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(b) Possible preparation of an international guidance document
on land investment contracts

(Memorandum prepared by the Secretariat)

Summary

This feasibility study provides background on the topic of land investment contracts, takes stock of existing initiatives with respect to such contracts, and evaluates whether a possible UNIDROIT instrument would be of additional benefit in this field, including consideration of the potential scope, content, and form of such an instrument

Action to be taken

To take note of the feasibility study and consider whether this topic should be retained in the UNIDROIT Work Programme for the 2017-2019 triennium and, if so, which level of priority it should recommend to the General Assembly

Related documents

UNIDROIT 2011 – C.D. (91) 8; UNIDROIT 2013 – C.D. (92) 7(b); UNIDROIT 2015 – C.D. (94) 13

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INTRODUCTION

1. This memorandum takes stock of the present situation of law relevant to land investment contracts and examines the feasibility of UNIDROIT undertaking work on an international guidance document or similar instrument on such contracts.

2. The memorandum is structured as follows. Part I provides background on the topic of land investment contracts, in particular the origin and evolution of its consideration by the Governing Council. Part II surveys the present situation relevant to land investment contracts, primarily by surveying initiatives by (a) international Organisations, (b) various States, and (c) non-profit organisations and the private sector. Part III evaluates whether a possible UNIDROIT instrument would be of additional benefit in this field and includes consideration of the potential scope, content, and form of such an instrument. Lastly, Part IV provides a brief conclusion.

I. BACKGROUND

3. At its 88th session (20-23 April 2009), the UNIDROIT Governing Council examined a memorandum prepared by the Secretariat containing various considerations regarding the possibility of UNIDROIT embarking on a new field of activity centring around the interaction between private law and economic and social development.¹ The Governing Council agreed that UNIDROIT's broad mandate in the field of private law gave the Institute a wide range of opportunities that 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 to enable joint projects to be developed with some of them.²

4. At its 89th session (10-12 May 2010), the Governing Council considered a document submitted by the Secretariat on "Private Law Aspects of Agricultural Finance", which stressed 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."³ The Governing Council agreed that the Secretariat should pursue preliminary research to identify 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 Institute,⁴ and this recommendation was endorsed by the UNIDROIT General Assembly at its 67th session on 1 December 2010.⁵

5. The Secretariat continued its informal consultations with the two Rome-based organisations specialised in development and agricultural finance – namely, the Food and Agriculture Organization of the United Nations (FAO) and the International Fund for Agricultural Development (IFAD) respectively – and participated in two meetings organised by these organisations, respectively in March and April 2011.⁶ In addition, the Secretariat organised a Colloquium (Rome, 8-10 November 2011) on "Promoting Investment in Agricultural Production: Private Law Aspects", with a view to exploring the nature of the contribution that UNIDROIT might make to global efforts

¹ UNIDROIT 2009 – C.D. (88) 7 add. 6.

² See UNIDROIT 2009 – C.D. (88) 17, paras. 87-98.

³ UNIDROIT 2010 – C.D. (89) 7 add. 4, para. 44.

⁴ UNIDROIT 2010 – C.D. (89) 17, paras. 112-115.

⁵ UNIDROIT 2010 – A.G. (67) 9 rev.

⁶ UNIDROIT 2011 – C.D. (90) 9, paras. 9-24.

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 Colloquium focused on the following potential areas of work: (a) title to land, (b) contracts for investment in agricultural land; (c) legal structure of agricultural enterprises, (d) contract farming, and (e) the financing of agriculture.⁷

6. For the Governing Council's 91st session (7-9 May 2012), the Secretariat provided a memorandum on the Colloquium, and it reported, in part, the following regarding contracts for investment in agricultural land:⁸

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 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 development [citing, e.g., the Principles for Responsible Investment in Agriculture and Food Systems, which were being finalised by the CFS at that time, and the Performance Standards on environmental and social sustainability, which were developed by the International Finance Corporation (IFC) for the activities of the private sector which it finances in developing countries] (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

⁷ The Acts of the Colloquium were published in the *Uniform Law Review*. See XVII UNIF. L. REV. (2012-1/2).

⁸ UNIDROIT 2011 – C.D. (91) 8, paras. 14-18.

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 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).

7. In synthesising the proposals as to the content of possible future work, the memorandum further stated that:⁹

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.

⁹ *Id.* paras. 46-47.

