties.

6.8. *Forms.* Grievance mechanisms can take one of four principal forms. They can be an extension of a grantor government or State-linked institutions, a part of the investor's corporate or operational structure, a collaboration between the contracting parties, or involve third party monitoring.

6.9. *State-linked grievance mechanisms.* Grievance mechanisms that are an extension of a grantor government or State-linked institutions serve to complement and supplement existing judicial mechanisms. In some situations, judicial remedy may not be required or culturally appropriate. Grievance mechanisms that are, for instance, administered by national human rights institutions or national small claims *tribunals* and offer to settle disputes in a more informal setting, may better meet the needs of aggrieved parties who prefer not to or refuse to go to court.

6.10. *Investor-linked grievance mechanisms.* Grievance mechanisms that form part of the investor's corporate or operational structure provide direct access to aggrieved non-parties affected by the investor's activities. *Such* mechanisms are often administered by the investor company or enterprise, but complaints can also be redirected by the investor to an external body. Establishing an effective in-house grievance mechanism counts towards an investor's discharge of its social responsibility to respect legitimate tenure right holder and local community rights, and enables the investor to identify and address grievances before they worsen.⁵ Like State-linked grievance mechanisms, investor-linked grievance mechanisms complement and supplement existing judicial mechanisms. They do not preclude access to other forms of non-judicial or judicial dispute settlement mechanisms.

6.11. *Stakeholder grievance mechanisms.* Grievance mechanisms can be managed by a single stakeholder, or *represent* collaborations between the key stakeholders who jointly administer the process,

² UN Guiding Principles, p. 28.

³ *Id.*

⁴ CFS-RAI, Principle 9; OECD, FAO. 2016. Guidance for Responsible Agricultural Supply Chains, pp. 26, 33, 53-4; OECD. 2017. OECD Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector, pp. 75-6.

⁵ 2012. VGGT, para. 3.2; see also IFC. 2009. Good Practice Note. Addressing Grievances from Project-Affected Communities.

or where one stakeholder oversees the process while remaining accountable to the other stakeholders. Stakeholders include the investor, the government, the legal and legitimate tenure right holders, the local community, as well as trade unions, guilds, inter-governmental organisations, non-governmental organisations and local, regional and international human rights bodies. Collaborative grievance mechanisms share the aims of State-linked and investor-linked grievance mechanisms. One notable stakeholder grievance mechanism is the World Bank Inspection Panel, which is managed solely by the World Bank and designed for local communities that have been adversely affected by World Bank-funded projects. The National Contact Points (NCP) for the Organisation for Economic Co-Operation and Development (OECD) Guidelines for Multinational Enterprises are another notable stakeholder grievance mechanism. States adhering to the OECD Guidelines are required to establish an NCP to handle grievances arising from non-observance of the Guidelines. Unlike the World Bank Inspection Panel which handles a wide spectrum of grievances with diverse origins, the OECD-NCP grievance mechanism is reserved for grievances brought about by non-observance of the OECD Guidelines.

6.12. *Third party-monitored grievance mechanisms.* Third party monitoring, which was already discussed in Chapter 3.V.A in the context of contract implementation, has the benefit of neutrality which State-linked, investor-linked, or stakeholder grievance mechanisms may lack. Third party-monitored grievance mechanisms can assume varying degrees of formality. Less formalised third party-monitored grievance mechanisms may involve the third party monitor writing down and collecting complaints during individual meetings, field visits, or at agreed locations. More formalised third party-monitored grievance mechanisms may involve the third party setting up a website, email or collection boxes to collate written grievances, after which the third party administers a State-linked, investor-linked, or stakeholder grievance mechanism for submitted grievances.

6.13. *Best practice.* Contracting parties and non-parties should note existing best practices on the setting up and implementation of grievance mechanisms. One example can be found in the Office of the Compliance Advisor/Ombudsman Advisory Note to the World Bank on A Guide to Designing and Implementing Grievance Mechanisms for Development Projects, which identifies “good practice markers” when developing and implementing a grievance mechanism:⁶

- *Refine core company values:* To improve their community relations in general and grievance resolution in particular, companies can adopt certain critical values or attitudes. These include:
 - Commitment to fairness in both process and outcomes;
 - Freedom from reprisal for all involved parties—within the company and in the community;
 - Dedication to building broad internal support for the grievance mechanism across project lines;
 - Mainstreaming responsibility for addressing grievances throughout the project, rather than isolating it within a single department; and
 - Willingness by senior management to visibly and sincerely champion the grievance system.
- *Start early in the project cycle:* The most successful grievance mechanisms are put in place as early as possible – ideally, during the project feasibility phase – and are modified for later project phases. Problems are often resolved more easily, cheaply, and efficiently when they are dealt with early and locally.

⁶ CAO. 2008- Advisory Note: A Guide to Designing and Implementing Grievance Mechanisms for Development Projects, pp. 2-4.

- *Involve the community in the design:* Stakeholders from the community and company should be involved in the grievance mechanism design. Indeed, some experts feel that imposing a company-designed system could be worse than having an ad hoc system. The company should engage community representatives to identify key factors, such as the kinds of disputes that could arise during the project life, how people in the community actually want to raise concerns, the effectiveness of current company procedures for resolving complaints, and the availability of local resources to resolve conflicts. Based upon this assessment, community representatives should help shape both the design and future improvements.
- *Ensure accessibility:* An effective grievance mechanism should be accessible to diverse members of the community, including more vulnerable groups such as women and youth. Multiple points of entry should be available, including face-to-face meetings, written complaints, telephone conversations, or e-mail. Confidentiality and privacy for complainants should be honoured where this is seen as important.
- *Maintain a wide scope of issues:* The grievance mechanism should be open to a wide range of concerns: both those based in factual data and those arising from perceptions or misperceptions. Perceived concerns can be as critical to address as actual hazards. The mechanism should also be able to address multi-party and multi-issue complaints.
- *Develop culturally appropriate procedures:* The mechanism should be responsive, respectful, and predictable – clearly laying out an expected timetable for key process milestones. The grievance mechanism should be capable of bridging deep divides, including cultural divides. The design and operation of the grievance mechanism should consider cultural differences, such as communities' preferences for direct or indirect negotiation; attitudes toward competition, cooperation, and conflict; the desire to preserve relationships among complainants; authority, social rank, and status; ways of understanding and interpreting the world; concepts of time management; attitudes toward third parties; and the broader social and institutional environment.
- *Incorporate a variety of grievance resolution approaches:* To accommodate differences in personal and cultural preferences, the grievance mechanism should offer a variety of grievance resolution approaches – not just a single grievance procedure. The complainant should have influence over which approach to select. Some complaints may be managed in an informal way solely by those directly involved, such as a company representative and the complainant. Others may rely on more formal independent redress, such as arbitration using a neutral third party. Some mechanisms may rely on an interest-based approach, such as responding to the stated legitimate and perceived needs of the complainant. Others may rely on a rights-based approach, based on legal, contractual, or other rights. Where possible, local, customary ways of grievance resolution should be evaluated and incorporated into the system.
- *Identify a central point for coordination:* A well-publicised and consistently staffed position, held by an individual or team, should be maintained. This central coordinator facilitates the development and implementation of the grievance mechanism, administers some of its resources, monitors internal and external good practice, ensures coordination among access points, and makes certain that the system is responsive to the information it manages.
- *Maintain and publicise multiple access points:* Expanding access beyond those individuals who have the primary responsibility to receive grievances can significantly reduce barriers to entering the system and encourage community members to address problems early and constructively. Individuals serving as access points are most effective if they are trustworthy, trained, knowledgeable, and approachable regardless of the ethnicity, gender, or religion of the complainant.
- *Report back to the community:* The company should provide regular feedback to relevant stakeholders to clarify expectations about what the mechanism does and does not do; to encourage people to use the mechanism; to present results; and to gather feedback to improve the grievance

system. Information reported back might include types of cases and how they were resolved, and the way the grievance has influenced company policies, procedures, operations, and the grievance mechanism itself.

- *Use a grievance log to monitor cases and improve the organisation:* In addition to resolving individual or community disputes, the grievance mechanism is an opportunity to promote improvements in the company. A grievance log (or register) can be used to analyse information about grievance and conflict trends, community issues, and project operations to anticipate the kinds of conflicts they might expect in the future, both to ensure that the grievance mechanism is set up to handle such issues and to propose organisational or operational changes. Sometimes, enacting policies or other types of structural change can resolve grievances around a common issue, rather than continuing to settle individual complaints on a case-by-case basis.
- *Evaluate and improve the system:* The company should periodically conduct an internal assessment of the grievance mechanism to evaluate and improve its effectiveness. Important elements of evaluation include: general awareness of the mechanism; whether it is used and by whom; the types of issues addressed; the ability of the mechanism to resolve conflicts early and constructively; the actual outcomes (impacts on project operations, management systems, and benefits for communities); its efficiency; and, most fundamentally, the ability to accomplish its stated purpose and goals. At certain times, the company should also solicit and include the views of stakeholder representatives to see how the mechanism is proving effective in practice.

