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**Draft UNIDROIT/FAO/IFAD Legal Guide on  
Agricultural Land Investment Contracts  
(ALIC)  
Online Consultations**

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**Report of the Online Consultations – Raising awareness and seeking feedback**

(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 98<sup>th</sup> 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 summarizes the comments received through the online consultation.

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## I. OVERVIEW

3. The online consultations on the future UNIDROIT/FAO/IFAD Legal Guide on Agricultural Land Investment Contracts (ALIC) was open from 1 June 2019 until 31 October 2019. The summary of the feedback received through different online platforms is presented below.

## II. UNIDROIT ONLINE CONSULTATION WEBPAGE

4. A dedicated UNIDROIT [online consultation webpage](#) was created to provide background information on the project's history and links to the relevant texts and material. Anyone interested in the draft Guide was invited to send feedback, including public authorities/state counsels, private sector/businesses, civil society organisations, academic institutions, and the public at large. Contributors were also invited to send any comment concerning the general approach of the Guide or on specific chapters, sections or issues, in particular with respect to redundant content, insufficient treatment or gaps in the addressed issues. Comments were sent electronically to [alic@unidroit.org](mailto:alic@unidroit.org).

### **Argentine Republic**

5. On behalf of the Embassy of the Argentine Republic in Italy, Mr. Alejandro Luppino (*Counsellor of the Embassy of Argentina in Italy*), acknowledged that the ALIC Guide constitutes an important input because it seeks to find a balanced solution among parties that usually intervene in land investment contracts, not only investors and landowners, but also the different levels of governments (depending on the scale of the investment). He asked if it would be appropriate to consider the use of the term "good practice" instead of "best practices", taking into account that this expression does not prejudice the greater relevance or effectiveness of a public policy and would allow various measures to achieve the objectives within the framework of a given policy. Regarding the topic on environmental assessments, and in view of the compatibility with the provisions of the sixth principle for Responsible Investment in Agriculture (PRAI), he suggested that the terminology "environmental disaster" currently used in the guide be replaced by "environmental risk".

### **People's Republic of China**

6. On behalf of the Embassy of the P.R.C in Italy, Ms. Xu Lingling (*Second Secretary, Economic and Commercial Counsellor's Office*), suggest deleting the information in the Guide that states that most governments seeking agricultural land investments have specific legislations for facilitating importation, "exempting investors' operations from duty tax", which is too absolute, as most of the countries have comparatively strict restrictions on the tax reduction and exemption during import. Another recommendation was to add a "qualification examination of the intermediaries" like accounting firms and their practitioners to remind the enterprises to avoid related risks.

### **United States of America**

7. On behalf of the US Embassy in Rome, Ms. Karin Kizer (*Attorney Adviser, U.S. Department of State*) acknowledged that the Guide on Agricultural Land Investment Contracts (ALIC) is rich in detail and scope, and has the potential to promote greater awareness of the myriad issues that are implicated in these types of contracts. She suggested that the Working Group may wish to consider additional ways to make the document more readily accessible, in order to benefit its target audience, and promote greater use of the Guide. In light of the above objectives, she recommended the following approaches:

- a) streamlining of the content – there is a need to identify ways to eliminate unnecessary significant repetition and duplication of issues through internal cross-references and to references to existing guidance. For example, the discussion of the treatment of legitimate

tenure right holders in Chapter 2, section I and II.C is repeated in the Introduction, section II.B. Conversely, some topics are treated in greater detail when compared with others. Hence, there is a need to ensure adequate treatment of all key topics, at roughly the same level of detail;

- b) consolidating summary information and facilitating ease of use – although the Guide is a rich source of information, its length may be unwieldy for its target audience. Accordingly, a single Executive summary that highlights the key points of each section might be preferable instead of several introductory sections, such as a preface, executive summary and introduction;
- c) highlighting relationship to prior UNIDROIT work – it is also suggested that the Working Group may also consider including more citations to the UPICC and to LGCF, as doing so would demonstrate the rationale for UNIDROIT's work in this area and the relationship between the Guide and prior work.

**Mr. Fabiano de Andrade Correa** (Food and Agriculture Organization of the United Nations, FAO)

*(PhD, International Legal Consultant, Food and Agriculture Organization of the United Nations, FAO)*

8. Mr. Fabiano de Andrade Correa remarked that the Guide is a complex, long and in some parts repetitive document. Therefore, he suggested further developing the current "checklist of issues" into a "general summary" by including detailed guidance on the obligations/rights of each party (investor, grantor, land right holder, etc.). He also noted that the definition of "responsible investments" should be provided in the beginning of the Guide and it would be important to maintain consistency in the use of this term throughout the Guide, as sometimes "responsible investment" is used, others "responsible and sustainable". Mr. Correa proposed the inclusion of the following definition in the introduction of the Guide: "Responsible agriculture investment can be defined as the "creation of productive assets and capital formation, which may comprise physical, human or intangible capital, oriented to support the realisation of food security, nutrition and sustainable development". It requires "respecting, protecting and promoting human rights, including the progressive realisation of the right to adequate food in the context of national food security", and "entails respect for gender equality, age, and non-discrimination and requires reliable, coherent and transparent laws and regulations" (CFS RAI Preamble). The VGGT further adds that responsible investments should "do no harm, safeguard against dispossession of legitimate tenure right holders and environmental damage" (VGGT 12.4). In addition, the VGGT notes that while States "should promote responsible investments in land, fisheries and forests" (12.1) and "provide safeguards to protect legitimate tenure rights, human rights, livelihoods, food security and the environment" (12.6), investors also have a "responsibility to respect national law and recognize and respect tenure rights of others and the rule of law" (12.12).

9. Moreover, he outlined that the right to food (CFS RAI Principle 1) is not mentioned among the social/economic issues in Chapter 3 and enquired whether the Guide could consider in more detail the investor's responsibility to safeguard food security in the host state, e.g. through a due diligence not to invest in crops that would potentially present a challenge for food security, such as biofuels. He also suggested adding a reference to the right to adequate housing, as it is a key right relating to land.

10. In relation to customary rules, Mr. Correa recommended providing more guidance when such rules may be exclusionary or inconsistent with Human Rights. He said it would be interesting to explain which rule would prevail in case of conflicts. He also suggested using the "sustainability impact assessment" concept to refer to all concerns (environment, social, human rights and

economic) that are generally included in the impact assessment and called for a more detailed presentation of the essential elements of impact assessments (origins, scope and use of this instrument).

**Ms. Jeannette Tramhel** (Organization of American States)

*(Senior Legal Officer, Department of International Law, Organization of American States)*

11. Ms. Tramhel suggested the reconsideration of the current underlying tone of Guide, which is to mitigate negative effects, and to present it as an opportunity to engage investors in a positive way towards sustainable agriculture. She also recommended including more reference to Sustainable Development Goal #2 “to end hunger, achieve food security and improved nutrition and promote sustainable agriculture”, as the overarching “rationale” as to why this Guide is necessary. In her view, the three main instruments that have been highlighted (UN Guiding Principles, VGGT and CFS-RAI) are key tools toward that goal but the connection between 1) those tools and the goal; and 2) use of the Guide to implement those tools, needs to be better explained.

12. In addition, she recommended the inclusion of references to the Inter-American legal instruments, given that other regional instruments are included. For example, as the Inter-American Court on Human Rights is mentioned, she suggested to include reference to the American Convention on Human Rights, the Panama Convention, etc. She also appointed some references that could be included, such as: the publication FAO, *EIA Guidelines for FAO Field Projects*, as a standard for EIA conducted under ALIC; FAO, *PPPs for agribusiness development*, which highlights useful lessons learned from various international experiences that could be drawn upon; and to mention the IPES-Food.org website as a helpful resource, generally, on land systems approach.

13. She also recommended considering the inclusion of a section on choice of law and a “governing law clause”. For clarification she suggested reviewing the use of the term “applicable law” noting that “applicable law” is a term often used in private international law when referring to a choice of the law of a state that should be applicable (in this case, to the contract). In the ALIC Guide, the term is used in this sense but also to refer to relevant areas of the law that might be applicable, which is confusing. Therefore, she suggested using “applicable law” in the first sense and “relevant areas of the law” in the second.

14. Ms. Tramhel mentioned that the notion “responsible investment” could be defined by adding a quote directly from the source documents, to explain that, “Responsible investment in agriculture means investment that complies with the RAI Principles. It is investment in agriculture that ‘enhances food security and nutrition and supports the progressive realization of the right to adequate food in the context of national food security; that makes a significant contribution to enhancing sustainable livelihoods, etc.’” She also sent a number of specific editorial and substantive comments on a chapter-by-chapter basis.

**Mr. Philip Seufert** (FIAN International)

15. On behalf of the Food First Information and Action Network (FIAN International), Mr. Philip Seufert recommended that the ALIC Guide should strengthen its policy guidance on agricultural investment by and for smallholders. He recognized that the ALIC Guide echoes the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests (VGTT) but outlined the importance of further taking into account the policy guidance developed by the UN Committee on World Food Security (CFS) in terms of what investment is best suited to benefit smallholder farmers, in particular the CFS Policy Recommendations “[Investing in smallholder agriculture for food security](#)” and “[Connecting Smallholders to Markets](#)”.

16. He remarked that given that the Guide uses “agricultural land investments” as a framework for land acquisitions, it is important that it acknowledges more clearly that many forms of needed agricultural investments lie outside its scope. Therefore, he suggested the Guide should strengthen its focus, established in Preface 3, and stream it more consistently throughout the entire guide, especially in Chapter 6 on grievance mechanisms and dispute resolution. Furthermore, Mr. Seufert acknowledged that the Guide does make reference to other types of investment models, in particular in the section on contract farming, outgrower schemes and supply chain relations, but he said that it should add that there is evidence that such schemes and relations can also result in dispossession and other form of rights abuses.

17. He pointed out that the Guide’s focus on contract law is a serious limitation and recommended extending the duties and responsibilities arising from a contract to all the existing business relationships. He explained that the complex investment structures – or investment webs – that involve several actors and subsidiary companies need to be taken into account for any effort aimed to prevent abuses and address human rights issues. In his opinion, focusing merely on the obligations, responsibilities and rights of contracting parties leaves out important actors of a given land deal. Therefore, he called for a more detailed treatment of non-contracting parties’ responsibilities and guidance on how to hold these other actors accountable for negative impacts of land investments, in particular in paragraphs 2.12, 2.13, and 2.26. In other terms, he said the Guide should not base its demand for accountability exclusively on the contractual relationships since it risks missing the fact that complex and opaque investment webs are used deliberately by transnationally operating actors to distance themselves from any type of liability for the impacts of their operations.

18. He also added that the Guide’s focus on contract law has limitations when it comes to addressing the impacts a land deal might have on people and communities. Therefore, he suggested not to focus on “contractual non-performance” as the basis for remedies (Chapter 4), since this may limit the access to remedy by affected communities or individuals, either because they are not contracting parties, or because the harm suffered does not refer to the object of the contract. In relation to grievance mechanisms and dispute settlement (Chapter 6), he recommended that the Guide should clearly advise contractors to include a statement in their contracts to avoid corporate investors using their own mechanisms that may impede communities from access to justice, and prefer using state based quasi-judicial and judicial mechanisms which could be more effective. On a similar line, he suggested that the grievance mechanisms should include a gender-sensitive measure so access to justice is adapted and appropriate to the needs of women including those who face multiple and intersecting forms of discrimination.

19. Finally, he suggested that the Guide should place a stronger emphasis on international human rights obligations and on its primacy, in line with one of its main focuses (Preface 4) regarding the protection and respect of tenure right holders.

**Ms. Dima Abdallah** (Beirut Bar Association)

*(Lawyer, Beirut Bar Association)*

20. Ms. Dima Abdallah pointed out that it would be important to restate in the purpose of the Guide how the right to adequate food is linked to other Human Rights, most importantly the Right to Health, Right to life, Right to education, as well as Employment Rights. In terms of how the Guide addressed “unsolicited bids”, she mentioned it should not put more pressure on a foreign investor than on a local investor. She suggested addressing the obligations for corporate organizations and affiliates in Chapter 3 rather than in topic 2.12 and 2.13.

**Mr. José Manuel Canelas Schütt** (Universidad Catolica Boliviana San Pablo - Regional Santa Cruz)

*(Professor of Law, Universidad Catolica Boliviana San Pablo - Regional Santa Cruz)*

21. Mr. Schütt suggested the Guide could expand more on the application of extraterritorial jurisdiction and foreign law in the following situations: when compliance with public policy and mandatory rules of other State(s) is necessary and not available in the host country; when the application of foreign law could result from the enforcement of a foreign judgment that relates to or has effects on the contractual relationship of the parties; and under a choice of law agreement. He also suggested that the Guide should consider mentioning that the contracting parties may agree to apply different laws to different parts of their contractual agreement. Furthermore, he suggested including reference to Articles 11 of the Inter-American Convention on the Law Applicable to International Contracts, and 11.2. of the Hague Principles on Choice of Law in International Commercial Contracts which provide general regulation of foreign applicable law, due to public policy or overriding provisions.

22. Regarding extraterritorial jurisdiction, he drew attention to cases of corruption offences and acknowledged that the Guide mentions the OECD anti-Bribery Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (par. 1.20), but fails to address the existence of other important instruments, notably the Inter-American Convention Against Corruption and the United Nations Convention against Corruption. He added that the UN Guiding Principles on Business and Human rights may also provide valuable guidance in this regard.

23. Mr. Schütt also pointed out some specific recommendations for certain parts of the Guide, including that it should: clarify that it discourages the *definitive* transactions of tenure and related rights to investors (preface 3); does not address foreign mandatory rules (preface 6); mention that some domestic legal systems are also based on grounds of “cultural criteria”, such as “intercultural interpretation”, “intraculturalism”, and “pluriculturalism” (paragraph 1.8); exemplify risks highlighted in the Guide with actual national conflicting cases, such as the management of water risk and the “Guerra del Agua” case in 2000 in Bolivia (paragraph 2.90); further analyse the principles of “party autonomy” and “freedom of contract” (paragraph 2.143); further explain rules of private international law or conflict of laws for those who may not already be familiar with them (paragraph 4.14).

**Ms. Caitlin Ryan** (University of Groningen)

*(Assistant Professor, Department of International Relations and International Organization, University of Groningen)*

24. Ms. Caitlin Ryan appreciated that the ALIC Guide considers the cross-cutting interests of different stakeholders and that it adopts a broad definition of “legitimate tenure rights holders” to include those who may have informal rights and/or use rights. Ms. Ryan nevertheless proposed three major points that should be further considered: 1) the Guide should clarify what the term “responsible” entails since it can be defined differently by different parties, depending on their interests; 2) the Guide should address stakeholder mapping not only as a technical and legal challenge but also as a political matter; 3) the Guide, in Chapter 1, should ask investors to understand not only the gaps in law, but also the host State’s capacity and political will for implementation of law. In other terms, Ms. Ryan outlined that the Guide should not assume a minimal level of State capacity and political will to enforce its domestic law, and that state-level institutions (particularly Rule of Law institutions) have the capacity and political will to arbitrate disputes and ensure due diligence.

25. Furthermore, she provided detailed suggestions to several sections of the Guide for the promotion of gender equality: in section 1.22, the gender equality issue should be addressed as a

political question and not only as a technical matter; sections 2.80/2.81, related to the assessment of economic impact, should include an evaluation of how the economic activity is gendered; and sections 2.90/2.91 should highlight that changes to water rights should not increase women's labour burden. She also outlined that there seems to be an "(unspoken) underlying assumption that treats economic activity as primarily formal economic activity" in the Guide and called for more focus on informal economic activity in assessing the impact of investment deals. Ms. Ryan explained that there needs to be clarity for all involved in the lease negotiation process about what currency the lease amount will be paid in, and therefore recommended the adaptation of section 3.57. Finally, she drew attention to the risk of assuming a level of literacy and access to technology that people in rural communities may not have, noting that section 3.165 could include an alternative method for sharing reports in those cases.

**Ms. Federica Violi** (Erasmus University Rotterdam)

*(Assistant Professor in International Law, Department of International and European Union Law, Erasmus School of Law, Erasmus University Rotterdam)*

26. Noting that the terms "responsible' investment" and "responsible and sustainable investment" are used throughout the Guide as a means to achieving certain Sustainable Development Goals, Ms. Federica Violi remarked that it would be useful to align the language everywhere, as the two adjectives imply a different set of concerns and characteristics. She also mentioned that the notion of "agricultural land" does not seem to be spelled out clearly in the Guide and therefore suggested to specify from the very beginning that the scope of "agricultural land" includes land used for the growing (and in certain cases the processing of) agricultural produce destined both for human consumption and for other uses (such as cotton, rubber, jatropha). She explained that a clear definition is necessary because different produce with different uses involve different sets of issues and might imply a different legal framework, both nationally and internationally (including for example certain provisions under WTO law for certain countries and certain produce). Including more guidance on the extent of land that might be subject to the investment contract would also be useful in Ms. Violi's opinion since the same investor or any of its affiliates may have already acquired tenure rights in the same country/area. Therefore, she suggested the Guide could mention that during the screening phase (under the transparency requirements) it is advisable to evaluate the risk of over-accumulation of land.

27. In addition, she advised including language in the Guide as to "choice of law clauses" and "clauses of prevalence" to further explain the implications they may have when the most powerful contracting party might, for example, push for the selection of a law of a third country that is highly favourable to him/her, but has no connection whatsoever with the investment. She also drew attention to the need to further explain the information on "general principles", included under section 1.14 of the Guide, to acknowledge the uncertainty surrounding this category in both doctrine and case-law. In her opinion, such an open-ended wording in the Guide might refer to general principles of international law or to general principles applicable to commercial transactions (*lex mercatoria*).

28. Ms. Violi suggested that the Guide could adopt a more nuanced approach when indicating that certain parts of international law might apply to the contract as a "supplement" to the applicable law (section 3.48). Instead she proposed the inclusion of "compatibility clauses" to mandate the compatibility of the contract with all relevant international law rules, rather than the direct application thereof, thus favouring a corrective rather than an integrative approach.

29. In relation to the treatment of "impact assessments" in the Guide, Ms. Violi considered that it seems to suggest, in section 2.108, that, differently from any other impact assessments, human rights impact assessments are not subject to any trade-off. Therefore, she recommended to reconsider the "trade-off" model and embrace a more comprehensive and interdependent impact



assessment exercise throughout the Guide. She also suggested to explicitly include an extra section on human rights in the Chapter related to “Rights and Obligations of the Parties”.

30. She outlined that the interaction between International Investment Agreements or Bilateral Investment Agreements and investment contracts is still extremely vague in the Guide and called for a deeper consideration of the following topics: regulatory authority of host States; stabilization clause; and expropriation. Finally, she highlighted that it is not entirely clear whether the transparency requirements that apply to the investor both at the phase of screening and later on in the project include also (international, public and private) lenders and financiers, suggesting that this aspect be clarified.

### **Students of the University of Washington School of Law**

31. Comments on the UNIDROIT/FAO/IFAD Legal Guide on Agricultural Land Investment Contracts were sent by the following students of the University of Washington School of Law: Dori Krupanics (Master of Jurisprudence candidate in Sustainable International Development) and Jessica Wachowicz (JD Candidate and undergraduate in Finance and Economics). In total they presented thirteen recommendations.

32. Their first comment related to the use of the term “sustainable investment” throughout the Guide and how it appears to operate under the assumption that all investors are seeking sustainability. In their opinion, the Guide seems to be useful to an investor whose objective is to establish a sustainable investment, as opposed to a quick profit or short-term gain investment. They recommended further explaining why pursuing sustainable investments is mutually beneficial to the company and the local community by adding in “Preface 6” (page 11 of the Guide) the following sentences: “Pursuing sustainable business objectives is essential in agricultural land investment contracts, as short-term objectives may lead to diminished resources, complex litigation, market failures, or weakened rapport with both consumers and communities. This Guide provides essential considerations that will allow investors to meet long-term business objectives by taking into account the needs of the local communities in which they invest.”

33. The second comment suggests inclusion of additional information regarding the importance of adequate translation, both in the negotiation process and in documenting consultations. Although the Guide correctly identifies language barriers and discusses valid issues that may arise if negotiations are not conducted in the local language, additional information relating to language barriers could be provided. For example, according to the Guide the failure to ensure that all parties have sufficient understanding of the terms may result in a lack of informed consent, thereby remedies can be availed. However, in the United States, informed consent is not a requirement in the making of valid contract, only assent to the terms is required. In *Myskina v Conde Nast*, the court held that failure to understand the English language shall not automatically excuse the party from complying with the terms of a contract. Furthermore, failure to use local language in agreements and negotiations doesn’t necessarily put the party in an unfair position, and for that matter the contract is unlikely be voidable on the basis on undue influence. In their opinion, the Guide should focus on two key points: a) the use of neutral translators, and b) the need to ensure that translated documents reflect the intent of both parties. They have recommended adding the need for proficient translators both in the investor’s language and the local language and also that they be well versed with both the legal systems so as to convey the intent of parties in the translated document, in Chapter 2, section IV, paragraph 2.61.

34. Another important comment states that the Guide should encourage investors to obtain consent prior to publishing personally identifiable information. The Guide recommends increasing transparency by making relevant documentation like the impact assessments publicly available. However, in light of the growing trend to control personal data in various legal regimes, the investors should be mindful of this and either seek consent from the individual or redact such personally

identifiable information prior to its being published. For example, the General Data Protection Regulation (GDPR) could be a reference point to lay standards for the collection and processing of data relating to community members. In other countries, where privacy laws are not that strong, the Guide might suggest that investors should have a legitimate basis for processing information and obtaining the informed consent of the data subject. In their opinion, the impact assessments should have a legitimate basis for collecting individuals' data and should not collect more than necessary. Also, prior consents must be taken before publishing any personally identifiable information, in Chapter 2 Section IV (B), Paragraph 2.74.

35. The fourth comment notes that the Guide should offer viable options to mitigate human rights implications in circumstances where a stabilization clause is used in an investment contract. As a stabilization clause can hinder a State's human rights obligations and contract the purpose of due diligence set forth by the UN Guiding Principles, it is imperative to look at the negative human rights impact of stabilization clauses, and ensure that it does not restrict the State's capacity to advance its human rights in the future. Although there seems to be a shift toward discouraging stabilization clauses, investors may still decide it is necessary depending on certain circumstances. Their recommendation is for Chapter 2, Section V (c) paragraph 2.142 to include, in circumstances when a stabilization clause is used, a mitigating recourse to an independent or third party to verify claimed costs or to allocate shared risk among the parties from a change in law. Additionally, a hybrid or economic clause could be stipulated based on economic and political projections, that a mutually agreed upon amount is placed in an escrow account by the State for the duration of the contract.

36. The fifth comment suggests that the Guide should treat the right to water on par with the right to food. Given that the right to water is one of the most fundamental and indispensable human rights and the management of this natural resource is a very sensitive issue, the Guide should address it separately under Chapter 2.IV.B.2 and treat it as a Human Rights issue in its own right. There are a lot of soft international laws that govern the human right to water. However, with the planet's decreasing water supply, access to water is a highly sensitive geopolitical matter. Thus, it becomes essential to ensure continued access to water where the investment is taking place. Although the Guide does address water as a resource and a utility, it curiously does not emphasize this topic and avoids placing it directly under the Human Rights section. It also lacks support for a right to water impact assessment, which should be a critical measure of the investor's and the grantor's due diligence. In their opinion, chapter 2 Section IV (B) 2 ought to be edited to include water as a Human Rights issue and water impact assessment should be conducted to assess the extent to which agricultural investments affect local access to water. Such an assessment would identify risks and include strategies to improve availability access.

37. The sixth comment refers to an inclusion of an involuntary resettlement safeguard principle that calls for Human Rights/Social Impact Assessment. The rationale being that it is not enough to simply identify potential stakeholders; safeguards should also be implemented that build upon the impact assessments ahead of a contractual agreement. Understanding whether resettlement will be required by certain populations, carrying out consultations with locals affected by the land acquisition and having a plan of action are some areas that need increased focus. Involuntary resettlement includes both physical and economic displacement and the requirements should be part of the contract to ensure resettlement of the population. Also, this should be a part of Social Impact Assessment and widely used before and during the time of the project. Analysing a project's social impact and creating a management plan to enhance human rights due diligence that accounts for avoidance, minimization and compensation that arise from the investment prior to the contract. They suggest that an Involuntary Resettlement section be included under Chapter 2.IV.B.2, that the management and compliance review of the involuntary resettlement should be implemented in a manner that follows demonstrated international resettlement standards including planning, implementation and monitoring of land acquisition, expropriation, livelihood restoration and grievance mechanisms.

38. The seventh comment mentions the need for the Guide to offer a complete Human Rights Audit for both State/Grantor and Investor that aims to offer viable options for vulnerable populations affected by investment to counter the weaknesses of the international investment regime, the UNGDP and other such guides, and the international arbitration mechanism. It states the Guide lacks representations from the Global South in providing input and relies heavily on the UN Guiding Principles for Business and Human Rights and other similar Guides. It is a nexus between business and State that perpetuates human rights violations. Thereby, the vulnerable populations have little voice and the impact of the international investment regime is no access to justice for them. Exclusion from the investment process, unfair fines, detention and criminalization of protestors, no awareness of an investment, no consultation with the communities, successful investor-state claims after harm to land and natural resources, lack of transparency and monitoring, information asymmetries, etc. To mitigate some of the enormous issues at hand, the Guide should aim to create and support a mechanism that forces both sides, business and State, into the most optimal place that serves and protects the vulnerable. In fact, if the investment contract itself pressures both sides toward the equilibrium because as it stands the interests of the stronger parties will always have the advantage. This Guide should go beyond the available direction and help create conditions that move closer to the optimal. Therefore, a Human Rights Audit section is necessary under Chapter 3. A Human Rights Audit would stand to thoroughly implement, document and disseminate all information in a transparent manner to all parties involved, including the vulnerable populations affected by the investment.

39. The purpose is to create contractual conditions that force the State/Investors to provide representations and mitigate the exploitations of vulnerable populations. Furthermore, a complete Human Rights Impact Audit should include, but not be limited to risks to human rights defenders, risk to people, ecosystems, management of human rights issue, transparency and monitoring of the assessment, and responsibilities of each party. The recommendation is to include a Human Rights Audit by the State/Investor and analyse the impact and thereby their responsibilities towards the populations affected by the investment.

40. The eighth comment states the need for the Guide to advise setting up and implementing cross-border paperless transaction management and safeguards. The secure transmission of data between State/Grantor and Investor is crucial and need to be addressed and safeguards must be agreed upon and thus, transfer of confidential data over a secure channel needs to be part of an investment contract. Therefore, the best practice for securing data through end-to-end file encryption must be used. Furthermore, a data risk management plan including all protocols and necessary steps must be agreed upon. In their opinion, a new sub-section C (Data Security) to be added to Chapter 3. V facilitating cross-border paperless transactions and necessary mechanisms for the protection of data must be part of the agreement.

41. In the ninth comment, an emphasis is given to adequately define the term 'large-scale transfer of tenure rights' in the Guide. It is noted that the Guide does not define what constitutes a large-scale transfer. Thus, a change is suggested in Preface I. Paragraph 5 (Purpose) to bring more clarity.

42. The tenth comment refers to the need for responsible investments. The need as specified is based on false economic assumptions to promote economic growth and suggest food security can only be achieved through investment. The Guide takes for granted and does not question or allow for the flexibility of an alternative economic and monetary framework. Thereby, it follows, supports and promotes an economic model endorsed by the current international framework created and controlled by the Western States. The Guide's purpose should be to help all parties navigate the current climate, and the ways to bring in how Sustainable Development Goals can be achieved may be varied. Consequently, it is suggested to Change Introduction I, to include that a more responsible investment in agriculture is required from public authorities, private sector investors and small holder farmers to achieve no poverty, and zero hunger, goals.

43. In the following comments, it is suggested that the Guide should insert additional key questions relating to ecological interests and impact on the ecosystem. These long-term and broad ecological questions relate to the impact of investment on future generations. Therefore, it is suggested to include two questions under Chapter 2. IV. A.1. par. 53, 'what are the overall ecological interests of the local populations?' and 'How is the investment impacting and affecting the larger ecosystem today and the health of the biodiversity in the future?'

44. Furthermore, another suggestion is to include a section on tenant rights in the Guide. It is assumed that in some instances there might be an improved property on the acquired investment land occupied by tenants, a tenancy right clause based on local rental and property laws should be followed. Accordingly, the investment contract should ensure appropriate provisions for resettlement or provide for other measures according to the tenancy rights. Thus, a section on tenant rights is recommended to be added to Chapter 2. Section II. (D). (Other Stakeholders).

45. The last comment is related to the supply chain process. It is suggested that the Guide should encourage investors to ensure that rural producers are paid a living wage and there is transparency in the supply chain process. For example, in coffee sales, the majority of the value is concentrated in the hands of the final seller and the roastery, whereas very little value is provided to the rural producers. They recommended that the Guide should encourage all members of the supply chain to assume responsibility for fair wages rather than the local minimum wages as it does, at present. Furthermore, they have recommended adoption of new technologies that can increase transparency in the supply chain, such as blockchain. Hence, they have suggested all members to assume responsibility to ensure rural producers are provided fair wage all year round and make necessary changes at the end of Chapter 3, paragraph 98 (encouraging an outgrower scheme).

### **III. AFRONOMICS LAW WEBPAGE**

46. To raise awareness about the Zero Draft of the UNIDROIT/FAO/IFAD Legal Guide on Agricultural Land Investment Contracts (ALIC) (hereinafter the ALIC Guide) and to ensure that it responds to the actual needs and reflects best practices, an online symposium was hosted on the Afronomics Law webpage in order to seek inputs from stakeholders. This symposium was introduced by Mr. James Thuo Gathii who is one of the ALIC Working Group experts who participated in the three-year consultative process during which the ALIC Guide was drafted. In total ten original contributions and invaluable insights on how to improve the Guide were received through this platform, as detailed below.

#### **Mr. Michael Fakhri** (University of Oregon)

*(Associate Professor in International Law at the University of Oregon)*

47. Mr. Michael Fakhri sent two comments related to human rights and agricultural land investment contracts. In his [first post](#), he acknowledged that the ALIC Guide provides an invaluable contribution to address the relationship between human rights and the transboundary movement of capital. He noted this issue is particularly addressed in the ALIC Guide in theoretical terms during the discussions about private and public law. In his opinion, the ALIC Guide encourages fair and transparent agricultural land investment transactions for all relevant actors and presents an unprecedented commitment to human rights. It supports human rights as a set of obligations that may create a business risk if not respected (due to legal liability and political unrest).

48. To support this argument, he provided two examples. First, the ALIC Guide provides guidance on how to reduce human rights risks by addressing it as a contractual safeguard. In his words, "the ALIC Guide provides local communities' leverage in their human rights claims when dealing with their own government and foreign investors". They are guided to request more time and resources to

study an investor's offer and to maintain the ability to refuse a deal. The second example mentioned is that the ALIC Guide defines "legitimate tenure right holders" very broadly and explains how it is in a business's financial and legal interest 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."

49. Subsequently, his [second submission](#) discussed how the ALIC Guide can better align with human rights by including a broader reflection on the inherent link between the right to food and agroecological practices. He explained how the right to food may provide businesses and local communities better tools for managing their negotiations and potential relationships and drew attention to how this right may be progressively realized through agroecology. Mr. Fakhri also acknowledged the importance given in the ALIC Guide to disclosure duties and to impact assessment obligations. He noted that it would be nice if paragraph 2.95 of the ALIC Guide reflected the order in which each of the four types of impact assessments appear later in the text. He explained that each impact assessment derives from a different source of authority and implies a different degree of obligation but drew attention to the fact that separating these assessments may have unfortunate legal and analytical implications. Moreover, he noted that multiple assessments may "create a disjointed understanding by all parties and a headache as a matter of project management." He reiterated that the notion of agroecology can contribute to integrative thinking of all the different types of assessments.

50. He presented a hierarchy of impact assessments in terms of how mandatory they are and asserted that human rights should be central to all assessments. However, he mentioned that the ALIC Guide includes provisions for respecting local parties' rights when addressing environment and social assessments but does not refer to these rights when describing economic impact assessments. He said this is legally inconsistent and called for a revision of the topic on economic impact assessment in the ALIC Guide since it is currently defined "very narrowly", including only the need to measure effects in terms of price, value and profit. He underlined that the economic impact assessment should include not only reference to local rights, but also an institutional analysis to examine how certain large-scale transactions may alter existing economic institutions such as households, local and global markets, and public administration, as well as may create new inequalities (gender, race and class).

**Mr. Tomaso Ferrando** (University of Warwick Law School)

*(Assistant professor of International Economic Law at the University of Warwick Law School)*

51. Mr. Ferrando warned about the risk of the ALIC Guide becoming another non-mandatory instrument that attempts to normalize the inherent limits that characterize large-scale investments in land. He pointed out that state-investors contracts can crystallize a situation that is only reversible "with strong political will and significant resources (especially if the contract is covered by a bilateral investment treaty)". He explained these contracts are often signed without any form of participation or involvement of the local communities and that some contracts may contain clauses where customary and occupied land is defined as State land and empty. He pointed out the risks of some contracts providing unlimited access to water to the investor and giving them priority over conflicting rights, while imposing almost no cost for the rent and offering full tax benefits.

52. He noted the ALIC Guide strongly advocates for more participation, information sharing, consent, grievance and includes the possibility of introducing clauses in favour of third-party beneficiaries. However, he drew attention to the fact that the ALIC Guide does not consider the cost of this involvement (both financial and organizational).

53. Furthermore, he mentioned that while the Guide does a good job recognizing the importance of including clauses concerning tax rates, transfer pricing, and export and import duties, in his opinion

contracts should not be considered a tool to “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”, as proposed by the ALIC Guide in paragraph 3.66.

54. He considered the ALIC Guide ambivalent in some parts, such as when it takes for granted that it is the role of the State to defend the private property of the investor against any disturbance, but also recognizes, in paragraph 3.137, that physical protection of the investment should occur within the limits set by the Voluntary Principles on Security and Human Rights, and recognizes, in paragraph 4.45, that the investor’s contribution to the State’s breach of duty shall be considered to reduce the recoverable damages or to deny the possibility of an action. He enquired why the ALIC Guide did not suggest the integration of a human rights’ clause allowing the State and the victims of human rights’ abuses to immediately terminate a contract, noting this could be linked with the innovative proposal of a clause in favour of third-party beneficiaries. Therefore, he suggested including more information on breaches of the contract for human rights’ violations in paragraph 4.86 of the ALIC Guide.

55. Finally, Mr. Ferrando mentioned the need to consider that private and public investors cannot disentangle their actions from the extraterritorial obligations that their home States have to guarantee that no national is involved in the violation of human and environmental rights abroad. Moreover, he noted the ALIC Guide could pay more attention to the way in which conceiving land and tenure rights in the context of global value chains can multiply the relevant spaces of engagement and challenge the traditional notion of jurisdictional spaces and fragmentation.

**Ms. Titilayo Adebola** (Aberdeen University)

*(Lecturer, Aberdeen University, Law Faculty)*

56. Ms. Adebola acknowledged that the ALIC Guide presents nuanced information and gives detailed guidance on the essential components of agricultural land investment contracts. However, she drew attention to how the access to food component is addressed and noted that the Guide does not properly deal with intellectual property rights (IPRs).

57. She mentioned that the ALIC Guide should clarify whether the food crops produced under agriculture land investment contracts would be for domestic consumption or export markets. Referring to the “no poverty” and “zero hunger” sustainable development goals, she highlighted that domestic realities and interests of host States should be prioritised. She suggested that the ALIC Guide should recommend the adoption of a “two-step distribution strategy” according to which meeting domestic consumption demands should be compulsory and an explicit provision should be included in the contracts to specify the percentage of production destined for domestic consumption. In her opinion, this two-step strategy aligns with Article 11 of the International Covenant on Economic, Social and Cultural Rights that provides for States to ensure the right of everyone to adequate food by improving the methods of production, conservation and distribution of food.

58. In terms of IPRs, she proposed their inclusion in the section dedicated to impact assessments in the ALIC Guide. She remarked that regardless of the percentage of small-scale farmers in host States or their prevalent traditional farming practices, investors backed by multinational seed/chemical/fertiliser companies, often lobby for the introduction of the plant breeders’ rights system proposed by the International Convention on the Protection of New Varieties of Plants (UPOV). She emphasized that the UPOV grants strong plant breeders’ rights and limits small-scale farmers rights to save, reuse, exchange or sell farm-saved seeds, which are fundamental to their farming practices and livelihoods’. Drawing from the background on the agricultural realities in Tanzania, she asserted that the adoption of the UPOV plant breeders’ right system is unsuited to least developed countries. Hence, she suggested reviewing the Guide to include the assessment of

IPRs among the types of impact assessments that are relevant to agricultural land investment (notably by including reference to IPR in pages 10, 18, 22 to 24, and 43).

**Mr. Chidi Oguamanam** (University of Ottawa)

*(Associate Professor, Faculty of Law (Common Law Section), University of Ottawa)*

59. After reviewing the phenomenon of globalization and how it has yielded legal harmonization, capitalist structuring and opening of markets under trade liberalization, Mr. Oguamanam pointed out that developing and least developing countries, especially African countries, are generally coerced to think that their quest for development will be best realized under a free market economic framework.

60. He also drew attention to the intellectual property rights topic by describing the implications that the World Trade Organization (WTO) TRIPS Agreement and the breeder-focused protection regime proposed by the International Union for the Protection of New Varieties of Plants (UPOV) may have for African countries. He outlined the problem of adopting the “pro-industry UPOV” and provided information on the African Union’s Model Legislation on the Protection of Rights of Local Communities, Farmers and Breeders for the Regulation of Access to Biological Resources of 2000, as an alternative.

61. Mr. Oguamanam noted that the ALIC Guide “addresses, in practical ways, virtually all conceivable concerns over how to ensure that foreign direct investment (FDI) in large agricultural lands are harnessed into opportunities to tackle the prevailing structural defects and asymmetries in globalization of agricultural production”. In his opinion, with the right political will, the ALIC Guide promises to be a pragmatic way to tackle the “unrelenting siege on African countries which have failed, so far, to rise to the challenge”. He perceived that the ALIC Guide addresses all conceivable concerns over how to ensure that FDIs tackle the prevailing structural defects and asymmetries in the globalization of agricultural production.

**Mr. Nicolás M. Perrone** (Durham Law School)

*(Lecturer in Law, Durham Law School, Durham University)*

62. Mr. Perrone first mentioned the positive aspects of the ALIC Guide, noting it goes beyond the classical discussion on the outcome of investor state dispute settlement cases and takes into account the development challenge by addressing issues such as the distribution of benefits, costs and risks associated with foreign investment. Recognizing that many international organisations insist that more private investment is needed to meet the sustainable development goals (SDGs), he emphasized the Guide is particularly interesting because it considers how host states and local communities can achieve a fairer distribution of benefits, as well as how to make the law more responsive to the costs and risks of host states and local communities. He noted the Guide takes into account the plurality of laws applied to foreign investment (international law, domestic law, contracts, voluntary guidelines, and codes of conduct) seriously and therefore represents a significant step in the right direction by bringing a detailed discussion of agricultural land investment contracts and several issues that are central to ensuring that foreign investment contributes to the SDGs. However, he pointed to the Guide’s broad approach as problematic, noting three issues that deserve to be developed in greater detail.

