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Item 10 on the Agenda: Private law and development

- (a) Report on the Colloquium "Promoting Investment in Agricultural Production: Private Law Aspects" (Rome, 8-10 November 2011)
- (b) Possible future work on private law aspects of agricultural financing
(Secretariat memorandum)

<i>Summary</i>	<i>Future work on private law and development</i>
<i>Action to be taken</i>	<i>Take note of the Report on the Colloquium held in Rome 8-10 November 2011 on "Promoting Investment in Agricultural Production: Private Law Aspects".</i> <i>Consider the areas of future work of UNIDROIT in the field of private law and agricultural development</i>
<i>Mandate</i>	<i>Work Programme 2011-2013</i>
<i>Priority level</i>	<i>Medium</i>
<i>Related documents</i>	<i>Uniform Law Review 2012-1/2</i>

Introduction

1. At its 88th session, the Governing Council examined a memorandum prepared by the Secretariat containing a certain number of considerations as regards the possibility of UNIDROIT embarking on a new field of activity centring around the interaction between private law and economic and social development (UNIDROIT 2009 – C.D. (88) 7 Add.6). The Council agreed that UNIDROIT's broad mandate in the field of private law gave the Institute a wide range of opportunities which would permit it to contribute to the Development Goals established by the international community, in particular in the field of agricultural investments and production. This would also permit any synergies with other inter-governmental organisations to be explored further and enable joint projects to be developed with some of them.¹

¹ See document UNIDROIT 2009 – C.D. (88) 17, Report on the session, paras. 87-98.

2. At its 89th session, the Governing Council considered a document submitted by the Secretariat on "Private Law Aspects of Agricultural Finance" (C.D. (89) 7 Add. 4), which stressed in particular that little attention had been devoted to the question of "the extent to which the various fields of private law that affect investment decisions, financing and marketing mechanisms for agricultural commodities in most countries promote sustainable agricultural investment, facilitate the mobilisation of capital for rural enterprises or favour rational and efficient choices for marketing of agricultural commodities."² The Governing Council agreed that the Secretariat should pursue the preliminary research with a view to identifying the areas in which UNIDROIT could make a meaningful contribution, in particular with a view to supplementing the work conducted by other organisations. The Council decided to recommend the inclusion of aspects of the private law of agricultural finance in the Work Programme of the Institute³ and this recommendation was endorsed by the UNIDROIT General Assembly at its 67th session on 1 December 2010.⁴

3. The Secretariat continued its informal consultations with the two Rome-based organisations specialised in development and/or agricultural finance – namely, the Food and Agriculture Organization of the United Nations (FAO) and the International Fund for Agricultural Development (IFAD) – and participated in two meetings organised by these organisations, respectively in March and April 2011.⁵ In addition, the Secretariat organised a Colloquium on "*Promoting Investment in Agricultural Production: Private Law Aspects*" in Rome from 8 to 10 November 2011, with a view to exploring the nature of the contribution that UNIDROIT might make to global efforts intended to face the objectives of food security, taking into account the specific mandate of the organisation and its expertise in formulating uniform private law rules, in synergy with the multilateral organisations working for agricultural development. The Acts of the Colloquium are being published in the Uniform Law Review 2012-1/2.

4. This document synthesises the main points of law raised by the participants in the colloquium for each of the sections of the programme (Part I). It then goes on to examine some of the proposals made by the participants and the Secretariat to the Governing Council on possible areas for future work by UNIDROIT in private law and agricultural development (Part II).

I. REPORT ON THE COLLOQUIUM "PROMOTING INVESTMENT IN AGRICULTURAL PRODUCTION: PRIVATE LAW ASPECTS" (ROME, 8-10 NOVEMBER 2011)

5. The colloquium was constructed around the following principal subjects: title to land, contracts for investment in agricultural land; legal structure of agricultural enterprises, contract farming, and the financing of agriculture.⁶

² UNIDROIT 2010 – C.D. (89) 7 Add. 4, para. 44.

³ UNIDROIT 2010 – C.D. (89) 17, Report on the session, paras. 112-115.

⁴ UNIDROIT 2010 – A.G. (67)9 rev.

⁵ UNIDROIT 2011– C.D. (90) 9, paras. 9-24.

⁶ The programme of the colloquium is reproduced in an Annex hereto. More than 30 high-level experts from different horizons, in particular multilateral organisations (the World Bank, the United Nations Commission on International Trade Law (UNCITRAL), the FAO, IFAD, and the International Finance Corporation, presented papers and participated in the discussions, in the presence of representatives of member States and independent experts. The Colloquium was opened by Ms Karen Johnson (*Chargée d'affaires*, United States Mission to the United Nations Agencies for Food and Agriculture in Rome) and by the Secretary-General of UNIDROIT, Mr José Angelo Estrella Faria, with the participation of Mr Rutsel Martha (General Counsel and Director of Legal Affairs, IFAD) and Mr Louis Gagnon (Legal Counsel, FAO). The Colloquium was closed by the President of UNIDROIT, Mr Alberto Mazzoni.

A – Title to land

6. The phenomenon of land insecurity concerns vast territories in developing countries but also in emerging countries, and affects large numbers of the economically vulnerable, living on the fringes of public education, health and housing systems and with poor legal protection. It places persons and communities at great risk: it increases the fragility of access to resources and to food, fosters conflict, land-grabbing operations and natural resource grabbing, and augments the risk of forced eviction and displacement. Recognised and secure land rights are essential to encourage small producers to increase agricultural production and yields over time, securing a return on investments; consolidated rights enable the owners to let their land or to dispose of it, thereby encouraging a more rational use of plots. They reinforce their capacity to negotiate with public authorities and with the recipient parties in investment operations and in relations with the participants in production networks (Dr Greg Myers, USAID, USA; Chairman of the Working Group of the CFS/FAO on Responsible Governance of Land Tenure; Prof. Zvi Lerman, Hebrew University of Jerusalem).