8. As requested by the memorandum,¹⁰ following supportive interventions by representatives of FAO and IFAD,¹¹ the Governing Council *inter alia* authorised the Secretariat to proceed with work on the preparation of an international guidance document on contract farming and “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.”¹²

9. For the Governing Council’s 92nd session (8-10 May 2013), the Secretariat suggested in a memorandum on possible future work on private law aspects of agricultural investment and financing that any decision on the preparation of an international guidance document on land investment contracts should (a) await the adoption of the Principles for Responsible Investment in Agriculture and Food Systems (CFS-RAI Principles) and take into account other ongoing initiatives, (b) consider the relationship between UNIDROIT’s possible work on long-term contracts and land investment contracts, and (c) build upon the experience which UNIDROIT will by then have acquired with the preparation of a Legal Guide on Contract Farming and upon the co-operation established in the meantime with international organisations active in the agricultural area.¹³ At the session, the Governing Council reaffirmed its interest in the possible future work, including on land investment contracts, and “encouraged the Secretariat to revisit these issues once the Legal Guide on Contract Farming had been completed.”¹⁴

10. Following the adoption of the Legal Guide on Contract Farming at its 94th session (6-8 May 2015), the Governing Council “instructed the Secretariat to undertake a stocktaking exercise and feasibility study on land investment contracts, in order to decide whether UNIDROIT’s particular expertise would be of additional benefit in this field.”¹⁵ Pursuant to the Governing Council’s instruction, the remainder of this memorandum takes stock of the present situation, in particular existing initiatives relevant to land investment contracts (Part II), examines whether a possible UNIDROIT instrument would be of additional benefit in this field (Part III), and concludes with a brief recommendation in this regard (Part IV).

II. TAKING STOCK OF EXISTING INITIATIVES

11. In recent years, acquisitions by investors of use or ownership rights to large areas of land for agricultural development projects or commercial production have attracted growing attention. There are, in general, three sources of law governing such acquisitions:

¹⁰ *Id.* para. 54.

¹¹ See UNIDROIT 2012 – C.D. (91) 15, paras. 91-92 (FAO), 93 (IFAD).

¹² *Id.* paras. 97-98.

¹³ UNIDROIT 2013 – C.D. (92) 7(b), para. 6.

¹⁴ UNIDROIT 2013 – C.D. (92) 17, para. 94.

¹⁵ UNIDROIT 2015 – C.D. (94) 13, para. 68; *see also id.* para. 66 (summarising an IFAD representative’s intervention, which “welcomed the suggestion of UNIDROIT undertaking a preliminary study in this area, and indicated that IFAD would like to collaborate on any future product”; “noted that there were many opportunities to explore in this vast field, so an initial consideration of where UNIDROIT might be able to contribute was vital to ensure any future project did not negatively impinge on existing projects”; and “also noted that IFAD would be interested in testing the recently adopted Responsible Investment in Agriculture (RAI) principles and looking at additional work building on them”); *id.* para. 67 (summarising a FAO representative’s intervention, which “welcomed the opportunity to continue its close collaboration with the partner organisations and asked partners to move forward on new projects; specifically noted that land investment contracts might be an area of potential additional work”; “further noted that FAO had led a lot of projects in this area and had developed several technical guides, including one aimed at governments, one tailored to the private sector and one for legal service providers”; and pointed out “that these projects were linked to the work of FAO’s Committee on World Food Security”).

- (a) *domestic law*, in particular the law of the State where the investment is made (i.e. the host State);
- (b) *international investment treaties*, for example, bilateral investment treaties (BITs) or investment chapters in trade agreements between the host State and the home State of the investor; and
- (c) *the contract or investment agreement*, which for ease of reference are referred to collectively as “land investment contracts” throughout this memorandum and could include, for example, contracts between private individuals and investors or, where the land is State-owned, investment agreements between host States and investors.

12. As acknowledged by the Secretariat’s recommendation in 2013 that this work should await the adoption of the CFS-RAI Principles and take into account other ongoing initiatives, there are indeed many initiatives that seek to avoid or limit the negative effects of large-scale land acquisitions and address to varying extents these three sources of law. Those initiatives, moreover, often recommend that land acquisitions are to be avoided altogether and may refrain from offering guidance on them in favour of promoting more inclusive contractual models which do not result in the large-scale transfer of land tenure rights, such as contract farming. At the same time, however, it should be acknowledged that land investment contracts involving a transfer of such rights might continue to be concluded without proper guidance, consultation, and negotiation, resulting in unbalanced deals which negatively affect local communities and do not support sustainable economic development.

13. In particular, this Part takes stock of initiatives in the order of those from (a) international Organisations, (b) various States, and (c) non-profit organisations and the private sector in order to assess whether there remains space in this field for a meaningful contribution by UNIDROIT on private law aspects of land investment contracts.

A. International Organisations

14. Numerous international Organisations have developed instruments and guidance documents on land investment. First, this subpart surveys such instruments and documents originating from the United Nations system, in particular FAO and IFAD, as well as those from other Organisations within that system. Second, this subpart surveys such instruments and documents from other intergovernmental Organisations.