63. In his opinion, the relationship between agricultural land investment contracts and other laws could be more explicit and detailed to highlight the challenges posed by some investment awards. With substantial cases as evidence, he highlighted that striking a fairer distribution of benefits, costs and risks in the contracts may be pointless if, for instance, investment arbitrators privilege foreign investors’ certainty and *pacta sunt servanda* when resolving disputes.

64. Another risk lies in the use of contracts as a governance tool, “whereby foreign investors and states are put at the same level when bargaining or when arbitrators interpret the terms of a

transaction”. He noted that a rigid transactional model may increase the rigidity of the governance structure and open the door for foreign investors to demand “regulatory givings” such as tax incentives. Thus, he suggested the Guide could elaborate more on an alternative domestic law model, which could be contractually supplemented in special circumstances. Moreover, he added that a transactional model limits the participation of local communities and due to asymmetric information, the Guide should provide more detailed examples of participatory and cooperative structures.

65. Finally, he acknowledged that the Guide will promote better public decision-making in the field of agricultural foreign investment, but mentioned that other initiatives and appropriate enforcement mechanisms might also be necessary, because States, in practice, tend to favour foreign investors and domestic elites to the detriment of local people’s well-being.

**Mr. Sam Szoke-Burke** (Columbia Center on Sustainable Investment)

*(Legal Researcher, Columbia Center on Sustainable Investment)*

66. Mr. Szoke-Burke considered that the ALIC Guide’s discussion on multi-actor contracts makes the negotiation of such contracts more inclusive and creates opportunities for communities to influence negotiations. However, he pointed out practical challenges to achieving the multi-actor contracts described in the Guide, noting that governments may lack the incentive to cede power and bear the cost to include communities in negotiations. Furthermore, he mentioned communities may lack the adequate resources to prepare for negotiations. Hence, he outlined that multi-actor contract negotiations should be conducted in faithful compliance with the free, prior and informed consent (FPIC) principle. In addition, he noted the need for innovative ways of funding technical support to ensure that informed negotiations are also culturally sensitive and accessible to communities.

67. He suggested that despite the challenges, multi-actor contracts could endow communities with legally enforceable rights to hold investors to account. In other terms, multi-actor agreements might enable the community with concrete influence, rather than inheriting third-party rights or third-party beneficiary clauses whose scope may or may not have been subject to community consultation and co-creation. He concluded that with the right framing and follow-up, the multi-actor agricultural land contracts suggested in the ALIC guide could be a game-changer and help communities retain control over their lands and resources.

**Mr. Philip Seufert** (FIAN International)

*(Food First Information and Action Network – FIAN International)*

68. After sharing information on FIAN’s work in applying a human rights-based approach to land issues, Mr. Philip Seufert suggested the ALIC Guide should further take into account the policy guidance developed by the UN Committee on World Food Security (CFS) in terms of what investment is best suited to benefit small-holder farmers, in particular the CFS Policy Recommendations “Investing in smallholder agriculture for food security” and “Connecting Smallholders to Markets”. He acknowledged the Guide focuses on contract law to address the issues arising from large-scale land deals, but noted some serious limitations in this approach, which are likely to limit the Guide’s ability to address key issues related to land deals and ensure accountability.

69. In his opinion, an approach that focuses merely on the obligations, responsibilities and rights of contracting parties leaves out important actors of a given land deal and does not address the power relationships in the case of “transnational investment webs”. He explained that the entity that operates on the ground (the contracting party) is not necessarily the entity that controls the investment and acknowledged that other actors that are not party to the contract play an important role, bear responsibilities, and therefore need to be held accountable for negative impacts of a given investment. He recognized that the Guide to some extent addresses some of these relationships between the “investors” and other actors, such as “corporate organization”, “affiliates”, and “other



stakeholders” including banks, insurers and “supply chain participants” (paragraphs 2.12, 2.13 and 2.26), but noted it currently does not address the issue of how these “other actors” can be held accountable.

70. In addition, he highlighted the limitations of focusing on “contractual non-performance” as the basis for remedies to address the impacts a land deal might have on people and communities. In his view, this focus on contract law bears the risk of limiting the access to remedy by affected communities or individuals, either because they are not contracting parties, or because the harm suffered does not refer to the object of the contract. He also noted that the Guide’s proposals regarding grievance mechanisms and dispute settlement risk allowing corporate investors to use their own mechanisms to impede communities to access justice using state based quasi-judicial and judicial mechanisms which could be more effective.

71. Therefore, he suggested that the Guide should broaden its approach beyond contract law and extend the duties and responsibilities arising from a contract to all the existing business relationships that are involved in a land deal. The Guide could move from an approach that asks for transparency of the “corporate organization” (paragraph 2.12) to one that aims at accountability of all involved actors in case of abuses or harm, be it affiliates, financiers or actors that are linked to a land deal through the value chain. Likewise, the Guide should propose clauses that impede corporate investors from using internal non-judicial grievance mechanisms to obstruct access to justice by affected communities or people.

72. Furthermore, Mr. Philip Seufert suggested the Guide should incorporate human rights and environmental law more consistently by drawing attention to the importance of cooperation between States and by clarifying situations of conflict between sources of international law (e.g. between human rights and investment protection).

**Mr. Bayo Majekolagbe** (Dalhousie University)

*(PhD candidate in law at the Schulich School of Law, Dalhousie University)*

73. Mr. Bayo Majekolagbe shared his opinion about the strengths and loopholes of the Guide in addressing environmental protection, particularly, impact assessment, biodiversity and ecosystem services, and climate change mitigation and adaptation. Noting that “sustainability is not a buzzword to be thrown around”, he regretted the lack of a definition of sustainability in the context of ALIC, as well as a working definition of what constitutes “agricultural lands” and “large-scale investments” in the Guide. He mentioned it is not clear if the Guide includes, for instance, lands for agricultural bioenergy or if it is limited to food agriculture.

74. Despite recognizing “Impact Assessment” as one of the most prominent terms in the Guide, Mr. Majekolagbe noted that the “triple bottom line” approach adopted to specify its dimensions (human rights, environment, social and economic dimensions) can be criticized as being divisive, making integration difficult, and centering trade-off. He noted a more comprehensive framework should be adopted to emphasize the interdependence of biophysical and socio-economic concerns, mainstream the precautionary principle, focus on encouraging positive steps rather than mitigating negative effects, and to set and enforce inviolable limits, as well as to relegate trade-offs as options of last resort and insist on multiple reinforcing and durable gains. He explained these dimensions are the central components of what is described as “Sustainability Assessment” and said that without adopting these requirements as a basis for impact assessment, the Guide will continue emphasizing just on the avoidance of negative impacts rather than stimulating the advancement of positive outcomes.

75. Therefore, he suggested the Guide should not refer to the four distinct types of impact assessments but be adapted to the “Sustainability Assessment” approach to provide a platform for

the integrated consideration of the various layers of impact assessments. He said the ALIC Guide could recommend the application of the sustainability assessment by proposing that the identification of context specific sustainability objectives should be jointly done by grantors, tenure right holders, community stakeholders, and the investors.

76. Another valuable point he mentioned was that the Guide needs to pay more attention to the role of agriculture in mitigating climate change. In addition to the Guide's current recommendations on low to zero tillage and multi-cropping, he suggested including the improvement of soil carbon, soil health and fertility, as well as improved nutrient use as other obligations. He mentioned initiatives including the Koronovia Joint Work on Agriculture and the 4 per 1000 initiative could be used as references to further explain the "obligation to embark on climate-enhancing agricultural practices catering both to net zero emissions and/or the sequestration of GHG". In addition, Mr. Majekolagbe highlighted that the Guide should recommend that the climate obligations included in the contracts should be updated according to the actualization of a State's nationally determined contributions (NDCs) adopted under the Paris Agreement.

77. Regarding forest conservation and deforestation, he pointed out that concepts like deforestation, afforestation, and reforestation were missing and called for an expression of discouragement of deforestation and the cultivation of agricultural areas with high and long-term carbon sequestration potential like peatlands.

78. He proposed an innovative approach to contracts for agricultural lands, which allows for integrated and/or efficient use of lands under which the grantors convey use-specific rights to investors, while retaining the right to subsequently donate rights for other compatible usages. In his opinion, sustainable use-based conveyance will not only ensure efficiency and limit further encroachment on uncultivated and forested lands but will also likely result in more profit for landowners.

79. Finally, he suggested to encourage the inclusion of clauses which will protect the environment for its own sake and not necessarily for the "services" humans benefit therefrom.

**Ms. Sara Seck** (Dalhousie University)

*(Associate Professor at the Schulich School of Law, Dalhousie University)*

80. Ms. Sara Seck acknowledged that the ALIC Guide suggests contracting parties to address the challenges of climate change in their agricultural land investment contracts, however, she drew attention to the lack of link between climate change and human rights. She asserted that in a time of climate crisis, it is highly problematic to be treating climate change as a small subset of environmental issues as if they can be balanced against economic or social concerns. She recommended that the final text of the Guide should consider more seriously the implications of climate crisis for agricultural land investment contracts, and pay close attention to the findings of the 2019 IPCC report entitled Climate Change and Land: an IPCC special report on climate change, desertification, land degradation, sustainable land management, food security, and greenhouse gas fluxes in terrestrial ecosystems.

**Ms. Elizabeth Gachenga** (Strathmore University)

*(Deputy Vice Chancellor, Academic & Student Affairs Strathmore University, Nairobi)*

81. Ms. Elizabeth Gachenga commended the ALIC Guide for being a comprehensive instrument that effectively highlights the critical components of agricultural land contracts and for acknowledging the need for ensuring that agricultural land investments go beyond the fulfilment of the basic contractual elements. However, she noted that in the attempt to be comprehensive the Guide may

not be very user-friendly to all its intended users. For her, the Guide is very useful for legal professionals, but may not benefit local communities who are often the legitimate tenure holders and communities affected by the investment since they are not likely to be able to afford the expenses of engaging professional legal representation. She suggested the Guide should include a summary with an FAQ section that summarizes the main issues. Another way to address this challenge is to require investors to bear the cost of legal representatives. However, she underlined the need to consider the high risk of conflict of interest for such lawyers.

82. Ms. Gachenga tested the applicability of the Guide to the Kenyan legal framework noting that there is a myriad of national laws applicable (Constitution, Law of Contract, Land related laws, Agricultural laws, the legal framework for environmental management, and Customary law). She mentioned that the Guide's emphasis on due diligence in the identification of the parties to the contract is very relevant and critical in the Kenyan context. However, she suggested that the Guide should further caution against the risk of elite capture, political interference, bad faith occupants and the dynamics of conflict between communities over land tenure, as well as the risk of local community advisors being disengaged from the communities. Moreover, she said the Guide's broad definition of stakeholders would make the process of seeking consent very difficult and recommended the inclusion of limitations regarding the requirement of mapping stakeholders to avoid an endless list. Still reflecting about the challenges related to the free, prior and informed consent of the parties to the contract, Ms. Gachenga said the Guide could consider requiring investors to prepare FAQs with the main terms and conditions, as well as add that notices for public consultation should be made in vernacular radio stations, as a means to address the language barriers.

83. Finally, she outlined that the drafters of the Guide could consider developing a preamble akin to "Our Common Future" to reiterate the importance of abiding by best practices, as a basis for a pro-active approach to ensuring ALICs contribute to sustainable development.

#### **IV. GLOBAL FORUM ON FOOD SECURITY AND NUTRITION (FSN-FORUM)**

84. An [online consultation](#) was moderated by the Global Forum on Food Security and Nutrition (FSN-Forum) and hosted on the Food and Agriculture Organization of the United Nations' (FAO) website to invite experts willing to share their thoughts and inputs on the Zero Draft of the future Legal Guide on Agricultural Land Investment Contracts (ALIC). Comments concerning the general approach of the Guide or on specific Chapters, sections or issues were welcomed and participants were invited to answer the following questions:

- a) Are there sections in the draft Guide that appear to be non-exhaustive or to have gaps in the addressed issues? If so, how would you propose to bridge them?
- b) Are there sections that lack clarity? If so, how would you propose to clarify them?
- c) Does the draft Guide present any sections where the content is redundant (i.e. has already been presented elsewhere)?

85. In total, 34 comments were sent by 14 experts through the FSN-Forum and their main recommendations are highlighted below.

**Ms. Yixin Xu** (Southwest University of Political Science and Law)

*(Southwest University of Political Science and Law, China)*

86. Ms. Yixin Xu commended the ALIC Guide for being an insightful and comprehensive instrument especially in terms of avoiding conflicts between various actors and improving their

performances on sustainable agricultural practices. She queried the decision to refrain from referencing domestic legislation, citing case studies or quoting contract clauses in the Guide. She remarked that it would be helpful to include references to cases from international courts, noting, for example, that section 3.111 mentions that “...international courts increasingly require States to conduct and demand an environmental impact assessment...” but does not include a footnote with the relevant case. Remarking that the lawyers involved on the grantors’ side may not have full professional proficiency in English, she questioned whether the revision of the ALIC Guide could include a format template for users in practice as an annex attached to the guidelines. In her opinion, straightforward contract clauses may be helpful to make the Guide more practice-oriented for developing countries.

87. She observed the need to further elaborate on the role of independent certification schemes, noting that foreign private investors may not voluntarily follow the Guide unless there is enough price premium for more responsible agriculture activities or company branding. She stated that several separate parts of the Guide mentioned concepts regarding certification schemes very briefly: para. 2.26. “certification providers” (p. 30), para. 2.56 “certification schemes” (p. 36), para. 3.112 “private standards and multi-stakeholder certification schemes” (p. 74), para. 3.122 “private certification schemes” (p. 77), para. 3.150, “certification bodies, which may be public or private entities” (p. 82) and recommended providing a clear definition at the beginning to explain more about how these certification schemes operate and specific rights and responsibilities that need to be agreed on in the land investment contracts.

88. Acknowledging that the Guide mentions several times that environmental issues are one of the important components of the land investment bargain, she suggested the Guide should make the “four pathways to ensure positive environmental results” more evident in the table of contents and more visible within the subtitles. Finally, she provided information on the newly amended Land Administration Law of the People's Republic of China and suggested the Guide could have an appendix at the end showing the available official online sources of relevant countries’ national legislation.

**Mr. Fabiano de Andrade Correa** (Food and Agriculture Organization of the United Nations, FAO)

*(PhD, International Legal Consultant, Food and Agriculture Organization of the United Nations, FAO)*

89. Mr. Fabiano de Andrade Correa advised making the Guide “a bit more digestible for readers, as it is quite long and complex”. He recommended including a summary with quick guidance by topic focusing on the different stakeholders (e.g. investor, grantor, legitimate right holder, etc) and potentially including “model clauses” at the end of the Guide. In addition, he suggested the Guide could provide a definition of the term “responsible investments” and seek to maintain consistency in the use of this term throughout the text, as sometimes “responsible investment” is used, and others “responsible and sustainable”. Moreover, underlining that the role of laws of the investor’s State in incentivizing/requiring responsible investments was not explored in the Guide or mentioned as an area of concern for those performing due diligence, he called for further development of this topic.

90. With regard to the section on the “Rights and Obligations of the Parties” (Chapter 3), he recommended further considering food security and the realization of the Right to Food, as recognized under CFS RAI principle 1, when negotiating an investment in agriculture. Mr. Correa also asked for clarification on the role investors may have to safeguard food security in the host State, e.g. through a due diligence not to invest in crops that would potentially present a challenge for food security, such as biofuels or export crops. He drew attention to the importance of including more guidance on how to include public health (e.g. pest control) and phytosanitary standard concerns, mentioned in CFS RAI principle 8, in agricultural land investment contracts. Finally, he raised a point with regard to the Free, Prior and Informed Consent (FPIC) and its potential applicability beyond

indigenous communities noting that the VGGT Technical Guide on FPIC emphasizes that, as an expression of the right to self-determination, “FPIC can be fairly interpreted as applying to all self-identified peoples who maintain customary relationships with their lands and natural resources, implying it is enjoyed widely in rural Africa and Asia”. In this regard, he questioned if the Guide should refer to consultations with other non-indigenous communities to follow the FPIC standards and allow a “right to say no”.

**Ms. Wei Yin** (Southwest University of Political Science and Law)

*(Southwest University of Political Science and Law, China)*

91. Ms. Wei Yin highlighted that the Guide mentions corporate social responsibility, responsible business conduct, and also mentions negative risks (e.g. human rights, social and environmental impacts) that may occur if an investment is not sustainable. However, she pointed out that the guiding instruments used as the basis for the ALIC Guide mainly focus on human rights, while other relevant instruments in relation to social and environmental elements can seldom be seen. Therefore, she recommended further specifying what “other international instruments” the Guide refers to in section “Intro.5” (page 14). She also suggested including footnotes or examples in the same section to further explain “customary land rights”. Moreover, she called for a clear definition of “sustainable investment”, “responsible and sustainable investment” and similar expressions in the field of agricultural land investments, providing specific elements or factors. Likewise, she drew attention to the lack of definition of “local communities”.

92. In terms of structure, Ms. Wei Yin said that although the table of contents follows a clear order, the same does not occur in each chapter and the key point of each paragraph is not always clearly identified. She suggested reviewing the structure and classification of each part of the Guide, in particular Chapter 1, to avoid overlap. For instance, she cautioned about the use of the notion “legal rules” to include all mandatory domestic legal sources dealt with under paragraph 1.10, noting that “case law” may not be described as “legal rules”. She drew attention to the fact that the guide mentions applicable tax and finance regime (section 1.21), but in the bullet points, it only emphasises fiscal regime and accounting standards.

93. In addition, she mentioned that the topic related to “protection of investment and regulatory autonomy” (section IV, Chapter 3) needs to be improved. First, she suggested that the Guide should avoid using the term “investment codes” (section 3.126) since many countries may not have an investment code but an investment law or regulation. Second she advised adding a footnote to explain the examples of “discounted cash flow method, book value, replace value” mentioned in section 3.134, as well as to explain the concepts of “economic equilibrium clauses” or “stabilisation clauses” since many other people may not be familiar with these technical terms.

94. Finally, she noted that it would be helpful if the Guide mentioned the United Nations Convention on International Settlement Agreements Resulting from Mediation in the section that deals with “Enforcement of Settlements or Decisions Resolving A Dispute” in Chapter 6 of the Guide.

**Ms. Omoyemen Lucia Odigie-Emmanuel** (Nigerian Law School)

*(Centre for Human Rights and Climate Change Research, Nigerian Law School)*

95. Ms. Omoyemen Lucia Odigie-Emmanuel sent suggestions and text amendment proposals specifically for Chapter 1 of the Guide. She emphasized the need to include reference to the Right to Food in the text, as well as rephrased some parts of the section addressing “customary and religious rules” and included more information on the environmental dimension of Human Rights. She noted that investors have a responsibility to assess “the potential negative impact their investment would have on rights and establish precautionary measure to avoid such negative impacts”.

**Mr. Abdesslam Omerani** (High Commission for Water and Forests and the Fight Against Desertification)

*(High Commission for Water and Forests and the Fight Against Desertification, Morocco)*

96. Mr. Abdesslam Omerani recommended the inclusion of guidance on “payment schemes for eco-systemic services”, highlighting the importance of encouraging practices aimed at preserving ecosystems and ensuring the sustainability of their services by making them profitable for farmers, individually or in groups. With a view to promoting territorial and generational solidarity, he added that these payment schemes would make it possible to remunerate farmers, suppliers or protectors of environmental services.

**Mr. Selvankumar Thangaswamy** (Mahendra Arts & Science College)

*(Research Department of Biotechnology, Mahendra Arts & Science College, India)*

97. Mr. Selvankumar Thangaswamy mentioned that the Guide could highlight the benefits of cultivating different varieties of land and include guidance on sustaining soil fertility and restoration of soil microbial community.

**Mr. Policarpo Tamele** (Entrepreneur Development Agency)

*(Entrepreneurship Development Agency, Mozambique)*

98. Mr. Policarpo Tamele recalled the usefulness of creating a legal framework that safeguards the investor, family producers, and entrepreneurs. He provided information on the law applicable to land use in Mozambique and drew attention to its lack of effectiveness noting that the Guide may contribute to safeguard land use and safety for investors primarily.

**Ms. Joanna Grammatiki** (Agroecopolis)

*(Agroecopolis, Greece)*

99. Regarding the structure of the ALIC Guide, Ms. Joanna Grammatiki believes that Chapter 4 on Contractual non-performance and remedies needs to be clarified, in particular in terms of proposals for achieving cooperation between parties and stakeholders. In addition, she outlined that Chapter 6 on grievance mechanisms and dispute settlement is interesting but lacks details.

**Mr. Brandon Eisler** (Nutritional University)

*(Nutritional Diversity, Panama)*

100. Mr. Brandon Eisler recommend including more guidance on agro-redesign directives related to permaculture, as well to further highlight the pedagogical function that contracts may acquire for disseminating information about the harms of using certain chemicals in agriculture and the benefits of adopting natural organic farming techniques. He explained that there should be tax break incentives to those implementing sustainable agriculture.

**Mr. Aklilu Nigussie** (Ethiopian Institute of Agricultural Research)

*(Ethiopian Institutes of Agricultural Research)*

101. Mr. Aklilu Nigussie commended the Guide for not promoting investment for tenure transactions as this would create more unemployment and cumulative poverty with different

dimensions. He proposed some changes in the Preface of the Guide, for instance to include the distinction between irrigated and rainfed land and how it may affect tenure rights.

**Mr. Aliou Niang** (Centre africain pour le commerce, l'intégration et le développement (CACID))

*(Centre africain pour le commerce, l'intégration et le développement (CACID), Senegal)*

102. Mr. Aliou Niang noted the importance of addressing ethics in investment contracts on agricultural land. He emphasized that ethics, as a value, must be the foundation of these types of contracts which include economic aspects, market values and non-market values such as food security, nutrition and environmental protection and suggested that there should be a section dealing with economic and commercial aspects of investment contracts for agricultural land and a part dealing with non-market values in these contracts.

**Mr. Martin Zervas** (Humane Society International)

*(Humane Society International, United States of America)*

103. Mr. Martin Zervas drew attention to the benefits of farm animal welfare in terms of food quality, food safety, environmental impact, resource usage, labour conditions and financial viability and suggested adding more references of best practices in the Guide, such as the Farm Animals Responsible Minimum Standards (FARMS) Initiative's Responsible Minimum Standards (RMS). He explained that the FARMS Initiative and the RMS will be included in the Resources section of the upcoming UNEP Finance Initiative's Principles for Responsible Banking and proposed the following description to be included in the Guide's section 3.112: "In the farm animal sector, the Responsible Minimum Standards of the FARMS Initiative provide technical guidance with respect to breeding, raising, transporting and slaughtering five of the most farmed species: Beef Cattle, Chickens, Dairy Cattle, Laying Hens and Pigs."

**Mr. Jeffer Mxotshwa** (African Development Training Institute (ADTI))

*(African Development Training Institute (ADTI), South Africa)*

104. Mr. Jeffer Mxotshwa remarked that the Guide did not clearly identify the "political group as the target audience". He noted the key role they may have in influencing decisions and for the implementation of such a Guide and therefore called for more detailed guidance on the role political groups may acquire in agricultural land investment contracts. On the implementation of the Guide, he asked if a committee under FAO or WFP would be tasked with explaining the Guide to countries, especially vulnerable countries.

**Mr. Dick Tinsley** (Colorado State University)

*(Colorado State University, United States of America)*

105. Mr. Dick Tinsley identified the Guide as "another effort for Estate Management of smallholder lands" and shared some thoughts on estate farming noting the opportunities of sharecropping in which during the season of estate management the owners will receive 30% of the crop. He explained the importance of assuring the farmers the opportunity to work for the estate and that the combination of wage earning and share should provide a reasonable income to the farmers.

## **V. LAND PORTAL**

106. The UNIDROIT Secretariat also engaged with the [LandPortal.org](https://landportal.org) a non-for-profit organization which works to build an information ecosystem for land governance that supports better informed decision and policy making at national and international levels. The ALIC Zero Draft has been featured in the [News & Events section of their website](#) and they also circulated the notice via their news digest email list which contains nearly 10,000 people representing a broad range of interested parties, including researchers, government, journalists, etc.

## **VI. SOCIAL MEDIA OUTREACH**

107. With a view to raising awareness about the Zero Draft of the UNIDROIT/FAO/IFAD Legal Guide on Agricultural Land Investment Contracts (ALIC), information was also circulated via the social media channels, including Facebook, Twitter and LinkedIn of all three partners, UNIDROIT, FAO and IFAD.



**ANNEX I****Original comments received through the UNIDROIT Webpage<sup>1</sup>**

- **Ms. Jeannette Tramhel** (Organization of American States)

September 23, 2019

**UNIDROIT-FAO-IFAD Legal Guide on ALIC – Zero Draft****Comments from Department of International Law, Secretariat for Legal Affairs****Organization of American States****General Comments:**

This is an excellent initiative with potential to significantly contribute towards “greater and more responsible agricultural investment.” The importance of “more and better” agricultural investment cannot be underestimated; it is critical to the actualization of Sustainable Development Goal #2 “to end hunger, achieve food security and improved nutrition and promote sustainable agriculture.”

Therefore, my primary suggestion is that the authors might wish to reflect and reconsider the current underlying tone, which seems more like “well, we really don’t approve of [chewing gum in school] but if you are going to do it anyway, here’s a Guide to mitigate the negative effects.” Yes, there are many examples of “failed” Agricultural Land Investment Contracts (“ALIC”), but this Guide represents an opportunity to engage investors in a positive way in the necessary shift towards sustainable agriculture. Just imagine what can be achieved by harnessing the private sector towards a land systems approach for food production supported by an integrated food policy strategy.

Thus, my second point is to strengthen reference to SDG #2 as the overarching “rationale” as to why this Guide is necessary. The three main instruments that have been highlighted (UN Guiding Principles, VGGT and CFS-RAI) are key tools toward that goal but the connection between 1) those tools and the goal; and 2) use of the Guide to implement those tools, needs to be better explained.<sup>2</sup>

Thirdly, it might be helpful to restructure the Guide and include a new Chapter, immediately after Chapter 1 on Legal Framework, to address “Pre-contractual Issues.” That new Chapter would subsume the part of Chapter 2. IV on due diligence to address 1. Identification of potential parties and stakeholders; 2. Identification of possible site; and 3. Impact Assessments, as well as the other points of discussion on these issues that are sprinkled throughout the rest of the Guide.

Finally, the text needs to be thoroughly edited. Due to length and wordiness, many of the really key ideas are buried. Although a “Zero draft,” the amount of duplication and change in writing styles are distracting and make it challenging to offer more specific comments. In some areas the ideas are

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<sup>1</sup> The following are the raw comments received electronically from the various sources presented in chronological order of receipt.

<sup>2</sup> For example, most ALIC – and perhaps the reason for so many examples of “failed ALIC” – applies conventional agricultural methods that rely heavily on fossil fuels to produce large volumes of commodities at the expense of depleted ecosystems and biodiversity while contributing towards greenhouse gas emissions, rising rates of obesity, and diminished smallholder livelihoods. One main reason is because policies that affect agriculture, trade, environment and health are frequently in conflict and made in isolation from each other, rather than through the development of an integrated, food systems policy. This can be addressed by emphasis on the call for States “to develop stable and long-term national food security and nutrition strategies” contained in CFS-RAI (Principle 10.35). Then, (and perhaps only then), should ALIC be engaged in furtherance of such strategies and through use of agricultural methods based on a land systems approach for food production.

very well expressed, in others, not so much. Odd use of italicized words throughout that appears to be accidental as the use or intended emphasis is unclear.

### **Suggestions:**

- include references to Inter-American legal instruments, given that other regional instruments are included. For example, as the Inter-American Court on Human Rights is mentioned, include reference to the American Convention on Human Rights. The Panama Convention, etc.
- consider the publication: FAO, *EIA Guidelines for FAO Field Projects*; this might also serve as a standard for EIA conducted under ALIC. <http://www.fao.org/3/i2802e/i2802e.pdf>
- consider the publication: FAO, *PPPs for agribusiness development*; useful lessons learned from various international experiences that could be drawn upon. <http://www.fao.org/3/a-i5699e.pdf>
- see <http://www.ipes-food.org/> as a helpful resource, generally, on land systems approach.
- consider a section on choice of law and a “governing law clause”. Seems oddly excluded.
- “applicable law” is a term often used in private international law when referring to a choice of the law of a state that should be applicable (in this case, to the contract). In ALIC, the term is used in this sense but also to refer to relevant areas of the law that might be applicable, which is confusing. Suggest use “applicable law” in the first sense and “relevant areas of the law” in the second.
- “responsible investment” – Is this defined or explained anywhere? Will we know it when we see it? Reader needs a better understand of the goal. Perhaps quote directly from the source documents, to explain that, “Responsible investment in agriculture means investment that complies with the RAI Principles. It is investment in agriculture that ‘enhances food security and nutrition and supports the progressive realization of the right to adequate food in the context of national food security; that makes a significant contribution to enhancing sustainable livelihoods, etc.”
- consider reference to the recommendation that “States are encouraged to develop stable and long-term national food security and nutrition strategies” contained in CFS-RAI (Principle 10.35). Consider a recommendation that investors ensure the ALIC is consistent with any such National Strategic Plan and if none, perhaps recommend that investor support such an initiative.

### **Specific Comments:**

#### **CONTENTS**

- Chapter 6, III.B. – heading on page 9 not the same as on page 124.
- Annex II. – heading not the same as on page 132.

#### **PREFACE:**

##### **I. Overview and Purpose**

- As currently written, preface gets into the discussion instead of telling reader what Guide will discuss. How about following the approach of the Contract Farming Guide (“CFG”)?

“The UNIDROIT/FAO/IFAD Legal Guide on Agricultural Land Investment Contracts (ALIC) is primarily addressed to parties engaging in agricultural investments that involve a transfer of tenure and related rights, excluding sales of land. It provides advice and guidance on the relationship between the parties and with other stakeholders, from negotiation to conclusion of such investments, with a specific focus on ensuring that rights of legitimate tenure right holders are taken into consideration throughout the process. The Guide provides a description of important ALIC terms and a discussion of legal issues and critical problems that may arise and that should be considered in the course of negotiating such investments. In so doing, the Guide aims to promote a better understanding of legal implications for [ALIC investors/contracting parties] in the context of the international consensus concerning such investments as reflected in key principles and standards for land tenure,

agricultural investment and related areas. It thereby intends to promote more balanced relationships and to assist parties in designing and implementing ALIC consistent with these international principles and standards, thereby generally contributing to a conducive environment for greater and more responsible agricultural investment.”

[whether or not to include specific reference to the threekey instrument in preface, not sure... Perhaps if so, then only citations, and perhaps in a footnote. Then get into them in detail later...]

[remaining paras in Preface can follow similar tone of that in the CFG – keep it upbeat!]

- Preface 3 says “investments involving transactions of tenure... are not the preferred option...” and Preface 4 says “The guide focuses on [ALIC]s involving a transaction of tenure...” This is very confusing for the reader. Maybe something to clarify – “Nonetheless, such [ALIC] continue to be popular and therefore, in order to promote more responsible investment, this Guide...” etc.
- Preface 5 – “where [ALIC] continued to be used....”

## II. Approach and Use of Guide

- Some of these would fit better under Part I. (e.g., target audience)
- Preface 9 – confusing as written – “The Guide is .... contracts, including for whether acting for investors.....The Guide might also.... including by legislators,...”

## INTRODUCTION

### Editorial comments:

Stark difference in writing style in comparison with that of Preface. Editorial corrections such as the following examples are required throughout, but it is too time consuming to try to do this without having the document in Word format to enable the use of trackchanges.

- Intro 1. “Greater and more responsible investment, particularly in agriculture, is needed...”  
“...private sector investors ~~and in~~, by and with....”
- Intro 2. ~~That need for an~~ An increase in the quantity and quality of investment ~~relates to different~~ is required across all segments of agricultural value chains.... Investments ~~themselves can intervene~~ at different points ~~in~~ along those chains ~~and~~ can take many different forms...”

### Substantive comments:

#### I. The Role of ALIC

- Intro 1. The need for ag investment. This really could be expanded upon, with SDG #2 as the overarching goal. Make reference to the specific indicators, specifically 2A to increase investment and 2.3 to double productivity, but in balance with 2.3 to ensure secure and equal access to land, and particularly 2.4 to ensure sustainable food production systems. Then you can refer back to that later in the sections on EIA, etc.
- Intro 2. Follow CFG. Begin by explaining ALIC – what is it? As written, Guide gets ahead of itself and jumps into the problems and threats without explaining ALIC. Part II.A, Intro 12 where ALIC is defined seems to come “too late” in the introduction.
- Then explain “responsible ag investment” – what is it? How will we know it when we see it? Some of this is in Intro 4 and 5, pull from the source documents mentioned, VGGT and RAI.

#### II. Scope

- Perhaps the definitions might be provided earlier. In Scope, state clearly what is and what is not being covered by Guide.
- Intro 13. Might stakeholders also include NGOs? CSOs? Ag/Development agencies?

- Definitions need work. For example, perhaps instead of “government” as defined, it appears to intend to define “government land granting authority”?

## CHAPTER 1. LEGAL FRAMEWORK

### Editorial Comments:

1.6 – ~~broken~~ divided

1.12 – ~~solved~~ resolved

1.13 – include a footnote at “even if not binding” FN. See para. 1.14 infra.

### Substantive Comments:

#### I. Sources

- “customary international law” (1.14) and “custom” in the local context (1.11-1.12) are two different concepts and are explained therein. But in a few places throughout the Guide, it is unclear which is being referenced; consistent terminology would make for greater clarity.
- “Choice of law”. Seems odd that no reference at all is made to the choice of law, or “governing law clause”. Even though it may be self-evident that a contract involving land will almost always be governed by the law of the state in which it is located, it could at least be acknowledged. See the CFG, makes brief reference but it is important.

#### II. Relevant Areas of Law

- Consider re-ordering; perhaps group together those areas of law that are strictly domestic and those with an international element. Then briefly describe those areas of law and why relevant, rather than getting into the issues to be addressed, which is done later (to reduce duplication).
- 1.22 Difficult to imagine where an ALIC that could negatively affect food security should go ahead. How could it be consistent with VGGT/RAI?
- 1.22 Gender – “...whether the State’s legal framework ~~creates opportunities~~— is consistent with international provisions for the socio-economic empowerment of women.”
- 1.26 – switch order to: Transparency, monitoring and compliance.
- 1.26. – last sentence of first para. is unclear.

## CHAPTER 2. PARTIES, etc.

- See my suggestion, above, to re-structure and take Part IV. Due Diligence, and make it into a separate Chapter on “Pre-contractual Issues.”
- 2.1 - why not give “agricultural land investment contract” the abbreviation ALIC and use that throughout?
- Parts I and II overlap with the definitions for these parties in Introduction.

I. Legitimate Tenure Rights Holders is addressed here, and then again in II. C. why not combine and put all in II.C.

#### II. Contracting Parties

- Marked change in writing style from I.
- 2.10 – last sentence unclear – the state-owned enterprise IS the investor.
- 2.11 – needs to be clarified. “...may be domiciled domestically or ~~internationally~~ in another state.”
- 2.16, 2.18, weak.

- 2.17 – shouldn't the contract always be made in accordance with domestic law? – not only if the contracting party is a sub-national actor?
- 2.23 – "local community" often comprises several groups, not a single homogenous group.

### III. Contractual Arrangements

- 2.27 – sort of defines an ALIC, but so does 2.2., and Intro 12....
- 2.33 – elaborate
- 2.42 – unclear
- 2.43 – "create the implication" ??

### IV. Due Diligence

- 2.48 "...important to ~~understand~~ ascertain their identity, as well as the ~~location~~ source and nature of their rights."
- 2.54 – "...is ~~enshrined~~ defined..." OR "...enshrined in the VGGT and defines as follows:"
- 2.55 – "...is to ~~gather~~ identify / enumerate the concerns..."
- 2.56 – ~~attaining~~ obtaining consent...."
- 2.58 – "pressure ~~of~~ on communities"
- 2.67 – the right to say no – good!! Glad that has been included
- 2.79 – these RAI Principles are critically important – highlighting these is possibly the most important contribution of the Guide. Therefore, this needs to be emphasized and explained, not buried here. Conventional ALIC is typically NOT consistent, what RAI requires is a land systems approach and a shift towards sustainable ag. RAI Principle 6 has been cited – elaborate – ALIC that contributes to the restoration of ecosystem functions, including agro-ecological approaches.
- 2.87 – access to resources – this appears to be duplicated later in Chapter 3?
- 2.87 - Here too, the land systems approach should be emphasized. RAI, 6 and VGGT, Principle 3B, 5. Holistic and sustainable approach recognizes that natural resources are interconnected and adopts **an integrated** approach to their administration.
- 2.96 - Impact assessments are to be conducted by independent experts, but who pays? Investor? Still seen as "independent and objective?" Would also be helpful to outline when, during in the ALIC process, such assessments should be done. (VGGT 12.10 refers to "prior" – not helpful.) Increasing direction is towards *participatory* impact assessment, where the stakeholders are not merely passive, but take an active role, and later in M&E.
- Consider FAO EIA Guidelines for FAO Field Projects; some helpful guidance on application of EIA to field projects, procedures for formulating and screening projects, etc.
- 2.97 – FN 66 VGGT reference should be to Provision 12.10.
- 2.111 – EIA. Concern is that even in states that do have legislation that guides EIA, it is "old school" – frequently it IS a box-ticking exercise; instead, we need to encourage cumulative effects assessment. EIA should be done in a manner consistent with RAI, 6 and VGGT and emerging international standards that emphasize a systems approach.

### V. Contract Formation – seems to be duplication / overlap with Section III.

## CHAPTER 3. RIGHTS & OBLIGATIONS

- 3.1 - starts from a negative approach. Re-work the language, something like "ALICs provide financial benefits in the form of job creation and development of infrastructure while ensuring

that environmental impacts are minimized. ~~All too often~~ (really?) Sometimes, reality has fallen short of expectations... " etc.

- 3.3 "law applicable to the project" – here is an example where the phrase leads to confusion. Here it does NOT mean a choice of law from among the domestic laws of different states, as used in private int'l law, thus, it might better be re-phrased as "other subject areas of law."
- 3.5 – "applicable law" – again, which meaning is unclear.

#### I. Land Tenure

- 3.7 – no reference to choice of law or governing clause, seems odd.
- 3.8 – ~~"...clear understanding of the land~~ the same understanding as to the land that is the subject of the contract..."
- 3.9 – Legal Process ~~"...it would be advantageous for the contract to reflect~~ is imperative that the contract specify the land..."
- 3.10 – promotes outdated conventional approach. Instead, consider the need for a shift towards a land systems approach, where land management decisions are made on the basis of ecosystems, watersheds, etc.
- 3.15 – more details - duration? Commencement? Etc. " ...the contract generally has, ~~together with obtaining~~ subject to any necessary permits...possess and use the land for the specified agricultural activities."
- 3.17 – 3.20 – overlap / duplication with discussions on these topics in previous chapters.
- 3.26 infrastructure – perhaps reference to the UNCITRAL Guide on Privately Financed Infrastructure might be relevant.
- 3.40 – "...typically grant the exclusive right to conduct specified commercial ag operations within the designated land area..." – should that be included in the definition of ALIC? first time it is mentioned in Guide.
- 3.59 – mention is made here of domestic law. Perhaps a section to address that for all issues.
- 3.113 – this point could be clarified and greatly elaborated. (see general comments above.)
- 3.115 – here EIA is suggested as a pre-condition of the contract – include in the EIA section.
- 3.117 – suggest breaking out the reference to an eco-system approach/integrated land management and lead with that as a separate para. then others to follow – water, soil, etc.