7. In many countries, the rules of formal law applicable to land date back to colonial days, with subsequent reforms being introduced in the framework of land re-distribution, and they co-exist with old customary law regimes and recent informal practices that create situations of fact, while their implementation and territorial management in most cases derive from a multiplicity of authorities, including both the State structure and traditional hierarchies (Professor Massart, University of Pisa). In Central and Eastern Europe and in the countries of the Commonwealth of Independent States (CIS), vast reform programmes were put in place after the 1990s that brought about a shift from collective forms of ownership or use to private agriculture (Lerman). Vast stretches of land still do not have titles and many rural populations have no formal rights.

8. Security of tenure implies putting in place appropriate institutional structures and a legal framework for private property rights. In this context, a number of complex questions arise: the identification of the different types of right, both individual and collective, which result from local custom, usage and local specificities, their legal recognition and their effects (including the protection of women and minors); the forms of acquisition of rights (acquisition by peaceful occupation in good faith for a definite period of time), the limits (such as temporary inalienability to avoid speculation on agricultural land), the modalities of transfer (in particular by inheritance and by contract), loss of rights (for example, by reason of expropriation in the “public interest” or similar and its consequences); the status of land that does not carry a title (developed or cultivated) and, incidentally, the property of the State; the registration of the rights and documents that derive therefrom, their legal nature and effects (Massart, Mr Didier Nourissat, Union internationale du Notariat); the settlement of disputes. Entitlement programmes must answer the criteria of transparency, participation of the populations concerned, effectiveness, rapidity and accessibility in terms of costs (Nourissat, Prof. Leon Verstappen, Global Land Tool Network – GLTN). Other aspects concern land management, and the modalities and systems of land taxation (Dr Jonathan M. Lindsay, World Bank).

9. Numerous States are working on land security, have adopted new laws and put in place programmes for titling. Multilateral organisations (in particular the World Bank) as well as bilateral cooperation agencies and non-governmental organisations also provide technical assistance. The obstacles that arise in the titling process also include high costs, bureaucratic complexities and the peculiarities of individual situations (Lerman, Nourissat, Verstappen).

10. Land tenure systems have deep roots in the history of countries and their people, reflecting widely varying land uses, tenure systems, social organisation, political realities, ecologies, cultural beliefs and religious practices. That diversity of approach is, however, no impediment to the search for rules that are widely if not universally applicable, as is borne out by a number of international instruments containing recommendations on land tenure and on institutional streamlining, in

particular the *Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security*,⁷ the purpose of which is to promote food security, reduce poverty, favour the sustainable use of resources and protect the environment, and which lay down principles and practices to serve as guidance in drafting national policies and laws relating to land tenure (Lindsay, Myers).

B – Contracts for investment in agricultural land

11. Investments in wide expanses of agricultural land – which take the form of acquisitions of land, long-term leases and concessions – can be conducive to the development of unexploited land or of land which gives low returns by promoting intensive cultivation, which requires significant capital input to prepare the land and organise crops and production facilities. Such investments, if successful, increase agricultural production and contribute to food security in the different countries, produce tax returns, and in addition can have non-monetary fall-out such as the development of the transport and communications infrastructure; the creation of direct or indirect employment; the improvement of rural living conditions, in particular as regards health services, education or housing; support for smallholders and farmers and the development of economic activities deriving therefrom (Antonio Flavio Camilo de Lima, Secretary of State for Agriculture and Irrigation, State of Goiás, Brazil).

12. Large-scale investments in land are, however, multiplying in Africa, South America and Asia, involving public or private investors intent on placing capital – including non-productive investment capital – or on the intensive cultivation of food or biofuels with a view to improving food and energy security in the countries of origin. Such investments usually show high returns due to the volatility of the commodities prices. Large-scale investments are sometimes criticised because of the imbalance they may create in the advantages gained by the investors and those obtained by the host country, and even because of the risks they may pose for sustainable development, food security and the rights of particularly vulnerable populations, for the environment and the availability of water, all of which are typical of the phenomenon of “land grabbing”,⁸ in particular where land insecurity prevails. Such operations are at times negotiated, concluded and implemented in questionable conditions to which the lack of transparency, equity and local community participation contribute (Dr Howard Mann, Senior International Law Advisor, International Institute for Sustainable Development, Prof. François Collart Dutilleul, University of Nantes).

13. Some States have introduced restrictions on the acquisition of land by foreign investors, with a view to favouring the putting in place of economic models based on partnerships between investors and economic operators and the communities of the host country. Two examples are joint ventures involving joint participation in the capital and the decision-making processes of agricultural enterprises, and contract-farming formulae by which local farmers produce the crops and the investor provides the equipment and the technology (Lima).

14. Among the different legal sources applicable to investments in land, the contract holds a place of particular prominence. In effect, national laws (which are applicable in matters of property law, land law and management of natural resources, health regulations, taxation, labour law, settlement of disputes, etc.) are mostly full of gaps and difficult to implement. As the contract is generally

⁷ Prepared under the aegis of the Committee on World Food Security (CFS) the negotiations of which were concluded on 9 March 2012.

