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**Draft UNIDROIT/FAO/IFAD Legal Guide on
Agricultural Land Investment Contracts
(ALIC)
Third Regional Consultation
Nairobi, 23 October 2019**

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**Report of the Third Regional Consultation - Raising awareness and seeking
feedback from Kenya and Africa**

(prepared by the UNIDROIT Secretariat)

1. As part of the elaboration process of the UNIDROIT/FAO/IFAD Legal Guide on Agricultural Land Investment Contracts (ALIC), the ALIC Working Group, in collaboration with the Food and Agriculture Organization of the United Nations (FAO) and the International Fund for Agricultural Development (IFAD), agreed that a consolidated draft of the future Guide – the ALIC Zero Draft (UNIDROIT 2019 – S80B - Doc. 6) – should be submitted to broad and extended consultations to raise awareness of the Legal Guide and to seek further input from stakeholders, in order to ensure a high-quality product that responds to actual needs and complies with ascertained best practices. This course of action was endorsed by the Governing Council of UNIDROIT ([C.D. \(98\) 5\(a\) rev.](#)) at its 98th session (Rome, 8 – 10 May 2019). The consultations included regional events in Asia, Latin America, and Africa, as well as an open online consultation.
2. This document serves to summarize the presentations and discussions that took place during the third regional consultation workshop held in Nairobi on 23 October 2019.

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I. OVERVIEW

3. The third regional consultation on the future UNIDROIT/FAO/IFAD Legal Guide on Agricultural Land Investment Contracts (ALIC) was held on 23 October 2019 in Kenya at the [Strathmore University Law School](#) and co-sponsored by the United Nations Food and Agriculture Organization (FAO) and the International Fund for Agricultural Development (IFAD). As part of the finalisation of the future Legal Guide, the workshop was designed to facilitate feedback on the “ALIC Zero Draft” from stakeholders in Africa, including investors’ legal counsels, government officials, non-governmental organisations, academics and private sector representatives. The workshop was organized in four sessions: to provide an overview of the Guide and its primary objectives (Session 1); to delve into the key issues of drafting and implementing responsible agricultural land investment contracts (Session 2); to strike the right balance between the rights and obligations of the parties in Africa (Session 3); and to explore remedies and dispute resolution in the context of agricultural land investment contracts (Session 4).

II. SUMMARY OF PRESENTATIONS

Welcome and Opening Remarks

4. *Mr. Francisco B. Lopez-Jurado* (Acting Dean of Law School, Strathmore University) first introduced the diverse participants including representatives of Intergovernmental Organisations, government officials, non-governmental organizations, investors’ legal counsels, academics and private sector representatives that came from a number of countries in Africa, including Kenya, Uganda, Ethiopia, Tanzania, Mauritania, Sudan, and South Africa. He recognized that FAO, IFAD and UNIDROIT’s work on agriculture-related issues contributes to Kenya’s agenda on food security, housing, and manufacturing. Finally, he expressed his appreciation for the opportunity to host this event and warmly welcomed all participants.

Session 1: The Forthcoming UNIDROIT/FAO/IFAD Legal Guide on Agricultural Land Investment Contracts and Africa

5. *Mr. Ignacio Tirado* (Secretary-General, UNIDROIT) introduced the future UNIDROIT/FAO/IFAD Legal Guide on Agricultural Land Investment Contracts. He emphasized that the Working Group is seeking feedback and noted that whatever was discussed at the workshop will be considered when finalising the instrument.

6. *Mr. Charles Bebay* (acting FAO Representative in Kenya) delivered a presentation on land tenure rights and responsible investments as founding principles. He mentioned that despite progress made over the past decades, still more than 800 million people continue to suffer from chronic hunger. He highlighted that political will is needed from various actors for action, including private sector, farmers, consumers, and governments to put food and agriculture on the development agenda. He acknowledged there is an emerging consensus on the importance of sustainable agriculture and world food security and noted that the CFS-RAI and VGGT create high-level standards of practice and promote broad-based economic growth.

7. He emphasised that the ALIC Guide combines a land-based legal framework to inform decision making and policy and noted it could be relevant to the programmes implemented in partnership with the Kenyan government (i.e. Land Commission) to promote food security.

8. *Ms. Edith Kirumba* (Environment, Climate and Safeguards Specialist, IFAD) discussed land tenure rights in IFAD’s work in the Eastern and Southern Africa region. She explained that the main areas of IFAD’s activities include agricultural production, market and finance and noted that IFAD’s

budget in Africa is approximately 2 billion dollars. She related how IFAD has financed both large and small programmes through institutions such as the Global Environment Facility (GEF) and explained how IFAD also has projects relating to climate change. She further elaborated on the reasons why IFAD considers land investment projects important and explained the key challenges arising from the complexity of land tenure issues.

9. *Mr. James Gathii* (Professor of International Law, Loyola University, Chicago) presented an overview of legal issues regarding agricultural land investments from an African perspective and explained that the scope of the guide has shifted from just governments and investors to a broader range of actors to legitimise contracts, seeking to move beyond the narrow confines of the investor-state model.

10. He underlined that contracts are an important instrument to fill what may be missing in domestic and international law in terms of minimum standards regarding investment. He further highlighted that the Guide also contains some innovations, for instance in relation to multi-party contracts, which include tripartite contracts between investors, governments, and communities. He stressed that these contracts should also be combined with human rights, as well as with environmental, social, and economic safeguards, especially for vulnerable communities, tenure rights holders, indigenous peoples and women.

11. In his view, the key contribution of the ALIC Guide is that it builds upon and implements high-level standards set forth mainly in the VGGT, the CFS-RAI Principles, and the UN Guiding Principles on business and human rights. It recommends due diligence in the identification of all tenure right holders (including both legal and legitimate rights holders), draws attention to the need for consultation, and the assessment of any possible impacts (e.g. loss of homes, access to water, food security, and livelihood sources for local communities), for which contractual safeguards would be needed.