Remaining Chapters address fairly standard topics and I have few comments at this stage.

- **Mr. José Manuel Canelas Schütt** (Universidad Catolica Boliviana San Pablo - Santa Cruz)

September 24, 2019

#### 1. Application of foreign law and extraterritorial jurisdiction:

It could be considered to expand more on extraterritorial jurisdiction and application of foreign law.

Foreign law and/or jurisdiction (understood as other than the law and jurisdiction of the host country of the investment) may be considered, for instance, when compliance with public policy/mandatory rules of other State(s) – including the Investor's State - is necessary and not available in the host country.

It could also be analyzed whether the application of foreign law could result from the enforcement of a foreign judgment that relates to or have effects on the contractual relationship of the parties.

Foreign law may naturally also be applicable under a choice of law agreement, inasmuch such choice is considered valid. Indeed, it may also result that the parties agree to apply different laws to different parts of their contractual agreement (*dépécage*). Such situation could also arise in States containing more than one legal system, as in the Plurinational State of Bolivia that has autonomous indigenous jurisdictions. It could also be the case that the applicable foreign law is a non-State law, such as the Unidroit Principles of International Commercial Contracts or other internationally recognized principles.

Foreign mandatory rules may also apply in regards to a range of other situations that could refer to “external” or “internal” factors of a contractual relationship. External factors could refer to taxation, third-parties’ rights; internal factors could refer to assignment or a relationship between principal and agent.

Articles 11 of the Inter-American Convention on the Law Applicable to International Contracts, and 11.2. of the Hague Principles on Choice of Law in International Commercial Contracts provide general regulation of foreign applicable law, due to public policy or overriding provisions.

In regard to extraterritorial jurisdiction, a typical example is corruption offences. In certain cases, companies behave under different standards when operating inside their borders than when they undertake business elsewhere, particularly when investing in less developed countries in sectors that are prone to the corruption risk, and where the Government or other stakeholders extort foreign companies<sup>3</sup>. Ever more increasingly, countries are fighting corruption in a more aggressive manner, following the lead of the UK and the US that prosecute such offences outside their borders when there is any connection with their jurisdiction<sup>4</sup>. This has obliged certain domestic companies to comply with foreign corruption laws, and address international corruption as a regulatory matter. There are also international instruments that criminalize international corruption. The Alic draft mentions very briefly one of them – the OECD anti-Bribery Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (par. 1.20), but fails to address the existence of other important ones, notably the Inter-American Convention Against Corruption and the United Nations Convention against Corruption.

The UN Guiding Principles on Business and Human rights – which establishes that businesses should ‘comply with all applicable laws and respect internationally recognized human rights, wherever they operate<sup>5</sup> - may also provide valuable guidance in this regard<sup>6</sup>.

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<sup>3</sup> See for instance the case of Swedish/Finnish telecom company Telia (before TeliaSonera), as reported by Transparency International:

[https://www.transparency.org/news/feature/trouble\\_at\\_the\\_top\\_why\\_high\\_scoring\\_countries\\_arent\\_corruption\\_free](https://www.transparency.org/news/feature/trouble_at_the_top_why_high_scoring_countries_arent_corruption_free)

<sup>4</sup> See UK Bribery Act of 2012, and U.S. Foreign Corruption Practices of 1977.

<sup>5</sup> p 25.

<sup>6</sup> This document establishes the following: “(...) at present States are not generally required under international human rights law to regulate the extraterritorial activities of businesses domiciled in their territory and/or jurisdiction. Nor are they generally prohibited from doing so, provided there is a recognized jurisdictional basis. Within these parameters some human rights treaty bodies recommend that home States take steps to prevent abuse abroad by business enterprises within their jurisdiction. There are strong policy reasons for home States to set out clearly the expectation that businesses respect human rights abroad, especially where the State itself is involved in or supports those businesses. The reasons include ensuring predictability for business enterprises by providing coherent and consistent messages and preserving the State’s own reputation. States have adopted a range of approaches in this regard. Some are domestic measures with extraterritorial implications. Examples include requirements on “parent” companies to report on the global operations of the entire enterprise; multilateral soft-law instruments such as the Guidelines for Multinational Enterprises of the Organisation for

## 2. Specific comments on paragraphs:

Preface 3: It may be considered clarifying that what is hereby discouraged are definitive transactions of tenure and related rights to investors.

Preface 6: It does not address foreign mandatory rules.

Intro 5 (Gaps in the legal framework): See comments on previous Section (' Application of foreign law and extraterritorial jurisdiction')

Intro 7: Consider drafting review: '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.' It was difficult to read and understand for me, and the phrase is repeated in par 2.28.

Par 1.1.: See comments on previous Section (' Application of foreign law and extraterritorial jurisdiction')

Par 1.7. et seq. (Sources of Law): Ibid

Par 1.8.: also on grounds of cultural criteria. See as a reference the Bolivian Constitution and the Jurisdictional Demarcation Act of Bolivia of 2011 (Ley de Deslinde Jurisdiccional). Bolivian legal system includes concepts such as 'intercultural interpretation', 'intraculturalism', and 'pluriculturalism'.

For instance, the Jurisdictional Demarcation Act establishes:

Art 2 (I): Given the pre-colonial existence of the native indigenous peoples (...) and their ancestral dominion over their territories, their self-determination is guaranteed within the framework of the unity of the State, which consists in their right to autonomy, to self-government, to their culture, to recognition of their institutions and the consolidation of their territorial entities.

Art 4 (c): 'The principles that govern this Law are:

(...) c) Cultural diversity: (...) is the essential basis of the Plurinational Communitarian State. All constitutionally recognized jurisdictions must respect the different cultural identities.

d) Intercultural interpretation: When administering and delivering justice, the authorities of the different constitutionally recognized jurisdictions must take into account the different cultural identities of the Plurinational State.

Par 1.11. Ibid

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Economic Co-operation and Development; and performance standards required by institutions that support overseas investments. Other approaches amount to direct extraterritorial legislation and enforcement. This includes criminal regimes that allow for prosecutions based on the nationality of the perpetrator no matter where the offence occurs. Various factors may contribute to the perceived and actual reasonableness of States' actions, for example whether they are grounded in multilateral agreement. (...) Although particular country and local contexts may affect the human rights risks of an enterprise's activities and business relationships, all business enterprises have the same responsibility to respect human rights wherever they operate. Where the domestic context renders it impossible to meet this responsibility fully, business enterprises are expected to respect the principles of internationally recognized human rights to the greatest extent possible in the circumstances, and to be able to demonstrate their efforts in this regard. Some operating environments, such as conflict-affected areas, may increase the risks of enterprises being complicit in gross human rights abuses committed by other actors (security forces, for example). Business enterprises should treat this risk as a legal compliance issue, given the expanding web of potential corporate legal liability arising from extraterritorial civil claims, and from the incorporation of the provisions of the Rome Statute of the International Criminal Court in jurisdictions that provide for corporate criminal responsibility. In addition, corporate directors, officers and employees may be subject to individual liability for acts that amount to gross human rights abuses".



Par 2.90.: In 2000, in the Department of Cochabamba (Bolivia) a conflict on the management of water, called 'La Guerra del Agua', raised international attention and generated profuse analysis. The study of this case may provide certain input.

Par 2.143.: Consider further analysis on party autonomy/freedom of contract.

Par 3.4.: See comments on previous Section (' Application of foreign law and extraterritorial jurisdiction')

Par 3.146.: See comments on par 1.8

Par 4.14.: For those not familiarized with rules of private international law or conflict of laws, this may not seem easy to grasp. It could be considered further elaboration.

Par 6.3.: This paragraph contains important information regarding choice of law. Consider including and developing this information in other parts of the Guide dealing with applicable law and sources of law.

It may also be considered the situation where a State has more than one legal system.

- **Ms. Caitlin Ryan** (University of Groningen)

September 29, 2019

Generally, I have quite a favorable impression of draft zero of the ALIC guidelines. I appreciate the attention to the cross-cutting interests of different stakeholders, and I am particularly happy to see that the definition of 'legitimate tenure rights holders' is broad enough to include those who may have informal rights and/or use rights.

I have three 'general' comments, and a number of smaller more specific comments

- 1) In the introduction, it is unclear if the point is to encourage investment that is more responsible, or an increase in (responsible) investment. The distinction is important. Further to this, it is not precise what 'responsible' entails – this can be defined quite differently by different parties, depending on their interests.
- 2) In some of the discussion of consultation and stakeholder mapping, there is a tendency to portray these questions as primarily technical in nature (i.e. the inclusion of a variety of stakeholders in mapping). However, what this risks missing is that some stakeholders are purposefully prevented from participation by local elites, or structurally prevented from participation such as because of the division of labor, seasonal out-migration, etc (One section that does this well is section 2.49). I would be of the view that the document could do a bit more to treat issues of inclusion/participation as fundamentally *political* rather than technical or legal questions. This has implications in terms of how to deal with competing interests and sources of authority for grantors – it may be difficult for investors (particularly outside investors) to see sources of competing authority over the right to be treated as the 'grantor'
- 3) Some of the document, (such as Chapter 3) seems to assume a minimal level of state capacity and political will to enforce its domestic law, and that state-level institutions (particularly Rule of Law institutions) have the capacity and political will to arbitrate disputes and ensure due diligence. Is there any way to account for situations where this may not be the case in whole or part? For example, Chapter 1 asks investors to understand gaps in law, but this doesn't require an understanding of gaps in state capacity and political will for *implementation* of law.

Smaller points:

- 1) Section 1.22 – promotion of gender equality – this is a welcome inclusion, but here also, the promotion of gender equality needs to be treated as a political question. Well-meaning attempts to increase gender equality can produce a back-lash if they are seen as a 'simple' technical matter.
- 2) Sections 2.80/2.81 In assessment of economic impact, there should be consideration for how economic activity is gendered

- 3) Sections 2.90/2.91 – Water is also highly gendered, and consultation should include women across a variety of age groups to ensure that changes to water rights do not increase women's labor burden
  - 4) Section 2.115 – There is an (unspoken) underlying assumption that treats economic activity as primarily formal economic activity. I would argue that there could be more focus on informal economic activity in assessing the impact of investment deals
  - 5) Section 3.57 – in research with rural communities in rural Sierra Leone, multiple respondents mentioned that they agreed to sign the lease because promises about the lease amount were given in USD, but payments were made in the local currency. They stated that the mention of 'dollars' convinced them to sign. There needs to be clarity for all involved in the lease negotiation process about what currency the lease amount will be paid in.
  - 6) Section 3.165 assumes a level of literacy and access to technology that people in rural communities may not have. This section could consider adding a provision for alternative means of sharing reports
- 1.0.

## • FIAN International

September 30, 2019

### I. Strengthen policy guidance on agricultural investments by and for smallholders.

According to UNIDROIT, FAO and IFAD, the draft Guide does not endorse large-scale land acquisitions, but acknowledges that land acquisitions continue to occur. It further states "that investments involving transactions of tenure and related rights to investors are not the preferred option for setting up an agricultural project" (Preface 3.), which echoes the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests (par. 12.6). It is very important that the draft Guide underlines this, but it should further take into account the policy guidance developed by the UN Committee on World Food Security (CFS) in terms of what investment is best suited to benefit small-holder farmers, in particular the CFS Policy Recommendations "[Investing in smallholder agriculture for food security](#)" and "[Connecting Smallholders to Markets](#)". This guidance clearly calls to prioritize investments by and for smallholders in order to ensure sufficient economic space for them; and that this prioritization is not always compatible with large-scale land acquisitions. Given that the draft Guide uses "agricultural land investments" as a framework for land acquisitions, it is important that it acknowledges more clearly that many forms of needed agricultural investments lie outside its scope.

We suggest to strengthen the focus established in Preface 3 and to stream it more consistently throughout the entire guide, especially in Chapter 6 on grievance mechanisms and dispute resolution. As it stands now, reference to other types of investment models is only found in the section on contract farming, outgrower schemes and supply chain relations, but there is evidence that such schemes and relations can also result in dispossession and other form of rights abuses.

### II. Address complex investment webs.

We believe that it is important to take the reality of land deals and land grabs as a starting point for any initiative aiming at providing guidance on responsible agricultural land investment. One aspect that needs to be highlighted in this context is the fact that the current wave of land deals is happening in the context of globalization, or, rather, the financialization of the global economy. By this, we refer to [the growing power and influence of global finance on the economy](#), and its increasing domination over the productive economy.

One expression of this is that "behind most large-scale agricultural projects is a web of global actors that make the project possible. These actors include banks and companies that are funding the project, and the companies that are buying the produce being grown or processed by it. All of these actors are necessary to the project's success, and all are aiming to earn a profit from it in one way or another." ([Blackmore et al., 2015: 2](#)) Some "investors" or companies are thus directly or

indirectly linked to land deals via financing schemes and shareholder agreements, which often involve complex, cascading relationships. Complex investment structures – or [investment webs](#) – that involve several actors, subsidiary companies etc. are a key feature of the current rush for land and need to be taken into account for any effort to preventing and addressing human rights issues.

The draft Guide's focus on contract law entails serious limitations in this regard. Indeed, focusing merely on the obligations, responsibilities and rights of contracting parties leaves out important actors of a given land deal. Furthermore, it does not address the power relationships within (transnational) investment webs. Simply put: the entity that operates on the ground – and is likely to be the contracting party – is not necessarily the entity – or, at best, not the only one – that controls the investment. In the majority of cases, it is very likely that other actors that are not party to the contract play an important role, bear responsibilities, and therefore need to be held accountable for negative impacts of a given deal. The draft Guide recognizes to some extent that "investors" may be linked to other actors – paras. 2.12, 2.13 and 2.26 refer to "corporate organization", "affiliates", and "other stakeholders" including banks, insurers and "supply chain participants" – but it does not address the issue of how these can be held accountable. Basing accountability exclusively on the contractual relationship misses the fact that complex and opaque investment webs are used deliberately by transnationally operating actors ("investors") to [distance themselves from any type of liability for the impacts of their operations](#). In practice, this puts the burden on affected communities or individuals to prove the responsibilities and power relationships within such webs in case of harm, which raises significant challenges. In a context of lack of transparency it is in many cases impossible for affected groups to prove the business relationships linked to a given land deal, as a basis for the determination of liability, and to get justice.

We recommend the Guide to extend the duties and responsibilities arising from a contract to all the existing business relationships that are involved in a land deal. This would mean to move from an approach that asks for transparency of the "corporate organization" (par. 2.12) to one that aims at accountability of all involved actors in case of abuses or harm, be it affiliates, financiers or actors that are linked to a land deal through the value chain.

### **III. Emphasize the primacy of international human rights law and the application of international human rights law to land deals.**

FIAN's experience shows that in many cases, land deals result in serious impairment of human rights as well as environmental crimes and ecosystem destruction. Any attempts to provide guidance towards more responsible land investment projects and to put in place safeguards, needs to take into account these patterns of violations.

The draft Guide's focus on contract law also has limitations when it comes to addressing the impacts a land deal might have on people and communities. As the Guide rightly states, these impacts may well affect people or communities that are not parties to the contract (par. 6.1). In addition, as discussed above, land deals often adversely impact human rights and cause environmental harm, which, however, may not explicitly be part of the contract. As such, the guide's focus on contract law bears the risk to limit the access to remedy by affected communities or individuals, either because they are not contracting parties, or because the harm suffered does not refer to the object of the contract – according to the draft Guide "contractual non-performance" is the basis for remedies (chapter 4).

We suggest that the draft Guide makes stronger emphasis on international human rights obligations and the primacy of international human rights law, in line with one of the main focuses of the Guide (Preface 4) regarding the protection and respect of tenure right holders. Even though strengthening legal frameworks and standards at national and international level might be outside of the Guide's scope, it needs to be clear about the institutional and legal context that is required to protect and guarantee human rights, as well as the importance of cooperation between states, including needed regulations in commercial and administrative law at national and international

levels. This can also contribute to clarify situations of conflicts between sources of international law (e.g. between human rights and investment protection).

#### **IV. Ensure affected communities' effective access to remedy and justice.**

As stated before, affected people's and communities' effective access to remedy and justice is a big challenge in the context of land deals, especially in cases where these involve transnational investment webs. The power relations between an "investor" and communities – but also between a TNC and a developing state – are a key factor that needs to be taken into account in this context. The draft Guide's approach of putting a narrow focus on the contractual relationship between parties is therefore insufficient in order to deal with human rights abuses committed by (transnational) corporate land "investors" and their investment webs. The draft Guide's proposals regarding grievance mechanisms and dispute settlement further risk allowing corporate investors to use their own mechanisms to impede communities to access justice using state based quasi-judicial and judicial mechanisms which could be more effective.

We recommend that the Guide proposes the inclusion of clauses into land deal contracts, which impede corporate investors from using internal non-judicial grievance mechanisms to obstruct access to justice by affected communities or people.

#### **V. Ensure gender equality and justice.**

As established in sections 4 and 3.78, gender equality should be an essential component in the initial phases of an investment agreement. Although the guide refers to gender impact assessments (1.22.) we also suggest adding a guideline on gender-sensitive measures to ensure access to remedy, including mechanisms for investment related dispute resolution. This would include that grievance and dispute settlement mechanisms (mentioned in chapter 6 of the Guide) are set affordable and physically accessible to women, and are adapted and appropriate to the needs of women including those who face multiple and intersecting forms of discrimination.

#### **• Ms. Dima Abdallah (Beirut Bar Association)**

Septembre 30, 2019

#### **Comment 1: Page 10. Preface 1. Introduction**

It would be important to restate in the purpose of this Guide how the right to adequate food is linked to other Human rights most importantly Right to Health, Right to life, Right to education, as well as Employment Rights. The overview shall highlight in a simple and concise way why this CSR guideline is crucial for our existence as human being.

#### **Comment 2: Page 14. Gaps in the legal framework**

Case situation: A foreign investor made an investment with local farmers for a land according to CSR guidelines, and they both started the agriculture project according to various policy goals. After few years of starting the project the neighbor built up an industrial project related to agriculture according to the rules of the country where there's a gap in the legal framework for rural development (he/she has the required licenses for this) but might harm the project of the investor.

How can the CSR fill in the gaps? and how would be able to convince foreign investors to sign contracts according to CSR in countries where there's a big gap in legal framework (and where most probably investing in agriculture according to CSR is much needed)?

#### **Comment 3: Page 15. Complexity**

What if tenure right holders are exercising their legitimate practice that contradicts the process of achieving SDGs. In other word, between SDGs and tenure right holders which one prevails?

**Comment 4: Page 16 Tenure**

Why not putting guidelines when subsurface resources may affect the produced food, and therefore may cause a breach to the right for adequate food?

**Comment 5: Page 18, Mandatory Rules**

Some human rights mandatory rules might not be enforceable for the investment contract due to gaps in national laws.

**Comment 6: Page 20. Recognition of customary rules**

Not all national courts consider CSR guidelines as renowned customary rules?

**Comment 7: Page 22. Unsolicited bids.**

In that case, local investor will always win as they have more knowledge in doing bribery without getting noticed...Therefore, it will be more difficult for foreign investor to compete with local investor. Surely we are not inviting to encourage Bribery, but putting more pressure on foreign investor than on local investor in this context does not fit common sense and fairness.

**Comment 8: Page 27. Importance of due diligence**

This cannot be applicable in some communities, especially in places where the government did not finish drawing the lines between landowners and where landowners are doing transactions based on a temporary drawing.

**Comment 9: Page 28 Domicile**

Will that pave the way for the beneficial right owners of shares in a company A established in X country, and made an investment through another company B in another country Y be responsible of the debts/taxes of B company not covered in Y company?

If the answer is yes, this might be a big hurdle for the principle of liberalization of foreign-direct investment, that is very important for the growth of underdeveloped countries.

**Comment 10: Page 28 Corporate Organization and Affiliates**

We are using "should" in both paragraphs. We defining the parties, now we are putting obligations. If this is exactly what is meant here, it is better to put both paragraphs in the chapter related to obligations and rights of the parties.

**Comment 11: Page 32 Content of the related agreement**

Some countries, such as China, long contracts/agreements are not recommended. Chinese companies would prefer small contracts over long contracts based on good faith concept.

**Comment 12: Page 44. Flexibility**

It is important to note that some investments can support human rights in one hand and violated in the other hand.

The investor might care about environment and employment, but he might choose values from here and there.

For instance, if investor cares about mental illness for their employee (investment that stands against long working hours and slavery), it must respect as well women's rights at work (such as their right to be pregnant, or her having the best environment to raise up children especially in communities where the role of women in families is fundamental).

As another example, if the investors care about the environment, they cannot make their agriculture project eco-friendly, and then throw their own waste at their neighbours just because he/she has a very small land or he/she is not using own land properly

- **Mr. Fabiano de Andrade Correa** (Food and Agriculture Organization of the United Nations)

October 4, 2019

I am submitting some comments and suggestions, on my personal capacity, as a contribution to the ongoing review of the ALIC guide.

I've inserted track changes directly in the document attached. In addition, a few more observations: General comments:

the Guide is a very long, complex document; a general summary (building on pages 132-137) could be developed, including detailed guidance on the obligations/rights of each party (investor, grantor, LRH, etc) at times, the text is repetitive (e.g. text in an introductory section is then repeated later on (e.g. the definition of what a business plan includes, which is repeated in pages 38 (2.73) and 42 (2.92)); a final review could help to streamline it.

"Responsible" investments

- I suggested providing a definition of it in the beginning of the guide;
- Would also be interested in fostering a discussion in the forum about the perception of this definition with other members of the FSN;
- Laws of home country;
- The role of the laws of the investor's country was not covered, though states should also take measures to promote more responsible investments by their investors (VGGT 12.15); has this been part of discussions? I've inserted some suggestions.
- Right to food/food security: Food security and realization of the RTF is the CFS RAI principle 1, yet it is not mentioned among the social/economic issues in Chapter 3 (Rights and Obligations of the parties) For the state the obligation is more obvious, but does the investor also have a responsibility to safeguard FS in the host state, e.g. through a due diligence not to invest in crops that would potentially present a challenge for FS such as biofuels or export crops? What is the balance here?

I hope this is useful. Please do not hesitate to get back to me for any clarification and/or further information on the comments/suggestions made.

- **People's Republic of China**

October 30, 2019.

Please find the comments from China regarding Legal Guide on Agricultural Land Investment Contracts (ALIC) below:

1. For Paragraph "3.36. Import", we suggest deleting "exempting investors' operations from duty tax", which is too absolute, as most of the countries have comparatively strict restrictions on the tax reduction and exemption during the import.

2. We suggest adding the qualification examination of the intermediaries like accounting firms and their practitioners, and the guidance on religious customs' impact on agricultural land investment, so to remind the enterprises to avoid related risks.

Best regards,

Xu Lingling

Second Secretary

Economic & Commercial Counsellor's Office

Embassy of the P.R.C in Italy

- **Argentine Republic**

October 31, 2019

El documento titulado "*A Legal Guide on Agricultural Land Investment Contracts (ALIC)*" constituye un insumo importante, por cuanto intenta buscar una solución equilibrada entre las partes que suelen intervenir en este tipo de contratos, no solamente los inversores y los titulares de las tierras, sino asimismo los diferentes niveles de gobiernos (dependiendo de la escala de la inversión agrícola). El mismo es también consistente con la "Guía de Principios para la inversión responsable en agricultura y los sistemas alimentarios de la ONU", a la cual adhirió la República Argentina.

Comentarios en particular:

a) Habida cuenta de que el documento utiliza en repetidas ocasiones la expresión "*best practices*", se considera conveniente la utilización de la expresión "*good practices*", atento a que esta expresión no prejuzga respecto de la mayor pertinencia o efectividad de una política pública respecto de otra, lo que permitiría que en el marco de una determinada política pública puedan ser adoptadas diversas medidas para el logro de los objetivos.

b) Respecto del párrafo 2.111, y en atención a la compatibilidad con lo dispuesto por el sexto principio para la Inversión Responsable en Agricultura (PRAI, por sus siglas en inglés), se sugiere adecuar la terminología empleada sustituyendo "*environmental disaster*" por "*disaster risk*".

c) Asimismo, y con relación a los incentivos para facilitar la exportación de productos agrícolas de los inversores operando en tal Estado, en el párrafo 3.37 cabría efectuar una remisión a las normas multilaterales de comercio, en particular el Acuerdo sobre la Agricultura de la Organización Mundial del Comercio (OMC) y la Decisión Ministerial de tal organización sobre Competencia de las Exportaciones (WT/MIN(15)/45, adoptada en Nairobi, Kenia, en 2015). Ello por cuanto los incentivos que se brinden a la exportación de productos agrícolas deberían respetar dichos marcos normativos.

Atento a ello, se sugiere un cambio en la redacción del párrafo 3.37: *Export. Some domestic laws may establish, **in accordance with multilaterally agreed rules**, incentives or other means for facilitating the export of agricultural products from investors operating within that State, generally through an investment incentive law.*

d) Igual comentario se efectúa respecto de la afirmación incluida en el párrafo 3.47 del documento respecto de los incentivos que se pudiera otorgar al inversor en caso de cumplir determinados objetivos. Cabría poner en conocimiento de UNIDROIT las dudas que el uso del término "incentivo" puede generar. Ello por cuanto podría ser entendido como legitimando el otorgamiento de subsidios agrícolas distorsivos (en forma de incentivos financieros) de manera contraria a las normas de la OMC. Cualquier incentivo financiero debe otorgarse en forma consistente con las reglas multilaterales de comercio (por ej. Acuerdo sobre la Agricultura y el Acuerdo sobre subvenciones y medidas compensatorias), considerando el contexto de proceso continuo de reforma de la agricultura en el marco de la OMC.

e) Cabría igualmente indicar que los estándares privados y los esquemas de certificación de múltiples actores interesados que -según la guía- definirían mejores prácticas internacionales, no necesariamente es correcta. El desarrollo de los estándares no siempre responde a principios de transparencia, ni sobre bases de sólida evidencia científica.

En tal sentido, debería tenerse en cuenta que los estándares privados y etiquetados ambientales deberían diseñarse e implementarse de tal manera que sean compatibles con las reglas de la OMC, evitando que los mismos se conviertan en restricciones encubiertas al comercio internacional; deben

basarse en sólida evidencia científica, procurando verdaderos beneficios ambientales; se debe velar por la transparencia e inclusividad en su elaboración, teniendo en cuenta los comentarios de las partes interesadas y/o potencialmente afectadas; y se deberían considerar las capacidades y necesidades especiales de los países en desarrollo.

Por tal motivo, se sugiere eliminar la frase "*private standards and multi-stakeholder certification schemes also define international best practice*", del párrafo 3.112.

f) Finalmente, en lo que respecta al capítulo 6 sobre mecanismos de solución de diferencias ("Grievance mechanism and dispute resolution"), se observa que el párrafo 6.3 dispone "[a]s 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".

Se considera pertinente reformular dicho párrafo a los fines de precisar que, en caso de ausencia de indicación expresa, se aplicará el ordenamiento jurídico vigente en la materia en el Estado receptor de la inversión.

#### • **United States of America**

November 11, 2019

Thank you for the opportunity to review the Legal Guide on Agriculture Land Investment Contracts (ALIC). It is clear that much work and thought have gone into the zero draft and it is a document that is rich in detail and scope. The Guide has the potential to promote greater awareness of the myriad issues that are implicated in these types of contracts.

Recognizing the richness of the content, the Working Group may wish to consider additional ways to make the document more readily accessible, in order to benefit its target audience, and to promote greater use of the underlying documents that give rise to the Guide. For those readers who may not be as familiar with the topic or the work that precedes it, making it more readily accessible will enhance the likelihood that it reach broader audiences. The comments below are designed to facilitate these objectives.

#### **Streamlining of the Content**

To make the document more readily accessible the Working Group should consider further streamline the content by identifying ways to eliminate unnecessary significant repetition and duplication of issues. For example, the discussion of the treatment of legitimate tenure right holders in Chapter 2, sections I and II.C is repeated in the Introduction, section II.B. Conversely, some topics are treated in greater detail, such as identification of land and potential impacts in Chapter 2, section IV.B, when compared with others, such as the discussion of the social and economic issues in Chapter 3, section II.

To minimize unnecessary duplication and repetition, it might useful to make greater use of internal cross-references and to references to existing guidance that already provides treats particular topics or issues, such as discussions included in the VGGT Technical Guides). Use of hyperlinks is one way that this objective could be achieved. By reducing repetition, confusion about whether the repetition is mean to convey a new point or not can be avoided. Similarly, it may be helpful to develop a more unified and simple citation style. Given that the product is not primarily designed for academic purposes, shorter citations might be more useful to a practical reader. Full citations could be included once in Annex II (Additional Resources).



To ensure adequate treatment of all key topics, it might be keep discussions on each topic at roughly the same level of detail, concentrating the text on the key elements and referring to other documents that may have addressed the topic in more detail. In areas where the Guide is enhancing previous work on this topic, more detailed discussion may be warranted. Examples of potential areas where value-added elements can be highlighted are the implications of agricultural land investment contracts for employment creation, outgrower schemes, and community development funds. Likewise, some chapters seem to be more heavily footnoted than others, although it is not clear why. Adding citations to the UPICC and LGCF could improve this apparent imbalance.

### **Consolidating Summary Information and Facilitating Ease of Use**

While the guide is a rich source of information, its length may be unwieldy for its target audience. Rather than include several introductory sections, such as a preface, executive summary, and introduction, it may be preferable to prepare a single Executive Summary that highlights the key points of each section and helps navigate the document through the use of hyperlinks. The use of “signposts” at the beginning of each section is a useful organizing tool, as is the Checklist of Issues in Annex I. In finalizing the guide, consideration should be given to ensuring that they track one another to facilitate ease of use.

More specifically, adding hyperlinks to internal cross-references, the references in Annex I (Checklist of Issues) and the various citations to other instruments upon which the Guide relies would take users directly to the cross-referenced portion or to the referenced source. Use of hyperlinks can make a long document appear less daunting.

### **Highlighting Relationship to Prior UNIDROIT Work**

The Working Group may also want to consider including more citations to the UPICC and to the LGCF, as doing so would demonstrate the rationale for UNIDROIT’s work in this area and the relationship between the Guide and prior work, in particular its work on contract law. Likewise, some chapters seem to be more heavily footnoted than others, although it is not clear why. Adding citations to the UPICC and LGCF could improve this apparent imbalance.

#### **• Ms. Federica Violi (Erasmus University Rotterdam)**

November 11, 2019

The Guide does an outstanding job in addressing and correcting several issues that have often arisen and might continue to arise in the context of large-scale agricultural land investment contracts. The following feedback includes both general considerations and more specific comments that look at some sections of the Guide, offering supplementing language suggestions in certain instances.

#### **1) TERMINOLOGICAL ISSUES**

- In its introduction and in a few other passages, the Guide refers to 'responsible' investment as a means to achieving certain SDGs (Intro 1). Considering that throughout the rest of the text the Guide refers to 'responsible and sustainable' investment, it would be useful to align the language everywhere, as the two adjectives imply a different set of concerns and characteristics.
- The notion of agricultural land does not seem to be spelled out in the Guide. When reading throughout, it becomes clearer that the notion of agricultural land is all-encompassing. However, it would be advisable to specify from the very beginning that the scope of 'agricultural land' includes land used for the growing (and in certain cases the processing of) agricultural produce destined both to human consumption and to other uses (such as cotton, rubber, jatropha). The reason is that different produce with different uses involve different sets of issues and might imply a different legal

framework, both nationally and internationally (including for example certain provisions under WTO law for certain countries and certain produce). Thus, it would be useful to be aware of the definition from the outset.

## 2) APPLICABLE LAW

- The Guide states that the law of the host State is the most important component of the contracts' legal framework (e.g. at 1.7). This is certainly the case for most contracts. However, in certain instances parties can and do avail themselves of choice of law clauses to select the applicable law to the contract. These clauses may carry the same set of problems the Guide identifies for the choice of dispute settlement mechanism (6.18). The most powerful party might, for example, push for the selection of a law of a third country that is highly favorable to him/her, but has no connection whatsoever with the investment. While mandatory rules of the host State would purportedly still apply, this might not be the case for customary (tenure right) rules, which are not necessarily mandatory. Therefore, it is advisable to include language in the Guide as to choice of law clauses and the implications thereof.

- In certain cases, the contract includes language that seems to invert the hierarchy of sources of the host country. Such 'clauses of prevalence' would typically place the contract above any law contrasting with the provisions of the transaction, typically with the only exception of the Constitution (as in force at time of conclusion). The contract basically acts as a source of rights and obligations, which is below the Constitution, yet above ordinary (or customary) laws. Also, in this case, it would be useful to include language to this purpose in the Guide.

- The Guide refers at 1.14 to 'general principles'. This is a very thorny legal category that both doctrine and case-law have struggled to grasp entirely. Such an open-ended wording in the Guide might refer to general principles of international law or to general principles applicable to commercial transactions (*lex mercatoria*). Be it as it may, some more clarity or language warranting the uncertainty surrounding this category might be useful. In fact, parties to such an agricultural investment contract (and especially the grantor) might want to avoid the unchecked application of purely commercial principles, which might not be fit for purpose and also not easily accessible, especially in the case of multi-party contracts.

- At various places, the Guide seems to indicate that (certain parts of) international law might apply to the contract as a 'supplement' to the applicable law (e.g. 3.48). Parties themselves often include international law in the applicable law clause. The assessment of such a referral is a complicated matter. The long-standing debate that started with the idea of internationalization still does not seem to be settled. Scholars and arbitrators are divided as to whether parties to a 'private' contract can refer to (public) international law as part of the *lex contractus*. Regardless of the validity of the choice, the question now seems to be whether international law is adequate at all to perform an integrative function in the contract, ie to directly fill in the gaps left by the contract and domestic law regarding a very specific investment operation (see also below on the interaction between IIAs and contracts). Thus, the Guide might adopt a more nuanced approach to this matter and instead suggest the inclusion of 'compatibility clauses'. These would be clauses that mandate the compatibility of the contract with *all* relevant international law rules, rather than the direct application thereof (thus favouring a corrective rather than an integrative approach).

- if a choice of law clause is included (and if allowed by the host State's private international law), the parties might want to consider the referral to soft-law instruments as a part of the *lex contractus*, like the VGGT or other sets of guidelines.

## 3) IMPACT ASSESSMENT AND RIGHTS & OBLIGATIONS

- It would probably be more effective if all the different impact assessments would be

integrated, as to guarantee a certain consistency and also the proper identification of issues that lie at the intersection of the different assessments.

- The Guide seems to suggest at 2.108 that, differently from any other impact assessments, human rights impact assessments are not subject to any trade-off. In current times, where the consequences and risks of climate change and its impact on human rights are becoming more and more visible, together with the understanding that this might be partially connected to the functioning of the global economic system, it might be advisable to reconsider the 'trade-off' model and embrace a more comprehensive and interdependent impact assessment exercise.
- While mentioned under Chapter 3.III.A., the respect, conservation and promotion of traditional knowledge and in-situ plant genetic resources does not figure under the Environmental impact assessment section. It would be useful to include explicit language and reference to existing applicable treaties under Chapter 2.IV. A.2 (b).
- The Guide seems to follow a structure by which the issues identified in the different impact assessments are reflected in the different categories under 'Rights and Obligations', 'Monitoring' and, subsequently consistently aligned with remedies (including termination). However, there seems to be no specific category for human rights under 'Rights and Obligations'. While most of the relevant human rights might be covered under 'Land Tenure' (3.I), 'Social and Economic Issues' (3.II) and 'Protection of Investment' (3.IV.B), some human rights that might be specific to a certain investment operation might not be included under these categories and thus remain outside the actual substantive content of the contract. This might have a domino effect on the scope of non-performance, remedies and termination which could then not apply to the violation of a certain human right that does not fall under any of the categories above. Therefore, it is suggested to rectify this, including explicit - yet all-inclusive - language on human rights under 'Rights and Obligations' (in the form of an extra section or otherwise), also as a way to conform with the UN Guiding Principles on Business and Human Rights.
- Violence around investment sites has been sadly vastly documented. In this light, it might be advisable to further articulate sections 3.136, 3.137 and 3.138, which come across as slightly vague and somewhat dismissive of the significant transfer of use of force from grantors to investors (including the right to detain and arrest).
- There seems to be no reference to the extent of land that might be subject to the investment contract. It is true that what is understood under 'large-scale' depends on a number of factors. However, there are some risks attached to this vagueness. In particular, it would be advisable to verify at the screening level already (and thus include this under the transparency requirements) whether the same investor or any of its affiliates has already acquired tenure rights in the same country/area and to what purposes. Over-accumulation of land might constitute a serious issue in terms of (re)distribution of resources and loss of control of the grantor and of the local communities over the land (so called 'control grabbing'). Similarly, it would be necessary to understand how much land overall has been destined to the same or similar type of investment. The impact of the single contract should in fact be assessed cumulatively against existing activities of the same kind, to understand how much is in fact diverted from other sorts of investments.
- As a general rule, section 1.3 states that parties are free to set the content of the contract as they see fit, subject to mandatory rules. In reality, party autonomy is not a value per se, especially when it involves the contractual capacity of States. Freedom of the parties should still pursue interests that are worthy of protection under the relevant legal system, and even

more so when the State is involved for the advancement of the general interest. The contractual capacity of host States, as an expression of their permanent right over natural resources, is qualified by the respect of self-determination and the attainment of the highest development and well-being. Thus, it might be advisable to further qualify freedom of contract in this context.

## 5) INTERACTION BETWEEN IIAs AND CONTRACTS

The interaction between relevant IIAs or BITs and investment contracts is still extremely vague. Scholars and arbitrators have provided all kind of different understandings of this relationship, yet there is no consensus. The matter is clearly of highly importance to the parties and more generally to the principle of certainty. To avoid the mechanical application of IIAs or BITs standards to investment contracts and the automatic transformation of contract claims into treaty claims, the Guide might consider the following:

- The substantive content of contracts might need to be tailored to the level of generality of the overarching BIT. Some IIAs (especially the old generation ones) might be extremely vague and include open-ended provisions as for example to FET or expropriation; new generation BITs might instead be more detailed as to the protection of the regulatory authority of host States and to what is understood by FET or legitimate expectations. Thus, it is important to identify whether and what BIT might cover the contract. Sections 2.12 and 2.13 might be useful in this regard. Through knowledge of the corporate organization and its affiliates, it might be possible to identify which nationality the investor might use for the purposes of claiming the more convenient treatment. Explicit language around this matter might be helpful.
- Stabilization clauses are highly problematic. Especially with old generation BITs, in order to avoid stabilization clauses being used as the basis to claim legitimate expectations, the parties might include the following language in the contract: 'for greater certainty, no legitimate expectations may be derived from this contract with regards to the exercise of sovereign power for the attainment of the public interest'. Furthermore, already some years ago, scholars had identified a possible way to 'neutralize' stabilization clauses. That is, by excluding and limiting the legal effect of these clauses for subjects that are formally third parties to the contracts, and whose human rights would be encroached upon by a certain stabilization clause.
- The same goes for expropriation. Even if the Guide at 3.135 considers that there might be no need to include an expropriation clause if there is an applicable BIT with provisions to this effect, it might still be useful to do so. In fact, the contract could further specify and express the understanding of the parties that a certain action does not constitute expropriation, but rather a regulatory measure. This could help arbitrators qualify the host State's conduct, should a dispute arise from the contract.
- In general when discussing IIAs, the Guide might seem to conflate the contract and treaty level. While this relationship is highly complicated, it would be advisable to include clarificatory language. For example at 6.3., the question of what law would govern the dispute depends very much on the nature of the claim, thus simply adding 'depending on the nature of the claim, the substance of the dispute may be governed (...)' might be helpful to avoid further confusion.
- At 6.21, the Guide seems to limit the participation of non-parties in dispute settlement proceedings before domestic court to amici curiae submission. However, most States have rules for third parties to intervene and file a request for joinder. It might be advisable to

review the sentence in this section accordingly.

