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Possible future work in the area of private law and development

(submitted by the Secretariat)

<i>Summary</i>	<i>Consideration of possible future work in the area of private law and development</i>
<i>Action to be taken</i>	<i>Future work</i>
<i>Mandate</i>	<i>Work Programme</i>
<i>Priority level</i>	<i>To be determined</i>
<i>Related documents</i>	<i>C.D. (88) 7</i>

Introduction

1. In recent years there have been repeated appeals to the Governing Council to give adequate consideration to the needs of developing countries when formulating recommendations for the Work Programme of UNIDROIT to the General Assembly.

2. The Secretariat submits that the broad mandate of UNIDROIT in the area of private law offers a wide range of opportunities for the Institute to contribute to the achievement of development goals agreed upon by the international community. Opening a line of work specifically devoted to the interplay between private law and economic and social development might also permit better to explore synergies with other intergovernmental organisations and to develop joint projects in co-operation with selected organisations.

1. PRIVATE LAW AND DEVELOPMENT

3. On 8 September 2000, the General Assembly of the United Nations adopted Resolution 55/2 "*United Nations Millennium Declaration*", from which eight *Millennium Development Goals* were derived. The Eight Millennium Development Goals are to:

1. eradicate extreme poverty and hunger
2. achieve universal primary education
3. promote gender equality and empower women
4. reduce child mortality
5. improve maternal health
6. combat HIV/AIDS, malaria, and other diseases
7. ensure environmental sustainability
8. develop a global partnership for development

4. Attempts to achieve these goals and objectives are made by the individual countries, but they are not alone in this endeavour. Numerous organisations, national and international, non-governmental and inter-governmental, have initiated projects.

5. The Commission on Legal Empowerment of the Poor was created within the framework of the United Nations to examine in particular the relationship between exclusion, poverty and the law and to formulate recommendations on how the laws, institutions and policies governing economic, social and political affairs can be changed to help fight poverty. The Commission was a high-level body and its members included former Heads of State and Government, cabinet ministers, jurists, economic researchers, and other senior policy-makers from various regions. The Commission met between 2005 and 2008, when it issued its final report.

6. The Commission understood legal empowerment not as direct aid, but as a means for "helping poor people lift themselves out of poverty by working for policy and institutional reforms that expand their legal opportunities and protections."¹ The final report of the Commission identified "four crucial pillars that must be central in national and international efforts to give the poor protection and opportunities."² These areas and their pertinence for the work of the Commission may be summarised as follows:

(a) *First Pillar: Access to Justice and the Rule of Law.* The Commission expressed the view that "legal empowerment is impossible when, *de jure or de facto*, poor people are denied access to a well functioning justice system. Where just laws enshrine and enforce the right and obligations of society, the benefits to all, especially the poor, are beyond measure."³

(b) *Second Pillar: Property Rights.* The Commission noted that "ownership of property, alone or in association with others, is a human right." It noted further that a fully functioning property system "is composed of four building blocks: a system of rules that defines the bundle of rights and obligations between people and assets reflecting the multiplicity and diversity of property systems around the world; a system of governance; a functioning market for the exchange of assets; and an instrument of social policy. Each of these components can be dysfunctional, operating against the poor. When the system fully functions, it becomes a vehicle for the inclusion of the poor in the formal economy, and a mechanism for their upward social mobility. When the entire system or a single component is dysfunctional, the poor are deprived of

1 Commission on Legal Empowerment of the Poor, *Making the Law Work for Everyone*, vol. 1: Report of the Commission on Legal Empowerment of the Poor (UNDP: New York, 2008), p. 16.

2 *Ibid.*, p. 2.

3 *Ibid.*, p. 5.

opportunity or discriminated against.”⁴ The Commission therefore advocated the following measures to achieve legal empowerment measures in this domain:

- (i) promote efficient governance of individual and collective property in order to integrate the extralegal economy into the formal economy and ensure it remains easily accessible to all citizens;
- (ii) ensure that all property recognised in each nation is legally enforceable by law and that all owners have access to the same rights and standards;
- (ii) create a functioning market for the exchange of assets that is accessible, transparent, and accountable;
- (iv) broaden the availability of property rights, including tenure security, through social and other public policies, such as access to housing, low interest loans, and the distribution of state land;
- (v) promote an inclusive property-rights system that will automatically recognise real and immovable property bought by men as the co-property of their wives or common-law partners.⁵