12. Mr. Gathii emphasised the responsibility of the private sector to respect human rights and to comply with domestic law on environmental aspects, thus taking into consideration non-commercial risks and challenges. He noted that the ALIC Guide provides legal guidance on various safeguards, such as employment and local content obligations, out-grower schemes, community development funds, social infrastructure, as well as monitoring, review and reporting requirements. The Guide also incorporates principles, standards and practices with which parties should comply; even if these are not mandatory, they reflect the international consensus on land tenure and support responsible and sustainable investment.

13. Finally, Mr. Gathii raised a number of key African issues and questions related to the following issues: (1) the identification of legitimate tenure right holders; (2) how environmental impacts should be measured and if there should be an integrated environmental sustainability approach; (3) how well, if at all, the Guide address climate change issues; (4) gaps in the Guide on impacts of agricultural land investments relating to human/wildlife conflicts; (5) how the Guide addresses threats to food security and family farming, i.e. going beyond price, value, profit; (6) how the Guide ensures human rights, environmental, and social concerns are not treated only as externalities; (7) how the Guide goes beyond contracts as the sole basis for investor accountability; (8) the connection between the Guide and the African Union's agenda on land, as well as the Framework and Guidelines on Land Policy in Africa, the Guiding Principles on Large Scale Land Based Investments, and the African Human Rights Systems.

14. During the discussion, *Mr. Joseph Kieyah* (Kenya Institute of Policy Analysis) elaborated on the fundamental role of land in unleashing capital. He noted that the ALIC Guide was timely since Kenya is struggling to put in place the guarantees for land tenure due to a lack of formal structures and capacity to engage with investors. He noted the importance of ensuring links between these investments and the social-economic impact on well-being and highlighted the need to look at

informal systems of ownership. To illustrate this point, he noted that non registered community lands account for 60-70% of land in Kenya. He also explained that governments themselves are sometimes uncertain of land tenure issues and mandatory acquisitions still take place.

15. *Ms. Husna Mbarak* (Lead, Governance of Land and Natural Resource sub-programme FAO, Kenya) raised a question regarding the contribution from the private sector when it comes to agricultural land investment projects in Africa.

16. *Ms. Elizabeth Gachenga* (Deputy Vice Chancellor Strathmore University, Nairobi, Kenya) enquired what was the plan for future steps and dissemination of the Guide and whether the next steps for individual countries would be to adopt legislation at the domestic level.

17. In response, *Mr. Tirado* explained that the next steps for the ALIC Guide were to finalise the Guide with the feedback obtained throughout the consultation period, then to submit the new version for the approval of UNIDROIT's Governing Council, and lastly for each country to adapt the final version and reform their contractual practices according to their country-specific situations. He also noted that UNIDROIT usually cooperates with universities and other partners to proceed with this last phase of country-specific adaption.

18. *Mr. Alamin Hassan Ibrahim* (Director of State Affairs and Legislation, Ministry of Foreign Affairs, Khartoum, Sudan) put forward one of the main problems for Africa in terms of commercialization of agriculture. He said African countries should promote and create their own domestic laws when foreign companies are interested in investing. Looking at the Chinese model, he highlighted how they had succeeded in commercial agriculture because they had a very promising land tenure law: all land belongs to the government (clear policy) and none of the farmers own the land. They only own what they produce. He noted that in Africa, this is not the case and argued that individual property rights had hindered agricultural development. Giving another example, he noted that in India, land tenure belongs to farmers, but the government introduced cooperatives to develop the national economy (introducing economies of scale and efficiency). For instance, in Bangladesh, there is a good policy on land tenure.

19. *Mr. Charles Bebay*, the acting FAO Representative in Kenya asked about the involvement of marginalized groups and to what extent they are being consulted in practice. *Mr. Gathii* responded that lots of outreach was done to include marginalised groups in the consultations organized to obtain feedback on the ALIC Zero Draft. For example, he noted the events held during the Committee on World Food Security and during the annual African land conference. He also highlighted that consultations included businesses to further gather the private sector's perspective through legal counsel who advise large investors.

20. *Mr. John Bosco Suuza* (Agriculture Commissioner, Directorate of Legal Advisory Services, Ministry of Justice, Kampala, Uganda) asked to what extent the Guide is intended to be a tool for influencing policy and law. He stressed that the question regarding ownership and management is a complicated one – noting every country and region has its unique challenges and emphasising that the Guide may be a tool to intervene on these issues.

21. *Mr. Gathii* indicated that the ALIC Guide highlights that the investor has to conduct due diligence for investment projects and review various other rights beyond the registry of land, including those granted by the 2010 Kenyan Constitution. He explained the Guide's objective is to address practical issues by informing people who want to engage in land transactions, such as investors and local communities, as well as lawyers that advise clients by breaking down the kinds of due diligence required.

22. *Mr. Tirado* further mentioned that the South African representative at UNIDROIT wanted to include a reference to land grabbing. However, he clarified that this is a highly political issue beyond the technical scope of the Guide.

Session 2: Drafting and Implementing Responsible Agricultural Land Investment Contracts – A Review of Key Issues

23. *Ms. Joan Kagwanja* (Coordinator, African Land Policy Centre) provided an overview of agricultural land investments in the African context and highlighted that inclusive land governance requires secure and equitable land tenure to eradicate poverty in all its forms and dimensions and to contribute to yielding economic, social, political and environmental benefits. She then further elaborated on several important governmental regional documents adopted in Africa on land governance.

24. She noted that under the Declaration on Land Issues and Challenges in Africa, the African Heads of State and Governments have committed to: prioritise land policy development and implementation; develop an appropriate institutional framework for land policy; allocate adequate budgetary resources for land policy; ensure equitable access to land for all; and strengthen women's land rights.

25. She explained the Declaration is a call to African Union Member States to review their land sector and develop comprehensive land policy; to build adequate capacity (human, institutional, financial) for land policy; and to guide national land policy processes. It requires Member States to establish an appropriate institutional framework for the implementation of the Declaration; to establish a fund to support its implementation; and to report back periodically on progress achieved.