6.14. *Best practice continued.* Another example can be found in the IFC's Good Practice Note on Addressing Grievances from Project-Affected Communities, which identifies five key steps in the grievance the management process:⁷

- *Step 1:* Publicising grievance mechanism procedures;
- *Step 2:* Receiving and keeping track of grievances;
- *Step 3:* Reviewing and investigating grievances;
- *Step 4:* Developing resolution options and preparing a response; and
- *Step 5:* Monitoring, reporting, and evaluating a grievance mechanism.

6.15. *Effectiveness.* Additionally, contracting parties and non-parties should adopt the "effectiveness criteria" from the UN Guiding Principles to ensure the optimal functioning of any established grievance mechanism:⁸

- *Legitimate:* enabling trust from the stakeholder groups for whose use they are intended, and being accountable for the fair conduct of grievance processes;
- *Accessible:* being known to all stakeholder groups for whose use they are intended, and providing adequate assistance for those who may face particular barriers to access;
- *Predictable:* providing a clear and known procedure with an indicative time frame for each stage, and clarity on the types of process and outcome available and means of monitoring implementation;
- *Equitable:* seeking to ensure that aggrieved parties have reasonable access to sources of information, advice and expertise necessary to engage in a grievance process on fair, informed and respectful terms;

⁷ IFC. 2009. Good Practice Note. Addressing Grievances from Project-Affected Communities, pp. 16-28.

⁸ UN Guiding Principles, Principle 31; see also OECD. 2017. Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector, p. 76 (Table 8).

- *Transparent*: keeping parties to a grievance informed about its progress, and providing sufficient information about the mechanism's performance to build confidence in its effectiveness and meet any public interest at stake;
- *Rights-compatible*: ensuring that outcomes and remedies accord with internationally recognised human rights;
- *A source of continuous learning*: drawing on relevant measures to identify lessons for improving the mechanism and preventing future grievances and harms; and
- *Based on engagement and dialogue*: consulting the stakeholder groups for whose use they are intended on their design and performance, and focusing on dialogue as the means to address and resolve grievances.

II. DISPUTES ARISING FROM AGRICULTURAL LAND INVESTMENT CONTRACTS

6.16. *Introduction*. The existence of a dispute presupposes unsatisfactory, unilaterally adjusted or non-performance by one or more of the contracting parties. However, not every failure to observe the terms of the contract needs to escalate into a dispute. For potential disputes involving only *contracting* parties, the parties may agree to waive or revise pertinent terms of performance. For potential disputes involving non-parties, the party or parties whose actions or omissions will affect third party beneficiaries and other stakeholders may consult and reach an agreement with the latter on a course of action that mitigates or avoids anticipated adverse impacts. If steps are taken to prevent a dispute from crystallising, neither the contracting parties nor the non-parties will proceed to dispute resolution.

6.17. *Party agreement*. Contracting parties may agree on a preferred mode of dispute settlement, provided that such an agreement is valid under host State law. Contracting parties may also agree on the formalities and rules governing the dispute settlement procedure. Certain aspects of their contractual relationship could be particularly contentious. They include, *inter alia*, competing rights over the granted agricultural land; the standard of compliance with social, economic and environmental *obligations*; excuses for non-performance; and grounds for termination. Non-parties whose rights or interests over the land overlap with those of the contracting parties might also be particularly affected. Therefore, when contracting parties are negotiating and drafting their contract, it is advisable to make provision for dispute settlement allowing for one or more forms of non-party participation.

6.18. *Unequal bargaining power*. The final choice of dispute settlement mechanism may reflect the unequal bargaining power of the contracting parties. For example, an investor with more bargaining power may *prefer* dispute settlement through international arbitration, while a grantor government with more bargaining power may prefer dispute settlement in domestic judicial or non-judicial settings. Furthermore, legitimate tenure rights holders or a local community may lack the bargaining power of the investor or the government, and may have to accept an imposed dispute settlement mechanism. Whichever the chosen dispute settlement mechanism, it should adequately protect the rights and interests of all the contracting parties, as well as those of the non-parties. Access to effective remedy becomes even more critical to the fostering of a functional contractual relationship, as well as contractual stability and predictability when the choice of dispute settlement mechanism was stipulated by one contracting party. It is a safeguard against unfair conduct on the part of the stronger contracting party, and ensures that the weaker contracting party or parties, as well as non-parties, have genuine recourse to remedies.

A. The importance of access to effective remedy

6.19. *In general*. Access to effective remedy is a foundational principle in the UN Guiding Principles.⁹ Even with careful negotiation and drafting, no contract caters for every eventuality. Changing circumstances may

⁹ UN Guiding Principles, pp. 27-8.

obstruct the performance of the contract on its original terms. Contractual renegotiation, moreover, may *not* enable continued performance of the contract on different terms. When this happens, resolving disputes between the contracting parties or with non-parties in an effective and efficient manner takes priority. In particular, the investor who may have committed significant capital resources expects a measure of predictability and certainty in the manner that a given dispute will be resolved. Therefore, contractual clauses which stipulate that one or more contracting parties, or all of the non-parties, waive their right of access to effective remedy, are unlikely to be enforceable.

6.20. *Substantive and procedural dimensions.* Access to effective remedy comprises both substantive and procedural dimensions. The substantive dimension concerns the objective of righting wrongs that have occurred, which can be met through financial or non-financial restitution, as well as punitive or preventive sanctions. The procedural dimension concerns the provision of remedy through an adjudicatory *process* that is independent, impartial and corruption-free. Given the variety of disputes arising from agricultural land investment contracts, awareness of the different non-judicial and judicial dispute settlement options will allow contracting parties to incorporate one or any number of mechanisms that best suits their needs, as well as those of non-parties, in the contract.

6.21. *Forums and non-party participation.* While some contracting parties may choose to litigate their dispute before a domestic court, others may consent to arbitrate their dispute before an international tribunal, and yet others may agree on alternative dispute resolution mechanisms. Contracting parties should also envisage or cater for the participation of non-parties in dispute settlement proceedings. In domestic litigation, and subject to the law of the forum, such participation may take the form of written or oral *amicus curiae* (or “friend of the court”) submissions. In international arbitration, and *subject* to the law governing the arbitration, non-parties may also make written submissions to the tribunal. To this end, contracting parties may consider adopting or adapting the procedure in the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration for receiving submissions from “third person(s)”.¹⁰ In less institutionalised dispute settlement proceedings, such as a hearing before indigenous community elders, the elders may wish to hear from all interested parties before making a final ruling that is binding on the contracting parties and the non-parties.

B. The provision of access to effective remedy

6.22. *Default forum.* When a contract does not contain a forum selection clause, a contracting party does not require the prior consent of the other contracting party or parties before submitting its dispute to the courts of the host State. This is because domestic courts can exercise compulsory personal and subject matter jurisdiction over persons and disputes located in that State’s territory. Therefore, judicial resolution may be unilaterally invoked by a claimant, regardless of whether the claimant is a contracting *party* or non-party. Compulsory jurisdiction enables domestic courts to compel a defendant to stand trial, and to impose punitive sanctions, such as contempt of court, if the defendant refuses to do so.

6.23. *Consent for alternative fora.* By contrast, non-judicial dispute resolution mechanisms are stipulated in the contract. For example, arbitration is a form of consensual, non-judicial dispute resolution. Contracting parties must consent to submit to arbitration before arbitration can proceed. Consent to arbitration can be expressed in an arbitration clause in the contract, or in an exchange of letters between the *contracting* parties.

6.24. *Consent outside of the contract.* Contracting parties may also agree to the non-judicial resolution of disputes outside of the agricultural land investment contract. The agreement may pertain to future disputes or the existing dispute, and will be recorded separately from the main contract. When the contract does not provide for a mode of dispute resolution, the separate agreement prevails. When the contract already provides for a mode of dispute resolution, whether the separate agreement takes precedence over a contractual clause depends on the wording of the separate agreement and the contractual clause. In order to minimise uncertainty over the chosen mode of dispute resolution, or the order of priority among *different*

¹⁰ UNCITRAL. 2014. Rules on Transparency in Treaty-based Investor-State Arbitration, art. 4.

chosen modes of dispute resolution, contracting parties should be adequately advised and represented not only during the contract drafting process, but also during pre-contractual and post-contractual communications.

6.25. *Circumstances of the dispute.* The following Parts outline possible forms that non-judicial and judicial dispute resolution can take. They do not prefer one form of dispute resolution over another, nor non-judicial dispute resolution over *judicial* dispute resolution. The most appropriate form of dispute resolution will depend on the circumstances of each situation or dispute and on the manner and extent which non-parties are involved.