- Considering their peculiarities, when dealing with sovereign wealth funds and state-owned enterprises, the grantor might insist on including a clause by which the investor waives any claims to immunity from jurisdiction and enforcement.

#### 6) DEVELOPMENTAL CONSIDERATIONS AND THE MULTISTAKEHOLDER NATURE OF AGRICULTURAL LAND INVESTMENT CONTRACTS

- It is not entirely clear whether the transparency requirements that apply to the investor both at the phase of screening and later on in the project include also (international, public and private) lenders and financiers. It might be advisable to clarify this aspect.
- At Preface 3, the Guide is explicit in *not* promoting transactions of the kind discussed therein. This is mainly because these are not considered the preferred or more desirable option for an agricultural project. In this light and for precisely this reason, the possibility should be contemplated to emphasize explicitly the requirement for these contracts to aim at a developmental purpose. That is, already in the proposal phase, the investor should spell out how exactly the investment he/she envisions *contributes* to the development of the host State.
- At 2.122, the Guide mentions 'alignment' with developmental priorities. It might be advisable to replace this with 'contribution to'. Mutual economic benefits, employment creation or monetary contribution do not necessarily demonstrate the developmental added value of the activities ought to be regulated by the contract. In fact, development should not just represent a by-product of the contract, or be assessed just in terms of SIA which '*can* contribute to sustainable and inclusive economic development' and '*can* be designed to establish whether an investment project has been designed to make such contribution' (2.114). Advancing host State's development needs to be a primary objective of the contract from the outset; this paradigm and the necessary contribution of the contract to it should to come out more clearly from the text.
- The Guide is a significant step forward towards reconceiving agricultural land contracts. At 3.15, it makes clear that tenure rights of the investor might very well coexist with other rights - of many different kind - held by legitimate tenure holders. This goes in the direction of incorporating explicitly the paradigm, which has been circulating now for a while, that neither contract nor property represent absolute transfer rights. Rather, these are qualified and limited by other competing or concurrent rights insisting over the same object. In the context of large-scale agricultural investments, this is much more in line with a solid understanding of the political economy of resource allocation and the distributional effects of (semi)private transactions.
- Contracts that allow for a multistakeholder participation in the enjoyment of rights over a certain area of land (regardless of whether multiparty or not) might work better as a regulatory tool and organizational model, rather than just be an expression of party autonomy. Thus, it might be worth expanding on this, and more strongly emphasize this participatory and concurrent use of land. Grantors might consider to further redefine tenure rights of investors and withhold rights not only for existing stakeholders, but also for future purposes, in the context of a larger developmental plan that involves several actors, either through one or multiple legal relations.

## • Students of the University of Washington School of Law

Dori Krupanics, MJ Candidate

Jessica Wachowicz, JD Candidate

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### **LEGAL GUIDE ON AGRICULTURAL LAND INVESTMENT CONTRACTS**

The following paper aims to identify gaps and proposes modifications or additions to the UNIDROIT-FAO-IFAD Guide on Agricultural Land Investment Contract (Guide). Each of us sought to contribute to this project using our varying areas of expertise. Dori Krupanics is a Master of Jurisprudence candidate in Sustainable International Development with an MA in International Relations, while Jessica Wachowicz is pursuing a law degree and received her undergraduate education in Finance and Economics. In analyzing the guide, we sought to gain a strong understanding of the issues faced by communities at present.

This Guide is an opportunity for implementing human rights obligations that both State and Investor should follow, even or especially so, when legally it is not strongly mandated. Supporting a strong human rights angle that is desperately lacking in international investment agreements can and should be applied. This Guide has a chance to move the levers in favor of human rights accountability for all involved to bridge the tension between human rights and investment. By cleverly and strategically exercising a pre-approach model, a standard operation to land acquisition could add long-term value to both the host-state, via possibly more foreign direct investment, and to the investor, who could better avoid tireless arbitration processes. This Guide has a responsibility to all people involved and affected. With this in mind, a sensible recommendation is presented, and each section of this paper identifies a proposal, the rationale, and a suggested edit or addition.

#### **SECTION I: “SUSTAINABLE INVESTMENT”**

**Proposal:** The Guide should do more to convince investors to pursue sustainable investments, as opposed to short-term profits.

#### **Rationale:**

The Guide presents investors with an opportunity to structure investments in a manner that is sustainable for their business while minimizing the potential harm to local individuals.

The term “sustainable investment” is used throughout this document, and it is evident that this Guide would only appear to be useful to an investor whose objective was to establish a

sustainable investment, as opposed to a quick profit. In reality, at least in the United States, pressure to deliver high profits – not sustainable profits – is substantial. Corporations are charged with a responsibility to maximize shareholder value. By failing to do so, they may be sued by their shareholders. With frequent reporting requirements, executives face pressure to deliver positive results. The Guide operates under the assumption that all investors are seeking sustainability, however, executives may have to be convinced to do so.

The United Nations' Inter-Agency Task Force on Financing for Development (UN), has found this to be a pertinent issue as well. It states that "sustainability and stability of the financial system are mutually reinforcing . . . [y]et, to date, capital markets remain short-term oriented."<sup>1</sup> This focus on short-term gain has been evidenced in the United States, as the average holding period for stocks fell from 8 years to under 1 year from the 1960s to 2016.<sup>2</sup> The UN further stated that "[a] 2016 survey of senior executives found that more than half of the respondents felt pressure to perform within a year, up from 44 [percent] three years earlier."<sup>3</sup>

By presenting examples of how failing to pursue sustainable investments can be detrimental, not only to the investor, but to the market as a whole, investors may choose to reconsider their motives. For example, Heifer International recently gave a lecture regarding coffee farming at the University of Washington. The speaker noted that due to global warming, coffee farmers are being forced to move their coffee farms further up the mountains. If there are no higher mountains in the area or the farmers do not have the resources to move, the coffee farm ceases to exist. This phenomenon will not only impact individual investors, but the market as a whole. With fewer viable locations for coffee farming, supply will decrease, prices will increase, and investors will be forced to leave the market. These same market failures can result from various types of unsustainable practices: contaminating land, subjecting individuals to poor working conditions, etc.

A pressure for short-term performance undoubtedly exists, and the effectiveness of this Guide is largely dependent on corporate goals. Given this tension, the Guide should seek to briefly educate investors on why pursuing sustainable investments is mutually beneficial to the company and the local community with whom they interact.

**Recommended Edit:** In the Preface, Section II, paragraph 6 (In general.), after " . . . responsible and sustainable investment," the Guide should add the following:

"Pursuing sustainable business objectives is essential in agricultural land investment contracts, as short-term objectives may lead to diminished resources, complex litigation, market failures, or weakened rapport with both consumers and communities. This Guide provides essential considerations that will allow investors to meet long-term business objectives by taking into account the needs of the local communities in which they invest."

## SECTION II: TRANSLATION

**Proposal:** The Guide should include additional information regarding the importance of adequate translation, both in the negotiation process and in documenting the consultations and agreements.

### Rationale:

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<sup>1</sup> Long-term and sustainable financial investment, UN Inter-Agency Task Force on Financing for Development, <https://developmentfinance.un.org/long-term-and-sustainable-financial-investment>.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

The Guide at present identifies issues related the language barriers as they relate to the negotiation process and the documentation of the negotiation process. With respect to the negotiation process, the Guide discusses potential validity issues that may arise if negotiations are not conducted in the local language. It further suggests that a neutral, third-party lawyer should be employed to represent the needs of the community. With respect to documentation, the Guide states that consultations and agreements should be documented in a language the other party can understand. The Guide is correct to address these issues, however, UNIDROIT should consider adding additional information relating to language barriers.

Language barriers in the negotiation process are discussed in the Guide in Chapter 2(V)(B)(1), paragraph 135. The Guide states that the validity of a contract will be at risk where there is sufficient evidence of a lack of informed consent.<sup>4</sup> It further states that factors to consider in determining whether informed consent exists are: (a) whether the negotiation was conducted in the local language; and (b) whether a facilitator was used to translate.<sup>7</sup>

#### Informed Consent

The Guide states that failing to ensure that all parties have sufficient understanding of the terms may result in a lack of informed consent. It further states that a lack of informed consent may amount to a defect in consent – “it may be interpreted as a mistake, either of fact or of law, or fraud, making the contract [voidable] or allowing for other remedies. In the United States, informed consent is not a requirement in the making of valid contract. Only assent to the terms is required. If the Guide intends to reference free, prior and informed consent (FPIC), there will remain situations in which tenant rights holders’ remedies are limited, as FPIC principles only apply with respect to indigenous people being forcibly removed or relocated.”<sup>7</sup>

In reading this portion of the Guide, a line of United States case law comes to mind. The first case relevant to language barriers is *Myskina v. Conde Nast*. In *Myskina*, the plaintiff, a Russian tennis professional, claimed that a contract she signed with Conde Nast should have been voidable, as she was not fluent in English and could not have understood its contents.<sup>8</sup> The Court, citing numerous cases, held that she was bound to the contract. The Court, quoting *Maines Paper and Food Service*, stated that “[a] person who is illiterate in the English language is not automatically excused from complying with the terms of a contract because he or she could not have read it.”<sup>9</sup> The Court stated that absent allegations of fraud, duress, or some other wrongdoing, the plaintiff was not excused from being bound to the contract.<sup>10</sup>

In an investment contract governed by U.S. contract principles, the question arises as to whether failing to conduct a negotiation in the other party’s native language (or failing to utilize a facilitator) results in fraud or duress.

Contract fraud typically relates to misrepresentations that are fraudulent or material. The Restatement of Contracts states that if a party’s assent is induced by a fraudulent or material misrepresentation, the contract is voidable.<sup>11</sup> Failing to conduct the negotiation in the local language

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<sup>4</sup> Guide, Chapter 2, Section V(B)(1), paragraph 135.

<sup>7</sup> *Id.*

<sup>7</sup> Guide, Chapter 2, Section IV, (A)(2)(b), paragraph 65 (citing UN Declaration of Rights of Indigenous Peoples, Article 10).

<sup>8</sup> *Myskina v. Conde Nast Publications, Inc.*, 386 F.Supp.2d 409, 412 (S.D. NY 2005).

<sup>9</sup> *Conde Nast* at 415 (citing *Maines Paper and Food Serv., Inc. v. Adel*, 256 A.D.2d 760, 761, 681 N.Y.S.2d 390, 391 (3d Dep’t 1998)).

<sup>10</sup> *Conde Nast* at 414.

<sup>11</sup> Restatement of Contracts (2d), Chapter 7, section 164.



or failing to employ a facilitator will likely not result in contract fraud, so long as the contract does not include material misrepresentations.

Duress typically relates to physical compulsion, threats, or undue influence. Failing to conduct the negotiation in the local language or failing to employ a facilitator does not amount to a physical compulsion or a threat. Numerous U.S. state laws and cases state that unequal bargaining power alone will not void a contract.<sup>12</sup>

Under the Restatement, undue influence is defined as “unfair persuasion of a party who is under the domination of the person exercising the persuasion or who by virtue of the relation between them is justified in assuming that the person will not act in a manner inconsistent with his welfare.”<sup>13</sup> Locals will likely understand that the investor is not acting on their behalf, thus it is unlikely that a contract will be voidable on the basis of undue influence.

Another legal avenue to pursue where there is unequal bargaining power is to argue that the contract is unconscionable and is thus unenforceable. Many courts analyze both the procedural unconscionability, meaning the formalities and process of making the contract, and substantive unconscionability, meaning the terms of the contract itself. If the negotiations are not conducted in the local language, or if it a facilitator is not used, that may be one factor in determining whether there is procedural unconscionability, though it is not determinative.

Because U.S. contract law may not be a strong avenue for tenant rights holders to seek a remedy in these situations, investors should be encouraged to conduct negotiations in the local language or employ adequate translators for other purposes. Including the benefits of engaging in such practices will be more persuasive to an investor than the treat of contract invalidity.

The Guide should focus on two key points: (a) the use of neutral translators, and (b) the need to ensure that translated documents reflect the intent of both parties. In many cases, the locals will be subject to the laws of the investor’s state and will be bound by the terms of an agreement drafted by the investor. Focusing on fairness in translation will help to mitigate the effects of any one party asserting greater control.

#### Neutral Translators

One portion of the guide states that a neutral, third-party lawyer should be employed to facilitate negotiations. However, in another portion of the guide, it discusses the fact that governments may, in some cases, facilitate the deal-making process between investors and communities. In some cases, governments may value foreign investment over community wellbeing. Thus, it may be useful to identify the risks posed by the use of government actors as facilitators, particularly where they may be providing translation services between the investor and the community. The Guide might suggest that the investor seek out a neutral and detached party to translate the discussions between investors and communities.

#### Translated Documents

With respect to documentation, the Guide provides that in order to ensure equity and transparency, “[t]he investor or the government, or the parties collectively, should ensure the community has . . . the legal support necessary to conduct meaningful consultation . . . by providing

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<sup>12</sup> See *Interpharm, Inc. v. Wells Fargo Bank, Nat. Ass’n*, 655 F.3d 13 (2011); *Alder v. Fred Lind Manor*, 153 Wash. 2d 331 (2004).

<sup>13</sup> Restatement of Contracts (2d), Chapter 7 section 177.

consultation documents in a language and medium communities can access.”<sup>14</sup> It further states that the investor should, in some cases, publish additional documentation relevant to the deal, including impact assessments, in the local language.

The Guide should further urge investors to deploy necessary resources to ensure the written translations adequately reflect the discussions had by the parties (in the case of an MOU, Investment Contract, or other agreement) or the findings included in supporting documentation (impact assessments, etc.). Disputes frequently arise over written translations, as oftentimes the language is translated in a manner that appears more favorable to the tenant rights holder.

This issue has been evident in international transactions since the birth of the global economy and has been discussed in literature. In 1986, Beaupre established the principle of legal equivalence, “which underlines the consideration of the legal effects that a translated text will have in the target culture.”<sup>15</sup> This principle “emphasizes the need for legal translation not only of achieving equal effect and equal meaning but also of preserving the original intent of the legal text.”<sup>16</sup>

Achieving legal equivalence is a challenge, as it requires both linguistic and legal interpretation. It requires the translator to have a holistic understanding of the intent and legal implications set forth by the source text, and such intentions and implications must be expressed in the translation.<sup>17</sup> One legal scholar asserts the following process as being adequate:

Translating legal texts means transferring legal information from one language and culture into another language and culture, considering the differences in the legal systems and the purpose of the translation . . . Since the legal information contained in the source text (ST) is often vague, indefinite, and may also be ambiguous, it should be interpreted within the source language (SL) first, the interpreted information translated into the target language (TL), and, finally, the translated information conformed to the purpose of translation and genre of the target text (TT).<sup>18</sup>

The key piece of Simms’s process is the last step -- conforming the translation to the purpose and genre of the text. This type of translation not only requires proficiency in both the source and target languages, but proficiency in legal interpretation and a strong understanding of the legal systems of both parties.<sup>19</sup> The translating party must understand potential linguistic constraints (absence of inflection, words with multiple meanings, etc.) and must possess the ability to adequately overcome such challenges.<sup>20</sup>

### **Recommended Edits:**

In Chapter 2, section IV, paragraph 61 (Equitable), following “[t]he investor or the government, or the parties collectively, should ensure the community has . . . the legal support necessary to conduct meaningful consultation . . . by providing consultation documents in a language and medium communities can access,” the Guide should state the following:

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<sup>14</sup> Guide, Chapter 2, Section IV, paragraph 61.

<sup>15</sup> *The Translation of Legal Texts: Interlinguistic and Intralinguistic Perspectives*, Maurizio Gotti, ESP Today, Vol. 4(1) (2016) 5-21 at 6.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 7 (citing Simms, K., Translating sensitive texts. Linguistic aspects, at 19 (1997)).

<sup>19</sup> *Id.* at 7.

<sup>20</sup> *Id.*

“Consultation documents should be translated by a party with proficiency in both the investor’s language and the local language. The translator should be sufficiently knowledgeable in the investor’s local legal system and the community’s legal system, so as to be able to conform the meaning of the translated document with the investor’s intent. Further, investors should be wary of using government officials to facilitate negotiations, as their interests may not be aligned with the local communities’ interests. Failing to take into consideration the needs and perspectives of the local community will impact the long-term sustainability of the project.”

### SECTION III: PRIVACY

**Proposal:** The Guide should encourage investors to obtain consent prior to publishing personally identifiable information or redact it, where practicable.

**Rationale:**

In order to increase transparency, the Guide recommends making relevant documentation publicly available, including impact assessments, subject to the protection of confidential information.<sup>21</sup> Subsection (c) defines confidential information to include commercially sensitive information but excludes information relating to governments or communities.

Privacy law is a developing area, and countries are just now beginning to see a greater desire to control personal data. This desire has been evidenced through the introduction of the GDPR in Europe, the California Consumer Protection Act (CCPA), and numerous pieces of draft legislation. Investors are unlikely to see similar legal privacy protections in the countries in which they transact, however, investors should be mindful of this global trend toward privacy protection.

To the extent that personally identifiable information may be included in impact assessments or other disseminated documentation, the investor should obtain consent from the individual prior to its publication. If consent is not obtained, or if the investor chooses to forego obtaining consent, the individual’s information should be redacted.

Further, the Guide could include standards for the collection and processing of data relating to community members. To use the GDPR as a reference point, any storage or touching of data constitutes “processing.” All entities that process data are subject to GDPR and must identify a legal basis for processing such data. This legal basis can be:

- I. Consent of the data subject;
- II. Necessary for performance of a contract to which the data subject is a party;
- III. Necessary for compliance with a legal obligation of the controller (data process);
- IV. Necessary to protect the vital interests of the data subject (good Samaritan);
- V. Necessary for the legitimate interests of the controller, so long as the interests are not overridden by the fundamental rights and freedoms of the individual.

In countries whose citizens are not afforded protection under the GDPR, the Guide might suggest that investors should: (a) have a legitimate basis for processing information, which means limiting the data collection to the amount necessary for the impact assessment, and (b) obtaining

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<sup>21</sup> *Guide*, Chapter 3, Section V(A)(2)(a), paragraph 160.

the informed consent of the data subject. Obtaining informed consent will require the investor to specify the ways in which the data will be used (publishing for transparency, determining the impact of the project, other uses). Requiring adequate disclosures regarding the collection and use of the data will limit the instances in which data is used for purposes unrelated to the transaction.

**Recommended Edit:** Add to Chapter 2 Section IV.(B), Paragraph 74.

“In conducting impact assessments, investors should have a legitimate basis for collecting individuals’ data. Investors should not collect more data than is necessary to conduct an adequate impact assessment. The data subjects should not be personally identified, unless the data subject consents to such identification. The data collected through these impact assessments should not be used, published, or distributed for purposes unrelated to the impact assessment.”

#### SECTION IV: STABILIZATION CLAUSES & HUMAN RIGHTS

**Proposal:** The Guide should offer viable options mitigating human rights implications when Stabilization Clause is used in an investment contract.

#### **Rationale:**

A Stabilization Clause can hinder a State’s human rights obligation as it can contradict the purpose of due diligence set forth by the UN Guiding Principles. It is important to look at the negative human rights impact of stabilization clauses. The Guiding Principles on Business and Human Rights sustains that “states should maintain adequate domestic policy space to meet their human rights obligations”.<sup>22</sup> Therefore, it is imperative that, if there is a stabilization clause, it does not restrict the state’s capacity to advance its human rights in the future. Regarding to stabilization clauses Principle 4 of the Principles for Responsible Contract provides that:

“Contractual stabilization 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.”<sup>23</sup>

The threat to human rights in state-investor agreements with developing countries, while present, does not stipulate that there should be no stabilization clauses. Rather, it is to be clear that a state’s duty to comply with human rights obligations under international law and stabilization clauses in contracts that ‘freeze’ human rights advancement should not be at odds with each other.<sup>24</sup> If they are, then it is in complete contradiction with the due diligence and corporate social responsibility measures set forth by the UN Guiding Principles of Business and Human Rights.<sup>25</sup>

While there seem to be a shift toward discouraging stabilization clauses, investors may still decide it is necessary depending on certain circumstances. Therefore, IV.C par. 142 – Consideration

<sup>22</sup> United Nations. Office of the High Commissioner for Human Rights, Issuing Body. *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*. New York; Geneva: United Nations, Office of the High Commissioner for Human Rights, 2011. Print.

<sup>23</sup> Principles for Responsible Contracts: Integrating the Management of Human Rights Risks into State-Investor Contract Negotiations – Guidance for Negotiators, 25 May 2011, UN Doc. A/HRC/ 17/31/Add.3, Principle 4.

<sup>24</sup> Lorenzo Cotula, *Reconsidering Sovereignty, Ownership and Consent in Natural Resource Contracts: From Concepts to Practice*, 9 in *European Yearbook of International Economic Law* 2018 143–174 (Marc Bungenberg et al. eds., 2018), [http://link.springer.com/10.1007/8165\\_2018\\_23](http://link.springer.com/10.1007/8165_2018_23) (last visited Mar 31, 2019).

<sup>25</sup> Stabilization Clauses in Investment Agreements – a Human Rights and Development Perspective, <http://lup.lub.lu.se/luur/download?func=downloadFile&recordId=3359538&fileId=3403760> (last visited Mar 5, 2019).

should further suggest viable options on how to mitigate recourse whether a freezing, hybrid or economic equilibrium clause has been chosen. This gap has been identified by Andrea Shemberg, a legal advisor to the United Nations Special Representative to the Secretary-General for Business and Human Rights.<sup>26</sup> Thereby, setting up an independent or third party for the verification and allocation of claimed costs and a mutually agreed upon escrow amount – as insurance and risk mitigation tool – could be placed in holding for the duration of the contract by the State. The amount should be based on a thorough analysis – that includes both economic and political projections – prior to entering into contract. However, the amount held should not be considered final; for that the independent party should be used at the time of the clause coming into effect. These options would have a greater effect on protecting human rights violations throughout the duration of the investment.

**Recommended Edit:** Add to Chapter 2. Section IV. (C) par. 142 (Consideration).

“When a stabilization clause is used, mitigating recourse by an independent or third party to verify claimed costs or to allocate shared risk among the parties from the change in law is a viable option. Additionally, a hybrid or economic clause could stipulate, based on an estimated economic and political projection, that a mutually agreed upon amount is allocated in an escrow account by the State for the duration of the contract”

## SECTION V: RIGHT TO WATER

**Proposal:** The Guide should treat the Right to Water on par with the Right to Food.

### **Rationale:**

Right to Water is one of the most fundamental and indispensable human rights. Because the management of this natural resource is a very sensitive issue the Guide should address it separately under Chapter 2.IV.B.2 and treat it as a Human Rights issue in its entirety just as it allocates a separate section for the Right to Food.

There are a lot of soft international laws that govern the human right to water. Article I. 1 in General Comment No 15 of the Committee on Economic, Social and Cultural Rights clearly states that “The human right to water is indispensable for leading a life in human dignity. It is a prerequisite for the realization of other human rights”.<sup>27</sup> In 2010 the UN General Assembly also explicitly recognized the human right to water in Resolution 64/292.<sup>28</sup> The World Health Organization (WHO) also called on Member States to ensure strategies in regards to safe water that also meet the Millennium Development Goals (MDG), now the 2030 Agenda. Social, economic and human rights development cannot be sustainable without adequate management of resources such as water.

However, because the planet is facing a decreasing water supply, access to water is a highly sensitive geopolitical matter. Research by the European Commission's Joint Research Centre (JRC) clearly shows that water will be a cause of major social conflict in the future.<sup>29</sup> Therefore, in a climate where the world is running out of water, it is essential to protect populations and to ensure continued access to water where the investment is taking place. The issue at hand is water privatization – that

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<sup>26</sup> Stabilization Clauses and Human Rights, available at: [https://www.ifc.org/wps/wcm/connect/topics\\_ext\\_content/ifc\\_external\\_corporate\\_site/sustainability-atifc/publications/publications\\_loe\\_stabilization\\_wci\\_1319577941106](https://www.ifc.org/wps/wcm/connect/topics_ext_content/ifc_external_corporate_site/sustainability-atifc/publications/publications_loe_stabilization_wci_1319577941106).

<sup>27</sup> UNDESA, [https://www.un.org/waterforlifedecade/human\\_right\\_to\\_water.shtml](https://www.un.org/waterforlifedecade/human_right_to_water.shtml).

<sup>28</sup> UNDESA, [https://www.un.org/waterforlifedecade/human\\_right\\_to\\_water.shtml](https://www.un.org/waterforlifedecade/human_right_to_water.shtml).

<sup>29</sup> European Commission's Joint Research Centre, available at: [http://ec.europa.eu/environment/integration/research/newsalert/pdf/368na1\\_en.pdf](http://ec.europa.eu/environment/integration/research/newsalert/pdf/368na1_en.pdf).

all geopolitical actors are very much aware of – and the function of the liberal international institutions. The debate of course is whether water is an economic good or not.

With the onset of neoliberalism and with the ‘leadership’ of former Prime Minister Margaret Thatcher and former President Ronald Reagan, this conversation tilted toward water being up for sale. The World Trade Organization (WTO), the International Monetary Fund (IMF) and others work tirelessly to ensure continuous Western, mainly US (who is the most opposed to the right to water), domination. And since Sustainable International Development means, sustainable for the Global North, it is crucial to incorporate human rights provisions regarding the right to water to the local population.

While the Guide does address water as a resource and a utility, it curiously does not emphasize and avoids placing it directly under the Human Rights section. It also lacks supporting a right to water impact assessment, which should be a critical measure of the investor’s and the grantor’s due diligence. Due to the continual decrease of freshwater supply – there is a growing gap of fresh water supply per capita – and an increase in drought onset by climate change, it is essential that the people have their Right to Water. Additionally, water and energy security are interdependent. Water is needed for energy production and today about 1 billion people are still without electricity in developing nations, which causes women and children to be marginalized and left out.

### **Right to water impact assessment**

The three main aspects to the right to water are a) the assurance of the right to water to all people; b) safeguarding access to water for land; and c) water basin management and indigenous rights.<sup>30</sup> The Guide should emphasize the need for a water impact assessment – as part of the Human Rights Impact Assessment – and the importance of a protocol for water allocation, including during periods of stress such as flooding or other natural disaster. Minimum safety standards should be assessed before and throughout the duration of the contract.

**Recommended Edit:** Add to Chapter 2. Section IV.(B) 2. to treat it as a Human Rights issue in its entirety just as it allocates a separate section for the Right to Food.

### **Right to water impact assessment**

“States should consider conducting right to water impact assessments to identify the impact of domestic policies and projects on the right to adequate water of the population within their borders generally and for vulnerable populations therein in particular. These impact assessments can form the basis for adopting corrective measures. Responsible investments need to contribute to water security, which includes supporting the right to adequate water. An investment that does not undermine the right to water would ideally have the following effects: enhanced food utilisation through access to clean water, sanitation, energy. 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 water, but also safeguard against dispossession of right holders, environmental damage, and it supports local communities. An integrated water resource management plan which considers the extraction of water and its impact on the local communities is recommended.” (Based on the Guide’s right to food impact assessment.)

### **Access to water**

“A human rights impact assessment can also assess the extent to which agricultural investments affect local access to water. Such an assessment would identify risks and include strategies to

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<sup>30</sup> The IISD Guide to Negotiating Investment Contracts for Farmland and Water, 62.

improve availability, access, stability of supply, and utilisation of water. The importance of such an assessment arises in part because projects that violate human rights expose investors to civil or criminal liability, local opposition<sup>31</sup> as well as reputational harm. It is important to understand the possibilities and limits of the justiciability of the right to water. Such impact assessments are particularly credible when conducted by an independent third party because this goes a long way to ensure their objectivity. Impact assessments are particularly useful when they identify how an investor can prevent, minimise, and mitigate the risks.<sup>32</sup> Of course if the results of an impact assessment regarding access to water are untenable, that assessment indicates that a land investment requires safeguards or should not proceed.<sup>33</sup> (Based on the Guide's Access to food section.)

## SECTION VI: INVOLUNTARY RESETTLEMENT SAFEGUARD PRINCIPLES

**Proposal:** The Guide should include an involuntary resettlement safeguard principle Guide that calls for a Human Rights/Social Impact Assessment.

### Rationale:

It is not enough to identify potential stakeholders but rather safeguards should be implemented that builds upon the impact assessments and prepares for it ahead of a contractual agreement. These should include a full understanding of whether resettlement will be required by certain populations, consultation with locals affected by the land acquisition and have a plan of action accommodating the resettled population.

Involuntary resettlement means both physical and economic displacement and the requirements should be part of the contract to ensure resettlement of the population. This should fall under either the Social Impact Assessment (SIA) or under a new Human Rights Impact Assessment (HRIA) that should be widely used not only before but during a project when unanticipated impacts arise. The assessment should undertake human rights due diligence. The Equator Principles<sup>34</sup> already heavily suggest that a SIA should be completed before the project and the new IFC's Good Practice Handbook: Land Acquisition & Resettlement<sup>35</sup> draft also highlights the importance of involuntary resettlement.

Analyzing a project's human rights/social impact is just as important as its environmental impact, therefore, a human rights/social management plan should be created to enhance human rights due diligence that accounts for avoidance, minimization and compensation that arise from the investment prior to the contract. Therefore, an Involuntary Resettlement section should be allocated under Chapter 2.IV.B.2 – Impact Assessments at a minimum, which outlines the management and a compliance review of resettlement by an independent party prior to implementation of the investment. However, a full Social Impact Assessment (SIA) or Human Rights Impact Assessment (HRIA) is highly recommended.

**Recommended Edit:** Add to Chapter 2. Section IV.(B) 2. (Impact Assessments)

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<sup>31</sup> *Id.* at 56.

<sup>32</sup> Vhugen, Darryl, Responsible Governance of Tenure: A Technical Guide for Investors; VGGT Technical Guide No. 7, page 61 (2016).

<sup>33</sup> *Ibid.*

<sup>34</sup> The Equator Principles Association Governance Rules, <https://equator-principles.com/wpcontent/uploads/2018/01/governance-rules-april-2017-v2.pdf>.

<sup>35</sup> IFC's Good Practice Handbook: Land Acquisition & Resettlement Draft [https://www.ifc.org/wps/wcm/connect/74f457f6-ddf7-44ec-87bbfed991b978fc/Draft\\_Resettlement+Handbook\\_Disclosure\\_March132019\\_Final.pdf?MOD=AJPERES](https://www.ifc.org/wps/wcm/connect/74f457f6-ddf7-44ec-87bbfed991b978fc/Draft_Resettlement+Handbook_Disclosure_March132019_Final.pdf?MOD=AJPERES).

## **Involuntary Resettlement - Management & Compliance Review**

“The management and compliance review of the involuntary resettlement should be implemented that follow demonstrated international resettlement standards including planning, implementation and monitoring of land acquisition, expropriation, livelihood restoration, and grievance mechanisms. Both the manager and the independent compliance reviewer should be familiar with the application of resettlement standards in context of the country. It is crucial that the representative of the local population is fully involves and has access to documents regarding the assessment, management and compliance of the resettlement process.”<sup>36</sup> (See. Section VII. Human Rights Audit.)

### **SECTION VII: HUMAN RIGHTS AUDIT**

**Proposal:** The Guide should offer a complete Human Rights Audit for both State/Grantor and Investor that aims to offer viable options for vulnerable populations effected by investment to counter the weaknesses of the international investment regime, the UNGDP and other such guide’s, and the international arbitration mechanism.

#### **Rationale:**

Not only do the authors of this Guide admit that it lacks representation from the Global South in providing input, but the Guide also relies heavily on the UN Guiding Principles for Business and Human Rights and many other similar Guide’s. Since it is the nexus between business and State that perpetuates human rights violations, an investment contract template should be used that pins business against State and vice versa in order to find the most optimal for the vulnerable.

In a roundtable discussion led by the Columbia Center on Sustainable Investment<sup>37</sup>, it has been documented – post UNGDP, in 2018 – that vulnerable populations have no voice and that the impact of the international investment regime is no access to justice for them. Exclusion from the investment process, unfair fines, detention and criminalization of protesters, no awareness of an investment, no consultation with the communities, successful investor-state claims after harm to land and natural resources, lack of transparency and monitoring, information asymmetries etc. is ever so present. The list is too long, which shows how there are horrendous barriers to participation for vulnerable populations that are affected by investment. A Guide, such as the UNIDRIOT Guide needs to be very mindful, how investment law is being developed through the use and interpretation of such Guide. While in theory it nudges investors toward human rights implementations, in reality it is very likely that it is complicit in perpetuating and possibly even strengthening the barriers for the vulnerable.

To mitigate some of the enormous issues at hand, the Guide should aim to create and support a mechanism that forces both sides, business and State, into the most optimal place that serves and protects the vulnerable. Without binding human rights laws such as the UNGDP, other creative mechanisms are necessary to ensure that the human rights need of the vulnerable populations are met. And the only way this is possible is if the investment contract itself pressures both sides toward that equilibrium because as it stands the interests of the stronger parties will always have the advantage. If this Guide is serious about preventing and solving human rights violations then it needs to go beyond the available direction, as it has been already documented not to work, and help create conditions that move closer to the optimal.

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<sup>36.</sup> *Id.*

<sup>37</sup> Impacts of the International Investment Regime on Access to Justice, [https://www.ohchr.org/Documents/Issues/Business/CCSI\\_UNWGBHR\\_InternationalInvestmentRegime.pdf](https://www.ohchr.org/Documents/Issues/Business/CCSI_UNWGBHR_InternationalInvestmentRegime.pdf).



“Participants agreed that, within the investment law framework, opportunities for individuals and communities affected by investment to access justice do not currently exist.”<sup>38</sup>

It cannot be disregarded that we are dealing with people who aim to serve their own interests, and neither business nor the State represent the interest of the vulnerable. Therefore, a Human Rights Audit section is necessary under Chapter. 3. Rights and Obligations of the Parties, that specifically highlight the responsibilities of business and State before, during and even after the investment period in such a way that each pins the other in tandem toward the most optimal possible. This is an area that needs serious conversation and thought because it is the responsibility of the authors and participants of this Guide on finding solutions on how the vulnerable can truly be protected. It is simply not enough to invoke the UNGDP because that Guide itself is vulnerable and is not capable of being implemented in reality on the ground no matter its high ideological standard.

The Human Rights Audit would stand to thoroughly implement, document and disseminate all information in a transparent manner to all parties involved, including the vulnerable populations effected by the investment. While this requires an exhaustive research, a starting point is presented below as food for thought on how to go about it. (In a sense, the Human Rights Audit is an audit on the UNIDROIT Guide itself, to question its place and its effect on the vulnerable populations.)

One of the major setbacks for the vulnerable populations are lack of access to representation. Therefore, both the State and the Investor should allocate and set up a fund that serves the vulnerable populations. This allows them to afford and hire their own legal representative and expert translator and interpreter of land acquisition of their choice, thereby ensuring their place, voice and equal footing at the table. Because both State and Investor profits from the land investment – from land that should serve the local population – the allocated account also needs to be continually funded based on the profit margins. An agreed upon percentage of profit should be continually allocated for the representation of the vulnerable populations throughout the investment.

While this above is, of course, what neither State nor Investor wants to do, we need to set up contractual conditions that force each to do so. Without such arrangement, it could be argued that the investment contract between the State and the Investor is illegitimate, because it falls under exploitation of vulnerable populations. (This legal technicality would be a major breakthrough for human rights.) Even the UNGDP falls short of this basic understanding. (Questionably, because it is not its true intent or because they are unable. Either way, it shows complete weakness and failure for humankind.)

“If a state denies human rights abuses committed against its own citizens, it is difficult to see how it can be proactive against human rights abuses in businesses operating in its territory, raising serious questions about the efficacy of the UN’s (2011) guiding principles.”<sup>39</sup>

The harder question, however, is, how can the contract be structured in such a way, so that both sides are able to push each other toward such optimal, without losing their interest in the project itself. The UNIDROIT Guide has the opportunity to create an international norm – or at least the conversation around it – that drives land investment in the future.

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<sup>38</sup> Impacts of the International Investment Regime on Access to Justice, [https://www.ohchr.org/Documents/Issues/Business/CCSI\\_UNWGBHR\\_InternationalInvestmentRegime.pdf](https://www.ohchr.org/Documents/Issues/Business/CCSI_UNWGBHR_InternationalInvestmentRegime.pdf).

<sup>39</sup> Siddiqui, Javed, and Shahzad Uddin. “Human Rights Disasters, Corporate Accountability and the State Lessons Learned from Rana Plaza.” *Accounting Auditing & Accountability Journal*, vol. 29, no. 4, 2016, pp. 679–704.

A complete Human Rights Impact Audit should be followed that includes, but is not limited to:

- a) Risks to human rights defenders
- b) Risk to people today and future generations
- c) Risks to the ecosystem
- d) Management of human rights issues
- e) Annual assessment by a third party
- f) Track Key Performance Indicators (KPI's)
- g) Transparency
- h) Monitoring
- i) Review of investor's business model
- j) Find optimal profit at which point above human rights and ecosystem deterioration is evident. Set up mechanisms to monitor and have plans for immediate redirection. Annual review is essential.
- k) Responsibilities of each parties
- l) Assessment of State and business human rights history

**Recommended Edit:** Add to Chapter. 3. Rights and Obligations of the Parties.

"Both State and Investor should follow a Human Rights Audit that aims to realize both their impact and thereby their responsibilities toward the populations affected by the investment. A thorough audit by a mutually agreed-upon (by State, Investor, and representative of the local community) third party should be conducted before entering into a contract and annually thereafter for the duration of the investment contract."

#### SECTION VIII: DATA SECURITY

**Proposal/Subject:** The Guide needs to advise setting up and implementing cross-border paperless transaction management and safeguards.

**Rational/Explanation:**

An e-transaction framework is not only beneficial but today is a must for both parties. Identifying relevant provisions of international law, regional and international regulations, and best practices can help draw up this framework. A reference map for a cross-border paperless investment transaction should define processes both State/Grantor and Investor are taking regarding the items below.