26. *Ms. Kagwanja* mentioned the top opportunities and challenges for farmland investments in Africa. Opportunities include employment creation, integration of local farmers, expansion of market, establishment of community development programs, increased incomes, as well as improved food security. Challenges comprise loss of land and poor resettlement plans, lack of openness and engagement with local communities, weak assessment of commercial viability, poor management of environmental and social impacts, and insufficient mechanisms to raise grievances.

27. The Nairobi Action Plan on Large Scale Land-Based Investments (LSLBI) in Africa calls for an assessment of LSLBI, the development of principles and recommendations on better governance, capacity building for Member States and actors, monitoring and evaluation, as well as an improved policy and regulatory framework within which LSLBI are conducted.

28. The Guiding Principles on LSLBI in Africa first require LSLBI to respect the human rights of communities and contribute to responsible governance of land and land-based resources. Relevant principles include: respect for customary rights as legitimate rights; to provide fair, timely compensation for lost of land rights and loss of benefits in compliance with national law; to establish legislative, and institutional arrangements to govern LSLBI and protect rights; and to promote transparency by all parties throughout the investment process.

29. Furthermore, she noted that decisions on LSLBI are guided by a national strategy for sustainable agricultural development which recognizes the importance of African agricultural land and the role of small holder farmers in achieving food security, poverty reduction and economic growth. Decisions on LSLBI and their implementation are based on good governance including transparency, subsidiarity, inclusiveness, prior informed participation and social acceptance of affected communities. The LSLBI action plan also respects the rights of women, recognizes their voice, generates meaningful opportunities for women alongside men and does not increase their marginalization. The decisions on the desirability and feasibility of LSLBI are made based on

independent, holistic assessments of the economic, financial, social and environmental costs and benefits. Member States uphold high standards of cooperation, collaboration and mutual accountability to ensure that LSLBI are beneficial to African economies and their people. And finally, Mr. Kagwanja introduced the platform of the African Land Policy Centre and its major campaign.

30. *Ms. Elizabeth Gachenga* (Deputy Vice Chancellor, Strathmore University) discussed issues related to contract formation, due diligence, and contractual socio-environmental obligations in the Kenyan context. She mentioned that the ALIC Guide underlies efforts to strike the delicate balance of sustainable development.

31. In the Kenyan context, she mentioned that the applicable laws include the Constitution of Kenya, which provides for sustainable development as a guiding principle, provisions on land tenure, and explicit guarantees of human and socio-economic rights, etc. Other relevant laws include the law of contract, land related statutes (Land Act, Community Land Act, Land Control Act, etc.), various agricultural related laws (Crops Act, Agriculture, Fisheries and Food Authority Act, etc.), environmental laws (Biosafety Act, Natural Resources' Laws, Water Act, Forest Conservation and Management Act, Fisheries Management and Development Act), investment laws (Investment Promotion Act, Foreign Investment Protection Act), customary law (context specific, living, and dynamic), general rules of international law included as part of the Constitution, and treaties ratified by Kenya.

32. Furthermore, Ms. Gachenga elaborated on stakeholder mapping through the Marakwet Case in which community lands were not formally registered. She explained the decision-making council consisted of male elders, limited youth, and women's voice 'by proxy'. The legitimate tenure right holders are customary law right holders, albeit unwritten.

33. She also presented some examples of customary law rights related to land, including the right to water from irrigation furrows based on contribution to labour, fluid grazing rights in times of drought, and right of access.

34. Multiple risks exist such as bad faith occupants, local advisors, the need to guard against "elite capture", and conflict with neighbouring communities.

35. She acknowledged that the ALIC Guide tends to be more pro-communities, but some considerations are also made from the investors' perspective. She asked whether there is a need to reinforce the references made to protection of the investor.

36. In addition, she noted that while the target audience of the ALIC Guide is legal counsels, an annex would also be useful for communities to look at the variety of applicable laws within a particular jurisdiction.

37. Regarding the issue of free, prior and informed consent (FPIC), she highlighted that it is not a simple issue because of the difficulty in identifying all legitimate stakeholders. She commended how the Guide had included a wide definition of stakeholders, however, she drew attention to the fact that sometimes giving too much information can be overwhelming for the communities. She therefore recommended considering the inclusion of a frequently asked questions (FAQ) to streamline the information.

38. Noting that language barriers exist for local practitioners, Ms. Gachenga said it may be interesting to consider the use of vernacular radio notices as a useful tool for dissemination of information. She explained these radio programmes may translate the Guide's recommendations for more responsible agriculture investment into the local languages of the concerned rural areas. Ms. Gachenga noted finally the risk of political manipulation.

39. She recognized the ALIC Guide's objective to fill legislative gaps as a laudable one and emphasised the importance of including impact assessments, noting that land in Kenya is more than a financial asset and is considered a key social good. She further explained that land has cultural importance and is a source of local cohesion, especially, ancestral land. Regarding social responsibility, she emphasized that investment enterprises should avoid contributing to socio-economic and cultural disruption.

40. In relation to the environmental aspects, she agreed that climate change, ecosystems safeguards, sustainable waste management, inclusion of land feasibility studies in environmental impact assessments (EIA), disclosure and public participation, as well as non-compliance consequences are all issues that need to be considered. Proposals in the Guide on socio-economic obligations should include challenges relating to land conflicts. She suggested the ALIC Guide may shift from the promotion of the inclusion of several stakeholders to authentic partnerships for sustainable development by considering the Brundtland Report preamble. She therefore suggested that the ALIC Guide should reiterate, from the beginning, that the guidelines are not a minimum standard but rather a tool for achieving the sustainable development aspiration.

41. *Mr. Joseph Kieyah* (Kenya Institute of Policy Analysis) spoke about land governance reform in Kenya from the law and economics perspective. He noted in Kenya, land categories include: private land (20%), public land (13%), and community land (67%). Regarding land investment contracts, he highlighted that the following issues should be considered: internalization of externalities, land grabbing, mismanagement of public land, invisible commercial value of the assets, and undefined property rights.