⁸ See, *inter alia*, the state of the places examined by the High Level Panel of Experts on Food Security and Nutrition (HLPE) of the Committee on World Food Security (CFS): .Land Tenure and International Investments in Agriculture, July 2011 at: http://www.fao.org/fileadmin/user_upload/hlpe/hlpe_documents/HLPE-Land-tenure-and-international-investments-in-agriculture-2011.pdf

concluded by the State in its capacity as owner of the land, it is subject to the treaties and the provisions on foreign investments which in essence protect the investor. In this context, the contract appears to be the most suitable instrument to manage the investment operation as a whole – not only to regulate its different aspects, but also to remedy the shortcomings of the national legislation. International arbitration, which is usually applicable to international contracts, will enable the contract provisions to be made operational.

15. This is why it is widely recommended that agricultural investment contracts give full effect to the principles enshrined in the non-mandatory international instruments on responsible investments and sustainable development⁹ (Myers, Mann) as well as in the instruments produced by multilateral organisations, in particular those on human rights and the struggle against corruption. The private sector for its part is increasingly anxious to combine economic objectives with social and environmental values and with principles of good governance.

16. The most sensitive question with regard to investments in agricultural land concerns their impact on the local populations and communities which are often threatened with displacement in the wake of agricultural development and intensive farming programmes and see their access to resources radically changed. The contract may play a central role in ensuring that these communities' rights are taken into consideration and that they can participate in the investment process, in particular where the legislation and the public authorities of the host country do not sufficiently recognise and protect them, so as to ensure that the risks will be as contained as possible and that suitable compensation is offered, and that the community will have access to the advantages deriving from the investment (Lima, Lindsay, Mann, Myers).

17. Another central aspect of investments in land is that of the lack of transparency which surrounds such operations by (or on behalf of) the public authorities in certain host countries, which leaves ample room for abusive practices and corruption. The contract and the legislative and regulatory framework within which the contract is negotiated may, on the contrary, provide that open and transparent procedures accompany the entire operation even before the contract is concluded, involving such mechanisms as calls for tender, the definition of objectives and evaluation criteria for all areas involved. This is so as to encourage competition between investors, guarantee impartiality and fairness in selecting an investor and give the best prospects as regards the performance of the contract, while enabling the beneficiaries to invoke the remedies open to them in the event of non-performance. In this respect, the international recommendations enshrined in the instruments adopted by the United Nations Commission on International Trade Law (UNCITRAL), *i.e.*, the Legislative Guide on Privately Financed Infrastructure Projects (2000), the Model Legislative Provisions on Privately Financed Infrastructure Projects (2003) and the Model Law on Public Procurement (2011), could provide useful guidelines for the procurement of contracts for agricultural investment (Ms Caroline Nicholas, UNCITRAL).

18. The complexity and scope of land investment transactions give rise to a host of questions regarding the rights, obligations and responsibilities of the parties – including those of the local populations as stakeholders. To be noted in particular are the nature and extent of the investor's rights to the land and other natural resources – of which water is a key element –, the technical and economic agricultural development plan and the advantages granted to investors, issues linked to the investor's payments, the services and infrastructures provided, as well as the economic collaborative models involving local farmers and their implications, environmental obligations, the many issues relating to the long term of the contract and its performance in an inherently fluid

⁹ Thus, the *Principles for responsible agricultural investment*, which are being finalised by intergovernmental organisations, or the *Performance Standards on environmental and social sustainability*, the respect for which is prescribed by the International Finance Corporation (IFC) for the activities of the private sector which it finances in developing countries.

context (changes in local regulations, supply fluctuations in the local market that affect food security in the host country, the availability of water, etc.), non-performance and its consequences, termination of the contract, its renewal, transfer of the contract or of the obligations under the contract, compliance management and settlement of disputes (Mann).

19. The *UNIDROIT Principles of International Commercial Contracts*, which constitute a corpus of soft law rules dealing with general contract law, could be applied to agricultural investment contracts, including investment in land, especially if the parties have incorporated them into their contract or if they have been chosen by the parties or by the arbitrators as the applicable law in an arbitral proceeding. A systematic examination of the chapters of the Principles (Formation, Validity, Performance and supervening events and Termination) in many cases allows solutions to be identified which are appropriate for long-term contracts, as investment contracts typically are. On the other hand, other specific aspects are not covered and could justify the preparation of specific provisions in the future (Prof. Michael Joachim Bonell, Consultant, UNIDROIT, Chairman of the Working Group for the preparation of the UNIDROIT Principles).

C – The legal structures of agricultural enterprises

20. The liberalisation of agricultural markets and growing competition between all participants on the global market put farmers under very strong pressure, in particular in the developing countries. Appropriate strategies for protection and development may be adopted based upon an examination of existing farming structures, how they function internally and how they collaborate with other market participants, and an analysis of past failures and successes.

21. The structures involved in agricultural production are extremely varied: individual farms or, more often, collective farming, with a solid presence of agricultural co-operatives but also of partnerships or joint stock companies. Everywhere in the world, including in places where there is large-scale intensive farming, small and medium-sized farms¹⁰ account for an important share of production. In Central and Eastern Europe and in the countries of the CIS, the procedure for the individualisation or privatisation of land which started after the 1990s, has had a positive effect on agricultural production and yield, in particular where small family enterprises are concerned (Lerman).

22. In the developing countries, most farmers are smallholders and the majority of the active population are farmers. In most cases, they depend on the informal economy and use the greater part of their output for subsistence purposes. Too poor to bear the cost and complexities of entering the formal market, they are also denied access to the protection and development opportunities such insertion would mean. Efforts must be made to reinforce their capacities at all levels. What is particularly important is that these persons and informal groups obtain recognised status as economic actors, which would give them access to both goods and financial markets and would have an impact at the legal, economic, fiscal and social level. (Dr Rutsel S. Martha, IFAD).