- a) Technical/operational agreements across multi-parties
- b) Information/Communication Security & Data protection
- c) Data Security Breach

- d) Data transfer – who owns what data?
- e) Privacy (See Section III.)
- f) Information Sharing
- g) IP Rights
- h) Data retention/electronic archiving
- i) Encryption
- j) E-signature
- k) Digital Identity & E-Authentication

Data is an important asset that needs to be safeguarded. The secure transmission of data between State/Grantor and Investor is crucial and need to be addressed and safeguards must be agreed upon. Therefore, the transfer of confidential data or proprietary information over a secure channel needs to be part of an investment contract.

The best practice for securing data is end-to-end file encryption, which prevents hackers to access, read and understand any data exchanged among the authorized parties. There are three widely used encryption options: FTPS (File Transfer Protocol Secure), SFTP (SSH File Transfer Protocol) and HTTPS (HTTP Secure). Cyber threat needs to be considered among the parties involved and the Guide should offer some strategic or defensive methods for protection.

The choice of law regarding data also need to be addressed in the Guide before entering into a contract, however, in 2013 the OECD questioned to what extent Guide's, such as UNIDRIOT's, should put forward solutions of a non-binding nature. Today, this should no longer be a question even though it is complex.

"The problems of choice of jurisdiction, choice of applicable law and recognition of foreign judgements have proved to be complex in the context of transborder data flows."<sup>40</sup>

The Guide should also advise that protocols in the event of a data breach are a must and that each party should be aware of all mechanisms in place in the event that one party's data is compromised. A data security risk management<sup>41</sup> plan should be in place and agreed upon by all parties.

**Recommendation/Edit:** Add to Chapter 3. V. as a new subsection C. (Data Security).

"The facilitation of cross-border paperless transactions need to have clear outlines and roadmaps for both State/Grantor and Investor that identifies, safeguards and implements secure mechanisms for the protection of all data. All parties should agree to a digital framework that facilitates and safeguards their paperless transactions, including, encryption, authentication, data breach, data transfer, data ownership, e-signature, etc. A data security risk management plan is also advised to be part of the contract to mitigate potential risks due to cybercrime or employee negligence."

<sup>40</sup> OECD Privacy Framework [http://www.oecd.org/sti/ieconomy/oecd\\_privacy\\_framework.pdf](http://www.oecd.org/sti/ieconomy/oecd_privacy_framework.pdf)

<sup>41</sup> OECD Data Security Risk Management <http://www.oecd.org/sti/ieconomy/digital-security-riskmanagement.htm>

## SECTION IX: LARGE-SCALE TRANSFER OF TENURE RIGHTS

**Proposal:** The Guide should more adequately define the term “large-scale transfer of tenure rights.”

**Rationale:** It is essential to define a measure for clarity in the text. The Guide presently states the following under Preface I.: “[t]he Guide, however, does not promote the *large-scale transfer* of tenure rights and excludes the sale of agricultural land from its scope.” The guide does not define what constitutes a large-scale transfer.

**Recommended Edit:** Change Preface I. Paragraph 5. (Purpose)

“The Guide, however, does not promote the large-scale (over X acres or X hectares) transfer of tenure rights and excludes the sale of agricultural land from its scope.”

## SECTION X: NEED FOR RESPONSIBLE INVESTMENTS

**Proposal:** The ‘need’ specified is based on false economic assumptions that promote economic growth and suggest that food security can only be achieved through investment by way of the current international monetary and economic system.

**Rationale:** The Guide takes for granted and does not question or allow for the flexibility of an alternative economic and monetary framework. Thereby, it follows, supports and promotes an economic model endorsed by the current international framework created and controlled by the Western states. Consequently, promoting the need for economic growth to achieve food security and reduction in poverty in developing nations through investment to achieve Sustainable Development Goals should not stand. The Guide’s purpose should be to help all parties navigate the current climate, but it should not be matter of fact about the ways with which Sustainable Development Goals can be achieved. Numerous studies clearly show not only that the larger international economic and monetary framework is broken, but also that within this scheme neither sustainability nor reduction in poverty can be achieved. Therefore, the following should be changed under Introduction I.

“Investment in agriculture is essential for achieving food security and adequate nutrition and for reducing poverty.<sup>42</sup> Greater and more responsible investment is expected to increase growth, employment and incomes, and 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 Sustainable Development Goals 1 (No poverty) and 2 (Zero hunger).<sup>43</sup>”

**Recommended Edit:** Change Introduction I.

“The need for a more responsible foreign investment in agriculture and the role of agricultural land investment contracts.” (Title)

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<sup>42</sup> 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 realization 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 marginalized 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.”).

<sup>43</sup> 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-WFP, *Achieving Zero Hunger, The critical role of investments in social protection and agriculture* (2nd ed., 2015) at iv-v, 13, <http://www.fao.org/3/a-i4951e.pdf>.

“A more responsible investment in agriculture is required from public authorities, private sector investors and smallholder farmers to achieve Sustainable Development Goals 1 (No poverty) and 2 (Zero hunger).”

## SECTION XI: KEY QUESTIONS

**Proposal:** The Guide should insert additional key questions relating to ecological interests and impact on the ecosystem.

**Rationale:** It is not only important to identify stakeholders’ short-term interests, but rather long-term and broad ecological questions should be added to the Guide that also relates to future generations that will be impacted by the investment.

**Recommended Edit:** Two additional questions should be added under Chapter 2.IV.A.1.par. 53 – Key Questions.

“What are the overall ecological interests of the local population?”

“How is the investment impact and affect the larger ecosystem today and the health of the biodiversity in the future?”

## SECTION XII: TENANT RIGHTS

**Proposal:** The Guide should include a section on tenant rights.

**Rationale:** Since it is feasible to assume that in some instances there might be an improved property on the acquired investment land occupied by tenants, a tenancy right clause should be provided. Local rental and property laws should be followed. The investment contract should make sure that tenant is either offered to have his/her current contract honored until it expires, have the option for renewal or have a resettlement process put in place.

**Recommended Edit:** This section should be added to Chapter 2. Section II. (D) (Other Stakeholders).

“Tenant rights should be honored, extended, and expired according to domestic real estate laws. The tenant must be notified of the potential investment and should be given adequate time about the terms extended by the new landlord and about the options of resettling prior to the land contract.”

## SECTION XIII: SUPPLY CHAIN

**Proposal:** The Guide should encourage investors to ensure that rural producers are paid a living wage and that there is transparency in the supply chain process.

**Rationale:** Heifer International recently came to speak at the University of Washington regarding rural coffee farmers. They shared that a majority of the value from coffee sales is concentrated in the hands of the final seller and the roastery.<sup>44</sup> Very little value is provided to the rural producers, causing farmers to become extremely poor outside of harvest seasons (referred to as the “lean months”). The Guide should encourage all members of the supply chain to assume responsibility for fair wages. The Guide references the living wage in one portion of the guide, however, it simply

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<sup>44</sup> Heifer International, presentation at the University of Washington School of Law (2019).

encourages investors to comply with local minimum wage (or living wage) laws. Where these laws do not exist or are not adequate, the investors should be responsible for bridging the gap.

Further, there are new technologies that can increase transparency in the supply chain, such as blockchain.<sup>45</sup> Blockchain is a distributed ledger that hosts information, similar to a database. It differs from a standard database in that all members of the blockchain can see the data and its contents cannot be changed. This prevents corrupt actions to manipulate data. This increased transparency should be encouraged, as organizations such as Heifer International and

Starbucks are experimenting with this technology and have thus far found it to be useful.<sup>46</sup>

**Recommended Edit:** At the end of Chapter 3, paragraph 98 (encouraging an outgrower scheme), the following should be added:

“All members of the supply chain should assume responsibility for ensuring that rural producers are guaranteed a living wage year-round. Investing in rural producers and their infrastructure will only make the investment more sustainable. Further, investors should consider using new technologies, such as blockchain, to increase transparency in the supply chain process.”

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<sup>45</sup> IBM Blockchain for supply chain, IBM, <https://www.ibm.com/blockchain/industries/supply-chain>.

<sup>46</sup> See Heifer International Blockchain Initiatives, Heifer International, <https://www.heifer.org/campaign/2018/blockchain-initiatives.html>; and Starbucks Launching Pilot Program for Blockchain in its Supply Chain, Daily Coffee News, <https://dailycoffeenews.com/2018/03/22/starbucks-launchingpilot-program-for-blockchain-in-its-supply-chain/>.

## ANNEX II

**Original comments received through the AFRONOMICS Webpage<sup>8</sup>**

- **Mr. James Thuo Gathii** (Loyola University Chicago)

[Summary of Symposium on UNIDROIT/FAO/IFAD Draft Legal Guide on Agricultural Land Investment Contracts \(ALIC\)](#)

An excellent line-up of 9 experts have studied the Legal Guide and put to paper their reactions, critical and otherwise, as well as very insightful suggestions on how to improve it. In the interests of full disclosure, I served as an expert in the three-year consultative process during which the Legal Guide was crafted. I am therefore delighted to see this high-level engagement on the draft from some of the thought leaders in this field.

To begin the symposium, [Michael Fakhri's](#) first of two posts argues that the Legal Guide is an invaluable tool for tenure rights holders, commercial lawyers, business people, and governments in their negotiations and drafting of agricultural land investment contracts. In his view, the Legal Guide fills the "void left by the bankruptcy of international investment treaties." He is particularly praiseworthy of how the Guide uses the FAO's Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries in the Context of Food Security, the UN Guiding Principles on Business and Human Rights and indigenous rights such as that requiring investors to acquire free, prior and informed consent from indigenous peoples as required by the UN Declaration on the Rights of Indigenous Peoples. He notes that the Legal Guide adopts a broader definition of legitimate tenure right holders than does the World Bank. He notes that the Legal Guide provides investors with specific ways they can reduce risk by treating human rights as a matter for contractual safeguards. Michael Fakhri notes that the Legal Guide "walks through a delicate compromise by not endorsing large-scale land acquisitions but acknowledging that land acquisitions continue to occur."

[Tomaso Ferrando](#) begins his reflections by noting how non-binding codes of conduct, like the Legal Guide, represent a threat to people and the planet because they proceed from the premise that agribusiness is essential to the future of food security and are an opportunity for employment and infrastructural development, rather than as a source of depletion of water and soil and for increasing the scarcity of good agricultural land. Such Guides, Tomaso warns, risk normalizing the inherent limits that characterize large-scale investments in land. Tomaso foregrounds the imbalances in bargaining power between communities and small-scale farmers, on the one hand, and agribusiness investors, on the other. This imbalance, he argues, as well as corruption and competition for foreign capital are overtly political questions that cannot be adequately addressed by drafting legal clauses.

That said, Tomaso borrows from his own experience helping local communities protect their access to land, livelihood and tenure rights in contractual negotiations in large-scale land investments. Based on this experience, he argues because existing contracts are heavily weighed in favor of investors, "not all the content of the Legal Guide should be thrown away with the bathwater." He likes the Legal Guide's recommendation of third-party beneficiary clauses as well as its explicit recognition that land investment contracts are more than just about land but also extend to other issues including water, oil, woods and spiritual values. He recommends that the Legal Guide take into account: (i) the financial and organizational cost of involving local communities in contract drafting; (ii) to think more carefully about the role of the state in defending the private property of investors from any disturbance and consider whether a state should no longer be bound by a contract whose performance is linked with breaches of its international and national obligations. This would overcome characterizing local community challenges to land investment contracts as a cost to an

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<sup>8</sup> The following are the raw comments posted on the Afronomics webpage in chronological order of receipt.

investor rather than as constituting breaches of internationally and nationally protected rights; (iii) to embrace termination clauses that would allow a state to terminate a land investment contract that would be in breach of the protection, respect and fulfillment of human rights; (iii) to consider the extra-territorial obligations of private and public investors in their overseas land investment dealings. Tomaso ends his blog posts with reflections about how the Legal Guide can be used by activists and others as an additional tool of engagement and challenge to the nature of agricultural land investments.

[Titilayo Adebola](#)'s post reflects on the Legal Guide from the perspective of access to food and intellectual property rights. While praising the proposed human rights impact assessment of land investment contracts, Titilayo argues that the Guide seems to prioritize food crops produced in such investments be primarily destined for foreign as opposed to domestic consumption. She notes this concern is vital especially in Africa where many States are heavily dependent on food imports and food aid. For this reason, she argues that SDG Goals 1 and 2 should be prioritized in the Draft to ensure responsible and sustainable investments that improve local food security and that move the ball towards 'no poverty' and 'zero hunger'. For this reason, she recommends that the Legal Guide should have explicit provisions on the percentage of production from agricultural land investments be reserved for domestic consumption.

In addition, she notes the lack of attention to the potential impact of agricultural land investments on intellectual property rights – especially those relating to plant varieties. She notes how agricultural investments have promoted and propelled the introduction of strong forms of breeders rights such as the International Convention on the Protection of New Varieties of Plants, (1991(UPOV) at the expense the rights of small-scale farmers who are in turn precluded from saving, reusing, exchanging or selling farmed saved seeds. This constitutes a threat to their farming practices and livelihoods. This is inconsistent with the VGGT's goals of increasing sustainable food production especially of safe and nutritious food and the promotion of fair and transparent food systems. Titilayo therefore recommends that the Legal Guide should incorporate intellectual rights within its impact assessments to ensure the interests of traditional farming practices, traditional knowledge and access and benefit sharing and small-scale farmers are taken into account. She also recommends systematic attention in the Legal Guide to the impact of agricultural land investments on intellectual property rights alongside considerations such as legitimate tenure rights, human rights, livelihoods, food security and the environment. In her view, the Legal Guide should make provision that would oblige States not to expressly include intellectual property rights provisions in land investment contracts especially those that are favored by large-scale agricultural businesses. Instead, she recommends attention be paid to 'imaginatively designed' sui generis intellectual property rights regimes that favor the rights of small scale farmers such as the [International Treaty on Plant Genetic Resources for Food and Agriculture](#) 2001, the [Convention on Biological Diversity](#), 1992, as well as the [Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity](#), 2010.

Like Titilayo Adebola, [Chidi Oguamanam](#) calls attention to the post-cold war consolidation of strong international frameworks for the protections and enforcement of intellectual property rights that favor northern industrial economies; that offer token wiggle room for developing countries and that are insensitive to African specific approaches to the protection of agricultural innovation. He gives the African Union's [African Model Legislation on the Protection of Rights of Local Communities, Farmers and Breeders for the Regulation of Access to Biological Resources](#) of 2000 as an alternative model. He regrets that external pressures on African governments from investors especially those involved in large scale agricultural land investments have adopted the pro-industry Union for the Protection of New Varieties of Plants (UPOV). He regrets this western reproduction of intellectual property rights that is inimical to the interests of communities affected by large-scale agricultural land investments. He hopes that the Legal Guide will go towards addressing this challenge.



[Nicolás M. Perrone's](#) contribution to the symposium notes that the Legal Guide is welcome because discussions on international investment law tend to focus too narrowly on the outcome of investor state dispute settlement cases. Such discussions he notes, fail to take into account "the distribution of benefits, costs and risks associated with foreign investment." Those benefits, costs and risks include how host states and local communities can achieve a fairer distribution of benefits and as such how to make the law more responsive to the costs and risks of host states and local communities. Perrone recommends three areas that the Legal Guide can develop in greater detail. First, the relationship between agricultural land investment contracts and other laws – here he has in mind the Guide being "more explicit about the challenges posed by some investment awards and other legal orders." Second, he is worried that a focus on contracts as a governance tool poses a risk of consolidating a transactional paradigm that reifies international investment law and therefore poses risks to the relevance of an alternative domestic law model for governing agricultural land investment contracts. While recognizing that the traditional contractual model leaves little to no scope for local community participation and the fact that the Legal Guide recommends creative ways of overcoming this, he argues that "it does not provide detailed examples of participatory and cooperative structures," which he considers a necessary first step before they could be implemented. Finally he notes that the dual role of States when they negotiate contracts as facilitators and regulators of foreign investment, is often in tension with the role of the state in ensuring its resources are used to promote the well being of their peoples. He argues that should receive more attention.

In his contribution to the Symposium, [Sam Szoke-Burke](#) welcomes the Legal Guide's embrace of multi-actor contracts that would allow legitimate tenure rights holders to participate in authorizing contract negotiations. This would allow local communities to weigh in early in the decision-making process to help them influence the framing and substance of contracts especially and where a project may create an unacceptably high risk of negative impacts a community may be able to help local communities regain control over their land and resources. But he notes that multi-actor contracts should not be seen as synonymous with free prior informed consent (FPIC). He notes that FPIC applies at very stage of decision-making around an investment. Like Tomaso he notes that power imbalances would likely tilt the bargaining power in favor of investors even in the context of multi-party contracts. That is why he supports innovative ways of funding technical support to ensure that informed negotiations that are also culturally sensitive and that are accessible to community. Szoke-Burke argues that enforceable multi actor contracts, especially those that include a termination clause for material breaches of contracts would help in making investors liable. Ultimately he argues such contracts are likely to be game changers in the way they would help advance the human rights of communities and/or community members to give or withhold their free prior informed consent.

For his part, [Philip Seufert](#) of [FIAN International](#), first contextualizes land investment contracts to the growing power and influence of global finance on the economy. The actors involved include banks as well as those that buy the produce grown. He emphasizes the complex investment structures adopted by these corporations must be taken into account in efforts to prevent and address the adverse human rights and environmental issues such as ecosystem destruction accompanied by their investments. In his view there are players not party to land investment contracts that are bear responsibility. For that reason, he is skeptical that a purely contractual approach would reach all the responsible parties who are able to leverage their 'distant' relationship from the parties to such contracts to escape liability. He therefore calls for more transparency in the complex web of corporate actors involved in agricultural land investment contracts to more accurately reflect liability of the various players. This he says requires not merely transparency of all the actors involved, but accountability of all actors involved in cases of abuses or harm by they 'affiliates, financiers or actors that are linked to a land deal through the value chain.'

With regard to communities, Seufert argues that effective prevention and access to remedies is critical to deal with human rights abuses by corporate actors. The recommendation in the Legal Guide of grievance mechanisms, he argues risks having corporate actors use mechanisms they control at

the expense of using state based quasi-judicial and judicial mechanisms which in his view could be more effective.

[Sara L. Seck's](#) contribution to this symposium reflects on the Zero Draft of the ALIC Legal Guide in light of the findings of the August 2019 IPCC report entitled Climate Change and Land: an IPCC special report on climate change, desertification, land degradation, sustainable land management, food security, and greenhouse gas fluxes in terrestrial ecosystems (IPCC CCLR). After examining how the IPCC Special Report relates to agricultural land investments, Sara notes that the Zero Draft of the ALIC Legal Guide dedicates only a paragraph on climate change, but does not link this to the "human rights implications of climate change, nor is there an attempt to determine what this might mean for business responsibilities under the United Nations Guiding Principles on Human Rights and Business."

Sara is also critical about how the report separates out impact assessments (human rights, environment, economic, socio) without seeking to understand the interrelationship between them. This together with the fact that the Zero Draft treat climate change as a small subset of environmental that can be balanced against economic or social concerns is according to Sara 'highly problematic in a time of climate crisis.' She therefore recommends that the final text of the ALIC Zero Draft should "more seriously grapple with the implications of climate crisis for agricultural land investment contracts, and pay close attention to the findings of the IPCC CCLR."

Like Sara, [Adebayo Majekolagbe](#) is also critical of the ALIC Zero Draft's fragmentation of impact assessments. This he notes departs from the close interdependence of biophysical and socio-economic concerns. He argues that the ALIC Zero Draft should focus on encouraging positive steps, relegate trade-offs and mitigation of negative effects as well as set inviolable limits while insisting on multiple reinforcing and durable gains. These are the central components of the type of a Sustainability Assessment that should be adopted in the final version of the Draft.

To round up the symposium, [Michael Fakhri's](#) second post also criticizes the separation of the impact assessments in the ALIC Zero Draft for the reasons that Sara and Adebayo allude to, but also because multiple assessments "may or may not be completed, [would be] conducted over different times of the year by different professionals [thereby creating] a disjointed understanding by all parties and a headache as a matter of project management." In addition, he regrets that the economic impact analysis does not include institutional analysis about how large-scale agricultural land investments "may alter existing economic institutions such as households, local and global markets, and public administration." He calls for an integrative human rights impact assessment that would require collaboration amongst different types of knowledge-holders and professionals.

On behalf of UNIDROIT, FAO and IFAD as well as all the experts and stakeholders who have been involved in putting together the ALIC Zero Draft I would like to thank all the authors of this really great online symposium for the time they spent studying the draft and for their very insightful feedback. This feedback will greatly improve the quality of the final report.

- **Ms. Titilayo Adebola** (Aberdeen University)

September 03, 2019

[Access to Food and Intellectual Property Rights: Commentary on the Draft UNIDROIT/FAO/IFAD Legal Guide on Agricultural Land Investment Contracts](#)

This commentary considers the access to food component of the draft UNIDROIT/FAO/IFAD Legal Guide on Agricultural Land Investment Contracts ([Guide](#)) and voices its silence on intellectual property rights (IPRs). In the past decade, foreign investors have increased the number of investments in the [long-term lease](#) of arable land, especially in Africa, and in the Global South,

generally. The [reasons](#) for the choice of these locations include the availability of large portions of inexpensive agricultural land, inexpensive local labour and favourable climatic conditions for crop production. The Guide proposes more responsible investments in agriculture from public and private sector investors as a way to achieve, inter alia 'No Poverty' and 'Zero Hunger' ([Sustainable Development Goals 1 and 2](#)).

The agricultural investment (investments), typically bilateral, involving an investor and a legal tenure right holder or a legitimate tenure holder, are in different forms, including investment contracts, concession agreements, community development agreements, contract farming and joint ventures. There are concerns that the agricultural land investment contracts are often negotiated or implemented in ways that fail to involve all holders of tenure rights or properly balance policy goals such as promoting food security, protecting the environment, safeguarding the rights of legitimate tenure right holders and stimulating economic goals. A critical analysis of the investments and concomitant contracts uncover social, economic, ethical and political complexities. Nevertheless, the Guide proposes the amelioration of food security concerns and complexities through ex ante human rights impact assessment.

#### Access to Food: Human Rights Impact Assessment

According to the Guide, a 'human rights impact assessment can 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' (see also: [VGGT Technical Guide No. 7](#) FAO, 2016). An investment that promotes the human right to food would provide for the increase in sustainable production, production of safe and nutritious food as well as fairness, transparency and efficiency in the markets. The proposed human rights impact assessment would delineate States positions on responsible investments that espouse the right to food (see also: [VGGT Provision 12.4](#) FAO, 2012).

While the proposed human rights assessment is laudable, it is not clear whether the food crops produced would be for domestic consumption in the host States or export markets. This is crucial 'vis-à-vis' responsible investments because many host States, for example, in [Africa](#), are heavily dependent on food importation or worse, food aid. To achieve the overarching aim of responsible investments alongside the Sustainable Development Goals 1 and 2, the domestic realities and interests of these host States should be prioritised. Two suggestions are proffered here. First, investors should dedicate the core of their investments to the production of domestic staple food crops. Put differently, the production of food crops should respond to local needs. In the words of [Oliver De Schutter](#) (United Nations Special Rapporteur on the Right to Food, 2008 – 2014) 'it is only to the extent that investments can improve local food security by increasing productivity and serving local markets .... that they are justified.' Second, the Guide should provide clear direction on the distribution of food products. A two-step distribution strategy is suggested. Meeting domestic consumption demands should be a compulsory first-step ahead of the export market demands. Explicit provisions should be made to specify the percentage of production for domestic consumption and when/how the domestic demands would be deemed to have been met. This two-step strategy aligns with Article 11 of the [International Covenant on Economic, Social and Cultural Rights](#) that provides for States to ensure the right of everyone to adequate food by improving the methods of production, conservation and distribution of food. Significantly, it provides that the problems of both food-importing and food-exporting countries be considered to ensure an equitable distribution of food supplies in relation to their need.

#### Intellectual Property Rights and Impact Assessments

Notably missing from the impact assessments furnished in the Guide is the potential impact of investments on IPRs. [Research](#) on IPRs for plant varieties in the Global South find that agriculture investments have precipitated the introduction of the International Convention on the Protection of

New Varieties of Plants, 1991 (UPOV) styled plant breeders' rights systems. [UPOV, 1991](#) grants strong plant breeders' rights and limits small-scale farmers rights to save, reuse, exchange or sell farm-saved seeds, which are fundamental to their farming practices and livelihoods. Regardless of the percentage of small-scale farmers in host States or their prevalent traditional farming practices, investors backed by multinational seed/chemical/fertiliser companies, often lobby for the introduction of UPOV-1991 styled IPRs systems. UPOV is advertised as 'the' IPRs for plant varieties system that will incentivise investments, resulting in its [inclusion](#) as a condition for agricultural investments.

Consider, for example, the United Republic of Tanzania (Tanzania) where about 75 per cent of its population is involved in [agriculture](#), made-up primarily of small-scale farmers who cultivate about 91 per cent of the arable land and contribute about 26.5 per cent of the gross domestic product. Tanzania earmarked agriculture as one of the core sectors to drive its economic transformation in its Tanzania Development Vision 2025. Consequently, it launched domestic initiatives such as the [Tanzania Agricultural Food Security Implementation Plan](#) 2011 and signed investment agreements such as the G8 New Alliance for Food Security and Nutrition in Africa, 2012 ([NAFSN](#)). The NAFSN sets out to unlock private investments in agriculture in Africa and operates through 'country cooperation frameworks' where members outline their commitments. Tanzania alongside the nine other participating African States (Burkina Faso, Benin, Cote d'Ivoire, Ethiopia, Ghana, Malawi, Mozambique, Nigeria and Senegal) submitted their 'policy commitments', while companies and donor agencies, such as Monsanto, Syngenta and Yara International, outlined their intended investments in 'letters of intent.' For its part, Tanzania committed to introducing a plant breeders' right system styled on UPOV 1991. It fulfilled this commitment through its Plant Breeders' Rights Act of 2012; it subsequently [joined](#) the International Union for the Protection of New Varieties of Plants on 22 November 2015, becoming its first least-developed country member. Drawing from the background on the agricultural realities in Tanzania mentioned above, [civil society organisations](#) assert that the adoption of the UPOV 1991 styled plant breeders' right system is unsuited to the State.

Accordingly, it is suggested that the Guide includes IPRs as one of the types of impact assessments relevant to agricultural land investment contracts, with the following revisions to page 43.

2.95. Five types. There are five types of impact assessments relevant to agricultural land investment contracts: (a) environmental (b) social (c) human rights (d) intellectual property rights and (e) economic.

(d) Intellectual property rights: closely linked to the human rights impacts, IPRs impact assessments are necessary because stronger IPRs systems are often an offshoot of agricultural investments. One principal benefit of recognising and undertaking an IPRs impacts assessment is that it considers the interests of all stakeholders, including the often-marginalised resource-poor small-scale farmers and farming communities. The impact assessments will include effects of IPRs systems on farmers' rights to save, reuse, exchange and sell farm-saved seeds and propagating materials. It will also include the effects of IPRs on the recognition and reward of traditional knowledge, biological diversity, cultural diversity, small-scale farmers, farming communities and indigenous peoples, which are all fundamental elements of traditional farming practices and informal seed systems.

To further establish the significance of IPRs to agricultural land investment contracts, it is suggested that other parts of the Guide, such as relevant sections of pages 10, 18 and 22 to 24, refer to IPRs as indicated below.

Page 10. Preface 2. Context... 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, intellectual property rights, food security and the progressive realisation of the right to adequate food, livelihoods and the environment...

Page 18. 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, intellectual property rights, livelihoods, food security and the environment...

Pages 22 to 24. Include IPRs as one of the 'Relevant Areas of Law.'

1.1. Intellectual Property Rights. Parties may not expressly include IPRs provisions in contracts; however, the protection of planting materials is a core component of large-scale agriculture businesses. The main IPRs systems favoured by large-scale agriculture businesses are patent systems and plant breeders' rights systems set out in UPOV 1991. These systems are unsuited to Global South States for a [variety of reasons](#). Alternative systems better suited to such States include imaginatively-designed sui generis IPRs systems that incorporate farmers rights, traditional knowledge protection alongside access and benefit-sharing principles drawn from the International Treaty on Plant Genetic Resources for Food and Agriculture 2001, Convention on Biological Diversity 1992, as well as the 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. Albeit dated, the African Model Legislation for the Protection of the Rights of Local Communities, Farmers and Breeders, and for the Regulation of Access to Biological Resources 2000 provides guidelines in this regard. It is essential to assess the IPRs systems States already have in place and to consider the inclusion of safeguards in agricultural land investment contracts or related agreements, that prohibit investors from (directly and indirectly) pressuring or coercing States to adopt preferred IPRs systems.

## Conclusion

The Guide reflects the commitment of its drafters to present nuanced information and detailed guidance on the essential components of agricultural land investment contracts and its potential implications. This commentary covers the access to food component of the Guide and highlights its silence on IPRs implications. It proffers three suggestions. First, the Guide should include provisions that specify the types of crops produced by investors. Investors primary commitment should be to produce domestic staple food crops that cater to host States needs and improve their national food security. Second, the Guide should include provisions that specify the distribution of the food crops produced. Domestic consumption should be prioritised ahead of export market demands. Third, the Guide should include IPRs in its impact assessments and discourse. With the proliferation of agricultural land investments, this Guide is a commendable intervention, which has the potentials to achieve its objectives.

- **Mr. Michael Fakhri - Part I** (University of Oregon)

October 1, 2019

## [Human Rights and Agricultural Land Investment Contracts – Part One](#)

The UNIDROIT-FAO-IFAD Legal Guide on Agricultural Land Investment Contracts (ALIC) resolves a number of long-standing debates in international law. The biggest one it responds to is: what is the relationship between human rights and the transboundary movement of capital? This question is addressed in theoretical terms during discussions about the relationship between private and public law.

In this first part, I share with you how I read the zero draft of ALIC as an answer to this question. ALIC is intended to guide tenure rights holders, commercial lawyers, business people, and governments through contract negotiations between foreign investors and local communities in a way that encourages fair and transparent agricultural land investment transactions. And it does so

with an unprecedented commitment to human rights. I provide two examples that reflect ALIC's commitment to human rights.

In my second part, I draw from a right-to-food perspective, critically push, and provide some constructive drafting suggestions. I appreciate the amount of hard work put into this draft, so my suggestions are meant to work within and build upon the spirit of the document.

It is important to understand ALIC as nested within a series of documents that build upon each other in slightly distinguished ways and from different institutional contexts. You can also appreciate ALIC's accomplishments if you understand it as a document that reflects how UNIDROIT quickly and adeptly filled in the void left by the social bankruptcy of international investment treaties. While discussions at UNCTAD Working Group III are trying to resuscitate investor-state dispute settlement under international investment treaties, this process has yet to address significant global inequalities of wealth and asymmetries of power. Investment treaties as a whole destabilized food security in many host countries and there are some good ideas on how to reform these treaties. But food security is not on the agenda of any investment treaty negotiations. Whereas UNIDROIT has brought forward a workable set of legal principles that can address international investors concerns and also commits to respecting local peoples' rights – before any deal is even agreed to.

UNIDROIT also filled a policy void in international economic law when it responded to the 2007-2008 world food crisis. During this same time people in social movements, NGOs, and the FAO were thinking about the issue in terms of "land grabs" and developing new human rights policies and instruments in response. All this contrasts the work coming out of the WTO under the leadership of Pascal Lamy; as WTO Secretary General, Lamy dismissed any claim that existing international economic institutions may be part of the problem, hardened the categorization of food security as a "non-trade" issue, and disparaged calls to at least reform the WTO. Meanwhile, the UNIDROIT Governing Council in 2009 discussed food security and the Secretariat under the leadership of José Angelo Estrella Faria published Private Law Aspects of Agricultural Finance soon after.

Two very different instruments emerged during all this. The Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries in the Context of National Food Security was the product of the reinvigorated Committee on Food Security – which through the support of the FAO had become the global place where governments and civil society could give concepts such as food security, right to food, food sovereignty, and agroecology legal and political meaning. The food sovereignty movement had every right to declare the Voluntary Guidelines to be a part of their victory because the social movement achieved what very few have: they negotiated a document through an intergovernmental platform that gave human rights enough substantive meaning to increase local people's leverage in transnational commercial negotiations. Finally, the world had a document that articulated a way to promote multilateral commercial interests but through and not against local laws that secure tenure rights and equitable access to land, fisheries, and forests. It can be understood as a legal instrument that lies somewhere between *lex mercatoria* and soft law.

From a transnational business perspective, the 2011 UN Guiding Principles on Business and Human Rights, which came out of the UN Human Rights Council, was a success. Starting in the 1970s, multinational corporations felt that they were under assault by human rights campaigns and litigation. This became more acute in the 1990s as people mounted more public campaigns and lawsuits against multinationals, making human rights a necessary part of business risk assessments. The Guiding Principles encouraged multinational corporations to prevent and respond to human rights claims to some degree. A good example is Coca-Cola's first human rights report published in 2016-2017 which opens with a "steadfast" commitment to human rights and explicit alignment with the Guiding Principles. The Guiding Principles established that businesses had a responsibility to respect human rights and encouraged businesses to make human rights integral to internal functions and processes. It, however, left open the question of whether human rights could recalibrate the power imbalance between foreign investors and local communities.

This was the institutional landscape before UNIDROIT when it committed to partnering with FAO and IFAD to address world food security. FAO brought its experience in agricultural development, right to food, and agroecology. IFAD brought experience in finance and investment. And UNIDROIT, which created the document's Working Group, set the agenda in terms of private law. All documents from this partnership had to align with each institution's doctrines and values. This in effect meant that all ensuing document had to align with both the Voluntary Guidelines and the UN Guiding Principles. These two documents represented the discursive boundaries of the dialogue.

The first document from this partnership was the 2015 Legal Guide on Contract Farming. Even though it primarily relied on international sales law, it nevertheless put human rights in a significant relationship to commercial decision-making. The language is brief but clear and worth transcribing:

Among the human rights that are closely linked to contract farming, one of the most central is the right to food. ... Contract farming's impact on the realisation of the right to food, as well as the impact of the right to food on contract farming, will indirectly depend on how governments incorporate their international human rights obligations into their domestic policies and regulatory frameworks, and directly depend on how contractors and producers include clauses conforming with the right to food in their contracts. As mentioned earlier, businesses have their own independent responsibility to respect human rights, and this should be reflected in the best contractual practices implemented in the field. [emphasis added]

In other words, contracts, which outlines parties' expectations and responsibilities to each other, had to conform to things like the right to food. What remained unclear was what international economic and commercial law would look like if it treated human rights not as an external threat but rather as a defining concern.

ALIC, the second publication from this partnership, is in many ways an answer to that question. Here are two examples:

First, ALIC repeatedly emphasizes that land acquisition – especially at large scales – is very risky and socially problematic. ALIC walks through a delicate compromise by not endorsing large-scale land acquisitions but acknowledging that land acquisitions continue to occur. This is a rare international economic legal instrument that does not assume that the transboundary movement of capital is by definition a good thing.

Like the Guiding Principles, ALIC includes human rights as a risk factor. But ALIC provides investors with specific ways they can reduce risk by treating human rights as a matter for contractual safeguards. ALIC also implicitly provides local communities leverage to argue for more time and resources to study an investor's offer and maintain the ability to refuse a deal.

Second, ALIC defines "legitimate tenure right holders" very broadly. Unlike a popular approach at the World Bank (drawing from the work of Hernando De Soto), ALIC does not suggest that existing land tenure systems need to be formalized in a way that makes it easier to buy and sell land. Instead, ALIC, aligning with the Voluntary Guidelines, takes existing formal and customary land rights as a fact that must be respected. For instance, ALIC requires investors to acquire free, prior, and informed consent from indigenous peoples as per the UN Declaration on the Rights of Indigenous Peoples. ALIC takes consent to mean that "indigenous peoples have agreed to the activity that is subject to the consultation." This brings ALIC closer to human rights doctrine than some governments are. For example, the Government of Canada continues to try to empty that doctrine of meaning by interpreting "free, prior, and informed consent" as a duty to notify and not a duty to substantively dialogue or negotiate with indigenous peoples.



In business terms, ALIC teaches businesses to think of land tenure rights in interlegal terms (to use Boaventura Santos's concept). ALIC does this by explaining how it is in a business's financial and legal interest 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."

By bringing forward this interlegal sensibility, ALIC invites the investor to think of their own best interest in broad term and to take the time to understand already-existing, pluralist socio-legal expectations and practices. It also implicitly reminds the investor to take the time to build a relationship with local communities that is buttressed by an iterative understanding of fairness (a core tenet of commercial law). Without such a relationship and appropriate due diligence, ALIC in effect recommends to the investor and the local community to not pursue the deal – no one benefits from a land transaction that is only made possible by disrupting local people's lives or dislocating them from their homeland

- **Mr. Tomaso Ferrando** (University of Warwick Law School)

October 2, 2019

#### [Systematizing the threat of land contracts to transform them into an opportunity](#)

In 2010, Saturnino Borrás Jr. and Jennifer Franco denounced the way in which the multiplication codes of conduct, codes of best practices and 'good governance' efforts represented an [attempt to domesticate the narrative around large-scale investments in land](#). In their piece, they identify six reasons why non-mandatory recommendations, nudging and the use of the win-win-win rhetoric (where communities, the host state and the investor are the three 'lucky' participants) disempower actors who claimed that this kind of agricultural projects represent a threat to people and the planet while reinforcing the position of those who consider agri-business as essential to the future of food security and an opportunity for employment and infrastructures' development. The UNIDROIT-FAO-IFAD Legal Guide on Agricultural Land Investment Contracts is no exception – and it is aware of it.

It is enough to look at Preamble 3 and point 10 (Investment options), to read 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." Why, therefore, spending more than one-hundred and forty-five pages trying to suggest the most appropriate way of drafting a contract that is – at best – a second option for both communities and host states, and that the drafter themselves do not support? Why including several references to human and environmental rights (including the right to food) if these projects have a high probability of not delivering what is truly needed? Probably because investments in land are happening and state-investors concessions continue to be drafted. Certainly because of the conviction that small and large can coexist, which dismisses how they would be competing for both resources and markets. Maybe because lawyers are more comfortable with drafting clauses than with addressing openly political questions concerning the way in which law determines the distribution of resources and the reproduction of inequality. Possibly because some among us are still intimately convinced that a properly drafted contract, the rule of law and effective implementation can make up for all the problems generated by power imbalance, economic incentive, corruption and competition for foreign capital.

Yet, hoping that a properly negotiated contract can fill the gap of the national legal system and provide socio-environmental benefits to all parties involved is a political statement. It is the manifestation of the decision to dismiss states' financial dependency on Foreign Direct Investments, the colonial legacy, the joke of international debt, the imbalance in legal understanding and support that characterizes the state-investors-communities dynamics, [the fall in Official Development Aid](#),



the inequality of power among the parties involved, and the [depletion of soil and water](#), which makes good agricultural land increasingly scarce and precious. The Legal Guide, although legally well-drafted, conscious of its own limits and broad in scope, must thus be read through the lenses of threats that become opportunities and as another attempt to normalize of the inherent limits that characterize large-scale investments in land. Having this in mind, I believe that there are still valid reasons to engage with the Guide and get the best out of it.