III. NON-JUDICIAL DISPUTE RESOLUTION

6.26. *Introduction.* Non-judicial dispute resolution proceedings are often more timely and flexible than judicial dispute resolution proceedings. Contracting parties can choose one or combine several options tailored to their needs. Contracting parties, for example, desiring to: (a) anticipate factual, environment-related disputes such as soil quality, management and degradation may benefit most from rapid expert determination; (b) preserve their contractual relationship to the greatest extent possible may prefer negotiation or mediation; and (c) to cater for disputes raising issues of law may benefit most from submission of those issues to legally-trained arbitrators.

A. Expert determination

6.27. *In general.* Expert determination can bring about the expeditious resolution of a dispute that raises only issues of fact. However, the nature of the factual dispute must be straightforward in order for an expert determination to suffice as the tie-breaker. An example of a straightforward factual dispute arising from an agricultural land investment contract is the contested existence of soil degradation. An expert determination may be all that is required to let the parties know if contractual provisions on compensation and reparative measures for soil degradation can be invoked against the defaulting party. A counterexample of a straightforward factual dispute is one in which the extent of an investor's compliance with its contractual obligations to maintain soil quality is contested, which involves an issue of law. The latter dispute raises legal issues of contractual interpretation and proof, which call for the involvement of legal counsel, and which expert determination alone is unlikely to resolve.

6.28. *Appointment procedures.* When a dispute can be resolved by expert determination, the expert or panel of experts tasked to hear the dispute is normally appointed by agreement of the disputing parties, who can be contracting parties as well as non-parties. Alternatively, each disputing party may appoint one expert, and the appointed experts may agree on another expert. Disputing parties may also request the appointment of an expert or a panel of experts from an arbitral institution or a relevant industry body. In the last scenario, the expert or experts will be appointed in accordance with institutional rules or procedure.

6.29. *Expert qualifications.* When appointing experts, disputing parties should ensure that the experts' qualifications, experience and professional standing demonstrate a high level of aptitude in the field or matter on which a determination is sought. Unless the disputing parties agree otherwise, experts must be independent of the *parties* (i.e. should not, for example, be an employee of one of the disputing parties). When appointing experts, disputing parties may also wish to consider the experts' availability, place of residence in the event that an on-site inspection is required, language skills, and costs of appointment.

6.30. *Expert report.* An expert determination may be rendered in a written report. A draft report may be circulated to the disputing parties for their comments, and the final report should address those comments. Although the final report is intended to resolve the dispute, recourse to expert determination generally does not bar disputing parties from subsequently accessing other forms of non-judicial or judicial dispute settlement.

B. Negotiation and mediation

6.31. *In general.* Negotiation and mediation are amicable forms of non-judicial dispute settlement. Mediation encompasses conciliation and any other procedure where a neutral third person is appointed to steer, but not compel, the disputing parties to a resolution. Negotiation and mediation can be initiated by and involve both contracting parties and non-parties, so long as all parties to the negotiation and mediation agree to have the dispute resolved in the proposed manner, and pledge to uphold any settlement they may reach on a voluntary basis. Negotiation differs from mediation in that the latter is normally conducted by a third person, the mediator, who assists the disputing parties in arriving at a compromise.¹¹ The mediator does not, however, have the power to impose a solution should the disputing parties fail to arrive at one. Neither negotiation nor mediation guarantees final resolution of the dispute. Disputing parties who fail to reach a settlement through negotiation or mediation are free to explore other means for resolving their dispute.

6.32. *Negotiation.* Negotiation is a relatively informal and confidential process in which disputing parties attempt to reach a settlement through discussions without third party intervention. Contracting parties with a long-standing relationship and who are familiar with each other's operations may view negotiation as a way to preserve a good working relationship. In contrast, some contracting parties may find it more *challenging* to negotiate with an entity with whom it has a disagreement, but limited familiarity. Non-parties that have a pre-existing relationship with the contracting parties may also find negotiation more appealing than non-parties without this pre-existing relationship. Should negotiation fail to yield a settlement between disputing parties, the next step is usually mediation.

Mediation. Mediation, unlike negotiation, is a more formal process in which disputing parties attempt to arrive at a resolution with the assistance of a mediator.¹² Mediation may appeal to disputing parties because it can be conducted over a short period, has low cost implications and, due to its confidential nature, generally keeps both small- and large-scale disputes out of the public eye. Disputing parties must expressly agree to submit their dispute to mediation. This can either be done in a contractual clause, or extra-contractually. Mediation can be conducted *ad hoc*, or pursuant to institutional rules *designed* for mediations. In the former, disputing parties determine the procedure and agree on a mediator with qualities corresponding to their particular situation. In the latter, disputing parties mediate under the auspices of an institution which designates procedural rules and recommends a mediator. Contracting parties may also stipulate that recourse to mediation is a precondition to the submission of the dispute to binding dispute settlement procedures like arbitration, or litigation before domestic courts. Unless otherwise agreed by the parties, a mediator does not act as an arbitrator of the dispute submitted to mediation, issuing a ruling that is binding on the mediating parties.¹³

C. Arbitration

6.33. *In general.* Arbitration is a consensual form of non-judicial dispute settlement. Although consent to arbitrate refers to the consent of the contracting parties, *non-parties to the contract* with interests at stake may wish to participate in the arbitral proceedings. *Non-parties to the dispute* who are also contracting parties may participate by requesting to be joined to the proceedings. The participation of non-parties to the contract in arbitral proceedings generally requires the consent of the contracting parties. Disputes arising from agricultural land investment contracts may be submitted to contract-based arbitration, or to treaty-based arbitration.

¹¹ UNCITRAL. 2018. UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation (amending the UNCITRAL Model Law on International Commercial Conciliation, 2002), Art.1, note 2.

¹² OHADA. 2017. Uniform Act on Mediation, Arts. 1, 4, 7-9.

¹³ UNCITRAL. 2018. UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation (amending the UNCITRAL Model Law on International Commercial Conciliation, 2002), Art.13.

6.34. *Contract-based arbitration.* In contract-based arbitration, the consent of the contracting parties to arbitrate may be recorded in an arbitration clause in the contract, or in a separate agreement after the dispute has arisen. An arbitration agreement may be recorded in writing, orally, or by other means.¹⁴ It should clearly define the matters which the contracting parties consent to submit to arbitration *and*, if they wish to arbitrate under the auspices of an arbitral institution, correctly identify that institution. An arbitration agreement should also stipulate the seat of the arbitration, and may indicate the language of the arbitration, and the number of arbitrators to hear and decide the dispute. Once consent to arbitrate is given by the contracting parties, it cannot be unilaterally withdrawn. A valid arbitration agreement creates a binding obligation on all parties to the agreement to submit to arbitration, and generally precludes any party to the agreement from seeking judicial resolution of the dispute.

6.35. *Separability.* In contract-based arbitration, an arbitration agreement is separable from the main contract,¹⁵ and empowers the arbitral tribunal to rule on its own jurisdiction without having recourse to the courts.¹⁶ Pursuant to the principle of separability, a finding by an arbitral tribunal that the contract was void *ab initio* or subsequently terminated does not affect the validity of an arbitration clause.¹⁷ Pursuant to the principle of *kompetenz-kompetenz*, an arbitral tribunal is its own judge of whether it has jurisdiction to hear a dispute. A contracting party may challenge the tribunal's jurisdictional ruling before the courts of the State in which the arbitration is seated. The procedure and outcome of the challenge is determined by the domestic laws of that State. If the court finds that there is a valid agreement to arbitrate, it will order a stay of court proceedings and refer the contracting parties to arbitration. If the court finds, however, that there is no valid agreement to arbitrate, it will not compel *the* contracting parties to submit to arbitration. In the latter scenario, contracting parties will have to consider adopting forms of non-judicial dispute resolution other than arbitration, or judicial dispute resolution. To minimise jurisdictional conflicts between arbitral tribunals and other dispute settlement bodies, contracting parties should draft an arbitration clause expressing a clear intention to arbitrate.

6.36. *Non-party participation.* In contract-based arbitration, *non-parties to the contract* may, exceptionally, participate in the proceedings by making submission to the arbitral tribunal or by observing a hearing. *Non-parties to the dispute* may participate by requesting to be joined to the proceedings. A request for joinder may be subject to time stipulations and be barred after a certain date, and may be rejected by the arbitral tribunal if it prejudices any of the existing disputing parties.¹⁸ When an arbitration is conducted in accordance with procedural rules designed by the contracting disputing parties, the possibility and manner of non-party (be it to the contract or to the dispute) participation is a matter for agreement between the contracting disputing parties. When an arbitration is conducted in accordance with the procedural rules of a chosen arbitral institution, the possibility and manner of non-party (be it to the contract or to the dispute) participation may be specified in the applicable institutional rules.