23. An interesting example in this respect is the new professional statute recently adopted by the Organisation for the Harmonisation of Business Law in Africa (OHADA) – for “*entreprenants*”, which may benefit traders, artisans and the liberal professions, but also farmers: the qualification of “*entreprenant*” may be obtained by means of a procedure which is simple, quick and cheap and which enables the beneficiary to engage in a small activity implying certain simple obligations (in particular in terms of accountancy and for taxation purposes), as well as reduced risks, while farmers can exercise certain rights, including the right to farm their land on a long-term basis, to reduce their economic dependence and, if necessary, to change their status if the activity prospers

¹⁰ According to IFAD, some 450 million smallholders in the world provide means of subsistence for about 2 billion people – IFAD 2010, *Rural Poverty Report 2011*, IFAD, Rome.

(Mr Daniel Tricot, Honorary President of the Commercial, financial and economic chamber of the *Cour de Cassation*, France; member of the Governing Council, UNIDROIT).

24. The producer organisations – whatever the company form under which they are established – have as their vocation the pooling and strengthening of individual capacities. These organisations play different roles and their potential varies depending on whether they are informal groups, associations or other forms of civil society organisations, cooperatives, or commercial companies. But in order to contribute significantly to their members' development and to participate in the global reinforcement of the agricultural sector, they must be established and operate with a view to financial sustainability. A comparative study might be carried out in respect of these different entities using as key criteria members' participation, access to capital, decision-making procedures, the allocation of risks and responsibilities, and profit-sharing (Prof. Andres Miguel Cosialls Ubach, University of Barcelona).

25. The soundness of the development project and that of the farmers' organisation are a pre-condition not only for the commercial financiers to commit themselves, but also for "social finance", which is aimed at the sustainable development of smallholders in developing countries. In this respect, the farmers' organisation must be seen to put in place a specific business strategy coupled with an appropriate capitalisation plan (based on the self-financing principle of the organisation), incorporating principles of proportionality to encourage participation by individual members (participation in production, decision-making and profit-sharing), clear governance and decision-making structures, and professional financial control and management systems. The commercial partners may play an important role in improving the functioning and effectiveness of farmers organisations by means of programmes to strengthen capabilities, and by exchanges within the value chain (Mr Gerard van Empel, Rabobank).

26. Cooperatives play an essential part in the panorama of organisations which bring together farmers both at production and distribution level. They concern a very large number of individual members – but also of collectives – in the world and despite their diversity, their specific identity is rooted in certain principles, the most important of which is the principle of solidarity. It is this principle that is decisive for entry into the cooperative, participation of the members in the capital, in the decision-making process, and in the profits. After having been used in many countries as structures for the implementation of public economic and social policies (creating inefficiency and a lack of independence), the structural transformation of the economy over the last thirty years has created new challenges for the cooperatives, mainly connected with the need to be competitive. In an attempt to improve the performance of cooperatives, some national legal frameworks have amended the relevant legal regimes to bring them more into line with the regime for commercial enterprises. This trend also impacts on the social and human dimension of the economic function of cooperatives (Prof. Hagen Henry, University of Helsinki).

D – Collaborative strategies: contract farming

27. The market for agricultural products is characterised by a great number of producers (be they individuals or, more often, groups such as cooperatives), fragmented and relatively little organised, and by a small number of highly concentrated buyers, operating in conditions of strong competition in the processing and distribution of agricultural, fisheries and animal husbandry products. In order to meet the increasing demands of the markets in terms of costs, quality and traceability of products, the sector is subject to pronounced vertical integration aimed at reducing and optimising the value chains (which cover the full range of operations involved in production until the product reaches the final consumer).

28. Contract farming offers considerable advantages both to producers and distributors: to the former, it guarantees the distribution and sale of produce on the terms agreed, with the support of

the distributor throughout the productive cycle; to the latter, it assures control of the agricultural production without the risks associated with it. The security of sale under contract enables producers to contract for goods and services with other participants in the chain, in particular for credit provided by financing institutions. Thus, contract farming reinforces the agricultural product chain by promoting the capitalisation of the productive sector, while increasing and diversifying the availability of products on the market for final distribution. A wide range of participants may intervene in the relationship – in the principal contract or by linked contracts –, such as credit and insurance institutions, intermediaries acting on behalf of the buyers, government institutions providing financial assistance or protection against risks, or acting as facilitators or regulators – sometimes also as buyers –, non-governmental development institutions, etc.

29. The contracts are extremely diverse in terms of factors such as the capacity, size and location of the parties (including foreign buyers), the number and size of transactions, the nature of the product or of the production chain, the term of the contracts, the regulatory environment (in particular in matters of price and competition). Contract farming may concern simple sales contracts for future products, at certain agreed terms as to price, quantity, quality, time and place of delivery and conditions of payment. However, as a general rule, it implies reciprocal performances by the parties throughout the production process: the producer undertakes to produce, at its own risk, and to deliver its produce exclusively to the buyer, whereas the latter supplies a varied range of goods or services: inputs, farming techniques, finance, logistical support, training, etc. The contractual relationship may also involve increased social participation by the buyer aimed at strengthening producer capacity and fostering community development programmes (Prof. Antonio Iannarelli, University of Bari).

30. The risks inherent in agricultural production and market structures place the producers at a high level of dependence with a resulting asymmetrical effect on the parties' position at the time of conclusion and in the performance of the contract. A great many sensitive aspects are potentially detrimental to the producer: uncertainties related to price determination, risks linked to production losses, managing situations of non-performance (in particular in cases of *force majeure*), abusive conduct, unilateral resolution clauses, the duration of the contract as compared to the investments made by the producer, and changed circumstances. Courts and dispute settlement bodies seldom offer the level of protection needed (Ms Ayelech Tiruwha Melese, Stichting Dir, Ms Caterina Pultrone, Consultant, FAO).