Let's not throw the baby with the bathwater.

I had the privilege to provide legal support to local communities whose access to land, livelihood and tenure rights (to soil, trees, wood, water, holy places, etc.) had been made invisible by the conclusion of investment contracts. From [past](#) and [ongoing resistance on the ground](#), I learned the importance of taking the state-investors contracts seriously and the weight that they can have in crystallizing a situation that is often irreversible – or that can be reversed but only with strong political will and significant resources (especially if the contract is covered by a bilateral investment treaty).

Most of the contracts were signed without any form of participation or involvement of the local communities. Others contain clauses where customary and occupied land was [defined as state land and empty](#). I was asked to comment on contracts providing [unlimited access to water to the investor](#), especially during the dry season and with priority over conflicting rights, while imposing almost no cost for the rent, offering a full tax-break and guaranteeing full capital mobility. I also had to deal with concessions where the state assumed the obligation to [protect the investor against any form of protest and any action that could negatively affect the operations](#). Because this is how existing contracts look like and future contracts are likely to be drafted, not all the content of the Legal Guide shall be thrown away with the bathwater.

The limited space of this blog does not offer me the possibility to discuss the way in which the Guide deals with participation, information, consent, and grievance. These are central and thorny issues, and it gives hope seeing that the Guide strongly advocates for them, including with the possibility of introducing clauses in favor of third-party beneficiaries that could be actioned by them. Yet, the focus on inclusion does not consider the cost of this involvement (both financial and organizational) and the fact that neither states nor investors ever show particular interest in facilitating the participation of actors that are often seen as obstacles to the smooth unfolding of the project.

Rather, I want to focus on the Legal Guide's merit to broaden the scope of legal attention and to clearly recognize that land contracts are not only about land, a point that I make in a chapter for the forthcoming volume *Beyond Development* edited by Sam Adelman and Abdul Paliwala, and that I am glad to see recognized in the document. In the Guide, land contracts are about more than land: they are about water, oil, wood and other tenure rights that may be subtracted from the communities, trigger multiple conflicts between communities and investors, be over-exploited or not properly accounted for when the value of the rent is defined (see, e.g., 2.89, 2.90, 2.91, 3.14, 3.17 and 3.18). Thus, negotiations should consider much more than just the land and recognize the complexity of the concession as a space where multiple values (material, immaterial, spiritual, etc.) coexist.

Similarly, the Legal Guide does a good job recognizing the importance that clauses concerning tax rates, transfer pricing, export and import duties and freedom of movement of capital have in the definition of the contract. Yet, different from what section 3.66 of the Legal Guide proposes, contracts are not the way to "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." These contracts are the legitimation and crystallization of corporate conducts that erode the base on which states exercise their fiscal powers, shift profits away from the host state and significantly impact on financial ability of public authorities to fulfil their human rights obligations. The [OECD](#), the [IMF](#), [Tax Justice](#)

[Network](#) and the other actors interested in strengthening states' fiscal positions should pay attention to the content of land concessions and push for an leverage the Guide to push for a strong and pro-public revenues agenda.

Finally, it is interesting to notice that the Legal Guide recognizes that contracts are also about the privatization of police power, i.e. they often contain clauses that formalize states' obligations to exercise due diligence in minimizing the damage caused to the investor by the civil disturbance or the recognition of the investors' right to have their own private security exercising police powers within the boundaries of the concession (and sometime, beyond it). Even when not covered by a Bilateral Investment Treaty (BIT), these clauses are particularly important because of the way in which they legalize a communion of interests between the state and the investors in opposition to anyone who may not fit in the legal and economic framework defined in the concession (for example, herders who want to take their cattle through the concession or communities who reclaim their access to land, water, wood or holy places). Disagreement, protests and non-compliance become potential costs for both the investor and the state, and both will do everything needed in order to avoid it.

Here, the Legal Guide appears ambivalent: it takes for granted that it is the role of the state to defend the private property of the investor against any disturbance, but also recognizes that physical protection of the investment should occur within the limits set by the [Voluntary Principles on Security and Human Rights](#) (s. 3.137) and that investor's contribution to the state's breach of duty shall be taken into consideration to reduce the recoverable damages or – if provided in the contract – to deny the possibility of an action (s. 4.45). At a time characterized by the escalation of [violence against community members](#), [environmental](#) and [human rights activists](#) and people who raise their voices against large-scale projects – including agricultural ones – the Guide should have been bolder. Because the Guide is the systematization of the underlying consensus on principles and practices, and because human rights (along with environmental protection, social protection, etc.) are one of these pillars, should not the Guide be based on the legal assumption that no state can and should be bound by a contract whose performance is linked with breaches of its international – and national – obligations ? Thus, why not suggesting the integration of a human rights' clause allowing the state to immediately terminate a contract tainted by violence and human rights' violations? This could also be linked with the innovative proposal of a clause in favour of third-party beneficiaries and offer a straightforward and much needed opportunity to communities who are often victims of both public and private violence.

And such clear subordination of the contracts to the fundamentals of international law should not only concern breaches of human rights caused by physical harm or threat, but also those contracts that allocate land, water, tax revenues and other precious resources in a way that deprive communities of their basic rights. On the contrary, breaches of the contract for human rights' (and environmental) violations are not discussed in the Guide, significantly limiting the role that they can play in improving the condition of human rights and environmental defenders on the ground (s. 4.86). Can the communities and activists truly be empowered by a contract that may continue operating above the principles of international law and the broad consensus around business and human rights? Can they effectively challenge the appropriation of land, water, fiscal resources and other tenure rights when their opposition is presented as a cost and when the state has an obligation to make them inoffensive? Should the Guide recognize that the protection, respect and fulfilment of human rights require the presence of a termination clause as an effective legal threat that victims of human rights' abuses can trigger, or that can be at least triggered by the state?

Three suggestions for a tactical, bottom-up and value chain-based use of the Guide

The Guide is a finely drafted document that tries – with some gaps and reservations- to push the boundaries of the legal engagement with the complexity of land concessions. Yet, it is not – nor pretends to be – emancipatory, subversive or transformative of the state-investors-communities

dynamics in the way in which local communities, environmental activists and human rights' defenders would hope. In particular, the technical approach and the limited power analysis contained in the document suggest that negotiation of these agreements is a matter of knowledge, understanding and representation, not of competitiveness, dependency and regulatory race to the bottom.

In the absence of strong political will and a space effective party autonomy – also guaranteed by a different international development scenario and the proposal of alternative pathways of 'development' for the states-, the Guide will hardly become the parties' term of reference for future contracts. Yet, the lack of direct recognition does not mean that the Guide could not be relevant and strengthen bottom-up legal resistance. In particular, there are at least two reasons why the Guide could empower bottom-up movements and be appropriated as a new tool in the political and legal struggle against large-scale land concessions as the mainstream development paradigm. Even in the context of large-scale land investments as an anti-poor solution and in the absence of straightforward termination clauses that clearly subordinate the contracts to the protection, respect and fulfilment of human rights.

On the one hand, if the Guide is assumed as a generally accepted term of reference for good faith and fair dealing, non-conforming clauses could be challenged not only for their socio-political implications but also for their departure from the legal standard and require states to provide stronger justification; on the other hand, it could be used to thoroughly challenge the support provided by the home states of the investors, international financial institutions, private investors, third parties (including NGOs that may support large-scale 'green agri-projects') and all the actors involved in the value chain that has its origin in the land concession.

I would like to conclude this blog with some reflections on the latter point, i.e. the possibility of using the Guide to embed the state-investor-communities relationships in the broader context of [law and global production](#) in order to multiply potential co-responsibilities and identify new leverage points (which I call '[legal chokeholds](#)' and that is at the center of the work on land rights realized by the [Global Legal Action Network](#)). At a time of the global food system where trade and investments are considered the most effective tools to guarantee national food security, land contracts cannot be seen in isolation but must be understood as the central piece of a long chain of capital, labor, natural resources and legal frameworks that is rooted into the land but is geographically wider than the land itself.

Firstly, if we think of private or public investors we cannot disentangle their actions from the [extraterritorial obligations](#) (ETOs) that their home states have to guarantee that no national is involved in the violation of human and environmental rights abroad (in particular, when home states are asked to exercise jurisdiction over a tort committed abroad). Secondly, the capital intensive nature of large-scale land investments often requires access to public or private financing (or both): if this is the case, the Guide can be used to hold to account financiers who have agreed to support or are about to support a project whose contractual terms and conditions are incompatible or worse than the term of reference. And the same could be done with institutional investors (like [pension funds](#)) holding shares in the company that has concluded the disputable contract: the Guide shows that certain contractual provisions may pose a material financial risk to investors, and this risk must be assessed and integrated not to be passed to the shareholders.

Thirdly, the content of the Guide could be used to challenge any actor profiting from an investment that is not aligned with it. Providers of seeds or agri-tech, traders who buy and distribute the fruits of the land, food processors that transform it and retailers that sell it to businesses or consumers would all benefit from the 'original sin' of a land concession that is or may be detrimental to people and the planet. In this context, the 'best practices' collected in the Guide could be a useful support to soft-law approaches (like mobilizing CSR, the OECD national contact point, or naming and shaming to obtain public support) or to legal actions brought outside of the host jurisdiction and against actors

who are not directly involved in the concession (like the tort of conversion [case filed against Tate & Lyle](#) for possessing sugar produced on land illegally subtracted to the communities in Cambodia).

Unfortunately, the Guide appears to be blind to the way in which conceiving land and tenure rights in the context of global value chains can multiply the relevant spaces of engagement and challenges the traditional notion of jurisdictional spaces and fragmentation. Luckily, communities, activists and lawyers acting on the ground have come to this realization long ago, and I believe that they will find the best way to use a document that aims to normalize large-scale investments but can also open new interesting spaces for political and legal resistance.

- **Mr. Chidi Oguamanam** (University of Ottawa)

October 4, 2019

#### [Re-thinking Large Scale Agricultural Land Acquisition through a Contract Model](#)

The triumph of capitalism and its impact, post-cold war, is manifest in diverse ways and sites in the global south, especially Africa. Perhaps the most prominent consequence of the post-cold war capitalist strangle-hold is the phenomenon of globalization. In its legal and economic gradient, globalization has yielded unprecedented spate of legal harmonization and capitalist structuring, opening up of markets under the trade liberalization mantra. In the midst of this linear ideological dominion, the developing and least developed countries, especially African countries, are coerced on board with assurances that their quest for development is best realized under a free market economic framework. To this end, they were co-opted into the new [World Trade Organization \(WTO\)](#)- supervised global trading order.

One of the significant features of the WTO is the [TRIPS Agreement](#) — a consolidation of existing international agreements on intellectual property (IP) under a stronger framework with enforcement mechanisms. TRIPS is designed to constrain the ability of countries to exercise national discretion with regard to the degree and extent of protection accorded to specific forms of innovation in their jurisdictions. Ideally, as its foundational logic, IP is an artificial monopoly designed as an exception to free trade. Under TRIPS, however, the IP logic was flipped 360. The US and OECD countries made stronger protection of IP the prerequisite for countries, including African countries, to participate in the new global economic order. A key feature of that order is that it supervised a transition from iron-and-steel, brick-and-mortar industrial innovation model to one driven by intellectual or intangible assets encapsulated in information and its digital escalations.

As a consequence, African countries were invited to participate in a new global economic space conceived and designed by industrialized regions, notably, US, Europe, and allies on the premise of [one-size-fits-all](#) that does not regard asymmetric levels of innovation and industrial sophistication amongst regions and countries. Thus, African countries only received assurances of tokenism in the nature of “free access” of their produce into the western markets, the flimsy promise of technology transfer, and continued support by the West to build and adapt African institutions to enforce IPRs of industrialized countries. Other promises came in the form of so-called “[wobble room](#)” or highly circumscribed concessions that can be applied to side-step insensitive IP laws to tackle contextual contingencies. So far, no country in Africa has successfully tapped into those concessions save South Africa which seized upon the Doha Declaration on TRIPS and Public Health to procure patented [HIV-AIDS drugs](#).

[Aside from health, agriculture and food security are sites where the new global IP order has significant ramifications for Africa.](#) TRIPS Agreement brought all innovations, including those relating to genetic resources and agriculture, under strong IP protection, leaving countries the wobble room to protect plant genetic resources for food and agriculture by patents or other potential sui generis options. African countries initially sought African specific approaches to the protection of agricultural

innovation. In 2000, the African Union adopted the [African model legislation](#) on the protection of the rights of local communities, farmers and breeders and for the regulation of access to biological resources. The significance of this approach is the recognition that in Africa, there is no distinction between farmers and breeders, reflecting the reality that farming in Africa is communal and farmers are the bedrock of agricultural production and the continent's food security.

Unfortunately, fifteen years after the AU took the initiative, not able to resist external pressures, regional and national governments [reverted to breeder-focused protection regimes](#) in compliance with the International [Union for the Protection of New Varieties of Plants \(UPOV\)](#). The UPOV standard was designed for countries with head start in plant breeding and, of course, agricultural biotechnology. The embrace of UPOV is a consequence of unrelenting political pressures that require a standard of IP protection above TRIPS. Without surprise, the two regional IP organizations in Africa, the [OAPI](#) and [ARIPO](#), are actors in facilitating the reversal of the 2000 AU position which represented a roadmap for African food security. An analyst likens this form of institutional infiltration as a system of elite socialization and [“\(re\)production of \[western\] intellectual property rights”](#).

In the grander scheme of things, amidst the crisis of climate change in which the vulnerability of Africa continues to unravel, [Africa remains a preferred choice of FDI in agriculture for the export of green energy and for food](#). This situation raises concerns about displacements, conflicts, shrinking traditional landraces and continental food security writ large. The traction for agricultural FDI comes through the scheme of large scale agricultural land acquisitions, which activists framed as agricultural [“land grabs”](#). Through the activities of international development finance agencies and intergovernmental entities, there has been critical appraisal of large scale agricultural land acquisitions with a view to how best they can be structured to accommodate multi-stakeholder interests in complex national settings under a win-win model.

Recently, a path-breaking UNIDROIT project conducted in conjunction with FAO and IFAD has resulted in a comprehensive [“Legal Guide on Agricultural Land Investments Contracts”](#). These manual addresses, in practical ways, virtually all conceivable concerns over how to ensure that FDIs in large agricultural lands are harnessed into opportunities to tackle the prevailing structural defects and asymmetries in globalization of agricultural production. With the right political will to implement it, the contractual model promises to be a pragmatic way to tackle the unrelenting siege on African countries which have failed, so far, to rise to the challenge. It complements existing instruments such as UN Guiding Principles on Business and Human Rights, the voluntary Guidelines on Responsible Governance of Tenure of Land, Fisheries and Forests in the context of National Food Security, and the Principles for Responsible Investments in Agriculture and Food Systems. According to James Gatthi, one of the expert resource persons on the project, “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.”

- **Mr. Nicolás M. Perrone** (Durham Law School)

October 7, 2019

The UNIDROIT-FAO-IFAD Legal Guide on Agricultural Land Investment Contracts (The Guide) is a tool to promote responsible agricultural foreign investment. Many international organisations insist that more private investment is needed to meet the sustainable development goals (SDGs). Agricultural foreign investment, particularly, is central to a world with no poverty (SDG 1) and no hunger (SDG 2) (The Guide 2019, 10, 13), but the link between foreign investment and these goals should not be taken for granted. Foreign investment can probably promote these and other SDGs; however, it also creates costs and risks.

A perennial policy question in Global South countries is how to maximise the benefits and minimise the costs and risks of foreign investment (Sagafi-nejad 2008, p. 51). Amongst others, this question is addressed at law and development scholars, posing real challenges yet to be resolved. It is undisputed that the law is implicated in the distribution of benefits, costs and risks associated with foreign investment. But the challenge is how to help host states and local communities to achieve a fairer distribution through law. Some options include designing mechanisms to promote responsible investment, increasing the bargaining power of host states and local communities, or making the law more responsive to the costs and risks of host states and local communities.

The Guide addresses this developmental challenge directly. A problem of international investment legal scholarship is the excessive interest on investor-state dispute settlement (ISDS) and the resolution of individual cases (Koskeniemi 2017, 343). Even when the discussion is broader, focusing on the political economy of ISDS, it often misses the broader developmental challenge. Moral hazard and regulatory chill resulting from ISDS are significant questions from a law and development perspective. The problem, however, is that the focus remains on the cases, ie the systemic implications of ISDS, as opposed to the distribution of benefits, costs and risks associated with foreign investment. ISDS is just the tip of the complex transnational system governing foreign investment. In this regard, the Guide represents a significant step in the right direction. The detailed discussion of agricultural land investment contracts focuses on several issues that are central to ensuring that foreign investment contributes to the SDGs.

Two of these issues are the interaction of different laws and the role of non-state local actors. Salacuse (2013) talks about the three laws of foreign investment: international law, domestic law and contracts. In reality, today, the plurality of laws is even more complex, involving also voluntary guidelines, codes of conduct and other private orders. A web of treaties, laws, contracts and guidelines delineates how law is implicated in the distribution of benefits, costs and risks. The Guide takes this plurality of laws seriously. It focuses on agricultural land investment contracts, but does not overlook other laws, accepting several disadvantages of a transactional model for governing agricultural foreign investment. It also discusses the need to rethink these contracts, criticises their excessive rigidity, and highlights the importance of mandatory rules (The Guide 2019, 14-5, 18-9, 22-4).

The Guide, moreover, underscores the need to protect tenure rights and local communities from irresponsible investors and global market pressures. For long, non-state local actors were ignored when discussing foreign investment policy questions (Perrone 2016, 383; Perrone 2019, 171). The Guide fills this gap. It examines the interaction of agricultural land investment contracts with local consultation, social licences, impact assessment studies and free, prior and informed consent (FPIC) (The Guide 2019, 35-7). But it does not stop there. It also discusses more dynamic forms of local participation and cooperation before, during and after the investment project (The Guide 2019, 13-6, 27-30). The fundamental advantage of these alternative structures is that control is distributed more evenly, between foreign investors, host states and local communities, creating an incentive for foreign investors to take into account local needs. Perhaps without enough detail, I will come back to this point below, the Guide looks at some participatory alternatives for agricultural investment (The Guide 2019, 15, 31-3).

Unquestionably, the Guide provides host states and other local actors with a comprehensive view of the problems and potential solutions related to agricultural foreign investment. A problem of this broad approach, as it happens quite regularly, is that some aspects cannot be developed in detail. There are three that might deserve more analysis. One is the relationship between agricultural land investment contracts and other laws. Striking a fairer distribution of benefits, costs and risks in the contracts may be pointless if, for instance, investment arbitrators privilege foreign investors' certainty and *pacta sunt servanda* when resolving disputes. Some awards have minimised requirements that make to the existence of investment contracts, such as parliamentary approval (*Bankswitch Ghana Ltd v. Ghana*), or mechanisms to ensure a minimum of state control, like the

prohibition to transfer rights without state approval (*Occidental v. Ecuador 2*). ISDS may also block or difficult renegotiations. The Guide cannot change international investment law, but it could be more explicit about the challenges posed by some investment awards and other legal orders.

Closely related is the question of using contracts as a governance tool. The use of contracts poses the risk of consolidating a transactional paradigm, whereby foreign investors and states are put at the same level when bargaining or when arbitrators interpret the terms of a transaction. A rigid transactional model can be problematic. It may increase the rigidity of the governance structure and clash with domestic law mandatory rules. A transactional model also opens the door for foreign investors to demand – and states to grant – too many regulatory givings, such as tax incentives, normalising exceptions (Cotula 2017, 424). The Guide acknowledges some of these issues, recognising that domestic law would address them better (The Guide 2019, 11). At the same time, perhaps it could go further and elaborate on an alternative domestic law model, which could be contractually supplemented in special circumstances and after complying with specific formalities.

Another weakness of a transactional model relates to the limited or no participation of host states and local communities in foreign investment projects. Foreign investment is generally a dynamic process where information is asymmetrically allocated. State approval, impact assessments, social licences, consultation, or FPIC may serve to give the green light to a project. But these tools may not be enough to ensure a good relationship and cooperation during and after the project. The Guide highlights that structures, whereby host states and local communities have more participation, should be preferred over models where participation is limited to the beginning of the project (The Guide 2019, 13, 15). Joint ventures are just one example. On the other hand, it does not provide detailed examples of participatory and cooperative structures. Discussing these options further might be a first and necessary step to their potential implementation.

The need to explore new governance structures leads, almost inevitably, to the role of the state in foreign investment governance. In international investment law, there is often the assumption that if investment arbitrators got states' right to regulate right, most of the problem would be resolved. An issue, however, is that states usually make decisions that favour foreign investors and domestic elites to the detriment of people's well-being. This dual role of states – as facilitators and regulators of foreign investment – deserves more attention in international investment law scholarship. If states need to comply with minimum standards when dealing with foreign investors, similar standards should also exist to ensure that natural resources promote people's well-being. The latter is also part of customary international law (GA Resolution 1803/1962). The Guide will promote better public decision-making in the field of agricultural foreign investment, but other initiatives and appropriate enforcement mechanisms might also be necessary.

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- **Mr. Sam Szoke-Burke** (Columbia Center on Sustainable Investment)

October 9, 2019

[Multi-actor contracts: A strategy for advancing community rights to free, prior and informed consent?](#)

The UNIDROIT/FAO/IFAD [draft guide on Agricultural Land Investment Contracts](#) is an exciting addition to existing guidance and norms surrounding investor-state (and other) contracts for agricultural projects. One potentially transformative feature is the guide's discussion of multi-actor contracts (also known as "tripartite contracts"), which would include land-holding communities and other legitimate tenure rights holders as a party. Why is this a good idea? What challenges do we face in encouraging more multi-party contracts? And when are such contracts likely to facilitate the fulfillment a community's right to give or withhold its free, prior and informed consent (FPIC) and to meaningfully participate in decision making? This submission considers these questions.

Investor-state contracts for natural resource investments continue to proliferate. In many countries, especially in the global south, governments use [agricultural land investment contracts](#) with companies as vehicles to authorize agricultural production. Such contracts also set out conditions concerning each project's scope and production requirements, environmental and social protections, and taxation requirements (and exemptions), among many other terms.

While there is increasing focus on the substance of such agreements (including [guides](#) and [models, principles](#), and studies of [specific clauses](#)), less attention has been given to innovations to make the negotiation of such contracts more inclusive. The draft guide's discussion of multi-actor contracts is therefore a welcome development. Expanding the parties to a concession agreement can potentially create opportunities for: communities to influence negotiations to protect their rights and interests; all parties to forge consensus and shared expectations; and companies to achieve stable working environments (and avoid [the costs and risks](#) associated with community conflict).

#### Making contract negotiations more inclusive

Communities have long been sidelined from contract negotiations. Their exclusion is very concerning for human rights and for democracy, given the radical effects land contracts can have on [laws, lands and lives](#). Yet inclusion in negotiations will not per se address other barriers communities experience when trying to understand and influence the terms of investment contracts. These contracts are technical and often inaccessible, making it hard for communities and their allies to identify entry points for change—both before and after the contract is signed. (Through our [OpenLandContracts.org](#) tool, and accompanying guidance, including a recent [briefing for grassroots organizations](#), we try to support local organizations to navigate these challenges.) In addition, communities may not immediately focus on contract negotiations as the key "moment" for



protecting their interests, given that: (a) communities usually will quite reasonably want to be involved in decision-making around proposals much earlier than the contract negotiation stage, and (b) if a community perceives a project as creating an unacceptably high risk of negative impacts, it may wish to halt the project altogether, not negotiate a contract that facilitates it.

Multi-actor contracts, then, should not be seen as synonymous with FPIC, which is a right that applies iteratively at every stage of decision-making around an investment. These contracts only offer the possibility of facilitating the granting of FPIC at the contract negotiation stage of an investment; FPIC processes will also be needed at much earlier stages of decision making, as well as on an ongoing basis during the operation of the investment if it proceeds. Nonetheless, if communities are open to exploring the potential for hosting an agricultural investment, multi-actor contracts can theoretically give them more influence. (In jurisdictions like Sierra Leone and Ghana, where communities already have the right to authorize agricultural projects on their lands through leases, whose terms can be negotiated, multi-actor contracts won't usually be necessary, and could even reduce the community's influence.) Multi-party contracts can also help to avoid companies and governments thinking of community consent as a binary "yes or no" signal that, once obtained, eviscerates community entitlements to influence and help shape the conditions under which an investment takes place on an ongoing basis.

What else is needed to achieve inclusively negotiated multi-actor contracts in practice?

There will be practical challenges to achieving the multi-actor contracts described in the draft guide. Governments will not easily cede power in jurisdictions that traditionally have excluded communities from negotiations. Extensive organizing, advocacy, and solidarity among communities and their allies will likely be needed. Even where governments decide to respond to pressure to open up negotiations to communities, they may do so with policies or promises that subtly preserve government power while slowing momentum for reform. Vigilance and attention to detail will therefore be needed.

We should also not assume that communities having a seat at the negotiation table equates to an even distribution of power between communities, the government and the company. Companies and, to a lesser extent, host governments usually have extensive experience and access to specialized legal and technical expertise, which they can use to dominate negotiations and secure disproportionate gains from communities. (In one case in Liberia, communities were pressured during negotiations to hand over land to an oil palm company in exchange for benefits as negligible as six toilets.) The community, on the other hand, may have never negotiated with an investor and may lack sufficient time and resources to properly understand the project's potential impacts and adequately prepare for negotiations.

Given these inevitable power imbalances, multi-actor contract negotiations should be conducted in faithful compliance with FPIC norms. In advance of negotiations, the community must have already provided its FPIC to continue discussions and commence negotiations regarding the proposed project. The negotiation process should then have the express objective of achieving an agreement to which the community provides its FPIC, and all parties should commit to respect any community decision not to consent to project proposals. Like earlier consultations and decision-making, contract negotiations should incorporate: sufficient time for the community to deliberate internally; legal empowerment support to enable community members to understand their rights and what is at stake, and to collectively decide what will best suit the needs of the community's current and future generations; technical support for the community as a whole and for those representing the community in the negotiations; and other support or resources requested by the community. Thought may need to be given to innovative ways for funding technical support to the community. Negotiations must also take place in a culturally sensitive and accessible manner for community members. In addition, trusted and impartial observers may be needed to monitor power dynamics during the negotiations and whether community negotiators are faithfully reporting back to, and representing the concerns of, their community members.

Despite the challenges, multi-actor contracts hold promise for communities wishing to protect their rights and interests by actively influencing the governance of agricultural projects. Unlike many voluntary [benefit agreements](#), multi-actor contracts could endow communities with [legally enforceable rights](#) to hold investors to account. This could include the right to revoke the company's authorization to conduct the project for any material breaches of the contract—a consequence any agribusiness would take very seriously. Relatedly, unlike third party beneficiary clauses, multi-actor agreements might enable the community to more concretely influence the framing and substance of contracts, rather than inheriting third party rights whose scope may or may not have been subject to community consultation and co-creation.

As with jurisdictions that respect the right of communities to decide whether or not to lease their land to agribusinesses, the use of multi-actor contracts in other jurisdictions may help communities retain control over their lands and resources. Such contracts can therefore help advance the human rights of communities and/or community members to give or withhold their free, prior and informed consent, as well as rights to self-determination, [public participation and information](#), among others. With the right framing and accompanying interventions, the multi-actor agricultural land contracts suggested in the draft guide could be a game-changer.

- **Mr. Philip Seufert** (FIAN International)

October 10, 2019

[Land Deals, Contracts and Human Rights: Some Reflections](#)

Introduction

The following reflections on the draft “UNIDROIT-FAO-IFAD Legal Guide on Agricultural Land Investment Contracts (ALIC)” (henceforth “the draft Guide”) are based on Food First Information and Action Network’s (FIAN) long-standing work on land issues. Since its inception in 1986, FIAN has investigated and documented land conflicts and supported rural communities in the defense and struggle for their lands and other natural resources. FIAN was one of the first human rights organizations that began [systematically applying a human rights-based approach to land issues](#) and to conceptualize them as human rights obligations. FIAN’s work is based on case work in support of communities affected by human rights violations, in order to ensure accountability and justice. We also monitor food and land-related policy frameworks and their impact on marginalized groups.

Land deals and “agricultural investments” – some preliminary remarks

Land deals can raise serious human rights issues, particularly when they are carried out in settings where the [process, immediate outcomes, and broader, long-term implications](#) are such that they effectively deny land-dependent people from exercising or gaining access to land, water and forest to use for livelihoods or spaces to live in. In such cases, grassroots organizations, social movements and civil society organizations speak of land grabs. While this does not necessarily mean that all land deals are land grabs, it points to the fact that a lot of attention needs to be made to avoid adverse human rights impacts.

According to its preface, the draft Guide does not endorse large-scale land acquisitions, but acknowledges that land acquisitions continue to occur. It further states “that investments involving transactions of tenure and related rights to investors are not the preferred option for setting up an agricultural project” (Preface 3.), which echoes the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests (par. 12.6). It is very important that the draft Guide underlines this, but it should further take into account the policy guidance developed by the UN Committee on World Food Security (CFS) in terms of what investment is best suited to benefit small-holder farmers, in particular the CFS Policy Recommendations “[Investing in smallholder](#)

[agriculture for food security](#)” and [“Connecting Smallholders to Markets”](#). This guidance clearly calls to prioritize investments by and for smallholders in order to ensure sufficient economic space for them; and that this prioritization is not always compatible with large-scale land acquisitions. Given that the draft Guide uses “agricultural land investments” as a framework for land acquisitions, it is important to acknowledge that many forms of needed agricultural investments lie outside of its scope.

#### Some important features of land deals

In order to address the human rights issues that arise in the context of land deals, it is important to understand these, as well as their driving factors and actors. We will focus on two aspects, which have proven to be of crucial importance, based on FIAN’s work on concrete cases. We believe that it is important to take the reality of land deals and land grabs as a starting point for any initiative aiming at addressing the issues at stake.

The first aspect that needs to be highlighted is the fact that the current wave of land deals is happening in the context of globalization, or, the financialization of the global economy. By this, we refer to [the growing power and influence of global finance on the economy](#), and its increasing domination over the productive economy. One expression of this is that “behind most large-scale agricultural projects is a web of global actors that make the project possible. These actors include banks and companies that are funding the project, and the companies that are buying the produce being grown or processed by it. All of these actors are necessary to the project’s success, and all are aiming to earn a profit from it in one way or another.” ([Blackmore et al., 2015: 2](#)) Some “investors” or companies are thus directly or indirectly linked to land deals via financing schemes and shareholder agreements, which often involve complex, cascading relationships. Complex investment structures – or [investment webs](#) – that involve several actors, subsidiary companies etc. are a key feature of the current rush for land and need to be taken into account for any effort to preventing and addressing human rights issues.

A second critical aspect in the context of land deals is the kind of abuses and violations that is typically linked to them. Our experience shows that in many cases, land deals result in serious impairment of human rights as well as environmental crimes and ecosystem destruction. Any attempts to provide guidance towards more “responsible” land investment projects and to put in place safeguards needs to take into account these patterns of violations.

#### Protecting human rights with contracts?

The draft Guide focuses on contract law to address the issues arising from large-scale land deals. The core assumption seems to be that getting the contract right allows to prevent harm – or, at least, to ensure remedy in case harm is caused. Such an approach can certainly address certain issues between the parties of a land deal contract. Good contracts can help making the relationships between contracting parties more equitable, and put in place important safeguards and mechanisms to ensure that parties of the contract abstain from certain harmful behavior. However, a narrow focus on contract law has some serious limitations, which are likely to limit the Guide’s ability to address key issues related to land deals and ensure accountability in the context described above.

In the case of transnational investment webs, an approach that focuses merely on the obligations, responsibilities and rights of contracting parties leaves out important actors of a given land deal. Furthermore, it does not address the power relationships within such webs. Simply put: the entity that operates on the ground – and is likely to be the contracting party – is not necessarily the entity that controls the investment. In the majority of cases, it is very likely that other actors that are not party to the contract play an important role, bear responsibilities, and therefore need to be held accountable for negative impacts of a given deal. The draft Guide recognizes to some extent that “investors” may be linked to other actors – paras. 2.12, 2.13 and 2.26 refer to “corporate

organization”, “affiliates”, and “other stakeholders” including banks, insurers and “supply chain participants” – but it does not address the issue of how these can be held accountable. Basing accountability exclusively on the contractual relationship misses the fact that complex and opaque investment webs are used deliberately by transnationally operating actors (“investors”) to [distance themselves from any type of liability for the impacts of their operations](#). In practice, this puts the burden on affected communities or individuals to prove the responsibilities and power relationships within such webs in case of harm, which raises significant challenges. In a context of lack of transparency it is in many cases impossible for affected groups to prove the business relationships linked to a given land deal, as a basis for the determination of liability, and to get justice.

The draft Guide’s focus on contract law also has limitations when it comes to addressing the impacts a land deal might have on people and communities. As the Guide rightly states, these impacts may well affect people or communities that are not parties to the contract (par. 6.1). In addition, as discussed above, land deals often adversely impact human rights and cause environmental harm, which, however, may not explicitly be part of the contract. As such, the guide’s focus on contract law bears the risk to limit the access to remedy by affected communities or individuals, either because they are not contracting parties, or because the harm suffered does not refer to the object of the contract – according to the draft Guide “contractual non-performance” is the basis for remedies (chapter 4).

Effective prevention and access to remedy by affected communities, individuals and groups is a critical issue in the context of land deals. The power relations between an “investor” and communities – but also between a TNC and a developing state – are a key factor that needs to be taken into account in this context. An approach that puts a narrow focus on the contractual relationship between parties is therefore insufficient in order to deal with human rights abuses committed by (transnational) corporate land “investors” and their investment webs. Adding to this, the draft Guide’s proposals regarding grievance mechanisms and dispute settlement risk allowing corporate investors to use their own mechanisms to impede communities to access justice using state based quasi-judicial and judicial mechanisms which could be more effective.

## Conclusion

The draft Guide addresses an important and complex issue. Providing guidance to improve land deal contracts is important, particularly wherever there are strong power asymmetries between the contracting parties (e.g. corporate transnational investors and governments of developing countries, or corporate transnational investors and local communities). However, its focus on contract law entails serious limitations that are likely to impede the achievement of the set objectives. In order to effectively respond to the reality of land deals, the draft Guide should thus broaden its approach to contracts, and beyond contract law.

A first element would be to extend the duties and responsibilities arising from a contract to all the existing business relationships that are involved in a land deal. This would mean to move from an approach that asks for transparency of the “corporate organization” (par. 2.12) to one that aims at accountability of all involved actors in case of abuses or harm, be it affiliates, financiers or actors that are linked to a land deal through the value chain. In addition, the Guide should propose clauses that impede corporate investors from using internal non-judicial grievance mechanisms to obstruct access to justice by affected communities or people.

Furthermore, the Guide should better take into account that land deals and their potential negative impacts go beyond contract law, and require a more consistent incorporation of human rights and environmental law. Even though strengthening legal frameworks and standards at national and international level might be outside of the Guide’s scope, it needs to be clear about the institutional and legal context that is required to protect and guarantee human rights, as well as the importance of cooperation between states, including needed regulations in commercial and administrative law

at national and international levels. This can also contribute to clarify situations of conflicts between sources of international law (e.g. between human rights and investment protection). We believe that also the draft Guide can and should contribute to ensuring the primacy of human rights.

[1] The author would like to thank Sofía Monsalve Suárez and Ana María Suárez Franco (both FIAN International) for their contributions to the following reflections.

- **Ms. Sara Seck** (Dalhousie University)

October 11, 2019

[Climate Change, Land, and the UNIDROIT Legal Guide on Agricultural Investments](#)

The UNIDROIT Legal Guide on Agricultural Land Investment Contracts (ALIC Zero Draft) was released for an [online public consultation](#) in June 2019. In this blog, I will reflect on the relationship between the ALIC Zero Draft and the findings of the August 2019 IPCC report entitled Climate Change and Land: [an IPCC special report](#) on climate change, desertification, land degradation, sustainable land management, food security, and greenhouse gas fluxes in terrestrial ecosystems (IPCC CCLR).

The ALIC Zero Draft adopts a pragmatic position with regard to a problem often described as ‘[land grabs](#)’ in which land is leased or bought by foreign investors for large-scale agricultural investment resulting in the export of food and other agricultural commodities from the [Global South](#), including [Africa](#), to the privileged in the Global North. The purpose, according to the ALIC Zero Draft (at p11, Preface 5) is to seek “to improve the contracting process” and so the quality of the agreements themselves, through the identification and equitable involvement of “all relevant parties and stakeholders.” The ALIC Zero Draft makes clear that it “does not promote the large-scale transfer of tenure rights”, and excludes from its scope contracts that involve sale of agricultural lands (at p11, Preface 5). Nevertheless, as land investment contracts are currently being negotiated in a way that violates “legitimate tenure rights” and fails to adequately deal with dimensions of an environmental, social, or economic nature, the ALIIC Zero Draft provides guidance for better contracting. The ultimate aim is for investment in agriculture to be more responsible, operationalizing international consensus in instruments such as the 2011 UN Guiding Principles on Business and Human Rights ([UNGPs](#)), among others. This will “enhance food security and nutrition” as well as “protect legitimate tenure holders, human rights, livelihoods and the environment” (at p11, Preface 5).

The IPCC Climate Change and Land Report ([IPCC CCLR](#)), on the other hand, is the latest report produced by the United Nations body tasked with assessing climate change science. Consisting of seven scientific chapters, it begins with what is termed a “[Summary for Policymakers](#)” that attempts to translate the scientific assessment into more accessible servings for digestion by non-experts. The Summary begins with a section entitled “People, land and climate in a warming world”. The first point [A.1], of clear relevance to the AIILC Zero Draft, is that “[L]and provides the principal basis for human livelihoods and well-being including the supply of food, freshwater and multiple other ecosystem services, as well as biodiversity. Human use directly affects more than 70% ... of the global, ice-free land surface ... Land also plays an important role in the climate system.” The IPCC CCLR goes on to explain [A2] how climate change is increasing surface air temperatures of land and the intensity and frequency of extremes, with adverse impacts on “food security and terrestrial ecosystems,” while also contributing to “desertification and land degradation.” Yet, “[A]griculture, Forestry and Other Land Use (AFOLU) activities” also contribute to greenhouse gas emissions [A.3], even as land serves as a sink. Ultimately, 21-37% of emissions are associated with AFOLU including “pre- and post-production activities in the global food system.”

The rest of the IPCC CCLR report considers in detail the relationship between climate change and land use. Topics addressed include the implications of different socio-economic development pathways on mitigation and adaptation to climate change, as well as the implications of response options such as sustainable forest management to reduce land degradation while also providing long-term community livelihoods. The role of local stakeholders in governance and effective decision-making is identified in the IPCC CCLR as key to “the selection, evaluation, implementation, and monitoring of policy instruments for land-based climate change adaptation and mitigation.” This is especially important for those “most vulnerable to climate change” including “Indigenous peoples and local communities, women, and the poor and marginalized.” [C.4] Accordingly, the importance of including Indigenous and local knowledge in decision-making while also contributing to the empowerment of women by reducing “barriers to women’s participation in sustainable land management” are highlighted.