(c) *Third Pillar: Labour rights.* The Commission stressed that “the legitimacy, even the acceptability, of the economy depends upon basic labour rights, as does the development of human capital necessary for sustained growth.”⁶ The Commission proceeded to formulate a number of recommendations for improving labour standards and rights to the benefit of the poor;

(d) *Fourth Pillar: Business rights.* The Commission held it to be self-evident that “the poor are entitled to rights, not only when working for others but also in developing their own businesses. Access to basic financial services is indispensable for potential or emerging entrepreneurs. Just as important is access to protections and opportunities such as the ability to contract, to make deals, to raise investment capital through shares, bonds, or other means, to contain personal financial risk through asset shielding and limited liability, and to pass ownership from one generation to another.”⁷ Specific measures advocated by the Commission included, among others, the following:

- (i) strengthen effective economic governance that makes it easy and affordable to set up and operate a business, to access markets, and to exit a business if necessary;
- (ii) expand the definition of ‘legal person’ to include legal liability companies that allow owners to separate their business and personal assets, thus enabling prudent risk taking;
- (iii) promote inclusive financial services that offer entrepreneurs in the developing world what many of their counterparts elsewhere take for granted -savings, credit, insurance, pensions, and other tools for risk management.⁸

7. It should be noted that the Commission, as a high-level policy body, was not conceived as a standard-setting or implementing agency. Accordingly, the Commission did not venture into formulating concrete advice or devising programmes for the implementation of its broad policy recommendations. For that purpose, the Commission expressly relied on the existing network of intergovernmental, international and regional organisations. The Commission invited the United Nations “and the broader multilateral system” to lend “their full support” to the process of legal

4 *Ibid.*, p. 6.

5 *Ibid.*, p. 7.

6 *Ibid.*, p. 7.

7 *Ibid.*, p. 8.

8 *Ibid.*, p. 9.

empowerment of the poor. In particular, the Commission called for integrating legal empowerment of the poor as “a core concern of global multilateral agencies”. The Commission pointed out that “in their distinctive ways, these agencies influence how governments establish and implement the rules that define economic and social protections and opportunities” and urged them to change their strategies and operational approaches “in order for them to provide strong, sustained and coordinated support to legal empowerment of the poor.”⁹

8. The Secretariat believes that, as an independent intergovernmental organisation with a solid record of achievement in the private law area, UNIDROIT would have a contribution to make toward achieving those objectives, within its own mandate and expertise, in particular as regards the second and fourth pillars (“property rights” and “business rights”) and, to some extent, also the first pillar (“access to justice and the rule of law”). This could take the form, for instance, of concrete legislative recommendations in clearly identified areas of civil, commercial and procedural law with a view to assisting countries, in particular in the developing world, in undertaking the domestic law reforms that are necessary to help the poor among their population to participate in their countries’ economies.

9. The Secretariat recognises the sensitive nature of some aspects of the broad areas identified above. It is by no means suggested that any work in these areas should aim at unification or even harmonisation as such of domestic rules. The Governing Council may wish to consider that UNIDROIT could nevertheless make an important contribution to domestic law reform and the modernisation of certain aspects of domestic legal systems. The Secretariat is also aware that past experience with law reform projects provides ample evidence of the need to take full account of the particular situation of recipient countries, including local culture, economy and institutions, and has often highlighted the minimal usefulness of abstract legislative models or foreign legal transplants. Of course, it is not suggested that it would be useful for UNIDROIT to formulate rigid models and recommend them for blind transplantation into domestic legal systems. The main objective would be to formulate balanced guidance drawn on international experience and offering options, as appropriate, to facilitate adaptation to the domestic legal system and the particular situation of a country.

2. PRIVATE LAW AND FOOD SECURITY

10. One discrete area within this broad spectrum on which the Governing Council may wish to focus its attention relates to the interplay between agricultural production and private law. Concerns over food security have become acute in recent years, mainly as a result of highly volatile prices for agricultural commodities, often leading to sharp increases that risk rendering basic products unaffordable for low-income consumers, particularly in developing countries. In its basic meaning, however, “food security” is neither a new nor a complex notion. In fact, it refers simply to the physical and economic access to sufficient, safe and nutritious food to meet their dietary needs and food preferences for an active and healthy life.¹⁰ Food security is therefore something that concerns all, and not only developing countries even if the situation is clearly most dramatic in those countries.