31. National public policies are involved at various levels and to a greater or lesser degree to support small producers and their professional associations, to encourage collective agreements for the different chains, and at times, to subject standard contracts drawn up by certain agribusiness branches to approval. In some countries, government authorities give specific assistance to smooth relations between investors and smallholders, including assistance in drafting and implementing contracts (Lic. Jorge Alberto Arrambive Montemayor, Ministry for Agrarian Reform, Mexico).

32. In recognition of the special nature of these contracts and aware of the importance of protecting them, some countries have adopted relevant legislative and regulatory provisions that are both binding and derogate from the general law of obligations. Yet in most countries, in particular the developing countries where small producers are particularly vulnerable, these contracts are subject to the autonomy of the parties: where that is the case, and where the legislative and judicial environment is not sufficiently developed to restore contractual equilibrium, there is a risk that the contract will centre on the economic return for the distributor to the detriment of the producer.

33. Strengthening contract farming is a priority agenda objective for many multilateral organisations, bilateral cooperation agencies and non-governmental organisations which work to support smallholders and rural populations in the developing countries. They are agreed that contract farming has the potential to establish a virtuous circle of increased agricultural production and yield,

accumulation of capital, economic development and support for rural populations. Contract farming is seen as a model that should be given priority over other types of investment such as land acquisition or land lease, which carry less manageable risks for producers. With this in mind, numerous multilateral or bilateral actors are now implementing programmes to strengthen the chains by involving smallholders, and the professional agri-food sector is increasingly taking part in that effort, in a bid to show its concern in matters of sustainable and mutually beneficial commercial development.

34. The assistance offered by the development agencies takes numerous forms: implementation of individual production and distribution projects as part of global programmes to strengthen technical, economic and human capacity in the producer organisations, or participation in the efforts undertaken to improve public policies. All the actors within the different areas of cooperation agree that the contract is key to balanced and successful relationships, and recognise the importance of the legislative and regulatory framework. The FAO, for example, devotes considerable resources to contract farming by implementing national or regional development programmes, issuing publications, and running a Contract-Farming Resource Centre on the FAO Internet website.¹¹ (Pultrone)

E. – Agricultural financing¹²

35. Access to finance is crucial in strengthening the agricultural productive sector, where credit default risks are usually high, so that guarantees and the possibility of enforcing them take on added importance for the lenders. The duration and amounts of finance available vary according to the different aspects of the agricultural activity concerned: supply of inputs, production activities and related services (transport, storage, packaging, processing, distribution, etc.), land and agricultural infrastructures, equipment, and the terms will likewise vary, based on an assessment of the economic and commercial targets: mobilisation of receivables, asset-based credit, risk cover devices, equity participation. Guarantee mechanisms sometimes accompany the various credit instruments or the finance institutions, so as to reduce default risk.

36. A real estate mortgage offers a number of advantages: it is particularly suitable for high-value, medium- to long-term loans. The guarantee base offers absolute security and is hardly subject to depreciation, and in countries with an appropriate legal framework, the creditor will be protected from third party claims. Such a regime pre-supposes the existence of secure land rights, of a land register and a mortgage register, and should contemplate a variety of aspects: the information required for registration, the mortgage terms, the nature of the mortgage, how it is assessed, the rules applicable to real property and facilities located on the mortgaged asset, the treatment of secondary rights *in rem*, the terms (and any restrictions) of enforcement of the mortgage (Dr Eduard Galishin, Russian Federation).

37. In most developing countries – the countries of the Middle East and North Africa are cases in point – agricultural land mortgages pose a number of problems: the inexistence or uncertainty of land rights, the complexity and high cost of procedures to assess the asset. A critical point is the mortgage itself: it is frowned upon socially and difficult to obtain in practice, involving lengthy and costly court procedures. Finance based on movable assets – harvest, livestock or equipment – is an option for short-term credit for seasonal activities, but its availability differs from country to country. Among the different obstacles standing in the way of credit are: variable levels of finance depending on the value of the asset, and its cost, since additional costs may be involved, for example to assess the asset and registration of the collateral. Creditors usually resort to personal

¹¹ <http://www.fao.org/ag/ags/contract-farming/index-cf/fr/>

¹² For a general overview, see document UNIDROIT 2010 – C.D. (89) 7 Add. 4 *Private law aspects of agricultural financing*, UNIDROIT Secretariat memorandum.

guarantees, which are costly but are often required in addition to other financing techniques or are the only type of guarantee accepted for small loans (Dr Mohammed R. Mustafa, NENARACA).

38. For a great number of smallholders who have no access to traditional forms of credit, the exchanges of goods for payment between the different participants along the chain (input providers, producers, processors, intermediaries, wholesalers and retailers) offer opportunities for extending credit, known as “value-chain finance”, in the shape of direct advances in kind, in particular seeds and fertilisers, the corresponding amount of which is deducted from subsequent payments upon delivery of the produce. Where the relationship between the producer and the buyer is a close and stable one, contracts of sale may be used as collateral by a financial institution making cash loans which are then recouped on the payments received from the buyer; in some cases, this may involve additional guarantees such as the warehouse receipt, assignment of payment for future product deliverables, or guarantees on the debtor’s equipment. It is the strengthening of this type of finance, in particular for export production, that lies at the heart of social finance (van Empel).