6.37. *Treaty-based arbitration.* In treaty-based arbitration, there has to be consent between the investor and the host State (i.e. the State in which the investment is located), and such consent is given separately. First, the State's consent to arbitrate may be found in a bilateral or multilateral international investment agreement (IIAs). IIAs are concluded between States and confer protection on qualifying investments of investors who are nationals of the other or other Contracting States. In most IIAs, a Contracting State consents to arbitrate a given class of future disputes arising from qualifying investments with qualifying investors at large. Second, the investor's consent to arbitrate, given after a dispute with the host State has arisen, is found in a request for arbitration with the State that refers to the applicable IIA. Once consent by the host State and the investor to arbitrate is given, the arbitration will be conducted in accordance with the procedure set out, or the institutional rules referenced, in the applicable IIA. At the time of writing, the drafters of this Guide note the ongoing work of UNCITRAL Working Group III on Investor-State Dispute

¹⁴ UNCITRAL. 2006. UNCITRAL Model Law on International Commercial Arbitration, Art.7 (Option 1).

¹⁵ UNCITRAL. 2006. Model Law on International Commercial Arbitration, Art.16(1); and accompanying Explanatory Note, para. 25.

¹⁶ *Id.*

¹⁷ See LGCF, p. 202.

¹⁸ UNCITRAL. 2010. UNCITRAL Arbitration Rules, Art.17(5).

Settlement Reform. Reform proposals range from maintenance, to minor modifications, to overhaul of the prevailing treaty-based arbitration regime. Without pre-empting or expressing a preference for any potential final recommendation of the Working Group, this Guide outlines what has already come to pass, namely, established recourse to treaty-based arbitration for the resolution of disputes between investors and States.

6.38. *Special procedural aspects of treaty-based arbitration.* Disputes arising from agricultural land investment contracts can be submitted to treaty-based arbitration when the applicable IIA expressly recognises contracts or rights created by contract as protected investments. Investor-State disputes that are contractual in origin can also be submitted to treaty-based arbitration if the applicable IIA does not expressly list contracts or rights created by contract as protected investments, but confers protection on rights and interests of economic value, regardless of provenance. By contrast, investor-State disputes that are contractual in origin cannot be submitted to treaty-based arbitration if the applicable IIA expressly excludes contracts and rights created by contract from protection. Although the preponderance of claims brought by investors against States in treaty-based arbitration allege the violation of the applicable IIA (i.e. treaty claims), some investors may also allege the breach of the underlying contract (i.e. contract claims). Whether a treaty-based arbitral tribunal is empowered to hear contract claims as well as treaty claims depends on the scope of the Contracting States' consent to arbitrate in the applicable IIA.

6.39. *Special substantive aspects of treaty-based arbitration.* In treaty-based arbitration, the investor is the claimant, while the State is the respondent. This is unlike contract-based arbitration where any of the contracting parties can be the claimant or the respondent. This is because most IIAs, which only set out the obligations of Contracting States with respect to investment protection, can only be invoked by investors against those States but not vice versa. Depending on the IIA, the State may be able to bring a counter-claim against the investor. Some newer IIAs impose obligations on investors to respect human rights and maintain high standards of corporate social responsibility when operating in the host State. However, these newer IIAs do not expressly allow States to initiate claims against investors who do not meet these obligations. When invoking an IIA, an investor claims that the State has violated international obligations owed to itself or to its investment. Common IIA obligations include the *conferral* of fair and equitable treatment on protected investors and their investments,¹⁹ the guarantee that protected investments will not be expropriated in the absence of a public purpose, proper compensation, and due process,²⁰ and the commitment – though becoming less common in recent and new IIAs – to observe all obligations the host State has entered into with the investor.²¹ The claim and any counter-claim will be heard by an arbitral tribunal constituted in accordance with the procedure set out, or the institutional rules referenced, in the applicable IIA. Like arbitral tribunals that derive their powers from contract, arbitral tribunals that derive their powers from IIAs can rule on their own jurisdictional competence and, when jurisdiction is established, rule on the merits of the claim.

6.40. *Public interest and transparency.* In treaty-based arbitration, investors challenge the legality of host State measures, and in turn the propriety of the exercise of sovereignty, affecting their investment. The significant public interest element in investor-State arbitration has led to calls for greater transparency in arbitration proceedings which are traditionally confidential. In this regard, the UNICTRAL Rules on *Transparency* in Treaty-based Investor-State Arbitration provide that key documents such as party submissions and witness statements shall be made available to members of the public on request,²² and that parties other than the claimant investors and respondent States can make submissions on matters within the scope of the dispute,²³ so long as the publication of documents and the participation of these parties do not compromise the protection of confidential information or the integrity of the arbitral process.²⁴ The UNCITRAL Transparency Rules cater for the participation of non-State legal tenure right holders,

¹⁹ The IIA clause setting out this obligation is also known as an FET clause.

²⁰ The IIA clause setting out this obligation is also known as an expropriation clause.

²¹ The IIA clause setting out this obligation is also known as an umbrella clause.

²² UNICTRAL Transparency Rules, Art. 3.

²³ *Id.*, Arts. 4-5.

²⁴ *Id.*, Art.7.

legitimate tenure right holders, and members of the local community in an investor-State arbitration. Outside the UNICTRAL Rules on Transparency, the publication of key documents and the participation of such holders and members in treaty-based investor-State arbitrations may be regulated by institutional arbitration rules. In other arbitrations or in the absence of applicable institutional arbitration rules, these matters are determined by arbitral tribunals, with the consent of the investor and the State, on a case-by-case basis.

6.41. *Procedural rules.* Although parties to an arbitration, be they contracting parties or non-parties, are free to design the arbitral procedure, the availability of institutional procedural rules, as well as procedural rules for *ad hoc* arbitrations,²⁵ they may also adopt a set of ready-made rules. These rules set out the time limits for the filing of statements of claim and defences, the constitution of the tribunals, the steps to take when seeking interim relief, the conduct of oral hearings, and the possibility of recourse against an arbitral award issued by the tribunal. Parties to an arbitration have an equal right to be heard in an arbitration. The failure to observe this may affect the enforceability of an award.

6.42. *Awards.* Arbitration is brought to a close with the issuance of a final award by the tribunal. The award is binding on the disputing parties to the arbitration. In a contract-based arbitration initiated by one contracting party against another for example, and in which affected members of the local community participated, any award rendered is binding on the disputing contracting parties, but not on members of the local community. In a treaty-based arbitration between an investor and a State for example, and in which an affected legitimate tenure right holder made written submissions, any award rendered is binding on the disputing investor and State, but not on the legitimate tenure right holder. An arbitral award may be satisfied voluntarily by the disputing party against whom an order of damages has been made. Absent voluntary satisfaction, the prevailing disputing party may seek enforcement and execution of the award in domestic courts. Award enforcement and execution is governed by *international* instruments, such as the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention),²⁶ in conjunction with domestic legislation. The grounds for refusing the enforcement or setting aside an arbitral award are limited to those supplied in treaties and in domestic law, ensuring finality in dispute resolution through arbitration (see also Part V below regarding enforcement).

IV. JUDICIAL DISPUTE RESOLUTION

6.43. *Introduction.* Disputing parties that choose to pursue judicial proceedings will be subject to the laws of the forum. If the courts of the host State have exclusive jurisdiction over disputes concerning land located there,²⁷ then the disputing parties must litigate their dispute before these courts. If the courts of that State do not have exclusive jurisdiction, then the disputing parties may litigate their dispute in a forum of their choice.

6.44. *Forum selection.* When choosing a forum, disputing parties should consider the procedural laws on limitation periods and the regulation of litigation, as well as any relevant practice, which can vary widely across jurisdictions. Disputes involving the adverse impact of land activities on children of the local community, for instance, should be litigated, to the extent that the disputing parties are free to choose their forum, in a jurisdiction with longer limitation periods for land-related claims. This is because the harmful effects may take many years to manifest. Such a claim may be time-barred from judicial resolution in a jurisdiction with a shorter limitation periods for land-related claims. Other relevant considerations when choosing a forum for judicial dispute resolution, for example, include the place of incorporation or headquarters (*siege sociale*) of the investor, laws that affect the justiciability or the ability of the courts of the forum to hear a claim, as well as laws setting out any special remedies. Depending on the circumstances of each dispute, and the identity of the disputing parties, the weightage given to each relevant consideration

²⁵ See e.g. UNCITRAL. 2010. Arbitration Rules.

²⁶ The New York Convention was signed 10 June 1958 and entered into force 7 July 1959.

²⁷ EU. 2012. Regulation (EU) No 1215/2012 of the European Parliament and of the Council on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, Art. 24(1).

will vary. Therefore, a forum chosen by weighing all relevant considerations for one dispute may not suit another dispute.