11. Food security is naturally one of the priority items of the mandate of the *Food and Agriculture Organization of the United Nations (FAO)*. Established pursuant to the provisions of Article V.6 of the FAO Constitution, the *Committee on World Food Security*¹¹ was set up in the aftermath of the 1974 World Food Conference and is open to all Member Nations of FAO as well as Member States of the United Nations, which notify the Director-General of FAO of their desire to

⁹ *Ibid.*, p. 10.

¹⁰ World Food Summit, 1996.

¹¹ The *Committee on World Food Security (CFS)* is a Technical Committee of FAO that serves as a forum in the United Nations System for review and follow-up of policies concerning world food security, including food production, nutrition and physical and economic access to food.

become members of the Committee,¹² and serves as the forum in the United Nations system for the monitoring of the implementation of the Plan of Action adopted by the World Food Summit. At its 34th Session (2008), 117 Governments' delegations participated. Food security is dealt with also by a number of other organisations, starting with the *World Trade Organisation (WTO)* Agriculture Negotiations, the *United Nations Development Programme (UNDP)*, the *United Nations Environment Programme (UNEP)*, the European Union and other regional and non-governmental organisations.

12. A number of different factors are involved in ensuring food security. The most obvious include availability of sufficient arable land, access to water for irrigation, parasites and disease control, adequate transport infrastructure, access to and actual usage of scientific and technical knowledge. Although its role may not be apparent and is admittedly not a leading one, private law is an important component of the range of conditions needed to attract and foster sufficient investment in agricultural production and for increasing the productivity of agricultural holdings. Obsolete or inefficient laws may discourage agricultural production or deprive farmers or agricultural enterprises of the legal certainty and predictability needed for their investment. They may also pose obstacles to commercialisation of agricultural products or limit access to credit needed for modernisation or expansion of agricultural production.

13. The most obvious area is land tenure and property rights, including rules and procedures governing titling, acquisition and registration of property, and the extent to which land owners may use their property rights as a collateral to secure financing. For instance, in a study published in 2004, the United Nations Economic Commission for Africa observed that "food security and poverty reduction cannot be achieved unless issues of access to land, security of tenure and the capacity to use land productively and in a sustainable manner are addressed."¹³ Besides those basic aspects related to land tenure, various areas of private law are also likely to affect agricultural production, directly or indirectly. Immediately related to property rights, for example, are water rights. Indeed, "the way in which land is used can, and often does, have a major impact on both the quality and the quantity of water resources and thus on water rights," since "nearly all uses of land have an impact on the hydrologic cycle of water and thus on water resources."¹⁴ The extent to which access to water is an accessory to land property rights may, however, directly impact the availability of water for agricultural production. Where supplemental irrigation is necessary to render agriculture profitable or at all possible, "lack of water security negatively affects the utility and thus the value of any land tenure rights they hold and vice versa." Yet, "irrigators in many countries lack secure rights to water, secure land tenure rights or both."¹⁵ A number of other areas of the law are also instrumental in supporting agricultural production and commercialisation of agricultural products. Thus, marketing of agricultural products may be enhanced, and investment in agricultural production may be encouraged, by helping farmers pool their productions and create economies of scale through an appropriate legal framework for the governance and functions of agricultural cooperatives. Marketing mechanisms may be further enhanced by adequate rules for the use of negotiable instruments specially linked to agriculture financing, production or trading in agricultural commodities (such as warehouse receipts).

14. In many legal systems, the basic features of land tenure and water rights are deeply rooted in traditional rules that may date back several centuries or even millennia. Their age is not by itself

12 In particular, the Committee (i) examines major problems and issues affecting the world food situation and the steps to redress such problems; (ii) examines the implications for world food security of other relevant factors such as the supply and demand of basic foodstuffs and food aid requirements and trends; (iii) recommends appropriate actions.

13 UN Economic Commission for Africa, *Land Tenure Systems and their Impacts on Food Security and Sustainable Development in Africa* (UN/ECA: Addis Ababa, 2004), p. 3.