The IPCC CCLR report is not the only climate report to receive attention of late. In late June, the UN Human Rights Council Special Rapporteur on extreme poverty and human rights, Philip Alston, released a report entitled [Climate Change and Poverty](#). The report paints a devastating picture, including that by 2050, at least 140 million people in Sub-Saharan Africa, Asia and Latin America could be displaced by climate change (para 10). Yet while the report is highly critical of the extent to which the human rights community has been slow to grapple with the human rights implications of climate crisis, [Alston’s report is blind](#) to business responsibilities for human rights, ignoring even the UN Human Rights Council’s own [Key Messages](#) on Human Rights and Climate Change which clearly state that businesses are duty-bearers and “must be accountable for their own climate impacts”.

The ALIC Zero Draft therefore provides an interesting case study. It does embrace business responsibilities to respect human rights through its commitment to operationalize the UNGPs, and, it cannot be said to be climate blind, with the some brief references to climate change treaties early on (1.13; 1.24), and further modest consideration in later parts dedicated to environmental issues (2.111; 2.112), and finally one whole paragraph dedicated to climate mitigation and adaptation (3.120), followed by two additional brief mentions (p82; p135). The dedicated paragraph on climate change contains some useful suggestions that appear in line with the IPCC CCLR, including endorsement of contractual obligations to adopt “climate-sensitive agro-ecological approaches and climate-smart livestock farming practices” (3.120). Yet the discussion of climate change is never linked to the human rights implications of climate change, nor is there an attempt to determine what this might mean for business responsibilities under the UNGPs.

The relationship between business responsibilities for human rights and climate change is [complex](#), but should not be ignored, particularly in a document of this depth and at this moment in time. Overall, while the ALIC Zero Draft embraces a human rights due diligence approach to the identification of local and Indigenous communities for the purposes of consultation or consent in [stakeholder engagement](#) (pp35-37), for example, it then proceeds to separate out human, environmental, social, and economic impact assessments with no attempt to understand the interrelationship between these constructs (pp43-48). This problematic separation of economic and social, from environmental concerns continues in the discussion of rights and obligations of the parties, completing failing to grapple with the fact that “good” jobs that are ecologically destructive are not even good for the workers themselves if workers are understood to have families, and live in communities that are dependent upon healthy local ecosystems (see more on the ecologically embedded relational individual [here](#) and [here](#)). It is also contrary to understandings of [sustainability](#) that accept that ecological limits constrain what is ultimately possible within the limit of planetary boundaries.

Treating climate change as a small subset of environmental issues which are then treated as if they can be balanced against economic or social concerns is highly problematic in a time of climate crisis. It is to be hoped that the final text of the ALIC Zero Draft will endeavour to more seriously grapple



with the implications of climate crisis for agricultural land investment contracts, and pay close attention to the findings of the IPCC CCLR.

- **Mr. Michael Fakhri - Part II** (University of Oregon)

October 12, 2019

### [Human Rights and Agricultural Land Investment Contracts – Part Two](#)

In my first essay, I provided some examples of how ALIC has significantly advanced the debate about the relationship between business' capital investments and peoples' human rights. After reading ALIC and its concomitant nest of documents, I am convinced that anyone who still wants to argue that peoples' human rights should not substantively determine financial and commercial decisions will find themselves in the ditches of international legal debates.

ALIC draws from the 2011 [UN Guiding Principles on Business and Human Rights](#) and treats human rights as a set of obligations that create a business risk (due to legal liability and political unrest). Such a definition of risk reminds businesses that they must deeply investigate local socio-political conditions. ALIC also implicitly increases local communities' leverage in their human rights claims when dealing with their own government and foreign investors.

Among the human rights that are closely linked to agriculture land investment contracts, one of the most central is the right to food. The right to food has been very well developed by the food sovereignty movement and through FAO. The result is that the right to food brings with it a particular understanding of risk. Not only would ALIC better align with human rights if it incorporated some these particular notions, but it would also provide businesses and local communities better tools to manage their negotiations and potential relationship.

Today, there is a global consensus amongst the [food sovereignty movement](#), [right to food experts](#), and many people at the [FAO](#), that one of the most effective ways to progressively realize the right to food is through agroecological practices. The parties are in midst of global [debate](#) and [dialogue](#) over the practical, political, and legal meaning of agroecology. Even with competing conceptions at play, ALIC can still take away some basic principles from the global consensus about the right to food's inherent link to agroecological practices.

Agroecology is not new. It is a recent technical term reflecting communal practices that have spanned generations. It assumes that how we eat and make food is an everyday dialogue and transaction amongst all beings. It is a way of always appreciating how we are always within nature and does away with the arrogant assumption that we can control, exploit, or overcome nature – a defining and dangerous assumption in [international law](#). Agroecology also eschews analytical distinctions amongst the different spheres of life and treats questions of fairness and biodiversity as intertwined constitutional concepts.

Agroecology draws from the knowledge of food-makers who regularly interface through different biomes, whether they be farmers, workers, hunters, or cooks. These are the people that understand the give-and-take of interspecies transactions and environmental change. Now, due to new patterns in the climate, people need to adapt to change at faster rates and at an unprecedented scale. This rapid change means that a growing number of people are living in new biomes without moving from their location, or have to leave their homes because of political and social responses to climate change. This also means that shared understandings of risk are quickly changing every day.

As a result, ongoing disclosure duties are more necessary than ever to ensure that the relationship between investors and rights-holders remains as transparent, beneficial, and fair as possible. So, impact assessments are only going to become more important. ALIC identifies four types of impact

assessments relevant to agricultural land investment contracts: (a) human rights (b) environmental (c) social (d) economic [as a drafting quibble, it would be nice if paragraph 2.95 reflected the order in which they appear later in the text].

In practice, each of these impact assessments would be conducted by a different type of expert. Separating out these assessments as different, however has unfortunate legal and analytical implications. As a legal matter, each impact assessment derives from a different source of authority and a different degree of obligation. This creates a hierarchy of impact assessments in terms of how mandatory they are. Here they are in ascending order in terms of investor impact assessment obligations:

1. human rights assessments must be conducted as a matter of legal responsibility and duty (and not just part of risk management) (2.106);
2. economic assessments may be used, but then the same provision notes that according to the Voluntary Guidelines and CFS-RAI Principles an investment in land should be subject to an economic assessment – this discrepancy between permissive and normative language should be addressed and be made consistent with the Voluntary Guidelines and CFS-RAI Principles (2.115);
3. environmental assessments are encouraged as per the CFS-RAI Principles (2.111); and
4. social assessments are least mandatory and are described in the aspirational terms of “less common but ...growing in practice” (2.113).

As a practical matter, it is easier to deal with one system of authority than multiple ones. As a doctrinal matter, human rights should be central to all assessments. The Voluntary Guidelines consistently references social, economic, cultural, environmental rights and concerns as a singular commitment reflecting human rights’ inseparability. In fact, ALIC’s language addressing environment and social assessments include provision for determining and respecting local parties’ rights. It is legally inconsistent, however, that ALIC’s description of economic impact assessments makes no reference to rights.

It is also analytically problematic that all the different types of assessments are broken up. Multiple assessments, that may or may not be completed, conducted over different times of year by different professionals creates a disjointed understanding by all parties and a headache as a matter of project management. Agroecological practices derive from integrative thinking and do not promote separating distinctions. Even though ALIC is specific as to what types of questions each type of assessment may address, the most actionable type of knowledge in this context is the kind that includes all spheres of life, presented in a cohesive and concise style, and can be readily operationalized by food-makers.

My final point is about how the economic impact assessment is defined very narrowly. Not only does it not include any reference to rights, but it mostly measures effects in terms of price, value, and profit. An economic impact assessment, in order to be more complete, must include an institutional analysis. Such an analysis examines how certain large-scale transactions may alter existing economic institutions such as households, local and global markets, and public administration. Such an evaluation should also look to how a project may exacerbate or create new inequalities that cut across categories of gender, race, and class (and not just a measure of income difference or a matter of advantages/disadvantages). The way ALIC is now drafted, parties are still able to rely on economic assessments that treat things like human rights, environmental, and social concerns as externalities; this can create a narrow assessment of parties’ interests. A human rights analysis, however, requires that such concerns be assessed as a whole pushing parties to understand each other’s expectations and interests as fully as possible.



I recommend that ALIC put forward that investment in land should be subject to a comprehensive human rights impact assessment and that all on-going effects, responsibilities, and duties be continuously monitored. The task would then be to spell out what a comprehensive human rights report should comprise. For example, ALIC already includes some excellent language about the integral role that results from environmental impact assessments can play in determining whether a deal will happen (3.115), affirming that parties have the duty to cooperate during the monitoring of all contract obligations (3.122), and encouraging parties to determine in advance what reports should be made publicly available and what information should be confidential (3.161; 3.166).

The general principle that reflects broad international consensus is that a comprehensive human report must address and interlink an account of social, cultural, economic, and environmental rights and interests. If ALIC framed a comprehensive human rights impact assessment in those terms, it would connect to [growing research](#) that already examines issues in those terms. ISO 26000 and 14000 are also good places to start.

Such an integrative human rights impact assessment should not be taken as an opportunity to reduce transaction costs or cut corners. It requires collaboration amongst different types of knowledge-holders and professionals. He underlined that if ALIC aligned all these disclosure requirements, it might generate a more globally robust and coherent impact assessment practice that is responsive to climate change. In sum, it is more legally sound, analytically useful, and logistically efficient for all parties to work together to produce an integrated human rights impact assessment on a regular basis instead of a disjointed set of impact assessments at different times of year.

- **Mr. Bayo Majekolagbe** (Dalhousie University)

October 12, 2019

[The Environment, Climate Change, and the Draft Legal Guide on Agricultural Land Investment Contracts](#)

The impact of land use on biodiversity and climate change has received increased attention from scholars and policy makers alike. For years, stakeholders have waved the red flag on the dangers posed by unsustainable agricultural and forestry practices and trends. [Recently](#), it was shown that cattle farming and oil seed production have led to major biodiversity losses. While the domains of loss are predominantly in Africa, Asia, Central and Southern America, they were substantially informed by demands in other parts of the world. Any doubt as to the linkage between unsustainable agricultural practices, biodiversity, and climate change should, ordinarily, be put to rest in the light of the findings of 107 leading scientists published by the Intergovernmental Panel on Climate Change (IPCC) in its [2019 special report on climate change and land](#). They find, in part, that one-quarter to one-third of the global [net primary production](#) (NPP) is, presently, used for food, feed, fibre, timber and energy; one-quarter of the Earth's ice-free land is being degraded by humans; and 23% of total anthropogenic greenhouse gas (GHG) emissions are from Agriculture, Forestry and Other Land Use (AFOLU). It is, therefore, hardly overboard to conclude that global sustainability will remain elusive until common sense sustainable and responsible agricultural land use orientations and practices are developed and adopted.

Promoting responsible agricultural investment is one of the objectives of [the Legal Guide on ALIC](#) (the Guide). The Guide elaborates on subjects, ranging from tenure rights to human rights, which should be covered by grantors and investors in Agricultural Land Investment Contracts. While diverse issues arise from the Guide, this blog post focuses on issues with direct bearing on the environment, particularly, impact assessment, biodiversity and ecosystem services, and climate change mitigation and adaptation. I consider the strengths and loopholes of the Guide on the highlighted issues and suggest possible inclusions. Prefatorily, considering that 'sustainability' is a recurrent theme in the Guide and foregrounds most of its provisions, the absence of what this means in the context of ALIC

is a minus. ‘Sustainability’ is not a buzzword to be thrown around, it must be deliberately and thoughtfully applied. Failure to do this informs either a sub-optimal or inconsistent application. The Guide’s definition of ALIC also does not specifically reference agricultural lands neither did the Guide provide a working definition of what constitutes agricultural lands. Do they include lands for [agricultural bioenergy](#) or are they limited to food agriculture? Bioenergy from agriculture has its [peculiar issues](#), particularly the tension with food security. Despite being one of the most burning issues in exploring the nexus between agriculture and climate change, the Guide is silent on agricultural bioenergy.

Impact assessment (IA) is perhaps one of the most prominent terms in the Guide, appearing 98 times. This is appropriate as IA, properly construed, does not only provide a tool for the appraisal of future effects, but also serves as the confluence of various dimensions of effects, ranging from the environmental to the social. Hence, the Guide explicitly caters to the human rights, environmental, social, and economic dimensions of impact assessment. This approach mirrors John Elkington’s [triple bottom line \(TBL\)](#), which itself is a reiteration of 1987 [Brundtland’s report’s](#) conceptualisation of sustainable development as entailing the society, economy, and ecology. This TBL approach to IA has, however, been [criticized](#) as being divisive, making integration difficult, and centering trade-off. More recently, Elkington has advocated for a [rethink](#) of the TBL approach he developed and propagated in favour of a [more comprehensive framework](#). Such framework, according to [Gibson](#), inter alia, emphasises the interdependence of biophysical and socio-economic concerns, mainstreams the precautionary principle, focuses on encouraging positive steps rather than mitigating negative effects, sets and enforces inviolable limits, relegates trade-offs as options of last resort and insists on multiple reinforcing and durable gains. These are the central components of what is described as Sustainability Assessment which is now gaining global traction.

As drafted, the Guide falls short of the requirements of Sustainability Assessment (SA). For example, its emphasis is the avoidance of negative impacts rather than the advancement of positive outcomes. Although, the Guide mildly refers to going beyond the mere avoidance of negative impacts, its reference to positive effect was limited to creating “mutually beneficial economic relationships with the affected communities”. This again lays bare another disadvantage of a TBL approach to IA, as it results in the [prioritization of the ‘economy’](#) over the environment and other social concerns. The Guide’s reference to “mutually beneficial economic relationships” discountenances the fact that land is more than its economic worth to many communities in developing countries. In lieu of its reference to four distinct types of IA, I argue that the Guide should focus on SA, which in turn will provide a platform for the integrated consideration of the various layers of IA. While trade-off is a last resort in SA, it is recognized that it is, often, inevitable. The Guide, however, has not paid attention to how such trade-off should be dealt with in the context of its sustainability mandate. Again, [Gibson](#) provides us with helpful trade-off rules which can be contextually applied in the ALIC’s context. The non-recognition of the need to consider cumulative, regional, and life-cycle effects in the conduct of ALIC IA is also problematic. Hence, the Guide, following the [VGGT](#), calls for “independent impact assessments ... in large-scale agricultural land investments”. While what constitutes “large-scale investments” is undefined, the wisdom of cumulative assessment is that otherwise benign investment could be malignant when taken alongside other existing investments. The question, therefore, is not necessarily whether this investment is harmful, but that when its effects are combined with other existing projects or investments, if such can be considered positive and/or unharmed. The Guide seems unpoised to answer this critical question.

Applying SA to ALIC begins with the identification of context specific sustainability objectives. This should be jointly done by grantors, tenure right holders, community stakeholders, and the investors taking a cue from existing framework like Gibson’s rules. The idea is to paint a picture of what a community considers as sustainability. An idea which more likely than not would entail concerns which blend the environmental, social, and economic. This collectively designed framework should inform the determination of the need(s) for which an agricultural project is designed and alternatives through which the objectives can be met. The alternatives may pertain to the site, scope or how an

agricultural project would operate. A no-project option must also be on the plate. The SA process is even more essential in the ALIC context given that ALIC is fundamentally an economic concern. It is different from community utility projects like a hydro generating plant or road. Invariably, the primary benefit of an ALIC project would be economic. In estimating cost and representing pecuniary benefits, it is necessary to internalize externalities. The cost of an ALIC project must include 'indirect' costs in terms of biodiversity loss and other social implications. This more robust picture as to cost will assist in choosing between alternatives and opting for more sustainable options which might be less expensive when compared to a proposed project with internalized costs.

The Guide further states that the "intersections between climate change and agriculture should be considered when negotiating and implementing ... contracts". While highlighting 'mitigation' and 'adaptation', there appears to be more focus on adaptation, hence, the admonition to engage in "climate-resilient agricultural land investment". No doubt, adaptation is a crucial piece when considering the climate change – agriculture nexus. However, attention must also be paid to the role of agriculture in mitigating climate change. As noted earlier, a substantial part of global GHG emissions (23%) is from AFOLU. There is an obligation to embark on climate-enhancing agricultural practices catering both to net zero emissions and/or the sequestration of GHG. Although reference has been made to the Paris Agreement, more specific consideration of initiatives including the [Koronivia Joint Work on Agriculture](#) and the [4 per 1000 initiative](#) is necessary. The joint work on agriculture focuses on the improvement of soil carbon, soil health and fertility, improved nutrient use etc., while 4 per 1000 initiative, more specifically, admonishes partners to annually increase the world's soil organic carbon stock by 0.4% in the top 30-40 cm of agricultural soils. These are specific inclusions that can be advised in the Guide in addition to its recommendations on low to zero tillage and multi-cropping. At a more strategic level, it is important that State parties consider the implications of agricultural projects on their nationally determined contributions (NDCs) under the Paris Agreement. The Guide should reflect contribution to the actualization of a State's NDC as one of the considerations which should be considered when entering an ALIC.

The Guide paid limited attention to conservation and deforestation. While forest and forestry appear a few times in the Guide, concepts like deforestation, afforestation, and reforestation are completely missing. This is surprising considering that agricultural use is primarily [responsible](#) for deforestation, and consequently, climate change and biodiversity loss. The Guide, which appears to have taken a broad-brush approach to conservation, should discourage deforestation and the cultivation of areas with high and long-term carbon sequestration potentials like peatlands. The [increasing competition for land](#) and its implications for sustainability and food security is also unmentioned in the Guide. This concern mandates an innovative approach to contracts for agricultural lands. Contract models allowing for integrated and/or efficient use of lands should be incorporated into the Guide. One way this can be done is for grantors to convey use-specific rights to investors, while retaining the right to subsequently donate rights for other compatible usages. Sustainable use-based conveyance will not only ensure efficiency and limit further encroachment on uncultivated and forested lands, it would also likely result in more profit for landowners.

One of the three objectives referenced in the introductory paragraph of the Guide is to provide Guidance for ALICs to promote "responsible agricultural investment" (RAI). I have made some observations in this blog. I reiterate a few. The working definitions of sustainability and agricultural land in the context of ALIC are needed in the Guide. While reference to RAI as an objective is positive, it is necessary to make sustainable investing an explicit objective given its relative specificity compared to responsible investment. Arguably, [responsible investment](#) is not the same as [sustainable investing](#). Financial return is the substance of the former, while the latter centres sustainability, particularly, ecological integrity. A sustainability objective will foreground sustainability-based assessment in lieu of a traditional impact assessment mode which is founded on the triple bottom line approach. Centering 'sustainability' as a key objective, also, makes a no-contract decision a necessary option when it is shown that a prospective project endangers the environment or at-risk-ecosystems. This option appears not to have been considered in the Guide.

The Guide on ALIC provides an opportunity to rethink land use agreements from the ground-up. A wholesale adoption of traditional models will not suffice in a world in dire need of sustainability. Encouraging a more efficient and integrated use of land and promoting a contract model that supports such integrated use is one way to align land contracts to sustainability imperatives. In rethinking this type of agreements, we must not forget to include or encourage the inclusion of clauses which will protect the earth for its own sake and not necessarily the 'services' humans benefit therefrom.

- **Ms. Elizabeth Gachenga** (Strathmore University)

December 16, 2019

## 2.0. Introduction

Food security is at the very core of human existence. Agriculture is thus a critical part of sustainable development. It is estimated that Agriculture contributes about 33% of the world's gross-domestic product.

A significant number of countries with the most arable land belong to the categorization of low to middle income nations, while a significant number of the high-income nations are dependent on food imports from the former. As a result, domestic and foreign agricultural land investment contracts are common as countries seek to achieve food security.

The UNIDROIT/FAO/IFAD Legal Guide to Agricultural Land Investment Contracts (ALIC) is thus a welcome framework for ensuring that these investments contribute to the sustainable development goals. On the overall, the legal guide provides comprehensive instrument that effectively highlights the critical components of such agricultural land contracts and is thus commendable.

## 3.0. Context, Purpose and Scope

The legal guide sets out an ambitious overall goal, which is to respond to the need for greater and more responsible investment in agriculture, which incorporates the necessary safeguards to enhance food security and nutrition and to protect legitimate tenure right holders, human rights, livelihoods and the environment and, in turn, (to reduce) investment risks.

This wide arching goal contributes to the complexity of the guide. The guide proposes to address the concerns affecting the variety of stakeholders, that is, the investors, governments and local communities, as well as any legitimate tenure right holders that might be affected. In the attempt to be comprehensive, the guide may not be very user-friendly to all its intended users.

Given the differing capacities of the various stakeholders, the creation of a single document that speaks to them is an onerous a task. In its current form, the guide is very useful for legal professionals, as well as some stakeholders. Local communities who are often the legitimate tenure holders and communities affected by the investment, may not benefit from the guide, as they are not likely to afford the expenses of engaging professional legal representation.

One of the ways, to address this challenge would be to consider developing a summary guide with an FAQ section that summarizes the main issues. One of the ways suggested for dealing with the stakeholder who may be disadvantaged in the negotiation of such contracts is to require investors to bear the cost of legal representatives for legitimate tenure holders who may be the local community. Whereas this could solve the problem, the risk of conflict of interest for such lawyers would be high.

The legal guide comprehensively addresses the legal framework for agricultural land investment contracts, from the source of law, to the identification of the parties to the contract, their contractual obligations, the remedies for non-performance and modes of dispute resolution. The guide also provides for the transfer and return of user rights upon completion of the contract. The guide does a very good job of highlighting the key themes and the possible challenges. The guide also appreciates the importance of context, and recognizes its limitation given that certain aspects of these contracts remain in the domain of domestic law.

The guide is also commendable in so far as it is characterized by an underlying effort to seek the delicate balance of the economic, environmental and social development needs amidst the demands of the terms of the contract.

### 3.0. Analysis of the Guide in the Context of Kenya's Legal Framework

This commentary seeks to contextualize some of the aspects of the guide to the Kenyan legal framework in a bid to test its applicability in context.

#### 3.1. Applicable Laws

There is a myriad of laws applicable to ALICs in Kenya. In the first place, the Constitution of Kenya 2010 provides a comprehensive guiding principle through its provisions on land tenure, its explicit guarantee of human, environmental and socio-economic rights. The Constitution is also replete with provisions safeguarding communities particularly the marginalized.

Other laws applicable to these contracts include, Kenya's Law of Contract which is based on the common law principles of contract and which would be the main source of law governing ALICs. All land related laws including; the Land Act, Community Land Act, Land Control Act, etc. would also apply to these types of contracts. All Agricultural related laws would also govern these contracts. The laws are varied and include Crops Act, Agriculture, Fisheries and Food Authority Act, etc. ALICs would also be guided by the legal framework for environmental management, which include The Environmental Management and Coordination Act (EMCA), Biosafety Act, etc. Other natural resource laws may also be applicable to ALICs such as the Water Act, Forest Conservation and Management Act, Fisheries Management and Development Act, etc. Other laws dealing with the economic aspects of such contract include, Investment Promotion Act, Foreign Investment Protection Act and other finance related legislation.

An important source of law for ALICs is customary law. Customary law is recognized in Kenya's constitution as a source of law. It is of particular importance in the governance of community land on which many of the ALICs would be based. Customary law presents a challenge as a source of law given the fact that it is very context specific and is also a living and dynamic source of law.

Article 2 of the Constitution recognizes the general rules of international law as part of Kenya's laws. Further, ratified treaties and conventions are also regarded as a source of law.

#### 3.2. Parties to the Contracts

The guide's emphasis of the need for due diligence in the identification of the parties to the contract is very relevant and critical in the Kenyan context. Apart from the investors, guarantors and the legitimate tenure holders, the Guide also points out to the fact that there may be other stakeholders who though not obvious parties to the contract, have an interest in the contract in so far as it may affect them. The guide anticipates that apart from the formal tenure holders recognized by written or formal law, there may be other legitimate tenure right holders who are recognised under customary law.

The Constitution in article 61, vests the ownership of all land in the people of Kenya collectively as a nation, as communities and as individuals. Land is classified as public, community or private. It is important for investors to take notice of the fact that where one of the parties to the contract is the national or county governments, such land is held in trust for the people of Kenya.

ALICs involving community land, require thoroughness in the conduct of due diligence so as to identify the tenure holders. As provided by article 63(1) of the Constitution, community land shall vest in and be held by communities identified on the basis of ethnicity, culture or similar community of interest. By this provision, the tenure holder of community land is the community itself. This raises challenges for investors in ALICs, when they have to identify the legitimate representative of the community. The council of elders which often is the representing body of the community, may not allow for representation of women and youth in its constitution. Nonetheless, the guide rightly highlights their being stakeholders and thus legitimate parties to the contracts.

The guide's distinction between formal tenure holders and the legitimate tenure right holders is particularly relevant in the context of ALICs involving community land. As noted above, the formal tenure holders as per the Constitution and the Community Land Act are the respective communities. However, communities may in accordance with customary law recognise the rights of access or fluid grazing rights, especially in times of drought, granted to members from other communities. Reference to the importance of identifying parties with such rights is noted as part of the due diligence required during ALICs negotiation. In identifying the tenure holders, the guide ought to highlight a caution against the risk of elite capture, political interference, bad faith occupants and the dynamics of conflict between communities over land tenure.

In a bid to be comprehensive in the stakeholder mapping, the guide includes a requirement to engage with other stakeholders apart from those above and who are defined as any party affected by the contract. Such a broad definition of stakeholders may deter potential investors as the determination of any affected party, could open up an endless list of stakeholders. The guide may thus need to provide a limit to its recommendations regarding the mapping of stakeholder requirements.

### 3.3. Consultation and Balance of Information and Power

The guide aptly recommends the importance of seeking consent of all the parties to the contract. As noted above, the guide's broad definition of 'other stakeholders', would make the process of seeking consent of parties to contract very difficult.

The complexity of ensuring that there has been free, prior and informed consent of the parties to the contract, is acknowledged as a challenge for ALICs. The guide proposes various modes of ensuring that the consent of the parties is based on sufficient understanding of the impact of the ALICs. Based on the Kenyan experience, the guide could consider requiring investors to prepare FAQs with the main terms and conditions. The guide could also add as a means to addressing the challenges of language barriers, that notices for public consultation should be made in vernacular radio stations. The guide makes recommends the engagement with local advisor at the community level. While this may be an effective way of providing information and seeking consent, the guide could consider including a caution of the risk of such advisors being disengaged from the communities. A further risk the guide may consider highlighting, is the political manipulation that is rampant in negotiation investment contracts in general.

### 3.4. Beyond Contractual Basic Requirements to Socio-economic and environmental obligations

One of the most commendable characteristics of the guide is its reference to the need for ensuring that ALICs go beyond fulfilment of the basic contractual elements. The guide's articulation of the socio-economic and environmental obligations that must be considered in entering into ALICs is in tandem with the growing appreciation for social investment enterprise.

The guide points to the fact that there may be legislative gaps in the countries in which ALICs are negotiated and recommends that investors seek international best practice rules to fill the gaps rather than exploit these in their favour. The guide could refer the investors to the provisions of 'neo constitutions' such as the Kenyan one which has clear provisions on the socio-economic and environmental obligations of all including government. Some of the provisions of Kenya's legislative framework following the enactment of the Constitution of Kenya in 2010 are set out below as a basis for enriching the guide.

#### 3.4.1. The complexity of Land

One of the most emotive issues during the consultation for the 2010 Constitution was the 'land question'. In Kenya land is not merely a financial asset but rather, a socio-cultural concept that touches on the very identity of its peoples. It is a source of local cohesion but can also be the cause of explosive discord. Colonialism and its consequent 'historical injustices' relating to land introduce a complexity for ALICs which parties to such contracts should appreciate.

The guide refers to the need to safeguard the socio-cultural rights relating to the land forming part of the ALICs. Based on the experience of Kenya, which experience is common in many former colonies, it may be useful to include the need to investigate these silent but salient issues impacting on ALICs.

#### 3.4.2. The Environmental Obligations surrounding ALICs

The Kenyan Constitution provides a good basis for enriching the guide's provisions relating to environmental obligations contained in ALICs. Kenya's legal framework for environmental and natural resource governance is well articulated in the Constitution and in the respective natural governance legislation.

Some of the learnings that could be considered in enriching the guide is to require the inclusion of the environmental management plan arising from the EIAs, as a contractual obligation for ALICs.

The guide could also consider making reference to the need for Strategic Environmental Assessments in the case of ALICs made at regional, national or county level. This provision is articulated in the 2015 revision of EMCA.

### 4.0. Conclusion

The guide provides an invaluable tool for ensuring sustainable development in the context of ALICs.

Given the fact that it would have no binding legal effect, there may be no incentive for parties to ALICs to comply with its recommendations. However, the guide is founded on principles of sustainable development which constitute a moral obligation for all.

In order to highlight the importance of complying with the guide, the drafters could consider developing a preamble akin to 'Our Common Future'. It is hoped that such a preamble would reiterate the importance of abiding by the best practice as set out in the guide in the context of ALICs.

The preamble could also highlight that the objective of the guide is not to simply provide a minimum standard to which parties must comply but rather to provide a basis for a pro-active approach to ensuring ALICs contribute to sustainable development.

**ANNEX III****Original comments received through the Global Forum on Food Security and Nutrition (FSN-Forum)<sup>9</sup>**

- **Mr. Dick Tinsley** (Colorado State University)

September 11, 2019

An interesting subject. It looks like this is another effort for "Estate Management" of smallholder lands. If this is the case make certain you learn the lessons from past efforts in particular the major debacle of the Gizzeria Scheme the Brits attempted outside Khartoum, Sudan at the confluence of the Blue and White Nile over 100 years ago. While as a major advocate for smallholder farming, I will agree that the estate management can be more productive and provide a better opportunity to meet national food security then individual smallholders. I will also agree that it could be a toss up if an individual is personally better off economically being an independent smallholder or an estate employee. However, as you do move from one to the other it can be a sensitive shift with many issues to consider.

1. Since an estate cannot have any isolated private holder inclusions you need some form of eminent domain to assure all land is included.

2. Then if you are not outright purchasing the land and disruptively displacing people, you need some equitable relationship for the use of the land.

If I were doing it, I would look at sharecropping in which during the season of estate management the owners will receive 30% of the crop. That is basically the world-wide standard share for use of land. This would be 30% of the total estate production prorated to the farmer according to area involved and not just 30% for the land involved as time differential across the estate will make the production on individual farms unequal. I would than guarantee the farmers the opportunity to work for the estate. The combination of wage earning and share should provide a reasonable income to the farmers. Also, if the estate is only interested in one crop a year the land should be available to the owners use during the off-season for personal production of something like short season vegetables.

Anyway, just some thought on estate farming of smallholder lands.

- **Mr. Martin Zerfas** (Humane Society International)

September 17, 2019

Would it be possible to add more resources and guidance related to specific issues?

The draft references the Roundtable on Sustainable Palm Oil, for example. Please consider adding a reference to the Farm Animals Responsible Minimum Standards (FARMS) Initiative's Responsible Minimum Standards (RMS), which provide technical guidance on best practice for breeding, rearing, transporting and slaughtering for five of the most farmed species. Attention to farm animal welfare has numerous benefits, including relating to food quality, food safety, environmental impact, resource usage, labor conditions and financial viability. The 1-2 page RMS are based upon principles of risk mitigation outlined in the IFC Good Practice Note on Animal Welfare in Livestock Operations.

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<sup>9</sup> The following are the raw comments posted on the FSN-Forum webpage in chronological order of receipt.



The FARMS Initiative and the RMS will be included in the Resources section of the upcoming UNEP Finance Initiative's Principles for Responsible Banking, to be launched in late-September.

The FARMS Initiative website: [www.farms-initiative.com](http://www.farms-initiative.com)

Responsible Minimum Standards: [Beef Cattle](#), [Chickens](#), [Dairy Cattle](#), [Laying Hens](#) and [Pigs](#)

Proposed description for the FARMS Initiative and the RMS to be included in Section 3.112.

"In the farm animal sector, the Responsible Minimum Standards of the FARMS Initiative provide technical guidance with respect to breeding, raising, transporting and slaughtering five of the most farmed species: Beef Cattle, Chickens, Dairy Cattle, Laying Hens and Pigs."

- **Mr. Jefter Mxotshwa** (African Development Training Institute)

September 17, 2019

After going through the document which has been worked on thoroughly, I would like to say we have done a great job.

What I could not see clearly is the political group as the target audience. These are not policy makers neither are their just other stakeholders or community but are key in influencing decisions and the implementation of such guide to rectify some sections of the law. I therefore would like a detail on the role of political groups, how they could be approached to influence land issues.

If all parties agree to this and it's approved by some processes, how could it be marketed for domestication? Will a committee under FAO or WFP be tasked with rolling out the guide to countries and work to guide vulnerable countries involving political parties?

- **Mr. Brandon Eisler** (Nutritional University)

September 25, 2019

Agricultural Land contracts *should* be made available to farm workers in responsible and functional increments, useful territories by both private owners and by government land portions.

A positive [permaculture](#) and nature conscious movement of agriculture is both very positive to our green world and can also be the cure to many social problems, health crisis and poverty.

Education and agro-redesign directives in such a contract should be very considerate of cattle and livestock maxims per portion of land, that should not be cleared completely as is currently practiced.

[Education about chemical agriculture](#), and the many harms from it, should be attached to contract documents.

[Converting cattle land to permaculture](#) (multipurpose) contracts should be made most available, there should be tax break incentives to those implementing sustainable ecology and systems as it is a win win for all involved, including the cows and the greater health of everything.

The most important opportunity I see, while the FAO is drawing a useful contract set(s) for land use agricultural, that certain contracts be made for poor individuals and families, with no money to start a sustainable land development, that will use zero chemicals, utilizing all natural organic farming techniques.

Possibly the mere existence of this contract standard could motivate what is needed to see the new future phases of organic natural, agricultural abundance potential take hold.

Agricultural Land Investment Contracts (ALIC) also have the opportunity to mandate a 50 / 50 % split of ownership, or 100 percent ownership of 50% of the land, etc., to lands developed agriculturally within the model of sustainable organic nature, to give security to those who tend the farm using the natural methods.

Appropriations of Federal and Nation Lands should be made available for this purpose, as a way of diversifying the assets, especially in cases of clearing and fires. This can motivate a rapid response to the casualty itself, and work as a deterrent to those who may purposely see acreage burned. For example is if x amount of natural disaster acreage could be claimed by one person's name, to be used specifically in an all natural permaculture or the like method, of reforestation, we would be then working in nature so much so to take advantage of the massive ash carbon infusions to soil.

Specifications such as how much livestock is permitted per acre, can be set.

Job creation incentives should be there for governments' also the private sector to consider, such as a Reforestation & Resource Protection officials who have the power to enforce livestock limits and chemical / GMO free small family agriculture.

Private land reserve investment can motivate wildlife and ecosystem security also, and this is the perfect conscious effort for wealthy people and companies.

Certain Species can be recommended to certain geographies and ideas like rotational re-visit style permaculture through a named resource link.

I sincerely hope that the committee can take into account these opportunities while drafting up their Agricultural Land Investment Contracts.

Please also see, [best diet information](#), to help emphasis the optimal human health benefits that come with permaculture investment. This information is also important in fueling individual motivation towards better, all natural agricultural systems.

- **Ms. Joanna Grammatiki** (Agroecopolis)

September 26, 2019

Regarding the topic of the structure of the ALIC Zero Draft i believe that part 4 which is about Contractual non performance and remedies need to be clarified!

What are the proposes and ideas of achieving cooperation between parties and stakeholders? Also, part 6 is an interesting issue but lacks of details!

- **Mr. Selvankumar Thangaswamy**

September 30, 2019

The contracts should cover to sustain the soil fertility and restoration of soil microbial community.

The contracts also insist to cultivate plants, not for the trees in the specified locations.

Make a regulation to cultivate common varieties i.e. nearer to the other cultivars.

- **Ms. Yixin Xu** (Southwest University of Political Science and Law)

October 1, 2019

The agriculture sector faces multiple globally interactive environmental and social challenges: greenhouse gases emissions, biodiversity loss, food security, and human rights of tenure right holders and indigenous peoples. The ALIC Zero Draft has adopted an exciting angle to tackle these issues. By focusing on the ‘investment contracts involving transaction of tenure and related rights’, the guide actually contributes to setting in advance the framework for actors and activities on the agricultural land in the future.<sup>[1]</sup> I also find it very insightful and comprehensive in terms of avoiding conflicts between various actors and improving their performances on sustainable agricultural practices.

Before going into detail, I was wondering could the working group clarify the following points about references?<sup>[2]</sup>

a. ‘the Guide refrains from making specific references to States, identifying particular domestic legislation, citing case studies or quoting contract clauses.’

Does this mean the guide refrains from citing domestic cases or also from cases from international courts or arbitrations?

b. ‘Instead, the Guide refers to international instruments...’

The following example documents are mainly international declarations and guidance, i.e., non-binding. Does the guide also refer to relevant binding international treaties or cases from international courts?

For instance, 3.111 ‘...international courts increasingly require States to conduct and demand an environmental impact assessment...’. A footnote with relevant case numbers will be helpful to support this claim.

I am also wondering whether the revision of the Zero Draft can include a format contract for users in practice as an annex attached to the guidelines. Thorough explanations and reasoning are beneficial for legal professionals, researchers, and legislators. However, the guide may be too complicated for a layman to comprehend. Notably, in rural areas in developing countries, lawyers are not so popular or widely asked to participate in contract matters. The involved lawyers from the grantors’ side may not have full professional proficiency in English. Therefore, straightforward contract clauses may be more helpful to make the guide more practice-oriented for developing countries.

The contract template can comprise a complete set of optional clauses written in a simple and clear format including fundamental operational issues and arrangements ensuring legitimate tenure rights and responsible/sustainable agriculture investment. There is not a well-known contract template published yet by any independent and authoritative organizations, especially from a perspective of contributing to sustainable development. Parties who are to be engaged in such a transaction can use this document as the basis to formalize a contract by editing, adding, or deleting clauses as they wish. Allowing modifications to the template is essential because it gives flexibility to the practitioners and increases the viability of the guide. At the moment, we cannot expect that all projects in relevant countries can apply the same level of responsible practices.

Another point relevant to the target audience is that I am worried that the private parties may not voluntarily apply these guidelines because measures to enhance environmental protection and human rights will increase costs.<sup>[3]</sup> Foreign private investors may not voluntarily follow the

guidelines unless there is enough price premium for more responsible agriculture activities or company branding. Then this process would need to involve independent certification schemes. Additionally, the local farmers in developing countries may not care about the environment or other long-term benefits to the extent of reducing their yearly income.<sup>[4]</sup> Hence, they may not voluntarily apply the guidelines at the cost of lower income in the short term.

*'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.'*

It also shows an intention to promote the protection of small tenure right holders at other places, for example:

*Intro 5, '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...' (ALIC p.14)*

*Intro. 6. Complexity. '...Indeed, if an investment fails to protect and respect the rights of legitimate tenure right holders, it should not proceed.'*

Hence, I wonder whether it would be better to seek a balance between investors and local land grantors so that economic interests can be achieved simultaneously for both parties, as well as social and environmental benefits.

Among the target audience, I think national legislators and local governments in developing countries who aim to promote the long-term benefits of a local area may be willing to adopt these guidelines. However, a barrier in practice is that the governments are lack of institutional capacity and funding to motivate and monitor the application of the guidelines by practitioners.