42. He underlined that land governance includes rules, processes and structures that regulate how accessibility and use of land are determined, implemented, and enforced and how competing interests over land are managed. The land governance reform includes the determination of policies that are citizen-centric and apply the public participation doctrine. He added that this reform is subject to the National Land Commission and to the Ministry of Land.

43. In terms of policy implementation, he said that there are various parameters and variables, as well as trade-offs between independence and accountability. In his opinion, independence requires mitigating public interest and accountability requires aligning citizens' interest with that of the policy makers. The Guide may therefore consider enhancing engagement vis-à-vis policy makers and paying more attention to the political landscape.

44. *Mr. Robert Kibugi* (Law Lecturer, University of Nairobi) presented on sustainability considerations in land investment contracts. He proposed that the key legal dilemma is that contracts tend to fall within private law, but public law rules define sustainability parameters.

45. He also enquired what the Guide referred to as sustainable development and if it referred just to ecologically sustainable development. He also questioned what are the key aspects and interests that need to be balanced: social, economic, environmental, cultural, political, and others and what is the outcome of the balancing.

46. He explained that tenure rights in Kenya have an ancestral perspective as fundamental rights, which include the rights to use, control, and transfer land. He suggested that securing duration and assurance of rights would give landowners or community a greater voice in formulating a contract. He also noted that the elements of the deal should include the value, activities, and roles of the landowner, as well as the form or size of the land, and the right of reversion. In mandatory acquisition, agriculture investment must rise to the level of a public purpose or public interest since it may involve issues such as involuntary displacement, compensation (market value), and consultations (informed consultations, legal standard of consultation, and disclosure), and local content (skills, labour, cultural dynamics).

47. Furthermore, Mr. Kibugi highlighted that the State should respect, protect and ensure fulfilment of human rights. There are substantive rights, which include land property rights, socio-economic rights, fair remuneration, and clean and healthy environment, as well as procedural human rights which include public consultation, stakeholder consultation, access to information, access to justice, and fair administrative action.

48. In terms of the freedom of contracting, the investment should avoid community elitism and influence peddling, as well as state coercion. One should note the trade-offs between national, local, and personal benefits. A clear representation of benefits, value and safeguards is important. In this sense, he suggested the Guide should discuss whether misrepresentation can vitiate a contract.

49. Mr. Kibugi noted also that the process of contracting involves the spatial planning and physical planning of an investment and enquired if that should rise to the scope of a strategic environmental assessment or just an environmental impact assessment at the project level. Finally, he shared an example of investors in dominion farms which harmed the environmental and social rights of local communities.

50. During the discussion, *Mr. Gathii* summarized many issues related to the future steps of the Guide noting that: Ms. Kagwanja discussed the use of a tracking system in the African Union documents; Ms. Gachenga enquired if there is enough consideration of investors' protection in the Guide; and Mr. Kieyah emphasized the benefits of the ALIC Guide in unlocking the value and potential of land use. He also recalled that Mr. Kibugi had addressed the relationship between public and private law rules. On the one hand, he mentioned that ALIC is mostly private law related, but when things go wrong, public law is unmerciful to investors. He therefore posed the question about the relationship between these two sets of rules and how they could be reconciled. He emphasized that it is important to flag for the lawyers that they should also consider the public law aspects related to land investments (e.g., constitution, human rights, and other areas).

51. Furthermore, Mr. Gathii, recalled that Ms. Mbarak had mentioned a project that involves aspects of coordination and classifications of land and explained that the management institutions in Kenya have problems. She observed that it may get confusing for investors because there are so many different actors and too many overlapping government agencies.

52. *Mr. Kieyah* mentioned that miscoordination was a result of the Kenyan constitution commission and explained that the connection between ministries should, ideally, be an executive responsibility. He added that the Land Commission must be accountable to the citizen and clarified that the courts have not yet dealt with this issue.

53. During the discussion, *Ms. Mbarak* emphasized the role of planning in the entirety of the agricultural sector within the country and said people need to look at how the structure of the Land Commission and its relationship with the Ministry has evolved. She also highlighted that because the perception of tenure holders is so different, one should look at the way things have been developed and implemented, as well as at the functions that the land commission could do better for land governance.

54. *Mr. Gathii* clarified that the focus of the Guide initially was on investor rights, but by the second Working Group meeting, the sense was that a more inclusive approach was needed. Experts felt that there was already a lot of guidance for investors so the Guide became an opportunity to fill in gaps and to look more at small farmers and land tenure holders. To Ms. Kagwanja, he enquired whether she could suggest a similar tracking mechanism used in the African Union land policies for the ALIC Guide.

55. *Ms. Gachenga* responded that perhaps the Guide can include a statement which notes that its purpose is to help investors to understand their rights within the context of land tenure rights or

perhaps just reformulate the current language. In her opinion, a preambular reference could be included to explain that the contract is also for the protection of investors.

56. *Ms. Kagwanja* suggested reviewing the indicators in place that can help compare and keep track of the responsible investment. She said it is important to stick to one set of indicators, noting that customary indicators have to be adapted to the domestic context and enhanced at the country level. She explained that they do not have a comprehensive mechanism to track the six fundamental principles and the 19 regular principles. She also recalled that the African Union uses a tracking mechanism that is not government-led and that includes legitimate stakeholders.

57. *Mr. Suuza* asked *Mr. Kibugi* to clarify which public law aspects he was specifically referring to during his presentation. In response, *Mr. Kibugi* explained that he was referring to some bilateral investment treaties (BITs) which freeze the position of the law (on labour and environment). He added that these are among the risks that investors may encounter and noted that contracts could be nullified on this basis. Hence, for the ALIC draft, he suggested that some sort of checklist would be very useful to ensure that all public law requirements are met.

Session 3: Rights and Obligations of the Parties to Agricultural Land Investment Contracts – Striking the Right Balance in the African Context

58. *Ms. Patricia Kameri-Mbote* (Professor, University of Nairobi) lead the discussion regarding women's rights and the environment in agricultural land investment. She noted that 5% of Kenyan women work on rural land, mainly on family/private farms. Regarding women's tenure rights, she highlighted the need to look at the intangibles, such as citizenship and kinship, which belongs to a community or to a group. She stressed that women tend to lose their land rights and drew attention to the need to look at doctrines that address women and men equally.