14 S. HODGSON, *Land and water – the rights interface*, FAO Legislative Study 84 (FAO: Rome 2004), p. 53.

15 *Ibid.*, p. 63.

a decisive indication of obsolescence. However, it is unquestionable that many rules that still apply today were developed in a context in many respects very different from today's world and were not conceived against the background of mounting demographic pressure and with full appreciation of the scarcity of natural resources and the measures needed for their preservation. A comprehensive comparative review of the continued adequacy of traditional rules of private law that affect agricultural production for the purpose of ensuring the high level of agricultural output needed to ensure food security in today's world would therefore seem to be a timely initiative.

15. Work on various aspects of land tenure is underway in more than one organisation. At FAO, for example, the work of the Land Tenure and Management Unit of the Natural Resources Management and Environment Department "includes investigations of the land tenure implications of climate change scenarios and of policy options in relation to the rapid growth of land use for bioenergy production; land tenure in emergency and post-emergency work; compulsory purchase of land and compensation; state land management; low-cost land tenure security; good governance in land administration; and making land information accessible for the poor".¹⁶ Together with FAO technical units, the Development Law Service of FAO has been providing legislative advice on land tenure and water rights to member countries, as well as publishing legal studies of rules and principles related to land tenure and water rights, including on marketing of agricultural products, agricultural cooperatives, water users' organizations, etc.¹⁷ The other UN organisations that deal with agriculture, the International Fund for Agricultural Development (IFAD) and the World Food Programme (WFP), do not have legislation as their sphere of activity. IFAD focuses on country-specific solutions and finances specific programmes and projects. The WFP instead focuses on emergency relief and on country-specific solutions to reduce hunger.

16. Another organisation that considers issues related to land tenure is the United Nations Economic Commission for Africa, which in 2004 published an in-depth analysis of "*Land Tenure Systems and their Impacts on Food Security and Sustainable Development in Africa*". There would, however, not appear to be a legislative programme as follow-up. The examination of the *World Bank* of land law reform has produced a detailed study on "*Achieving Development Policy Objectives*" which extensively considers land tenure. However, while some World Bank programmes may support or encourage legal reform and the enactment of legislation necessary in the context of a project, the World Bank is not a standard-setting agency. Law reform projects are typically carried out on a country-by-country basis using the advice of especially engaged experts.

17. Subject to further investigation, which the Secretariat would be happy to carry out if asked to do so by the Governing Council, it would seem that no international organisation has or is currently in the process of formulating legislative advice exclusively or specifically on the private law aspects of land tenure and water rights. Furthermore, it seems that no organisation has or is envisaging developing a comprehensive study focusing specifically on rules and principles of private law that may affect agricultural production with a view to formulating appropriate legislative advice to domestic legislators.

18. The Secretariat believes that, within its own mandate and expertise, UNIDROIT would have a contribution to make toward achieving food security. This could take the form, for instance, of concrete legislative recommendations in clearly identified areas of private law having direct relevance for agricultural production with a view to complementing existing legal assistance to countries, in particular in the developing world, undertake the domestic law reforms that are necessary to foster agricultural investment and expand production with a view to achieving greater food security.

¹⁶ <http://www.fao.org/nr/tenure/lt-home/en/> (10 March 2009).

¹⁷ FAO produces two series of legal publications: Legislative studies (available at <http://www.fao.org/Legal/legstud/list-e.htm>) and Legal Papers Online (available at: <http://www.fao.org/Legal/legstud/list-e.htm>).

19. The Secretariat recognises that legal questions related to use of land are in most countries politically sensitive. The Secretariat also recognises that property rights, in particular land property, constitute an area of the law which lawyers from many legal systems might be reluctant to propose for an international debate. The Secretariat submits, however, that the purpose of any work that UNIDROIT might undertake would not be to achieve unification or harmonisation of property law, but merely to present options, as appropriate to various legal systems, for rendering the law more conducive to attracting greater investment in agriculture and increasing rural productivity. It should also be noted that the international debate on food security has clearly shown that there is a shared interest in expanding agricultural production. At the same time, there has also been a significant increase in foreign investment in arable land.¹⁸ These factors suggest that the availability of international advice on the entire spectrum of legal rules and principles of private law that may affect agricultural production may, therefore, be a particularly useful complement to the legal advice already provided by other intergovernmental organizations.

3. PRIVATE LAW AND AGRICULTURAL REGULATION

20. Closely related to the previous considerations is the interplay between specific regulatory aspects of agricultural production and private law.