39. Warehouse receipts are a form of guarantee of the delivery of non-perishable agricultural produce stored in anticipation of its sale and covered by a receipt issued by the warehouse operator. They are evidence of the deposit of specified commodities of stated quantity and quality and may be given as security to a credit provider. In its simplest form, the receipt may not be transferred, but other systems exist, the most secure being the system whereby an independent regulator certifies and supervises the warehouse operators, and which involves the issuing of a negotiable title that can be traded between individuals or on the stock or commodities exchanges. This technique offers substantial advantages to producers and to the efficiency of the chains: it means that produce can be sold at the most appropriate time rather than at the time of harvest, it reduces the costs to intermediaries and enables product movements to be tracked. However, it depends on the existence of appropriate infrastructures (Prof. Henry D. Gabriel, Elon University, Member of the UNIDROIT Governing Council) and of an adequate legislative and regulatory framework, in particular one that defines the nature and the transferability of the receipt, defines the rights of the receipt holders – in particular in the event of third party claims on the goods –, and defines the function of the regulator (public or private) and its responsibilities (Dr. Gideon E. Onumah, National Resources Institute (NRI), University of Greenwich).

40. Mechanisation is essential to increase agricultural productivity and yields. To finance the acquisition of equipment, the equipment lease is a particularly suitable technique, since the creditor puts the assets at the debtor’s disposal in return for the payment of rentals, without requiring other collateral. The potential of this technique, in particular for small and medium enterprises and increasingly in the agricultural sector, has prompted the International Finance Corporation (IFC) to give its backing to the development of the leasing sector in emerging markets, among other things by recommending the adoption of an appropriate legislative and regulatory framework. It is a fact that certain critical aspects need to be regulated, such as the respective rights and obligations of the three parties to the leasing operation – the supplier of the asset, the credit provider, and the buyer –, while the creditor needs the security of knowing it can make good its claim vis-à-vis third parties, and re-possess the asset and sell it in the event of the debtor’s default (Mr Murat Sultanov, IFC).

41. The *UNIDROIT Model Law on Leasing*, adopted in 2008, aims to provide a fair and secure framework for the parties to not only the financial leasing operation, but also non-financial leasing, which is a technique much used in asset-acquisition. The Model Law covers a vast range of assets, including future assets and specially manufactured assets, whatever their use (hand-crafted, commercial or professional), capital assets, immovables, equipment and tools, plants and animals, born or unborn. This instrument accordingly has great potential for application in the agricultural sector and is used as a basis for the drafting of domestic legislation in several countries (Mr Martin J. Stanford, UNIDROIT).

42. Another equipment finance technique might be provided by a possible fourth Protocol to the 2001 *Cape Town Convention on International Interests in Mobile Equipment* on matters specific to agricultural, mining and construction equipment. The Convention is in force for aircraft equipment under the relevant Protocol. It provides a general framework to govern the constitution, enforceability and the realisation of the collateral of international interests on equipment moving across countries. The prospect of facilitating foreign investment by offering better guarantees to the investor is an additional factor in assessing whether it would make sense for UNIDROIT to draft such a Protocol (Mr John Atwood, UNIDROIT).

II. POSSIBLE AREAS OF FUTURE WORK BY UNIDROIT IN THE FIELD OF PRIVATE LAW AND AGRICULTURAL DEVELOPMENT

43. On the basis of the papers presented at the November 2011 Colloquium and the discussions thereon, and of the content of the contributions submitted for publication in the Acts, as well as the consultations that have taken place with the Secretariats of FAO and IFAD, the UNIDROIT Secretariat can synthesize its proposals as to the content of possible future work in the field of private law and agricultural development, as follows:

A. – Title to land

44. While bearing in mind the diversity that characterises this subject and which precludes any attempt at uniformity (see *supra*), work might be undertaken in selected areas, in particular with a view to studying the repercussions that best practices developed at the international level, such as the *Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests*, might have in the different fields. Any such work undertaken by UNIDROIT might focus on studying national land tenure systems in light of these best practices (Mr J. Lindsay, World Bank).

45. Such an approach might be based on an in-depth study of land tenure systems and property rights (individual and collective, physical and legal persons), also with a view to clarifying the relationship between customary law rights and written legal rights and to strengthening these rights. Another focus might be the different ways of transferring land tenure rights (and possibly, rights to other natural resources, in particular water). UNIDROIT could provide an appropriate forum to undertake the preparation of a study or a document established on an international basis, which would provide information and reference material for States undertaking legislative reform (Mr G. Myers, USAID).

B. – Contracts for investment in agricultural land

46. Information gathered to date highlights both the key role of the contract in ensuring a balanced investment relationship and the general weakness of the legislative environment in an area where huge economic, social and environmental issues are at stake. It should be noted that several international projects are underway in this area – in particular the preparation of a set of *Principles for Responsible Agricultural Investment*.

47. While fully aware of the complexity of this subject, which incorporates multiple aspects involving different areas of the law, the expertise gained with the *Principles of International Commercial Contracts* might enable UNIDROIT, together with other organisations, in particular FAO – which has already indicated that it recognises the usefulness of such an initiative – to envisage the preparation of an instrument that would serve as a guide and a repository of “best practices” especially designed for land investment contracts. Such an instrument would offer an in-depth legal analysis of the different aspects of the problem and suggest balanced and sustainable solutions. It might be used in drafting contracts, and as a reference for national legislators engaged upon improving the domestic legislative and regulatory framework.

C. – Legal structures of agricultural enterprises

48. Although this is an area that presents a very wide range of legal forms of the many participants in the agricultural production process, there is a strong thrust towards integration, also at the international level. In this respect, a careful study of the structures of agricultural enterprises, and the different coordination techniques that are developing between them (joint ventures or contractual forms such as the consortium or networks), might be envisaged within the context of future work at UNIDROIT, as an aspect relating to private law and agricultural development, with a view to reflecting upon the means of strengthening the capacity of agricultural enterprises, for example, by preparing a guide for the private sector and governments (Myers, Martha).