59. She further explained that many African countries' rural legal systems have diverse norms and institutions applying to men and women and in some cases access to land depends on formal and informal rules. Formal rights have traditionally been privileged and informal rights have been generally neglected. Regarding the formalization of informal land relations, she expressed the difficulty with legitimate tenure holders in Kenya. When involving free hold, it is difficult to define the entitlement of the other members. In her view, a contract should define which land is under these informal and formal norms and what are the overlapping issues in the same land. She also noted the issue generational biases in land which are linked to the need to identify who is the next generation since currently the average age of farmers is 55.

60. *Ms. Kameri-Mbote* noted that regarding soil degradation, one should look at the non-fungible value of land and remarked that the impacts of climate change on human rights should be further considered.

61. *Ms. Kameri-Mbote* also drew attention to the connection between land rights and intellectual property rights (IPR) for plant protection, such as patents. She highlighted that there are several land activities relevant to IPR, such as seed banking and underlined that this issue may impact how people negotiate contracts.

62. She emphasized the need for both social and environmental impact assessment to define land uses in the contracts and suggested the Guide considers the diverse meanings of land, and their multiple functions: 1) economic functions, 2) food security function 3) reduction of vulnerability, and 4) other social functions.

63. *Mr. Rugemeleza Nshala* (Executive Director of the Lawyers Environment Action Team, Tanzania) discussed due diligence in contract formation. He explained that Tanzania has different types of land.

64. *Ms. Titilayo Adebola* (Lecturer, Law Faculty, Aberdeen University) addressed issues related to small holder farmers and IPR and her core suggestion was to include IPR for plant varieties under the ALIC Guide's impact assessments by reviewing the guidance currently included at page 43 of the Guide. She explained that pressures to accede to the 1991 Convention for the Protection of New Varieties of Plants (UPOV) were often a direct or indirect offshoot of agricultural investments in Africa.

65. She also pointed out other parts of the ALIC Guide that should refer to IPR, such as relevant sections in pages 10, 18 and 22 to 24. For example, she mentioned that at page 10 the context included under "Preface 2" could read "(...) potential impact on tenure rights, intellectual property rights, food security (...)" and at page 18 the topic "1.1. Overview" could state "human rights, intellectual property rights, livelihoods, food security".

66. *Ms. Aphrodite Smagadi* (Legal Officer, Law Division, United Nations Environment Programme, Nairobi, Kenya) discussed issues and obligations related to the environment. She asserted that in the ALIC Guide the grantor should require investors to put in place and continuously improve sustainable production systems, e.g., with reduced use of pesticides and fertilizer; decreased water use; energy efficiency; maintenance of biological diversity; soil management; erosion control; waste management; and climate smart agriculture. Furthermore, she recognized that the ALIC Guide recommends parties impose timelines and reporting procedures related to these environmental measures.

67. In light of the precautionary and prevention principles, she added that the ALIC Guide could further cover pollution aspects, related to the use and handling of chemicals, by recommending trainings following manufacturer's instructions and reporting of accidents or spills.

68. Regarding Environmental Impact Assessments (EIA) she emphasized that a contractual clause may require: 1) investors to conduct independent or verified EIAs in accordance with applicable laws; 2) development of an Environmental Management Plan based on the EIA, which includes plans to mitigate or rehabilitate environmental impacts; 3) reporting and communication on progress of implementation of the Environmental Management Plan; 4) post-project analysis and lessons learned for future agriculture investments; and 5) imposition of liability upon the investor for breaches of a contract.

69. Ms. Smagadi drew attention to the [UN Environment Guidelines for Conducting Environmental Assessments](#) and recommended an integrated approach to impact assessments where all the aspects are considered: environmental; human rights; social; economic and cultural. She stressed that an EIA is ineffective unless a strong public consultation process is imposed. It depends upon the national legal framework, the existence of strong environmental standards, and strategies for the long term.¹

70. In addition, she explained that the Strategic Environmental Assessment (SEA) focuses on proposed actions at a policy, programmatic or legislative level and noted the SEA can be applied to agricultural policies to ensure that environmental considerations are made when implementing the policies through specific activities that would require EIA. She emphasized that if an SEA has taken place, the EIA draws a lot of elements from the SEA and can be faster and easier to conclude.

¹ For an overview of environmental impact assessment legislations, see: UNEP, 2018 [Assessing Environmental Impacts - A Global Review of Legislation](#).

71. To avoid a race to the bottom as regards EIA/SEA standards, neighbouring countries should consider developing minimum requirements/standards on EIA/SEA at the regional level.

72. In view of environmental rights, including access to information, public participation, and access to justice, she noted that contracting parties should agree to make their contract and all reports submitted by the investor available to the public, except for commercially sensitive information. She acknowledged that inclusivity is also a key element for effective public participation: women, youth, and indigenous people and their communities have a vital role in environmental management and development (Principles 20, 21, 22, Rio Declaration, 1992).

73. In addition she said that prior to agriculture land investments, investors should develop a plan for community engagement that clearly outlines: affected persons (prior informed consent may be required based on law); roles and responsibilities for both investors and community members; modes of communication; and a complaints system.

74. Parties can agree on methods of monitoring, timelines and indicators. Environmental audits are an effective tool for environmental monitoring. Parties should also incorporate modalities for periodic reviews of the contract including review of environmental protection provisions.

75. She also highlighted that penalties for non-compliance with environmental obligations may include: 1) criminal sanctions such as fines; rehabilitation or remediation orders; forfeiture orders; closure of facilities; withdrawal of licenses; and community service; 2) contractual remedies such as the suspension or termination of contract and compensation. In addition, she noted that investors may also be required to develop internal mechanisms to address complaints from affected communities.