6.45. *Proceedings.* Judicial proceedings are distinguishable from most forms of non-judicial dispute resolution by their high level of formality. Each litigant's fundamental right to a fair trial before independent and impartial judges requires the strict observation of procedural guarantees. Disputing parties may be required to act through lawyers who will help them navigate complex rules of procedure and present their best claim or defence. When relying on legal representation, parties should be mindful of legal costs. At the close of judicial dispute resolution, courts may order each disputing party to bear its own legal costs, or the losing party to pay the winning party's costs.

6.46. *Fora.* Disputing parties electing judicial dispute resolution may (a) litigate in the courts of the host State or (b) submit to an international or regional court. The choice of litigating before domestic courts or before international or regional courts turns on the nature of the claim and the jurisdictional competence of the court over that claim. As international and regional courts have a narrower jurisdictional competence than *domestic* courts – such competence usually limited to claims alleging the violation of human rights or raising questions of international law – there is a greater variety of disputes arising from investor-government and investor-community contracts being litigated in domestic courts.

A. Domestic courts

6.47. *In general.* Contracting parties can sue and be sued on the contract before domestic courts. Litigants before domestic courts do not require the prior approval or consent of defendant parties before they bring a claim. So long as the claim complies with all the relevant rules of procedure of the forum, it will be heard.

6.48. *Investors.* A domestic investor who is a party to a contract that does not contain an arbitration clause may litigate its dispute with the other or other contracting parties before the courts of the host State (i.e. that in which the land is located). A foreign investor who is a party to a contract that does not contain an arbitration clause may also litigate its dispute with domestic contracting parties (e.g. that host-State *government* or a local community in that state) before the courts of the host State. When the defendant is the investor's home State, the investor may be bound by domestic law to litigate its dispute before domestic courts.

6.49. *Other contracting parties.* Other contracting parties may also sue an investor on the contract before domestic courts. When the claimant is a grantor government or local community, litigation is likely to commence before the courts of the host State. Investors, both domestic and foreign, may be sued in the courts of the jurisdiction in which the investment is situated for non-performance, unsatisfactory performance, or any *other* breach of the contract, or for the violation of domestic laws in the course of performing the contract.

6.50. *Non-parties.* Non-parties, such as legitimate tenure right holders and members of the local community, who are adversely *affected* by the activities carried out by the contracting parties and may even have rights as third party beneficiaries, may also sue the latter in domestic courts. When the defendant is a domestic investor or a grantor government or local community, the dispute is domestic in nature and the proper forum is the courts of the host State.

B. International and regional courts

6.51. *In general.* Contracting parties and non-parties may submit or request submission of disputes arising from a contract to international or regional courts for resolution. At present, with the exception of individual commission of *international crimes*,²⁸ only States can be sued before international and regional courts.

6.52. *Regional courts.* Domestic investors and non-parties from certain jurisdictions have the option of suing their State of nationality or the host State for human rights violations or environmental damage before

²⁸ Rome Statute of the International Criminal Court, Art. 25.

a sub-regional or a regional court. One example of a sub-regional court that can hear claims for violations of human rights in Member States is the Economic Community of West African States Community Court of Justice. One example of a regional court that can hear claims brought by nationals and non-*nationals* against signatory States is the Inter-American Court of Human Rights which enforces the American Convention on Human Rights. Other examples of regional courts are the African Court on Human and People's Rights and the European Court of Human Rights.

6.53. *Diplomatic protection.* Foreign investors, apart from invoking applicable IIAs against host States as explained in Part III.C above, may request diplomatic protection from their home State. As the conferral of diplomatic protection for contractual disputes is infrequent and discretionary, few investors seek assistance from their home State if they can bring a claim directly against the host State. Diplomatic protection entails "the invocation by a State, through diplomatic action or other means of peaceful *settlement*, of the responsibility of another State for an injury caused by an internationally wrongful act of that State to a natural or legal person that is a national of the former State with a view to the implementation of such responsibility".²⁹ Diplomatic action can consist of negotiations at the inter-State level, while peaceful settlement can consist of the home State bringing a claim against the host State before the International Court of Justice. However, the jurisdiction of the ICJ is limited to disputes concerning "the interpretation of a treaty, any question of international law, the existence of any fact which, if established, would constitute a breach of an international obligation, and the nature or extent of the reparation to be made for the breach of an international obligation".³⁰ Unless a dispute arising from a contract clearly satisfies one of the ICJ's narrow jurisdictional grounds, the likelihood of an investor's home State agreeing to espouse a claim before the ICJ against the host State is very low.

V. ENFORCEMENT OF SETTLEMENTS OR DECISIONS RESOLVING A DISPUTE

6.54. *Introduction.* When a dispute has been resolved through non-judicial or judicial means, disputing parties should comply with the terms of the agreement, settlement, decision, award or judgment. If the disputing party directed to *take* or refrain from a course of action, or to compensate the other disputing party for its losses, does not voluntarily satisfy the settlement or the decision reached, the creditor party will be required to launch enforcement procedures. As enforcement regimes can vary from State to State, the creditor party should be aware of the applicable laws of the forum in which enforcement is sought.

6.55. *Enforcement via public authorities.* When enforcing a settlement or decision against private entities, the creditor party may have recourse to public authorities. Where the creditor party has an arbitral award, this entails an application to a court in a jurisdiction where the debtor party has known assets, to first recognise the award pursuant to the New York Convention or applicable domestic legislation, and then to execute the award against the debtor party's known assets. On occasion, a creditor party may need to seek an injunction from the court to stop the debtor party from disposing of its assets. Satisfaction is obtained when the court orders the seizure and sale of the debtor party's assets.

6.56. *Enforcement by private means.* In the alternative, the creditor party may pursue enforcement by private means. Such means can be written into the contract. Additionally, the creditor party may consider "blacklisting", by formal announcement or otherwise, the debtor party. Reputational sanction is likely to undermine a debtor party's future contracting opportunities and profits. A debtor party will respond positively to private means of enforcement when the benefits of satisfaction outweigh the costs of non-satisfaction.

6.57. *Enforcement against a government.* When enforcing a settlement or decision against a government, the creditor party may also have recourse to public authorities. Awards rendered pursuant to investor-State arbitration may be recognised and executed against the respondent State's assets in domestic courts in accordance with the New York Convention or applicable domestic legislation. If the *investor*-State arbitration was conducted pursuant to the Convention on the Settlement of Investment Disputes between States and

²⁹ ILC. 2006. Draft articles on Diplomatic Protection, Art.1.

³⁰ Statute of the International Court of Justice, Art. 36(2)(a)-(d).

Nationals of Other States, the award shall be recognised and enforced by the courts of any signatory State to the Convention like a final judgment of a court in that State.³¹ The applicability of the NY Convention and the ICSID Convention, both of which facilitate the enforcement of arbitral awards, depends on whether the State from whose courts enforcement is sought is a signatory to either or both Conventions.

6.58. *Sovereign immunity.* States can claim sovereign immunity from execution against State assets. Many jurisdictions recognise qualified sovereign immunity from enforcement. A small number of jurisdictions recognise absolute sovereign immunity from enforcement. In the former, State assets expressly earmarked or ruled by the courts to serve a governmental purpose, such as military aircraft and monies held by the central bank, are immune from execution. In the latter, all State assets, regardless of whether they serve a governmental or commercial purpose, are immune from enforcement. The decision to recognise qualified or absolute sovereign immunity from execution lies within the discretion of each State.

6.59. *Importance of effective enforcement.* Whether enforcement of a settlement, award or judicial decision is sought by a domestic *investor*, a foreign investor, by a grantor, or by non-parties against contracting parties, all States should ensure that there is an effective enforcement regime to provide genuine redress.³²

³¹ Signed 18 March 1965, entered into force 14 October 1966, art. 54(1).

³² UN Guiding Principles, pp. 3-12, 27-35. Examples of enforcement regimes include UN Convention on International Settlement Agreements Resulting from Mediation (2019); UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958); Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters (1971).

ANNEX I: CHECKLIST OF ISSUES

INTRODUCTION

- In planning an investment in a new agricultural project or an existing one, consider the need for greater and more responsible investment in agriculture, including the key aims of such investment and the various forms that such investment can take, with an emphasis on business models that protect existing tenure rights and are inclusive of legitimate tenure right holders and local communities (Part I), as set out in general by the UN Guiding Principles, the VGGT and the CFS-RAI Principles (Para. 3 and the PREFACE, OVERVIEW AND).
- Consider the important role played by contracts and related agreements in agricultural land investments and how those contracts and agreements can best be prepared, negotiated and implemented to achieve those key aims (Paras. 4-6), including by evaluating various potential contractual arrangements (Part II.A) and negotiating and consulting with the diverse array of possible parties and stakeholders (Part II.B) about a potential or ongoing project.