D. – Collaborative strategies: contract farming

49. The information gathered highlights the agricultural producers highly vulnerable position compared to that of the distributors, in what is generally a poorly regulated area in the developing countries. Some countries have taken legislative and regulatory steps to improve the position of the producers. At a time when trade – especially international trade – is growing apace and chains are becoming increasingly integrated, UNIDROIT's expertise in the field of contracts might be usefully employed.

50. The preparation of a guide, based on a study of agricultural production contracts and identifying the thorniest problems by detailing the ways in which practice and the legislative framework address them, could be of assistance in understanding the different types of contract, provide guidelines for the drafting of such contracts – in particular, standard contracts and collective contracts concluded between producers and distributors in certain chains. It could also provide a useful reference for arbitration and dispute settlement. Such a guide – which could be similar in form to the *UNIDROIT Guide to International Master Franchise Arrangements* and in the preparation of which the *UNIDROIT Principles of International Commercial Contracts* could be of great assistance – could be particularly useful in those countries where the legislative framework appears little suited to support the development of contract farming by ensuring fair contractual equilibrium, and could constitute a source of information and recommendations for those States that wish to provide legislative backing for contract farming (Myers, Melese).

51. Consultations with FAO and IFAD, and the preliminary research carried out by the Secretariat with other actors in the development process, have shown that such an instrument could be very useful to these organisations in the framework of their cooperation programmes in the developing countries. As an instrument capable of participating in the goal of developing lasting commercial partnerships, it could provide an important source of reference for support programmes designed to assist farmers and national public authorities.

E. – Agricultural financing

52. As indicated in the UNIDROIT Secretariat memorandum on "Private Law Aspects of Agricultural Financing",¹³ various international organisations have in recent years carried out important work to assist domestic legislators and policy-makers to improve the legal framework for the financing of commercial activities, in particular secured transactions. Similarly, important and useful work has been carried out on the different private law aspects relating to the structures and marketing strategies of enterprises operating in the rural sector, be it in the form of general advice or in country-specific or regional programmes. However, the Secretariat is not aware that there exists

¹³ Cf. *supra* note 12, paras. 45-46.

any document providing guidance at the international level that would have presented the results obtained by all these instruments, studies and guidance documents, in particular as they apply to private law aspects of transactions in the agricultural sector.

53. The preparation of such an instrument, possibly in the form of a Legislative Guide, presented in a balanced manner and taking care not to overlap with other organisations, as may be expected of UNIDROIT, could provide a useful addition to the large body of specific advisory material that exists already. An instrument of this type would set out various options available to countries with different legal traditions, and discuss their relative advantages and disadvantages in light of the overall objective of promoting investment in agricultural production and easing access to rural credit.

CONCLUSION

54. *Taking account of the foregoing, the Council is invited to give its opinion on the future work of the Institute in the field of private law and agricultural development. In this respect, the Secretariat submits the following proposals:*

(a) to authorise the establishment of a Study Group for the preparation of an international guidance document to contract farming arrangements – its first meeting to be held before the end of 2012 – and to invite FAO, IFAD and other interested international organisations to participate in its work;

(b) to continue, in the framework of the corresponding item on the agenda, its consideration of the possibility of preparing a fourth Protocol on matters specific to agricultural, construction and mining equipment to the 2011 Cape Town Convention on International Interests in Mobile Equipment, and to instruct the Secretariat to promote – resources permitting – those UNIDROIT instruments in the area of finance that are of particular relevance to agricultural financing, in particular the UNIDROIT Conventions on International Financial Leasing and on International Factoring, as well as the UNIDROIT Model Law on Leasing;

(c) to instruct the Secretariat to pursue – resources permitting – its consultations and preliminary work with a view to the possible preparation, in the future, of an international guidance document on land investment contracts, taking account, in particular, of the UNIDROIT Principles of International Commercial Contracts ;

(d) to instruct the Secretariat to monitor – resources permitting – developments at the international and national level in respect of reform and modernisation of land tenure regimes ;

(e) to take note of possible future projects in respect of the legal structure of agricultural enterprises and of an international guidance document to agricultural financing, with a decision to be taken at a later date, in light of the work which will by then have been carried out by UNIDROIT in the field of agriculture.

UNIDROIT COLLOQUIUM

PROMOTING INVESTMENT IN AGRICULTURAL PRODUCTION: PRIVATE LAW ASPECTS

Villa Aldobrandini, Via Panisperna 28, 00184 Rome (Italy)
8-10 November 2011

PROGRAMME

Tuesday 8 November – Private law and responsible agricultural investment

- Opening remarks by:

Ms Karen Johnson, Chargé d'Affaires, Permanent Representation of the United States to the United Nations Agencies for Food and Agriculture in Rome

Mr José Angelo Estrella Faria, Secretary-General of UNIDROIT

1st session – Title to land, mortgages and agricultural finance

CHAIR : DR. RUTSEL S. MARTHA, GENERAL COUNSEL AND DIRECTOR OF LEGAL AFFAIRS, INTERNATIONAL FUND FOR AGRICULTURAL DEVELOPMENT (IFAD)

- Investment in land – opportunities and risks: lessons learned from land titling programmes
Dr. Jonathan M. Lindsay, Senior Counsel, Environmental and International Law (LEGEN), Legal Department, World Bank
- Property rights over land
Prof. Alfredo Massart, Santa Anna School of Advanced Studies, Pisa (Italy)
- The public registration system for land mortgages in the Russian Federation
Dr. Eduard Galishin, Real Estate Department, Ministry of Economic Development, Russian Federation
- The land titling action of the International Union of Notaries and the Simplified Secure Deed
Me Didier Nourissat, Vice-President of the Working Group on Land Titling of the International Union of Notaries
- The Global Land Tool Network (GLTN): developing a pro-poor land recordation system
Prof. Leon Verstappen, Faculty of Law, University of Groningen (Netherlands)