76. She acknowledged that the ALIC Guide mentions also the obligation of restoration of the environment according to which contracting parties should indicate the conditions upon which the land should be returned, as well as adopt decommissioning and investor transfer clauses. Modes of restoration could include re-planting, environmental bonds and insurances, clean-ups, etc. She drew attention to the fact that in 2018 UNEP & Global Partnership on Forest and Landscape Restoration released a Report entitled 'Restoring Forests and Landscapes: The Key to a Sustainable Future' and called for its inclusion in the Guide as a reference.

77. She further noted that a model agreement is desirable, even though it may be too challenging and complicated. She also suggested to be careful with bilateral treaties that freeze the environmental standards and affect future activities.

78. During the discussion, *Mr. Gathii* asked Ms. Kameri-Mbote to further explain her scepticism in regulating legitimate tenure holders. In response, *Ms. Kameri-Mbote* mentioned that the word "legitimate" should specify to whom, noting that even if the concept is extremely broad, it could still leave out certain groups.

79. *Ms. Titilayo Adebola* (University of Aberdeen) reiterated the need to include the relation between land rights and IPR and *Ms. Kameri-Mbote* referred to the Monsanto (Canada) case, where it was decided that a company had the right to the technology and farmers to the land. *Ms. Adebola* suggested that investors should learn more about local communities' traditional knowledge and seed conservation techniques. *Mr. Elijah Letangule* (Director Advocacy National Land Commission, Nairobi, Kenya) supported comments from Ms. Adebola and suggested that IPR concerns should not only apply to seeds. *Ms. Smagadi* also agreed with linking IPR and land rights.

80. *Mr. Tirado* asked how the participants suggest improving environmental protection in the ALIC Guide. *Ms. Smagadi* mentioned that the section on environmental impact assessment only has

two to three pages and suggested the Guide should also mention Strategic Environmental assessment.

81. A question was raised about whether the Guide should include elements of political impact assessment.

82. *Mr. Nshala* said disclosure is very important, however, noted that the Guide is very general on this issue. He mentioned the disclosure of affiliates, hedging agreements, and that consideration of the power dynamic is necessary and highlighted that the community should be able to understand the disclosure, recommending the Guide to further specify this topic. He also enquired whether the land goes back to the community when a contract doesn't succeed. In addition, he emphasized the importance of value addition to the raw materials, recognizing that the Guide encourages firms to conduct at least part of the processing within the country.

83. *Mr. Tirado* highlighted the need to be very careful in making political decisions and noted that the Guide's purpose is to draw attention to the various problems and issues related to agricultural land investment, but it is up to individual jurisdictions to make policy decisions.

84. *Mr. Lopez-Jurado* mentioned that guidelines for contracts are generally very difficult to implement, noting that when the national government is a party to the contract there may be a conflict of interest. He mentioned that the protection of the environment will require wider regional coordination and urged not putting too much pressure on the guidelines, especially on its implementation.

85. *Mr. Gathii* noted that many comments appeared to push the Guide towards issues addressed in investment treaties. He added that African mechanisms to resolve investment disputes are relevant.

86. A participant enquired if there should be several impact assessments, or if it would be better to just have one comprehensive impact assessment of all aspects. In response, *Ms. Smagadi* explained she was in favour of having a single comprehensive impact assessment report, which could include even IPR. She further noted that in the ALIC Guide environmental and human rights were addressed in different sections, noting she thought it would be better to have an integrated impact assessment that addresses sustainability overall.

87. Strategic Environmental Impact assessment is something a country should be encouraged to adopt to assess the impacts of a national policy and to check the general impact of its planned activities. It is something to be done by a country not to be imposed in the negotiation with the investor in a contract. This is part of the due diligence for the country.

88. *Mr. Nshala* suggested that page eight of the Guide include a mention of the possibility that transfer pricing abuses may exist. *Mr. Suuza* argued that it may be more appropriately addressed under national tax law and policy. *Mr. Nshala* added that Africa has been losing money due to mining and agriculture investments and stressed that contracts should require companies to disclose all of its holdings as this may contribute to halt abuses.

Session 4: Remedies and Dispute Resolution in Agricultural Land Investment Contracts - What to Do When Things Go Wrong?

89. *Mr. John Bosco Suuza* (Agriculture Commissioner (Contracts and Negotiations), Directorate of Legal Advisory Services, Ministry of Justice, Kampala, Uganda) discussed agricultural land investment contracts from a government perspective. He recognized the importance of the ALIC Guide in drawing attention to the role local governments play in guiding more responsible land investment contracts. While acknowledging the incentives from the government to attract foreign

investment, he also suggested placing emphasis on domestic regulation and the power of States to regulate. He acknowledged the need to adopt several contracts not only with the national government, but also with local communities and other affected stakeholders. He recommended that the Guide advise contracting parties to include a clause that mentions that the investor shall follow the laws on taxation.

90. He explained the differences that may exist between a lease agreement and a land investment contract and noted the distinction between the legislative realm and the contractual realm, emphasizing that the contract shall be subject to national regulations. In terms of remedies, Mr. Suuza highlighted that the contracts should be enforceable against national governments, sub-national government and other stakeholders.

91. *Ms. Teresa Rodríguez de las Heras Ballell* (Professor of Commercial Law University Carlos III, Madrid, Spain) presented on contractual non-performance and remedies in agricultural land investment contracts. She illustrated remedies that may be good solutions, such as: withholding performance, demanding specific performance (civil/common law), additional time and the right to cure. In addition, she mentioned that monetary remedies refer to preserving the exchange and restoring the balance through price reduction, damages, and penalties. Renegotiation is another solution to adapt to the changes brought about by new and unexpected events. Termination and restitution are the ultimate remedies for non-performance and fundamental breach. Such drastic remedies are likely to affect third parties.

92. *Mr. James Nyiha* (Legal Practitioner, Lecturer – Strathmore University, Nairobi, Kenya) discussed disputes in agricultural land investment contracts in Kenya from a private practitioner's perspective. He noted that the Constitution of Kenya classifies land as public land (unalienated land; land held by State organs, etc.), community land (land vested in and held by communities identified on the basis of ethnicity, culture or similar community of interest), and private land (land held under freehold or leasehold tenure). In the preparation, negotiation, implementation, and review of agricultural land investment contracts, it is important, in particular during the due diligence process to know whether the land is public, communal, or private and whether any of the contracting parties is a foreign individual or corporation. These elements will affect the possible tenure granted in the investment contract.