CHAPTER 1 - THE LEGAL FRAMEWORK

- Review and understand the sources of law, including domestic and international sources, together with local counsel (Part I), including by:
 - considering the hierarchy of rules within the State in which the investment is made or to be made (Part I.A);
 - analysing whether there are any applicable customary rules and, if so, whether they are recognised and otherwise consistent with other sources (*e.g.* non-discriminatory on the basis of gender) (Paras. 11-12);
 - identifying applicable international treaties, including those which are binding and with which the parties must comply and those which are non-binding but with which the parties should comply, as well as any potentially applicable investment treaties (Para. 13), inter-governmental instruments (*e.g.* the UN Guiding Principles, the VGGT, the CFS-RAI Principles and relevant UNIDROIT instruments) and guidance documents (Paras. 16-17); and
 - being aware of relevant judicial decisions, whether domestic (Paras. 10-12) or international (Para. 15).
- Assess the legal framework, including relevant areas of law (Part II), to identify mandatory rules with which the parties must comply (Para. 4) and any gaps in such law and, with respect to such gaps:
 - consider whether those gaps (*e.g.* lack of protections for legitimate tenure right holders) can be addressed through contractual provisions; and
 - if not, evaluate whether a proposed investment should ultimately not proceed (Para. 6).

CHAPTER 2 - PARTIES, CONTRACTUAL ARRANGEMENTS, DUE DILIGENCE AND FORMATION

- Discuss and take steps to understand, protect and respect the rights of legitimate tenure right holders (Part I) – which differ from those of legal tenure right holders – by involving them in the contractual arrangements, conducting due diligence and seeking their participation in contract formation.

- Consider the various potential parties and stakeholders, in particular investors, grantors, legitimate tenure right holders and other stakeholders, including local communities, indigenous peoples and government agencies (Part II).
- Consider the possible contractual arrangements for balancing the various interests of those parties and stakeholders, including contracts between investors and grantors (Part III.A), multiparty contracts (Part III.B.1), related agreements (Part III.B.2) and contracts with legitimate tenure right holders as third party beneficiaries (Part III.B.3).
- Identify the possible parties and stakeholders by performing stakeholder mapping (Part IV.A.1) and consultations and by:
 - taking steps to ensure such consultations are meaningful (Part IV.A.1(a)); and
 - obtaining free, prior and informed consent for a project impacting indigenous peoples (Part IV.A.1(b)).
- Consider whether the identified land is both suitable and available and, if so, its valuation (Part IV.B.1(a)), whether necessary resources are also available (Part IV.B.1(b)), develop a business plan for the proposed or ongoing project involving that land and resources (Part IV.B.1(c)), and
 - in considering land and resources, pay particular attention to existing rights to that land, both for protecting and respecting the rights of any legitimate tenure right holders and for involving affected stakeholders in valuation (Para. 82); and
 - in doing so, if the project involves land that is to be expropriated or has already been expropriated – as a result of which or for which such holders are evicted – that project should be reconsidered (Paras. 84-86).
- Perform necessary impact assessments in order to identify potential impacts of a project (Part IV.B.2) – including with respect to human rights (Part IV.B.2(a)), environmental (Part IV.B.2(b)), social (Part IV.B.2(c)) or economic aspects (Part IV.B.2(d)) – while making sure that such assessments include all of the essential elements (Para. 99) and keeping in mind that not all assessments may be required in a particular context (Para. 101), and
 - using those assessments, consider whether provisions in the agricultural land investment contract or a related agreement could avoid or mitigate those potential impacts (see Chapter 3 generally, as well as Chapters 4-6); and
 - if significant negative impacts – which cannot be avoided or mitigated through the contract or a related agreement – are envisioned, that project should be reconsidered.
- Comply with requirements and guidance for proper contract negotiation and formation (Part V), including in particular:
 - for the submission and review of investment proposals, which should be screened in a transparent manner which considers that proposal's impacts, safeguards and overall alignment with development plans (Part V.A) and results in the publication of the contract and any related agreements, subject to the redaction of confidential information (Para. 128);
 - for the negotiations or renegotiations, which should be conducted in an inclusive and transparent manner (Part V.B), which ensures both the validity of any resulting contract, agreement or any amendments thereto (Part V.B.1) and that parties and stakeholders are properly represented and have the necessary legal assistance (Part V.B.2); and
 - for the resulting contract or agreement, which should meet requirements of form and content, the non-fulfilment of which could lead, for example, to avoidance of that contract or agreement or various penalties (Part V.B.3).

CHAPTER 3 - RIGHTS AND OBLIGATIONS OF THE PARTIES

- In taking into consideration the evaluation of the legal framework (Chapter 1) and the performance of due diligence (Chapter 2), that evaluation and performance should provide the foundation for contractual provisions – which can give effect to domestic law, supplement it with respect to any gaps in such law, and provide safeguards for potential negative impacts (Paras. 1-6) – and the following areas and possible clauses should be considered in that regard.
- With respect to land tenure (Part I), consider and specify as necessary:
 - the location and description of the land (Part I.A), including possibly related clauses containing terms regarding additional land;
 - the tenure rights to be granted (Part I.B.1), including rights of use (Para. 15), access and control for land (Paras. 15-16), resources (Paras. 17-20) and facilities (Para. 22), as well as any rights withheld or reserved for the grantor or to protect and respect the rights of legitimate tenure right holders (Para. 21);
 - any related rights to be granted (Part I.B.2), including access to utilities (Part I.B.2(a)), to use and build infrastructure (Part I.B.2(b)), and others necessary for the project's activities (e.g. import, export, transport and market production) (Part I.B.2(c));
 - parameters for project development (Part I.C), including targets, timeframes, indicators of performance and incentives and in coordination, for example, with any terms for duration and renewal (Part I.D), monitoring (Part V.A), periodic review (Part V.B.5), force majeure situations (Chapter 4.II.A) and transfer and return (Chapter 5); and
 - terms for the duration and renewal of the grant of those rights (Part I.D), in coordination with any project development parameters (Part I.C) and periodic review provisions (Part V.B.5).
- With respect to social and economic issues (Part II), consider and specify as necessary:
 - the monetary contributions in exchange for the granted rights (Part II.A), which may vary depending on the form of the project and overall bargain established by the agricultural land investment contract and any related agreements, as well as the timing and form of those contributions (Para. 66) and any capitalisation requirements to ensure the investor has adequate resources (Para. 67);
 - employment creation, access to jobs and labour rights (Part II.B), which may offer legitimate tenure right holders quality jobs on the project (Paras. 70-71), with a particular emphasis on including such holders in a way which reduces occupational segregation (Paras. 78-79) and adheres to international rights and standards with respect to labour and workplace conditions (Paras. 80-82);
 - local content and processing (Part II.C), which can promote inclusive development in the project area and may involve incentives (Para. 88) or performance requirements (Paras. 90-91) in order to establish more linkages with the local economy;
 - contract farming, outgrower schemes and supply chain relations (Part II.D), which offer various arrangements for the project to involve legitimate tenure right holders and local communities, and certain minimum parameters and key aspects of those arrangements should be specified in the agricultural land investment contract or a related agreement (Paras. 100-102); and
 - community development funds and social infrastructure (Part II.E), by which the investor makes monetary or in-kind contributions to funds or community projects in order to share the benefits of the investment and for which there is a variety of contractual practices and matters to be addressed in the agricultural land investment contract or a related agreement (Paras. 106-107).
- With respect to the environment (Part III), consider and specify as necessary:

- applicable domestic, regional and international law in connection with the evaluation of the legal framework (Chapter 1), as well as relevant corporate social responsibility instruments and the role that agricultural land investment contracts and related agreements can play in environmental protection (Part III.A);
 - the results of environmental impact assessments (Chapter 2.IV.B.2(b)) and how those impacts could be addressed through contractual provisions (Para. 114); and
 - such provisions, as needed in accordance with applicable law, regarding the prevention of pollution (Para. 115) and soil degradation (Para. 117), protection of water (Para. 116) and ecosystems (Para. 118), management of waste (Para. 120) and mitigating climate change (Para. 119), together with monitoring (Para. 121) and project closure (Para. 122) provisions.
- With respect to investment protection and regulatory autonomy (Part IV), consider and specify as necessary:
 - the need for balance between protection of the investor's investment and the regulatory autonomy of the State in which that investment is located or to be located (Paras. 124-128), under the applicable law (Chapter 1) and any applicable international investment agreements (Chapter 1.B, para. 13 and Chapter 6.III.C, paras. 39-41); and
 - in light of that balance, provisions for agricultural land investment contracts between investors and governments, addressing if needed the circumstances under which a government may expropriate an investor's investment (Part IV.A) and the investment's physical (Part IV.B) and legal security (Part IV.C), while keeping in mind that a responsible and sustainable agricultural investment project should not require extensive security arrangements.
- With respect to monitoring and implementation (Part V), consider and specify as necessary:
 - the arrangements for the monitoring and implementation of the project, with a particular emphasis on promoting open communications between the parties and stakeholders (Para. 145);
 - who is responsible for monitoring of the various obligations in the agricultural land investment contract or a related agreement, as well as the methods and standards for such monitoring (Part V.A.1);
 - how investors (Part V.A.2(a)) and grantors (Part V.A.2(b)) are to report on the matters monitored and the overall project, among themselves and with stakeholders and the general public, taking into consideration reporting obligations under applicable law, international reporting standards, and redaction of confidential information (Part V.A.2(c)); and
 - terms regarding permits and licenses, insurance, any performance guarantees or bonds and notice and periodic review of the contract's implementation (Part V.B).