Furthermore, I think the guide would also be a valuable reference for the assessing criteria of two self-regulating entities: independent certification schemes for sustainable agricultural products and multilateral funds supporting projects to address environmental and social problems in agriculture activities.

Indeed, a guide cannot make every interest group happy. However, a widely applicable guide with a practical dimension should provide everyone something they need. Foreign investors, grantors, national legislators, NGOs providing aid to negotiating a contract, and third-party certification schemes, every actor has different focuses, perspectives, rights, and responsibilities. The guide has done an impressive job of handling their roles. What would be more helpful is to give guidance from different perspectives and follow the same order of discussion on every issue. For example, in Part I Chapter 2 about legitimate tenure right, the guide can start with the rights and responsibilities of the investors, issues they need to pay particular attention. Then goes to local tenure rights holders, the local or national regulator, and NGOs and third parties afterward.

The ALIC zero draft has mentioned many times that environmental issues are one of the important components of the bargain.<sup>[5]</sup> The draft provides four pathways to ensure positive environmental results, whereas some of them are slightly hidden in the texts. After explaining that there are national and international laws on relevant environmental issues, the draft mainly addresses these issues by suggesting a feasibility study for the investors to be aware of the environmental risks and environmental impact assessments (EIA) as required by the law.<sup>[6]</sup> The draft also suggests that 'in response to these potential impacts, investors ought to prepare management programs that create

operational procedures, practices, plans, and legal agreements ... These ought to include environmental and social action plans with measurable targets as well as for monitoring and review as well as for stakeholder...'[7] Lastly, the investor may be obliged to pay compensation for the misuse of the land as discussed in Chapter 5.[8]

These pathways are thoroughly listed in the text, whereas the draft should also make it more evident in the table of contents and make it more visible with subtitles. Then it would be easier for practitioners to locate where to look when the non-performance, transfer, and dispute are about environmental issues in Chapters 4, 5, and 6.

Also, it is doubtful whether international and national legal systems can provide a credible EIA to mitigate environmental risks, hence they may not be able to provide 'assurances that environmental standards will be maintained'.[9] The EIA is sometimes not binding under international law. For instance, in the case of CDM agriculture activities, whether to conduct an EIA is subject to the decision of the designated national authority, and relevant international agencies do not conduct a substantial review.[10] The national/local authorities may have deficient standards or lack of the institutional and financial capacity to hold a credible EIA.[11]

It is a smart idea to ask investors to make environmental plans to prevent future risks. It has happened in international cases, that a project was terminated because the NGOs discovered significant adverse environmental impacts during the implementation. In the case concerning Gabčíkovo-Nagymaros project, the International Court of Justice (ICJ) ruled the Hungarian government to continue the project, and both parties should apply newly developed norms of environmental law.[12] However, would the private investors be willing to bear such a responsibility (as suggested below, state maybe investors as well. But the discussion here focuses on the private investors)? For those who invest in sustainable agricultural production, are they institutionally and financially capacity to design and implement a mechanism that even international and national authorities could hardly achieve, and then what kind of mechanism it would be? If it is possible, the revision of the draft would be very beneficial for the investors to give more details on the design of such a mechanism (combining operational procedures, practices, plans, legal agreements, and action plans) to mitigate environmental risks.

Another idea that may be interesting for the parties is the possibility to combine multilateral funding for sustainable agricultural activities. There are multilateral funds that support biodiversity conservation, climate change mitigation and adaption, and capacity building, such as the Global Environmental Fund, Green Climate Fund, and Adaptation Fund. If the planned agriculture activities are relevant to any of those themes above, the parties may consider applying for additional funding and repay with the positive environmental and social results that would be generated regardless. In this context, the parties may need to arrange in their investment contract, which area is for such funding and their relevant rights and responsibilities.

Regarding the certification schemes for sustainable agricultural products and supply chains, the draft may also consider adding more clarifications and details. Several separate places mentioned relevant concepts very briefly: para. 2.26. 'certification providers' (p. 30), para. 2.56 'certification schemes' (p. 36), para. 3.112 'private standards and multi-stakeholder certification schemes' (p. 74), para. 3.122 'private certification schemes' (p. 77), para. 3.150, 'certification bodies, which may be public or private entities' (p. 82). It may be stronger to provide a clear definition at the beginning and explain a bit more about how these certification schemes operate and specific rights and responsibilities that need to be agreed on in the land investment contracts.

Some private companies are willing to invest in sustainable agricultural activities to show their leadership in addressing global environmental or social challenges. However, these investing companies themselves may not be specialized in agricultural projects. Instead of investing directly, they may seek intermediaries. Such intermediaries may have various forms, such as development

banks and private companies. They usually have their own teams of experts and codes of conduct. Many explanations of basic legal knowledge may not be helpful for them. For instance, 'this is because domestic courts can exercise compulsory personal and subject matter jurisdiction over persons and disputes located in that State's territory'(p.123). Hence, after defining a clear scope of the audience in the revision, the draft may consider rearranging the structure of texts so that legal experts can locate the core issues easier.

The newly amended Land Administration Law of the People's Republic of China was issued on 26th August 2019 and will become effective from 1st January 2020. It shares some common ground with the ALIC. It prioritizes biodiversity conservation and sustainable development (Art. 18). The acquisition of land is limited to clearly defined purposes and procedures (Art. 45-7).

The amendment strengthens the protection of tenure right holders (Art. 48) and simplifies the procedure of the transaction of land tenure rights to non-local entities and individuals (Art. 13).

Considering the international audience of the ALIC, it would be beneficial to have an appendix at the end showing the available official online sources of relevant countries' national legislation.

[1] Preface 4. Focus and Guidance. ALIC Zero Draft, UNIDROIT/FAO/IFAD (2019), p. 11.

[2] Preface 8, References, ALIC Zero Draft, UNIDROIT/FAO/IFAD (2019), p. 12.

[3] Preface 9, Target Audience, ALIC Zero Draft, UNIDROIT/FAO/IFAD (2019), p. 12. J. M. Rodriguez, et al. "Barriers to adoption of sustainable agriculture practices: Change agent perspectives." *Renewable Agriculture and Food Systems* 24.1 (2009), pp. 60-71.

[4] W. E. Oates & R. M. Schwab, 'Economic Competition among Jurisdictions: Efficiency Enhancing or Distortion Inducing?' (1988) 35 (3) *Journal of Public Economics*, pp. 333-54, at 351. E. Hettig, J. Lay & K. Sipangule, 'Drivers of Households' Land-Use Decisions - a Critical Review of Micro-Level Studies in Tropical Regions' (2015) 5 (4) *Land*, pp. 1-32, at 18.

[5] E.g. ALIC Zero Draft, UNIDROIT/FAO/IFAD (2019), p. 17, 23

[6] *Ibid.*, p. 24

[7] *Ibid.*, p. 47

[8] *Ibid.*, p. 116

[9] *Ibid.*, p. 24

[10] Para. 132, Annex 1, Clean Development Mechanism Validation and Verification Manual, CDM EB 55 Report, p. 26.

[11] *Ibid.*, p. 112; L. Schneider, *Is the CDM Fulfilling its Environmental and Sustainable Development Objectives? An Evaluation of the CDM and Options for Improvement*. Öko-Institut for Applied Ecology, 2007 (248), p. 1685.

[12] ICJ, *Summaries of Judgments and Orders, Case Concerning Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment of 25 September 1997.

- **Mr. Policarpo Tamele** (Entrepreneur Development Agency)

October 2, 2019

First, thank you for the topic and the debate.

On the subject, I think it is necessary to create a legal framework that can safeguard the investor, family producers, entrepreneur.

In the case of Mozambique, there is a law called Law and Use of Land Use, which unfortunately has fragility in the defense of rights mainly to family farmers, peasants. So with Legal Guide on Agricultural Land Investment Contracts I believe it will safeguard the use and safety for investors primarily.

- **Mr. Abdesslam Omerani** (High Commission for Water and Forests and the Fight Against Desertification)

October 4, 2019

*1. Are there any sections in the draft guide that do not appear to be exhaustive or that are deficient in the issues addressed ? If so, how do you plan to address them?*

In my opinion, it is important to encourage practices aimed at preserving ecosystems and ensuring the sustainability of their services by making them profitable for farmers, individually or in groups.

Thus, the inclusion of payment schemes for eco-systemic services in investment contracts for agricultural land would promote the regulation of agricultural and forestry activities by ensuring the internalisation of environmental externalities.

With a view to promoting territorial and generational solidarity, these PES would make it possible to remunerate farmers, suppliers or protectors of environmental services, through the beneficiaries of these services. Parties involved in such arrangements could be private persons together with public authorities or private persons only.

- **Ms. Wei Yin** (Southwest University of Political Science and Law)

October 8, 2019

In every part of this draft guide, I can see the intention of drafting organisations to contribute to sustainable and responsible investment in agricultural land and to achieve goals set in SDGs, in particular those in relation to agriculture and food. The guide mentioned CSR, responsible business conduct, and also mentioned negative risks (e.g. human rights, social and environmental impacts) that may occur if investment is not sustainable. However, the guiding instruments as the basis for this guide mainly focuses on human rights, while other relevant instruments in relation to social and environmental elements can seldom be seen in this guide. And in page 14-Intro 5, the guide mentions the consistence with the UN Guiding Principles, the VGGT, the CFS-RAI Principles and other international instruments. What does the 'other international instruments' refer to?

Generally speaking, it shows that the guide, once finalised, may contribute to sustainable investment in agricultural land and the implementation of the Sustainable Development Goals (SDGs). The aim of this guide is of value. But for a more practical and useful guide, there might be something that needs to be improved. The first thing that I intend to raise is similar to one of the recent contributions below, i.e. the definition of 'sustainable investment', 'responsible and sustainable investment' and similar expressions. It would be helpful, if the guide can provide definition of these terms for the purpose of realising the aim of this guide. In academic papers, policy papers and/or some international soft law instruments or statements, these terms do not have a shared or unified definition, but usually there are some key elements that were usually mentioned to defining these terms.

Since this guide focuses on Agricultural Land Investment Contracts, it is important to define these terms in this field, providing specific elements or factors. Secondly, as a guide for different stakeholders or to be adopted by different parties, the structure and content of the guide need be clear and easy to read and follow. Although the table of content follows a clear order but in each Chapter, the content is not in a proper order or the content or main point of each paragraph is not that clear or reader-friendly. Thirdly, I want to raise a small technical question in relation to 'local communities'. For the contract between investors and local communities, even though the word of 'local community' is known to many people or entities, but in some countries, the meaning or

definition of 'local community' is not clear or even in some countries, the so called 'local community' cannot sign land contract with other investors.

There are few things that can be improved in Chapter 1- The Legal Framework. First, after reading this chapter, the structure and classification of each part is not that clear and sometime overlap. It would be helpful if the drafting team can reconsider a more logical structure of this chapter. Second, in 1.5 (page 15), it mentions 'customary land rights' and 'customary rights'. Would it possible to provide footnotes or examples on this? In 1.8 – Domestic legal system in general, it mainly discusses and/or mentions constitution or constitutional system. While, in some countries, the institution does not specifically mentions contract regulation or provide information on how to regulate contract with public factors. This part can provide few more general information concerning the domestic legal system.

In part A-Domestic Sources 1.10, the guide use 'legal rules' to include all mandatory domestic legal sources, but I have some reservations about it. The case law may not be described as 'rules'. The guide puts the 1.10, 1.11, and 1.12 into parallel parts, while it seems that the three parts might not be the same level. Or it would be nice if considering putting the 'customary rules' and 'recognition of customary rules' in one part with sub-titles. There are also overlaps in part B- International sources and Part II. Relevant Areas of Law, especially when mentioning international instruments concerning human rights. In 1.21, the guide mentions applicable tax and finance regime, but in the bullet points, it only emphasises fiscal regime and accounting standards.

In the part of IV. Protection of Investment and Regulatory Autonomy, there are few things that need to be improved or clarified. First, in 3.126, the guide mentions 'domestic investment codes', but I would suggest not to use the term 'codes' but 'law' or 'rules' or 'regulation' since in many countries they do not have investment "codes" but investment law, or regulation, or provisions in relation to investment in other codes or law. The term of 'codes' is not frequently used in investment law field. In 3.132, when mentioning 'indirect expropriation or regulatory taking' or 'tantamount', other similar alternatives or terms can be also mentioned for wide readers, e.g. 'creeping', or 'de facto' expropriation. In 3.134 (page 79), whether the examples of 'discounted cash flow method, book value, replace value' can be further explained or with footnotes provided. In 3.139 (page 80) and 3.140, it would be helpful if the term 'economic equilibrium clauses' or 'stabilisation clauses' can be explained since many other people may not be familiar with these technical terms. Actually, there are two basic types of stabilisation clause, i.e. 'freezing clauses' and 'economic equilibrium clause'.

The guide in this part may have to clarify the relation of these clauses to make readers clearly understand it. In addition, this part seems to provide an approach or an view to address or reflect the conflict between protection of investment and protection of the right to regulate and try to make a balance, however, the obligation (binding or non-binding) of investors has seldom been mentioned.

It seems that the view of this part is mainly to provide measures or approaches that the government can take to balance this conflicting interest but not the measures or approaches that the government can take to protect its right to regulate, i.e. countermeasures. The guide mentioned CSR, responsible business conduct or similar expression but in this part these terms do not appear. Given that, for the readers, the obligation or soft responsibility of investors is not a key issue, but this is also very important for the purpose of achieving sustainable investment.

For Chapter 6 – Grievance Mechanisms and Dispute Resolution, grievance mechanisms can also be regarded as a kind of dispute resolution mechanism and it might be a judicial one or non-judicial one. The classification of dispute resolution mechanisms and the order or title of this part can be reconsidered.

The guide mentions Mediation in Chapter 6, however, it would be helpful if the guide can mentions the United Nations Convention on International Settlement Agreements Resulting from Mediation-



Singapore Mediation Convention in the part of 'Enforcement of Settlements or Decisions Resolving A Dispute'.

- **Ms. Omoyemen Lucia Odigie-Emmanuel** (Nigerian Law School)

October 8, 2019

CHAPTER 1 - THE LEGAL FRAMEWORK (with text amendment and proposals for inclusion in red and underlined)

**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 particularly the right to food, 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 (including customary law), 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, and 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 and covenants addressing, to the extent possible, such issues or gaps needed to protect right holders. 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.<sup>1</sup> In transactions involving governments and local communities in an area as critical to the realization of the right to food and 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 without jeopardizing customary tenure system and land rights.

**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 which cannot be varied by express agreements of the parties (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).<sup>2</sup> If the parties' contract fails to comply with those rules, it runs the risk of being unenforceable and overturned, thereby undermining the agricultural investment.

**1.11.** Customary and Religious 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 and religious 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 and religious may deal with who is entitled to hold rights to land, the capacity of persons to enter into and execute an agreement on behalf of group right holders, 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 and public policy, for example by prohibiting women from owning or inheriting land or from entering into contracts.

**1.12.** Recognition of customary and religious rules. Customary and religious 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 and religious rules may be applied by courts as local customs or usages,<sup>6</sup> 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.

**1.22.** Human rights. Various human rights instruments establish civil, cultural, economic, environmental, political and social rights. States have a duty to respect, protect and fulfil such rights,<sup>16</sup> and investors have a corresponding responsibility to respect human rights and to identify and assess the potential negative impact their investment would have on rights and establish precautionary measures to avoid such negative impacts and also to remedy any negative impacts they have on such rights.<sup>17</sup> 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.<sup>18</sup> 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 pose as an obstacle to pose as an emerging obstacle to the right food thus negatively affect food security. Any 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).

- **Mr. Fabiano de Andrade Correa** (Food and Agriculture Organization of the United Nations, FAO)

October 9, 2019

This is a valuable resource in an area where not sufficient guidance is available, I believe it will be a helpful instrument for the stakeholders involved.

One suggestion would be to make the document a bit more 'digestible' for readers, as it is quite long and complex. As suggested by some below, a summary with quick guidance by topic focusing on the different stakeholders (e.g. investor, grantor, legitimate right holder, etc) could be developed, building on the checklist already prepared at the end of the draft, and potentially including potential 'model clauses', (though the latter is a complicated undertaking).

A concern of mine (as a lawyer worried about precision of language) is with regards the term "responsible investments". I would suggest to provide a definition of it, and also to maintain

consistency as sometimes “responsible investment” is used, others “responsible and sustainable” - both subjective terms for which no definition is provided.

Here's a suggestion that could be adapted as needed: Responsible agriculture investment can be defined as the “creation of productive assets and capital formation, which may comprise physical, human or intangible capital, oriented to support the realisation of food security, nutrition and sustainable development”. It requires “respecting, protecting and promoting human rights, including the progressive realisation of the right to adequate food in the context of national food security”, and “entails respect for gender equality, age, and non-discrimination and requires reliable, coherent and transparent laws and regulations” (CFS RAI Preamble). The VGGT further adds that responsible investments should “do no harm, safeguard against dispossession of legitimate tenure right holders and environmental damage (VGGT 12.4). In addition, the VGGT notes that while States “should promote responsible investments in land, fisheries and forests (12.1) and “provide safeguards to protect legitimate tenure rights, human rights, livelihoods, food security and the environment” (12.6), investors also have a “responsibility to respect national law and recognize and respect tenure rights of others and the rule of law” (12.12)”.

Would also be interesting to hear the insights of other members of this Forum about this term, how it is perceived and what it entails, and how would national policy makers view it.

Another consideration I would add, is a reflection on the role for the laws of the investor’s state in incentivizing/requiring responsible investments - as this is not explored in the guide or mentioned as an area of concern for those performing due diligence.

The VGGT (12.15) says that when states invest or promote investments abroad, they should ensure that their conduct is consistent with the protection of tenure rights, food security, etc.

So should also a paragraph be inserted to expand a bit more on this issue?

Some suggested sources where this is discussed:

<http://www.fao.org/3/a-i5802e.pdf>

<http://www.foncier-developpement.fr/publication/guide-to-due-diligence-o...>

[https://www.land-links.org/wp-content/uploads/2016/09/USAID\\_Operational ...](https://www.land-links.org/wp-content/uploads/2016/09/USAID_Operational_...)

With regards to the section on the rights and obligations of the parties (chapter 3), food security and realization of the RTF is the CFS RAI principle 1, yet it is not mentioned among the social/economic issues. Is this something that should be included, and that need to be considered when negotiating an investment in agriculture? For the state the obligation is more obvious, but does the investor also have a responsibility to safeguard FS in the host state, e.g. through a due diligence not to invest in crops that would potentially present a challenge for FS such as biofuels or export crops? What is the balance here?

Public health (e.g. pest control) and phytosanitary standard concerns are also not mentioned, but could also be contemplated under a contract (CFS RAI 8)? I'd also raise a point with regards to FPIC, and its potential applicability beyond indigenous communities. Though it was originally formulated with regards to indigenous peoples, FPIC is nowadays considered an applicable principle to all types of communities potentially affected by land transactions. In fact, FPIC is nowadays considered an expression of the realization of different human rights (adequate housing, culture, etc.)

In addition, the VGGT Technical Guide on FPIC emphasizes that, as an expression of the right to self determination, “FPIC can be fairly interpreted as applying to all self-identified peoples who maintain customary relationships with their lands and natural resources, implying it is enjoyed widely in rural Africa and Asia” (for instance).

In this regard, should the guide make reference for consultations with other non IP communities to follow the FPIC standards and allow a “right to say no”?

- **Mr. Aklilu Nigussie** (Ethiopian Institute of Agricultural Research)

It looks like an interesting zero draft because it has all the necessary steps, yet it can be developed to more fully fledge.

I have read the Preface it appears good; but:

Preface1:- land tenure in Ethiopian case good gaze from points of;-

- Irrigate (where mostly encompass the low land ago-ecological areas-or pastoral, agro-pastoral and sedentary farming (crop production)

- Rainfed system (which more of the high lander and mid altitudes); the tenure here is grazing communal and agricultural crop production system

Preface 2:- this looks great especially the corporate social responsibility might assure the smallholder's producers for future food security and the right to invest in its own land without scarcity to access capital; social welfare and livelihood development might accelerate.

Preface 3:- it is great that the guide does not promote investors for tenure transactions as it will create more unemployment and cumulative poverty with different dimensions.

- **Mr. Aliou Niang** (Centre africain pour le commerce, l'intégration et le développement)

I am Dr. Aliou NIANG, lawyer, researcher and farmer.

I find the guide innovative. There is one aspect that seems to me to be interesting and which must be addressed in the guide. It is the ethics in investment contracts on agricultural land. Ethics as a value must be the foundation of these types of contracts which include economic aspects, market values and non-market values such as food security, nutrition and environmental protection.

More specifically, in the guide, there should be a section dealing with economic and commercial aspects in investment contracts for agricultural land and a part dealing with non-market values in these contracts, such as ethics ... etc.

- **FSN Forum – Clustering of comments**

### **Global Forum on Food Security and Nutrition (FSN Forum)**

The Future UNIDROIT-FAO-IFAD Legal Guide on Agricultural Land Investment Contracts (ALIC)

**1) Are there sections in the draft Guide that appear to be non-exhaustive or to have gaps in the addressed issues? If so, how would you propose to bridge them?**

#### **Ethics in investment contracts**

*Aliou Niang, Centre africain pour le commerce, l'intégration et le développement (CACID), Senegal*  
Ethics as a value must be the foundation of these types of contracts, which include economic aspects, market values and non-market values such as food security, nutrition and environmental protection.

In the guide there should be a section dealing with economic and commercial aspects in investment contracts for agricultural land and a part dealing with non-market values of these contracts, such as ethics.

#### **Standard model of contractualization**

*Aliou Niang, Centre africain pour le commerce, l'intégration et le développement (CACID), Senegal*

Add a part on agricultural contractualization between investor and producers followed by a standard model of contractualization that can serve as a Guide or support.

#### **Payment for ecosystem services**

*Abdesslam Omerani, Haut Commissariat aux Eaux et Forêts et à la Lutte Contre La Désertification, Morocco*

The inclusion of payment schemes for eco-systemic services (PES) in investment contracts for agricultural land would promote the regulation of agricultural and forestry activities by ensuring the internalisation of environmental externalities.

PES would make it possible to remunerate farmers, suppliers or protectors of environmental services, through the beneficiaries of these services. Parties involved in such arrangements could be private persons together with public authorities or private persons only.

#### **Right to Adequate Food**

*Fabiano de Andrade Correa, FAO, Italy*

Contrary to the CFS RAI, the section on the rights and obligations of the parties (chapter 3) does not mention the realization of the RTF among the social/economic issues.

#### **Responsibilities of the investor**

*Fabiano de Andrade Correa, FAO, Italy*

For the state the obligation is more obvious, but does the investor also have a responsibility to safeguard FS in the host state, e.g. through a due diligence not to invest in crops that would potentially present a challenge for FS such as biofuels or export crops?

#### **Public health and phytosanitary standard**

*Fabiano de Andrade Correa, FAO, Italy*

Public health (e.g. pest control) and phytosanitary standard concerns are not mentioned, but could also be contemplated under a contract (CFS RAI 8).

#### **Role of the national laws of the investor's country**

*Fabiano de Andrade Correa, FAO, Italy*

Add a reflection on the role for the laws of the investor's state in incentivizing or requiring responsible investments.

The VGGT (12.15) say that when states invest or promote investments abroad, they should ensure that their conduct is consistent with the protection of tenure rights, food security, etc.

#### **Appendix with relevant national legislation**

*Yixin Xu, Southwest University of Political Science and Law, China*

Considering the international audience of the ALIC, it would be beneficial to have an appendix at the end showing the available official online sources of relevant countries' national legislation.

#### **Responsible Minimum Standards of the Farm Animals Responsible Minimum Standards (FARMS) Initiative**

*Martin Zervas, Humane Society International, United States of America*

Consider adding a reference to the Farm Animals Responsible Minimum Standards (FARMS) Initiative's Responsible Minimum Standards (RMS), which provide technical guidance on best practice for breeding, rearing, transporting and slaughtering for five of the most farmed species.

Proposed description for the FARMS Initiative and the RMS to be included in Section 3.112.

"In the farm animal sector, the Responsible Minimum Standards of the FARMS Initiative provide technical guidance with respect to breeding, raising, transporting and slaughtering five of the most farmed species: Beef Cattle, Chickens, Dairy Cattle, Laying Hens and Pigs."

## **2) Are there sections that lack clarity? If so, how would you propose to clarify them?**

### **Role of political groups**

*Jeffer Mxotshwa, African Development Training Institute (ADTI), South Africa*

Add detail on the role of political groups and on how they could be approached to influence land issues. While not being policy makers, they are key in influencing decisions and the implementation of the Guide.

### **Contractual non performance**

*Joanna Grammatiki, Agroecopolis, Greece*

Part 4 about contractual non performance and remedies needs to be clarified. What are the proposals and ideas for achieving cooperation between parties and stakeholders?

### **Grievance mechanisms and dispute resolution**

*Joanna Grammatiki, Agroecopolis, Greece*

Part 6 lacks detail.

### **Reference to domestic legislation and jurisprudence**

*Yixin Xu, Southwest University of Political Science and Law, China*

The Guide refrains from making specific references to States, identifying particular domestic legislation, citing case studies or quoting contract clauses.

Does this mean the Guide refrains from citing domestic cases or also from cases from international courts or arbitrations?

Instead, the Guide refers to non-binding international instruments such as international declarations and guidance. Does the Guide also refer to relevant binding international treaties or cases from international courts?

For instance, 3.111 '...international courts increasingly require States to conduct and demand an environmental impact assessment...'. A footnote with relevant case numbers will be helpful to support this claim.

### **Coherent structure across sections**

*Yixin Xu, Southwest University of Political Science and Law, China*

It would be useful to give guidance from different perspectives and follow the same order of discussion on every issue.

For example, in Part I Chapter 2 about legitimate tenure right, the Guide can start with the rights and responsibilities of the investors. Then it moves to local tenure rights holders, the local or national regulator, and NGOs and third parties afterwards.

### **Easy to use Guide**

*Fabiano de Andrade Correa, FAO, Italy*

Make the document a bit more 'digestible' for readers, as it is quite long and complex. A summary with quick guidance by topic focusing on the different stakeholders could be developed, building on the checklist already prepared at the end of the draft, and including potential 'model clauses'.

*Wei Yin, Southwest University of Political Science and Law, China*

As a Guide for different stakeholders and to be adopted by different parties, its structure and content need to be clear and easy to read and follow. Although the table of content follows a clear order, in the chapters, the content is not always in a proper order and the main point of each paragraph is not presented in a reader-friendly way.

## Definition of responsible investments

*Fabiano de Andrade Correa, FAO, Italy*

It is necessary to provide a definition of the term "responsible investments" and to maintain consistency, as "responsible investment" and "responsible and sustainable" are used interchangeably.

Suggested definition:

Responsible agriculture investment is the "creation of productive assets and capital formation, which may comprise physical, human or intangible capital, oriented to support the realisation of food security, nutrition and sustainable development". It requires "respecting, protecting and promoting human rights, including the progressive realisation of the right to adequate food in the context of national food security", and "entails respect for gender equality, age, and non-discrimination and requires reliable, coherent and transparent laws and regulations" (CFS RAI Preamble).

The VGGT further adds that responsible investments should "do no harm, safeguard against dispossession of legitimate tenure right holders and environmental damage" (VGGT 12.4). In addition, the VGGT notes that while States "should promote responsible investments in land, fisheries and forests" (12.1) and "provide safeguards to protect legitimate tenure rights, human rights, livelihoods, food security and the environment" (12.6), investors also have a "responsibility to respect national law and recognize and respect tenure rights of others and the rule of law" (12.12)".

*Wei Yin, Southwest University of Political Science and Law, China*

It would be helpful if the Guide can provide definition of "sustainable investment" and "responsible and sustainable investment". In academic papers, policy papers and some international soft law instruments or statements, these terms do not have a shared or unified definition, but usually there are some key elements that could be used to define these terms.

## Definition of local community

*Wei Yin, Southwest University of Political Science and Law, China*

The definition of 'local community' is not clear. In addition, in some countries, such an entity would not be in the legal position to sign a land contract with investors.

## Other existing international instruments

*Wei Yin, Southwest University of Political Science and Law, China*

On page 14 - Intro 5, the Guide mentions the consistence with the UN Guiding Principles, the VGGT, the CFS-RAI Principles and other international instruments. What does the 'other international instruments' refer to?

## Emphasis places on human rights

*Wei Yin, Southwest University of Political Science and Law, China*

The instruments at the basis of this Guide mainly focus on human rights, while other relevant social and environmental elements are not as prevalent.

## Grievance mechanisms

*Wei Yin, Southwest University of Political Science and Law, China*

In Chapter 6 – Grievance Mechanisms and Dispute Resolution, grievance mechanisms can also be regarded as a kind of dispute resolution mechanism, both judicial or non-judicial.

The classification of dispute resolution mechanisms and their order can be reconsidered.

## Mediation

*Wei Yin, Southwest University of Political Science and Law, China*

The Guide mentions mediation in Chapter 6. However, it would be helpful if the Guide could mention the United Nations Convention on International Settlement Agreements Resulting from Mediation-Singapore Mediation Convention in the part on 'Enforcement of Settlements or Decisions Resolving a Dispute'.

### **Four pathways to ensure positive environmental results**

*Yixin Xu, Southwest University of Political Science and Law, China*

The ALIC zero draft mentions many times that environmental issues are one of the important components of the bargain.

The draft provides four pathways to ensure positive environmental results, but they are slightly hidden in the text and could be made more evident in the table of contents and through the use of subtitles.

### **Environmental impact assessment**

*Yixin Xu, Southwest University of Political Science and Law, China*

It is doubtful whether international and national legal systems can provide a credible environmental impact assessment (EIA) to mitigate environmental risks, hence they may not be able to provide 'assurances that environmental standards will be maintained'.

The EIA is sometimes not binding under international law. For instance, in the case of Clean Development Mechanism (CDM) agricultural activities, whether to conduct an EIA is subject to the decision of the designated national authority, and relevant international agencies do not conduct a substantial review.

The national/local authorities may have deficient standards or lack the institutional and financial capacity to hold a credible EIA.

It is a smart idea to ask investors to make environmental plans to prevent future risks. It has happened in international cases, that a project was terminated because the NGOs discovered significant adverse environmental impacts during the implementation.

However, would private investors be willing to bear such a responsibility?

Are those investing in sustainable agricultural production institutionally and financially capable to design and implement a mechanism that even international and national authorities could hardly achieve?

### **Protection of Investment and Regulatory Autonomy**

*Wei Yin, Southwest University of Political Science and Law, China*

In part IV. Protection of Investment and Regulatory Autonomy, there are few things that need to be improved or clarified.

In 3.126, the Guide mentions 'domestic investment codes'. I would suggest not to use the term 'codes' but 'law', 'rules' or 'regulation' since many countries do not have investment "codes". The term of 'codes' is not frequently used in the field of investment law.

In 3.132, when mentioning 'indirect expropriation or regulatory taking' or 'tantamount', other similar alternatives or terms can be also mentioned, e.g. 'creeping', or 'de facto' expropriation.

In 3.134, the examples of 'discounted cash flow method, book value, replace value' should be further explained.

In 3.139 and 3.140, it would be helpful if the term 'economic equilibrium clauses' or 'stabilisation clauses' can be explained since many people may not be familiar with these technical terms.

The Guide may have to further clarify the relation between these clauses. In addition, this part seems to address the conflict between protection of investment and protection of the right to regulate. However, the obligation (binding or non-binding) of investors is rarely mentioned. It mainly focused on measures or approaches that governments can take to balance conflicting interests. What is missing are measures or approaches that the government can take to protect its right to regulate.

### **Certification schemes**

*Yixin Xu, Southwest University of Political Science and Law, China*

Regarding the certification schemes for sustainable agricultural products and supply chains, the draft may also consider adding more clarifications and details. Relevant concepts are mentioned very briefly across the document: para. 2.26. 'certification providers' (p. 30), para. 2.56 'certification schemes' (p. 36), para. 3.112 'private standards and multi-stakeholder certification schemes' (p.



74), para. 3.122 ‘private certification schemes’ (p. 77), para. 3.150, ‘certification bodies, which may be public or private entities’ (p. 82).

It may be better to provide a clear definition at the beginning and explain a bit more how these certification schemes operate and about the specific rights and responsibilities that need to be agreed on.

### **Legal Framework**

*Wei Yin, Southwest University of Political Science and Law, China*

The structure and classifications of Chapter 1 - The Legal Framework are not that clear and sometimes overlap exists.

In 1.5 (page 15), there is mention of ‘customary land rights’ and ‘customary rights’. Would it possible to provide examples on this?

In 1.8 – Domestic legal system in general, the Guide mainly discusses and/or mentions the constitution or constitutional system. However, in some countries, the constitution does not specifically mention contract regulation or provide information on how to regulate contracts. This part can provide more general information concerning the domestic legal systems.

In part A - Domestic Sources 1.10, the Guide uses ‘legal rules’ to include all mandatory domestic legal sources. However, case law may not be described as ‘rules’.

The Guide puts 1.10, 1.11, and 1.12 into parallel parts, while it seems that the three parts might not be at the same level.

Consider putting the ‘customary rules’ and ‘recognition of customary rules’ in one part with subtitles. There are also overlaps in part B - International sources and Part II. Relevant Areas of Law, especially when mentioning international instruments concerning human rights.

In 1.21, the Guide mentions applicable tax and finance regime, but in the bullet points, it only emphasises fiscal regime and accounting standards.

### **Other comments**

#### **Economic aspects might limit the voluntary application of the Guide**

*Yixin Xu, Southwest University of Political Science and Law, China*

Parties may not voluntarily apply these guidelines because measures to enhance environmental protection and human rights will increase costs.

Foreign private investors may not voluntarily follow the guidelines unless there is enough price premium for more responsible agricultural activities or company branding. Such process would however need to involve independent certification schemes.

Additionally, farmers in developing countries may not care about the environment or other long-term benefits to the extent of reducing their yearly income.

#### **Lack of institutional capacity and funding can limit the voluntary application of the Guide**

*Yixin Xu, Southwest University of Political Science and Law, China*

A barrier in practice is that the governments lack the institutional capacity and funding to motivate and monitor the application of the guidelines by practitioners.

#### **Reference for certification schemes and social-environmental projects**

*Yixin Xu, Southwest University of Political Science and Law, China*

The Guide would also be a valuable reference for the assessment criteria of two self-regulating entities:

independent certification schemes for sustainable agricultural products multilateral funds supporting projects to address environmental and social problems in agriculture.

#### **Use of the Guide by intermediaries**

*Yixin Xu, Southwest University of Political Science and Law, China*

Some private companies are willing to invest in sustainable agricultural activities to show their leadership in addressing global environmental or social challenges.

However, these investing companies themselves may not be specialized in agricultural projects, instead relying on intermediaries. Such intermediaries may have various forms, such as development banks and private companies. They usually have their own teams of experts and codes of conduct. It would therefore be good to rearrange the structure of texts to make it easier for legal experts to locate the core issues.

### **Bio-ecological aspects**

*Selvankumar Thangaswamy, Research Department of Biotechnology, Mahendra Arts & Science College, India*

The contracts should also cover obligations to sustain soil fertility and the cultivation of certain plants.

### **Free, Prior and Informed Consent**

*Fabiano de Andrade Correa, FAO, Italy*

Though it was originally formulated with regards to indigenous peoples, Free, Prior and Informed Consent (FPIC) is nowadays considered an applicable principle to all types of communities potentially affected by land transactions. In fact, FPIC is considered an expression of the realization of different human rights (adequate housing, culture, etc.).

In addition, the VGGT Technical Guide on FPIC emphasizes that, as an expression of the right to self-determination, “FPIC can be fairly interpreted as applying to all self-identified peoples who maintain customary relationships with their lands and natural resources, implying it is enjoyed widely in rural Africa and Asia”.

### **Land Administration Law of the People's Republic of China**

*Yixin Xu, Southwest University of Political Science and Law, China*

The newly amended Land Administration Law of the People's Republic of China shares some common ground with the ALIC. It prioritizes biodiversity conservation and sustainable development (Art. 18). The acquisition of land is limited to clearly defined purposes and procedures (Art. 45-7). The amendment strengthens the protection of tenure right holders (Art. 48) and simplifies the procedure of the transaction of land tenure rights to non-local entities and individuals (Art. 13).

### **Learning from past estate management approaches**

*Dick Tinsley, Colorado State University, United States of America*

It looks like this is another effort for “Estate Management” of smallholder lands.

I will agree that the estate management can be more productive and provide a better opportunity to meet national food security than individual smallholders. I will also agree that it could be a toss up if an individual is personally better off economically being an independent smallholder or an estate employee. However, as you do move from one to the other it can be a sensitive shift with many issues to consider.

Since an estate cannot have any isolated private holder inclusions you need some form of eminent domain to assure all land is included.

Then if you are not outright purchasing the land and disruptively displacing people, you need some equitable relationship for the use of the land.

### **Supporting the adoption of the Guide at local level**

*Jeffer Mxotshwa, African Development Training Institute (ADTI), South Africa*

How can the Guide's adoption at local level be supported? Will a committee under FAO or WFP be tasked with rolling out the Guide to countries and work to guide vulnerable countries?

### **Complement existing weaker legal protection at national level**

*Policarpo Tamele, Entrepreneurship Development Agency, Mozambique*

In the case of Mozambique, there is a law called Law and Use of Land Use, which unfortunately is quite fragile in the defence of rights of family farmers and smallholders. The Guide can help create a legal framework that can safeguard the investor, family producers and entrepreneurs.

### **Detailed in-document comments**

*Fabiano de Andrade Correa, FAO, Italy*

<http://www.fao.org/fsnforum/sites/default/files/discussions/contributions/ALIC%20Zero%20Draft%201%20June%202019%20ID%20%28CLEAN%29%20-%20FAC%20comments%20Oct%202019.docx>

### **Resources shared by participants**

Clean Development Mechanism Validation and Verification Manual, CDM EB 55 Report

[Due diligence, tenure and agricultural investment – A guide on the dual responsibilities of private sector lawyers in advising on the acquisition of land and natural resources](#)

[Enabling regulatory frameworks for contract farming](#)

[FAO Governance of Tenure](#)

[Guide to due diligence of agribusiness projects that affect land and property rights](#)

[Home country measures that promote responsible foreign agricultural investment: evidence from selected OECD countries](#)

ICJ, Summaries of Judgments and Orders, Case Concerning Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment of 25 September 1997.

L. Schneider, Is the CDM Fulfilling its Environmental and Sustainable Development Objectives? An Evaluation of the CDM and Options for Improvement. Öko-Institut for Applied Ecology, 2007 (248)

[Legal guide on contract farming](#)

[Legislative Studies of FAO Legal Office](#)

[Model agreement for responsible contract farming – with commentary](#)

[Operational guidelines for responsible land-based investment](#)

[Overview of the FAO Umbrella Programme Supporting Responsible Investments in Agriculture and Food Systems](#)

[Responsible governance of tenure and the law](#)

[Responsible governance of tenure: a technical guide for investors](#)

[Responsible Investment in Agriculture and Food Systems](#)

[Safeguarding land tenure rights in the context of agricultural investment](#)

[Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security](#)