93. He further elaborated on domestic land laws. First, he presented the National Land Commission (NLC) noting that where the NLC finds that the land title was irregularly acquired, it takes appropriate steps to correct the irregularity. Mr. Nyiha suggested that an investor should make sure that the title to the land in which the investment occurs was not irregularly acquired.

94. He further explained that section 15 of the NLC Act mandates the NLC to receive, admit and investigate all historical land injustice complaints and to recommend appropriate redress. It also outlines the definition of historical land injustice, the criteria to be met for a claim of historical land injustice, the procedure for investigation, and remedies. Remedies include restitution and compensation. If it is impossible to restore the land, remedies include resettlement, order for revocation, and reallocation of the land with refund to bona fide third-party purchasers after valuation, or declaratory and preservation orders including injunctions.

95. He added that section 26(1) of the Land Registration Act provides that the land title certificate issued upon registration shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate. The title of the proprietor shall not be subject to challenge, except on the ground of fraud or misrepresentation to which the person is proved to be a party; or where the land title certificate has been acquired illegally, without following normal procedures or through a corrupt scheme. Where two persons claim to hold

the same land title, and both titles being issued regularly and procedurally without fraud, the Courts have held that the first title should prevail.

96. Agricultural land investment contracts would fall under controlled transactions according to the Land Control Act. Controlled transactions include sale, transfer, lease, mortgage, partition, sub-division and sale of shares in a private company or co-operative society which owns agricultural land situated within a land control area. No consent will be given for certain transactions, to wit, sale, transfer, lease, exchange or partition to a person who is not: (i) a citizen of Kenya; or (ii) a private company or co-operative society with all members being citizens of Kenya. Hence, if the investor is not Kenyan, this would affect agricultural land investment contracts.

97. Regarding litigation, Mr. Nyiha explained that access to justice has been hampered by many unfavourable factors which include, inter alia, high filing fees, bureaucracy, complex procedures, illiteracy, distance from the courts and lack of legal know-how.

98. *Mr. Carlo Di Nicola* (Senior Legal Officer, UNIDROIT) illustrated how the ALIC Guide addresses grievance mechanisms and dispute resolution in agricultural land investment contracts and explained in detail how the enforcement of settlements should occur.

99. At the end of the discussion, *Mr. Gathii* expressed his appreciation to all speakers and summarised a number of the main points collected during the workshop.

III. SUMMARY OF RECOMMENDATIONS FOR THE ALIC ZERO DRAFT

100. The topics listed below reflect the main recommendations that the Working Group may wish to consider when reviewing the ALIC Zero Draft. Therefore, the ALIC Guide could:

Insert language

- i. include reference to land grabbing (see above, para. 22);
- ii. include a checklist to ensure that all public law requirements are met (see above, para. 56);
- iii. include an annex for communities to identify contract law aspects and variety of applicable laws within a particular jurisdiction (see above, para. 36);
- iv. consider a shift from inclusion to authentic partnerships for sustainable development by adding a preamble with reference to the Brundtland report and clarify from the beginning that the guidelines are not a minimum standard but rather a tool for achieving the sustainable development aspiration (see above, para. 39);
- v. include a statement which notes that the purpose of the Guide is to help investors understand their rights within the context of land tenure rights and to look at the public law aspects: constitutional law, human rights, and other related areas (see above, para. 49);

Further clarify

- vi. what the Guide refers to as “sustainability”, explain if it includes social, economic, environmental, cultural, political, and other aspects (see above, para. 13);
- vii. how the Guide ensures human rights, environmental rights, and social concerns are not treated as externalities (see above, para. 13);
- viii. how the Guide addresses the issue of climate change (see above, para. 13);
- ix. whether the Guide goes beyond contracts as the sole basis for investor accountability (see above, para. 13);
- x. how environmental impacts should be measured and if there should be an integrated environmental sustainability approach (see above, para. 13);
- xi. how the Guide addresses the involvement of marginalized groups, identifies all legitimate

- stakeholders, and informal customary rights holders (see above, para. 19);
- xii. to what extent the Guide is intended to be a tool for influencing policy and law regarding land ownership and management (see above, para. 20);
 - xiii. the following risks: loss of land and poor resettlement plans; lack of openness and engagement with local communities; weak assessment of commercial viability; poor management of environmental and social impacts; insufficient mechanisms to raise grievances (see above, para. 26);
 - xiv. how to ensure accurate representation and avoid community elitism, influence peddling, and state coercion (see above, para. 47);
 - xv. how to balance national, local, and personal benefits and how to achieve a clear representation of benefits, value, and safeguards (see above, para. 47);
 - xvi. whether misrepresentation vitiates a contract and which other situations can vitiate a contract (see above, para. 47);
 - xvii. the challenges of small farmers and land tenure holders (see above, para. 53);
 - xviii. the need to ensure disclosure of affiliates and to ensure that the community can understand the disclosure (see above, para. 79).

Provide more guidance

- xix. on strategic environmental assessment which integrate environmental and other sustainability considerations in the preparation of policies, plans, and programmes (see above, para. 67);
- xx. on informal systems of ownership that are not registered (see above, para. 14);
- xxi. on the right to water from irrigation furrows based on contribution to labour and fluid grazing rights in times of drought (see above, para. 33);
- xxii. on procedural rights (public consultation and stakeholder consultation, access to information, access to justice, and fair administrative action) (see above, para. 46);
- xxiii. additional safeguards to address the issue of meaningful public consultation: using FAQs; vernacular radio notices to avoid language barriers; local advisors to avoid risk of disconnection with community; and the risk of political manipulation. Note that sometimes giving too much information to the communities can be overwhelming (see above, para. 37);
- xxiv. on mismanagement of public land, invisible commercial value, and undefined property rights (see above, para. 40);
- xxv. on a mechanism that is not government led and includes legitimate stakeholders to track the impacts of agricultural land investments with indicators (see above, para. 55).