CHAPTER 4 - CONTRACTUAL NON-PERFORMANCE AND REMEDIES

- Discuss in connection with the applicable law possible situations in which certain obligations might not be met and how that non-performance might be excused or otherwise remedied in order to build, to the extent necessary, a contingency plan into the agricultural land investment contract for such situations and to promote predictability, stability and flexibility in the contractual relationship (Paras. 1-5).
- In designing such a plan, take steps to ensure that the excuses or remedies that it provides are proportional, promote cooperation between the parties (Part I) and are otherwise consistent with any agreed monitoring obligations (Chapter 3.V) and grievance and dispute resolution mechanisms (Chapter 6).
- With respect to the excuses (Part II), consider and specify as necessary:

- for force majeure (Part II.A), the events qualifying as force majeure situations and the consequences of such a qualifying situation;
- for changes of circumstances (Part II.B), the diversity of approaches under domestic law, the particular circumstances giving rise to a hardship situation, and the consequences of that situation; and
- for contracts between investors and governments, the special circumstances that may arise from civil disturbances and necessity situations (Part II.C).
- With respect to remedies (Part III), consider and specify as necessary:
 - the role of the aggrieved party's conduct in the breach, including interference (Para. 44), contribution to the breach (Para. 45) and the duty to mitigate (Paras. 46-47);
 - in-kind remedies (Part III.B.1), which include withholding performance (Para.50), right to performance (Paras. 51-52), and corrective measures and the right to cure (Paras. 53-56);
 - monetary remedies (Part III.B.2), which include price reduction (Part III.B.2(a)) and damages (Part III.B.2(b)), as well as the right to interest and late payments (Part III.B.2(c)).
 - renegotiations (Part III.B.3), which may allow for mitigation of risk and revision of the contract or related agreement;
 - termination and restitution (Part III.B.4), including grounds for termination, penalty clauses, and the procedure and effects of termination, which should be used only as a last resort; and
 - how various breaches – by the investor (Part III.C.1), grantor (Part III.C.2) and legitimate tenure right holder (Part III.C.3) – would generally be remedied.

CHAPTER 5 - TRANSFER AND RETURN

- Discuss issues of transfer and return in order to ensure that a project becomes or continues to be responsible and sustainable and that land remains productive and any rights to it are returned to those who granted them or gave them up in favour of the investment project (Para 1).
- Regarding transfer (Part I), consider and specify as necessary:
 - terms by which the project may be transferred (Part I.A), including with respect to prior notice, acceptance and consent to that transfer, as well as how that transfer affects any related agreements;
 - terms by which the investor may transfer its rights and obligations to another investor (Part I.B), including with respect to changes in control, heirs and affiliates, mergers and partnerships;
 - limitations on transfer (Part I.C), including with respect to government land, large-scale land areas and the investor's nationality; and
 - the importance of disclosure of transfers (Part I.D).
- Regarding return (Part II), consider and specify as necessary:
 - what situations are covered by return (Para. 28), which generally relates to when the contract ends, whether at the expiration of the contract's duration or by mutual agreement;
 - the particular context of the return (Part II.A), including the assets to be returned, distinctions between public and private property, and how the land, trees, crops, buildings and infrastructure, equipment and other technology are to be handled;
 - the cost and liabilities of the return (Part II.B), including how responsibility is borne for them, deterioration, and timing.

CHAPTER 6 - GRIEVANCE MECHANISMS AND DISPUTE RESOLUTION

- Discuss how grievances and disputes are to be handled – not only for parties to the contract or a related agreement but also for any other stakeholders, including third party beneficiaries (Para. 2) – under applicable law (Para. 3) and develop provisions to resolve such grievances and disputes in a timely manner in order to promote a responsible and sustainable project.
- For grievance mechanisms (Part I), consider and specify as necessary:
 - how such mechanisms are linked to impact assessments, legitimate tenure right holders and local communities and how such holders and communities' concerns can be best addressed (Paras. 6-7);
 - the various types and forms of such mechanisms (Paras. 8-12); and
 - best practices, which provide guidance for setting up and implementing effective grievance mechanisms (Paras. 13-15).
- Regarding disputes, consider both the importance of access to effective remedy (Part II.A) and the provision of such remedy (Part II.B), with an understanding of what can be agreed by the parties (Para. 17), how unequal bargaining power can influence that agreement (Para. 18), the various available forums and non-party participation (Paras. 21), the default forum (Para. 22) and consent (Paras. 23-24).
- For non-judicial dispute resolution (Part III), consider choosing one or combining several of the following options tailored to the particular circumstances – including expert determination for disputes of fact (Part III.A), negotiation or mediation (Part III.B), and arbitration (Part III.C), the latter of which may be contractually-based (Para. 36) or based on an international investment agreement, in other words treaty-based (Para. 39) – with a particular emphasis on being inclusive of any other stakeholders and third party beneficiaries (Para. 42).
- For judicial dispute resolution (Part IV), consider whether the courts of the State in which the land is located (i.e. host State) has exclusive jurisdiction over disputes concerning land (Para. 45) and the various claims and procedures in those domestic courts (Part IV.A) and whether certain claims could be submitted to international or regional courts (Part IV.B).
- With respect to enforcement of settlements or decisions resolving a dispute (Part V), consider the various means by which a settlement or decision could be enforced in order to ensure an effective enforcement regime is available, if needed, to provide genuine redress.

ANNEX II:

RESOURCES

This Annex lists resources that supported the Guide's development. Such references are categorised as (I) instruments and guidance documents from inter-governmental Organisations; and (II) additional resources from international entities, scholarly articles and related materials, where appropriate keyed to the relevant paragraph(s) of the Guide. Within those categories, the resources are organised alphabetically by the entity or individual authors. Internet links are updated at 1 June 2019. It must be noted, however, that inclusion of a resource in this list does not indicate that UNIDROIT agrees with or approves that resource.

I – Instruments and guidance documents from inter-governmental Organisations

1. International Conventions

[African Charter on Human and Peoples' Rights, 1981](#)

[American Convention on Human Rights, 1969](#)

[Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, 1989](#)

[Cartagena Protocol on Biosafety to the Convention on Biological Diversity, 2000](#)

[Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984](#)

[Convention concerning the Abolition of Forced Labour, 1957](#)

[Convention concerning the Application of the Principles of the Right to Organise and to Bargain Collectively, 1949](#)

[Convention concerning Discrimination in Respect of Employment and Occupation, 1958](#)

[Convention concerning Forced or Compulsory Labour, 1930](#)

[Convention concerning Freedom of Association and Protection of the Right to Organise, 1948](#)

[Convention concerning Indigenous and Tribal Peoples in Independent Countries, 1989](#)

[Convention concerning Minimum Age for Admission to Employment, 1973](#)

[Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, 1999](#)

[Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, 1998](#)

[Convention on Biological Diversity, 1992](#)

[Convention on the Elimination of All Forms of Discrimination against Women, 1979](#)

[Convention on Environmental Impact Assessment in Transboundary Context, 1991](#)

[Convention on International Trade in Endangered Species of Wild Fauna and Flora, 1973](#)

[Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, 1971](#)

[Convention on the Rights of the Child, 1989](#)

[Convention on Wetlands of International Importance, especially as Waterfowl Habitat, 1971](#)

[Equal Remuneration Convention, 1951](#)

[European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950](#)

[International Convention on the Elimination of All Forms of Racial Discrimination, 1965](#)

[International Covenant on Civil and Political Rights, 1966](#)

[International Covenant on Economic, Social and Cultural Rights, 1966](#)

[International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, 1990](#)

[International Treaty on Plant Genetic Resources for Food and Agriculture, 2009](#)

[Kyoto Protocol to the United Nations Framework Convention on Climate Change, 1997](#)

[Montreal Protocol on Substances that Deplete the Ozone Layer, 1987](#)

[Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilisation to the Convention on Biological Diversity, 2010](#)

[Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean, 2018](#)

[Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, 1998](#)

[Stockholm Convention on Persistent Organic Pollutants, 2001](#)

[United Nations Convention on Contracts for the International Sale of Goods, 2010](#)

[UN Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa, 1994](#)

[UN Convention on International Settlement Agreements Resulting from Mediation, 2019](#)

[UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958](#)

[UN Declaration on Human Rights Defenders, 1999](#)

[UN Declaration on the Rights of Indigenous Peoples, 2007](#)

[UN Framework Convention on Climate Change, 1992](#)

[UN Rio Declaration on Environment and Development, 1992](#)