21. In carrying out its specific mandate, FAO deals with a wide range of technical matters relating to the production and marketing of agricultural commodities and food, often at national rather than supra-national level. Besides its function as in-house counsel in accordance with the basic texts of the organisation, the FAO Legal Office provides "legal advisory services to FAO members, assists in the formulation of treaties on food and agriculture, for which the Director-General acts as Depositary, publishes legal studies and maintains a database (FAOLEX) of national legislation and international agreements concerning food and agriculture (including fisheries, forestry and water)". It also "provides legal advisory services to governments on land, water, fisheries, plants, animals, food, forestry, wildlife and national parks and environment and biodiversity as well as general agricultural issues (institutions, trade, economic reform)." ¹⁹ Working, generally in co-operation with the concerned FAO technical departments, the Legal Office assists governments in preparing basic laws and required implementing regulations, negotiating agreements, advising on institutional structures and on compliance with international law. An element of most advisory projects is capacity building through participatory training of national officials and consultants." These advisory services are concerned with all technical matters falling under the mandate of FAO.

22. These and other areas of work by FAO do not have an explicit relationship to UNIDROIT'S area of work. Nevertheless, in a number of instances, the subject matter of technical regulations has private law implications that FAO typically refrains from dealing with for want of a specific mandate and expertise in the area of private law. The result is that the domestic implementation of some projects or broad FAO standards may either lack a useful private law component, or may leave unanswered some important questions of private law directly related to the technical standards being introduced. So, for example, assistance by FAO in developing a legislative and regulatory framework for the operation of commodity warehouses might not include a specific framework for the issuance and negotiability of warehouse receipts that might further facilitate trading in the commodity in question. Similarly, legislative advice on biotechnology, food security and in particular "street food" systems, fertilisers or pesticides control would typically deal with technical standards, adopted within the framework of an international instrument to which the concerned country is a party, internal

¹⁸ "Corsa alla terra, ultimo investimento", Corriere della Sera 31 December 2008; "La terra in svendita", La Repubblica 31 January 2009; "S Koreans to lease farmland in Madagascar", Financial Times 19 November 2008; "Land leased in Africa to secure crops for South Korea", The Malaysia Insider, 18 February 2009.

¹⁹ <http://www.fao.org/Legal/advserv/advice-e.htm> (10 March 2009).

regulatory mechanisms, administrative structures and control procedures in the relevant areas. Often private law tools and approaches may be included in this type of legislative advice, so UNIDROIT's specific expertise on private law aspects such as tort or contractual liability arising out of, for instance, defective products, contamination, unexpected spreading of diseases or dissemination of unwanted species could be a welcome complement to ongoing legal work carried out by FAO.

23. Another subject covering both public and private law should also be noted: modern biotechnology applications, including genetic engineering and Genetically Modified Organisms (GMOs), have a strong impact on food security (development of crops, breeding, fisheries and forestry, i.a.) and may pose risks to the environment and, in particular, to the conservation of biological diversity. Such technologies therefore require the establishment of a biosafety system, including legal, scientific, technical, and administrative mechanisms which regulate its application and address safety for the environment, including humans, of GMOs. Governments may not be able to regulate such new and difficult issues whose classical objectives are the elaboration and adoption of a legislative biosafety framework with a view to allow for the safe introduction of GMOs, to comply with international agreements such as the Cartagena Biosafety Protocol to the Convention on Biodiversity (CBD), and the FAO International Treaty on Plant Genetic Resources for Food and Agriculture. While this field of legislative advisory activity covers mainly public law, some essential elements are to be regulated under the private law system in force in the concerned country. For instance, the elaboration of a biosafety legislative framework must take into account the development of appropriate private law mechanisms regulating the legal liability of persons dealing with GMOs.

24. If UNIDROIT were to include legal aspects related to agricultural production in its Work Programme, in consultation with FAO, the two organisations could develop modalities for co-operation with a view to strengthening the analysis of private law implications into the technical advice provided by FAO.

5. Conclusion

25. *The Council is invited to consider the desirability of requesting the Secretariat to conduct further research into the matters indicated above, in particular private law aspects related to agricultural production, including land tenure and related topics, with a view to submitting a feasibility study for consideration by the Council at its 89th session, in 2010.*