ANNEX I

PROGRAMME



Regional Consultation Workshop

**The future UNIDROIT/FAO/IFAD Legal Guide on
Agricultural Land Investment Contracts (ALIC)**
Raising awareness and seeking feedback from Kenya and Africa

Wednesday 23 October 2019 8:30 – 17:45

**Strathmore Law School, Madaraka Estate, Ole Sangale Road, Keri Campus
Sir Thomas More Building, 1st Floor, Policy Innovation Centre (Nairobi, Kenya)**

With the patronage of



Developed by a UNIDROIT Working Group in collaboration with the Food and Agriculture Organisation of the United Nations (FAO) and the International Fund for Agricultural Development (IFAD), the future Legal Guide on Agricultural Land Investment Contracts responds to the need for greater and more responsible investment in agriculture, incorporating necessary safeguards to enhance food security and nutrition and to protect legitimate tenure right holders, human rights, livelihoods and the environment while reducing investment risks.

As part of the finalization of the future Legal Guide, this workshop is designed to facilitate feedback on the ALIC Zero Draft from stakeholders in Africa, including investors' legal counsels, government officials, non-governmental organisations, academics and private sector representatives.

This regional consultation is supported by a grant from IFAD and the workshop language will be English.

Please confirm your participation (free of cost) by sending an email to: info@unidroit.org.

Website for Online Consultation on the ALIC Zero Draft of the Guide:

<https://www.unidroit.org/work-in-progress/agricultural-land-investment/online-consultation>

The ALIC Zero Draft is accessible at:

<https://www.unidroit.org/english/documents/2019/study80b/190601-alic-zero-draft.pdf>

Wednesday 23 October

<i>OPENING</i>	
The future UNIDROIT/FAO/IFAD Legal Guide on Agricultural Land Investment Contracts and Africa	
8:30 – 9:00	Registration
9:00 – 9:20	Welcome address <i>Francisco B. Lopez-Jurado (Acting Dean of Strathmore University, Law School)</i>
<i>SESSION 1</i>	
The forthcoming UNIDROIT/FAO/IFAD Legal Guide on Agricultural Land Investment Contracts and Africa	
	Moderator: Allan Mukuki (Strathmore)
9:20 – 9:40	An introduction to the future UNIDROIT/FAO/IFAD Legal Guide on Agricultural Land Investment Contracts
9:40 – 10:00	<i>Ignacio Tirado (Secretary-General, UNIDROIT)</i> Land tenure rights and responsible investments as founding principles <i>Charles Bebay (FAO Representative a.i. in Kenya)</i>
10:00 – 10:20	The leasing of agricultural land in Kenya: trends and limitations for responsible investment <i>Edith Kirumba (Environment, Climate and Safeguards Specialist, IFAD)</i>
10:20 – 10:50	Setting the scene from an African perspective: an overview of legal issues regarding agricultural land investments <i>James Gathii (Professor of International Law, Loyola University, Chicago)</i> Questions and discussion
11:15 – 11:30	<i>Coffee Break</i>
<i>SESSION 2</i>	
Drafting and implementing responsible agricultural land investment contracts – A review of key issues	
	Moderator: James Gathii (Loyola University)
11:30 – 11:50	Agricultural land investment contracts in the African context <i>Joan Kagwanja (Coordinator, African Land Policy Centre)</i>
11:50 – 12:10	Contract formation, due diligence and contractual socio-environmental obligations in the Kenyan context <i>Elizabeth Gachenga (Deputy Vice Chancellor, Strathmore University)</i>
12:10 – 12:30	Land investment contracts and land governance reform in Kenya <i>Joseph Kieyah (Kenya Institute of Policy Analysis)</i>
12:30 – 12:50	Sustainability considerations and land investment contracts <i>Robert Kibugi (Law Lecturer, University of Nairobi)</i> Questions and discussion

13:15 – 14:15	Lunch
SESSION 3	
Rights and obligations of the parties to agricultural land investment contracts – Striking the right balance in the African context	
14:15 – 14:35	Moderator: Elizabeth Gachenga (Strathmore) Agricultural land investment, women’s rights and the environment <i>Patricia Kameri-Mbote (Professor, University of Nairobi)</i>
14:35 – 14:55	Due diligence in contract formation <i>Rugemeleza Nshala (Executive Director of the Lawyers Environment Action Team, Tanzania)</i>
14:55 – 15:15	Small holder farmers and the protection of intellectual property rights <i>Titilayo Adebola (Lecturer, Aberdeen University, Law Faculty)</i>
15:15 – 15:35	Issues and obligations with regard to the environment <i>Aphrodite Smagadi (Law Division, UNEP)</i>
15:50 – 16:10	Coffee Break
SESSION 4	
Remedies and dispute resolution in agricultural land investment contracts - What to do when things go wrong?	
16:10 – 16:30	Moderator: André Smit (State Kaw Adviser, Dept. Intl Relations, South Africa) Agricultural land investment contracts – A government perspective <i>Mr. John Bosco Suuza, Ag. Commissioner (Contracts and Negotiations) Directorate of Legal Advisory Services, Ministry of Justice of Uganda</i>
16:30 – 16:50	Contractual non-performance and remedies in agricultural land investment contracts <i>Teresa Rodríguez de las Heras Ballell (Professor Commercial Law, University Carlos III Madrid)</i>
16:50 – 17:10	Land investment contract disputes – A private practitioner’s perspective <i>James Nyiha (Legal Practitioner, Lecturer at Strathmore University)</i>
17:10 – 17:30	Grievance mechanisms and dispute resolution in agricultural land investment contracts <i>Carlo Di Nicola (Senior Legal Officer, UNIDROIT)</i>
	Questions and discussion <i>Final inputs for the UNIDROIT/FAO/IFAD Legal Guide on Agricultural Land Investment Contracts</i>
17:45	Closing of the event

ANNEX II**LIST OF PARTICIPANTS*****SPEAKERS***

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