2. Other instruments and guidance documents from inter-governmental Organisations

[AU \(African Union\), ADB \(African Development Bank\) and UNECA \(United Nations Economic Commission for Africa\). 2014. *Guiding Principles on Large Scale Land Based Investments in Africa*. Addis Ababa](#)

[CAO \(Compliance Advisor/Ombudsman\). 2008. *Advisory Note: A Guide to Designing and Implementing Grievance Mechanisms for Development Projects*. Washington, D.C.](#)

[CED \(Centre pour l'Environnement et le Développement\). 2017. *Éléments pour un contrat modèle de concession foncière pour les agro-industries en Afrique*. CBI 9 - Action efficace contre l'accaparement des terres](#)

[CESCR \(UN Committee on Economic, Social and Cultural Rights\). 1997. *General Comment No. 7: The right to adequate housing \(Art. 11.1\): forced evictions*](#)

[CESCR. 1999. *General Comment No. 12: The Right to Adequate Food \(Art. 11\)*](#)

[CESCR. 2003. *General Comment No. 15: The right to water \(arts. 11 and 12\)*](#)

[CFS \(Committee on World Food Security\). 2014. *Principles for Responsible Investment in Agriculture and Food Systems*](#)

[EU \(European Union\). 2012. *Regulation \(Eu\) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters*. Official Journal of the European Union, L. 351](#)

[EU Task Force on Land Tenure. 2004. *EU Land Policy Guidelines. Guidelines for support to land policy design and land policy reform processes in developing countries*](#)

- [FAO \(Food and Agriculture Organisation of the United Nations\). 2004. *Voluntary Guidelines to support the progressive realization of the right to adequate food in the context of national food security*. Rome](#)
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- [FAO. 2014. Respecting free, prior and informed consent. *Governance of Tenure Technical Guide No 3*. Rome](#)
- [FAO. 2014. *The International Code of Conduct on Pesticide Management*. Rome](#)
- [FAO. 2015. Safeguarding land tenure rights in the context of agricultural investment. *Governance of Tenure Technical Guide No 4*. Rome](#)
- [FAO. 2016. Responsible governance of tenure and the law. *Governance of Tenure Technical Guide No. 5*. Rome](#)
- [FAO. 2016. Improving governance of pastoral lands. *Governance of Tenure Technical Guide No. 6*. Rome](#)
- [FAO. 2016. Responsible governance of tenure: a technical guide for investors. *Governance of Tenure Technical Guide No. 7*. Rome](#)
- [FAO. 2016. *Free Prior and Informed Consent. An indigenous peoples' right and a good practice for local communities*. Rome](#)
- [FAO. 2016. Governing Tenure Rights to Commons. *Governance of Tenure Technical Guide No. 10*. Rome](#)
- [FAO. 2017. Creating a system to record tenure rights and first registration. *Governance of Tenure Technical Guide No. 9*. Rome](#)
- [FAO. 2017. Improving ways to record tenure rights. *Governance of Tenure Technical Guide No. 10*. Rome](#)
- [FAO. 2017. *Voluntary Guidelines for Sustainable Soil Management Food and Agriculture*. Rome](#)
- [FAO. 2018. Valuing land tenure rights. *Governance of Tenure Technical Guide No. 11*. Rome](#)
- [FAO. 2019. *Due diligence, tenure and agricultural investment: A guide to the dual responsibilities of private sector lawyers advising on the acquisition of land and natural resources*. FAO Legal Guide No. 1, Rome](#)
- [FAO, IFAD \(International Fund for Agricultural Development\) and WFP \(World Food Programme\). 2015. *Achieving Zero Hunger: the critical role of investments in social protection and agriculture*. Rome](#)
- [IFC \(International Finance Corporation\). 2009. *Good Practice Note. Addressing Grievances from Project-Affected Communities*](#)
- [IFC. 2012. *Performance Standards on Environmental and Social Sustainability*](#)
- [ILC \(International Law Commission\). 2001. *Responsibility of States for Internationally Wrongful Acts*](#)
- [ILC. 2006. *Draft articles on Diplomatic Protection*](#)
- [OECD \(Organisation for Economic Cooperation and Development\). 2011. *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*](#)
- [OECD. 2011. *OECD Guidelines for Multinational Enterprises*](#)
- [OECD. 2016. *Preventing Corruption in Public Procurement*](#)
- [OECD. 2017. *OECD Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector*. Paris](#)
- [OECD, FAO. 2016. *OECD-FAO Guidance for Responsible Agricultural Supply Chains*. Paris](#)
- [OHADA \(Organisation for the Harmonisation of Business Law in Africa\). 2017. *Uniform Act in Mediation*. Conakry](#)

- [UN \(UNITED NATIONS\). 2011. *Guiding Principles on Business and Human Rights*. New York and Geneva](#)
- [UN. 2015. *Principles for Responsible Contracts Integrating the Management of Human Rights Risks Into State-Investor Contract Negotiations*. New York and Geneva](#)
- [UNCITRAL \(UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW\). 2001. *Legislative Guide on Privately Financed Infrastructure Projects*. New York](#)
- [UNCITRAL. 2008. *UNCITRAL Model Law on International Commercial Arbitration 1985 – With amendments as adopted in 2006*. Vienna](#)
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- [UNCITRAL. 2014. *UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration*. New York](#)
- [UNCITRAL. 2014. *UNCITRAL Model Law on Public Procurement*. New York](#)
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- [UNCITRAL. 2018. *UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation \(amending the UNCITRAL Model Law on International Commercial Conciliation, 2002\)*](#)
- [UNCTAD \(United Nations Conference on Trade and Development\). 1985. *Draft International Code of Conduct on the Transfer of Technology as at the close of the 6th session of the Conference on 5 June 1985*. Geneva](#)
- [UNCTAD. 2002. *How to prepare your business plan*. New York and Geneva](#)
- [UNCTAD. 2004. *A Manual for the Preparers and Users of Eco-efficiency Indicators*. New York and Geneva](#)
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- [UNECA \(United Nations Economic Commission for Africa\). 2017. *Report: The Continental Free Trade Area \(CFTA\) in a human rights perspective*. Addis Ababa](#)
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- [UNIDROIT \(International Institute for the Unification of Private Law\). 2013. *Model Clauses for the Use of the UNIDROIT Principles of International Commercial Contracts*. Rome](#)
- [UNIDROIT. 2016. *UNIDROIT Principles of International Commercial Contracts*. Rome](#)
- [UNIDROIT. 2016. *Feasibility study on the possible preparation of an international guidance document on agricultural land investment contracts*. C.D. \(95\) 7\(b\). Rome](#)
- [UNIDROIT, FAO and IFAD. 2015. *UNIDROIT/FAO/IFAD Legal Guide on Contract Farming*. Rome](#)

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- Bo District Council. 2016. *Guidelines on Responsible Large Scale Land Investment*.
- Bonell, M. J. 2009. *An International Restatement of Contract Law: UNIDROIT Principles of International Commercial Contracts*, (3rd ed.), pp. 102 et seq. - [6.1]
- [Boudreaux, K. C.; Neyman, Y. 2015. *USAID Operational Guidelines on Responsible Land-Based Investments* - \[2.51-53, 2.57\]](#)
- [CCSI \(Columbia Center on Sustainable Investment\); Namati. *Community-Investor Negotiation Guide 1: Preparing in Advance for Potential Investors*](#)

- [CCSI; Namati. 2018. *Community-Investor Negotiation Guide 2: Negotiating Contracts with Investors* - \[2.129, 3.106-107\]](#)
- [Cotula, L. 2006. *Gender and law. Women's rights in agriculture*. FAO Legislative Study, 76 \(1\). Rome: FAO - \[3.78\]](#)
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- [Cotula, L. 2011. *Land Deals in Africa: What is in the Contracts?* IIED, London - \[3.45\]](#)
- [Cotula, L. 2016. *Foreign Investment, Law and Sustainable Development; A Handbook on Agriculture and Extractive Industries*. Natural Resource Issues No. 31. IIED, London, 2nd edition - \[1.2, 3.3, 3.61, 3.70, 3.78, 3.91, 3.96, 3.124\]](#)
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- [Hodgson, S. 2016. *Exploring the Concept of Water Tenure*. FAO Land and Water Discussion Paper, 10, p. IV - \[2.91\]](#)
- [IBA \(International Bar Association\). 2016. *Reference Annex to the IBA Practical Guide on Business and Human Rights for Business Lawyers* - \[2.105\]](#)
- [Indufor. 2017. *Valuing Rural Lands: A Tool to Strengthen Property Rights?*](#)
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- [Smaller, C. \(Ed.\). 2014. *IISD Guide to Negotiating Investment Contracts for Farmland and Water* – \[1.2, 1.17, 3.3, 3.66-67, 3.76, 3.91-92, 3.113, 3.183, 5.6, 5.28, 6.23\]](#)
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