Comments and questions by participants

2nd session – Foreign investment in agricultural land

CHAIR : PROF. DON WALLACE JR., CHAIRMAN OF THE INTERNATIONAL LAW INSTITUTE, WASHINGTON DC (USA);
PRESIDENT OF THE AMERICAN FOUNDATION FOR INTERNATIONAL UNIFORM LAW

- The legal framework: investment v. commercial law – national v. international
Prof. François Collart Dutilleul, Faculty of Law, University of Nantes (France)
- Key issues in ensuring a fair balance between investor interests and host country benefits
Mr Antonio Flavio Camilo de Lima, Secretary of State for agriculture and irrigation, State of Goias (Brazil)
- Program for the promotion of public and private investment in rural property : the Mexican case
Lic. Jorge Alberto Arrambive Montemayor, Director-General for the Support to the Ordination of Rural Property, Agrarian Legal Bureau, Ministry of Land Reform of Mexico
- Devising transparent and efficient concession award procedures
Ms Caroline Nicholas, Senior Legal Officer, United Nations Commission of International Trade Law (UNCITRAL)

3rd session – Long term investment in land: select legal issues

- Principles for Responsible Agricultural Investment and Voluntary Guidelines on Responsible Governance of Tenure of Land
*Dr. Greg Myers, Senior Advisor, Land Tenure and Property Rights Unit, USAID (USA);
Chair of the FAO/CFS Working Group on Voluntary Guidelines for Land Tenure*
- A review of crucial issues under the contract of investment in agricultural land and water
Dr. Howard Mann, Senior International Law Advisor, International Institute for Sustainable Development (Canada)
- General contract law – a place for the UNIDROIT Principles of International Commercial Contracts (UPICC) ?
Prof. Michael Joachim Bonell, Professor Emeritus, Faculty of Law, University of Rome I (Italy); Consultant, UNIDROIT

Comments and questions by participants

**Wednesday 9 November – Legal tools for including smallholder farmers
in the value chain**

1st session – Farmers’ organisations: legal structure and operation

CHAIR : MR LOUIS GAGNON, LEGAL COUNSEL, FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS (FAO)

- Bringing smallholder farmers into the value chain: opportunities and risks – a review of the legal issues
Dr. Rutsel S. Martha, General Counsel and Director of Legal Affairs, IFAD
- Basics and new features of cooperative legislation
Prof. Hagen Henry, Ruralia Institute, University of Helsinki (Finland)
- Farmers’ organisations: select issues – membership and ownership, liabilities and profits, management and governance
Prof. Andres Miguel Cosialls Ubach, Faculty of Law, University of Barcelona (Spain)
- The promotion of the agricultural enterprise under OHADA law
Mr Daniel Tricot, Honorary President of the Commercial, Financial and Economic Chamber of the Cour de Cassation (France); Member of the UNIDROIT Governing Council
- Farm structure and market constraints: a focus on CEE and CIS countries
Prof. Zvi Lerman, Department of Agricultural Economics and Management, Faculty of Agriculture, Hebrew University (Israel)
- Access to credit and equipment finance
Mr Gerard van Empel, Managing Director Rabo International Advisory Services, Director Rabo Development BV (Netherlands)

Comments and questions by participants

2nd session – Collaborative strategies: organisational and contractual business models

CHAIR : MR DANIEL TRICOT, HONORARY PRESIDENT OF THE COMMERCIAL, FINANCIAL AND ECONOMIC CHAMBER OF THE COUR DE CASSATION (FRANCE); MEMBER OF THE UNIDROIT GOVERNING COUNCIL

- Contractual frameworks and inter-firm cooperation
Prof. Antonio Iannarelli, Faculty of Law, University of Bari (Italy)
- Contract farming: a review of crucial issues
Dr. Carlos Da Silva, Senior Agribusiness Economist, FAO
- Contract farming: business models that maximise benefits of farmers’ inclusion in the value chain
Ms Ayelech Tiruwha Melese, Project officer, Stichting Dir (Netherlands)

Comments and questions by participants

Thursday 10 November (morning) – Increasing capital mobilisation and equipment finance for agricultural production through secured transactions law

CHAIR : PROF. ALBERTO MAZZONI, PRESIDENT OF UNIDROIT

1st session - Agricultural receivables financing

- Financing instruments and structures for agricultural production: an overview
Mr Gerard van Empel, Managing Director Rabo International Advisory Services, Director Rabo Development BV (Netherlands)
- Loan collateral in rural finance based on NENA region: experience, issues and solutions
Dr. Mohammed R. Mustafa, Secretary General, Near East North Africa Rural and Agricultural Credit Association (NENARACA)
- Warehouse receipts and securitization in agricultural finance
 - *Prof. Henry D. Gabriel, School of Law, Elon University, Greensboro, North Carolina (USA); Member of the UNIDROIT Governing Council*
 - *Dr. Gideon E. Onumah, National Resources Institute (NRI), University of Greenwich (United Kingdom) (excused)*

2nd session - Agricultural equipment financing

- Equipment lease: relevance of the legal framework
Mr Murat Sultanov, IFC Advisory Services in Middle East and North Africa (MENA), Program Manager, International Finance Corporation (IFC)
- The UNIDROIT model law on leasing
Mr Martin Stanford, Deputy Secretary General, UNIDROIT
- Equipment import and security interests: possible benefits of extending the Cape Town system to agricultural equipment
Mr John Atwood, Senior Officer, UNIDROIT

Comments and questions by participants

Closing remarks by Prof. Alberto Mazzoni, President of UNIDROIT

End of the Colloquium