1. United Nations system initiatives

- (a) FAO and IFAD initiatives

15. With the world’s population increasing and efforts to eradicate poverty ongoing, FAO and IFAD have recognised the need to increase agricultural productivity and to do so in ways that promote sustainable development, better livelihoods, and food security. Through the Committee on World Food Security (CFS),¹⁶ two complementary instruments have been developed,¹⁷ addressing

¹⁶ As described on its website, the CFS is “an intergovernmental body that reviews and follows up on food security and nutrition policies” and is “the foremost inclusive international and intergovernmental platform for all stakeholders to work together to ensure food security and nutrition for all.” See CFS Home, <http://www.fao.org/cfs/en/> (last accessed 29 Mar. 2016). As further described, the CFS, “[u]sing a multi-stakeholder, inclusive approach, ... develops and endorses policy recommendations and guidance on a wide range of food security and nutrition topics.” *Id.* (emphasis added).

¹⁷ Prior to the development of these two instruments, FAO, IFAD, the United Nations Conference on Trade and Development (UNCTAD), and the World Bank Group, upon an initiative of the World Bank Group, had prepared a discussion note to contribute to an ongoing global dialogue entitled “Principles for Responsible Agricultural Investment that Respects Rights, Livelihoods and Resources”, which sets out, together with explanatory paragraphs, the following seven Principles:

land tenure and land investment respectively: (a) the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the context of National Food Security (VGGT)¹⁸ and (b) the Principles for Responsible Investment in Agriculture and Food Systems (CFS-RAI Principles).¹⁹

16. First, the VGGT, endorsed in May 2012, were developed in response to growing and widespread interest on responsible tenure governance and built upon prior FAO and partner work.²⁰ The VGGT are “to serve as a reference and to provide guidance to improve the governance of tenure of land, fisheries and forests with the overarching goal of achieving food security for all and to support the progressive realization of the right to adequate food in the context of national food security.”²¹

17. The VGGT identify guiding principles of responsible tenure governance, including general principles²² and implementation principles.²³ Guidelines are also provided on (a) legal recognition

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- (1) Existing rights to land and associated natural resources are recognized and respected;
 - (2) Investments do not jeopardize food security but rather strengthen it;
 - (3) Processes for accessing land and other resources and then making associated investments are transparent, monitored, and ensure accountability by all stakeholders, within a proper business, legal, and regulatory environment;
 - (4) All those materially affected are consulted, and agreements from consultations are recorded and enforced;
 - (5) Investors ensure that projects respect the rule of law, reflect industry best practice, are viable economically, and result in durable shared value;
 - (6) Investments generate desirable social and distributional impacts and do not increase vulnerability; and
 - (7) Environmental impacts due to a project are quantified and measures taken to encourage sustainable resource use while minimizing the risk/magnitude of negative impacts and mitigating them.

See FAO, IFAD, UNCTAD and the World Bank Group, Principles for Responsible Agricultural Investment that Respects Rights, Livelihoods and Resources, Extended Version (25 Jan. 2010), available at http://siteresources.worldbank.org/INTARD/214574-1111138388661/22453321/Principles_Extended.pdf (PRAI Principles).

¹⁸ CFS, FAO, Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the context of National Food Security (11 May 2012), available at <http://www.fao.org/docrep/016/i2801e/i2801e.pdf> (VGGT).

¹⁹ CFS, Principles for Responsible Investment in Agriculture and Food Systems (15 Oct. 2014), available at http://www.fao.org/fileadmin/templates/cfs/Docs1314/rai/CFS_Principles_Oct_2014_EN.pdf (CFS-RAI Principles).

²⁰ VGGT at v. In particular, the VGGT “built on and supports the *Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food in the Context of National Food Security* (Voluntary Guidelines on the Right to Food), which were adopted ... in November 2004, and the 2006 *International Conference on Agrarian Reform and Rural Development* (ICARRD).” *Id.*

²¹ *Id.* at iv.

²² The general principles provide that States should:

- (1) Recognize and respect all legitimate tenure right holders and their rights. They should take reasonable measures to identify, record and respect legitimate tenure right holders and their rights, whether formally recorded or not; to refrain from infringement of tenure rights of others; and to meet the duties associated with tenure rights.
- (2) Safeguard legitimate tenure rights against threats and infringements. They should protect tenure right holders against the arbitrary loss of their tenure rights, including forced evictions that are inconsistent with their existing obligations under national and international law.
- (3) Promote and facilitate the enjoyment of legitimate tenure rights. They should take active measures to promote and facilitate the full realization of tenure rights or the making of transactions with the rights, such as ensuring that services are accessible to all.
- (4) Provide access to justice to deal with infringements of legitimate tenure rights. They should provide effective and accessible means to everyone, through judicial authorities or other approaches, to resolve disputes over tenure rights; and to provide affordable and prompt enforcement of outcomes. States should provide prompt, just compensation where tenure rights are taken for public purposes.

and allocation of tenure rights and duties; (b) transfer and other changes to tenure rights and duties; (c) administration of tenure; (d) responses to climate change and emergencies; and (e) promotion, implementation, monitoring and evaluation. Many of the Guidelines address issues related to land investment contracts, but only at a high level consistent with FAO's practice for voluntary instruments.²⁴

18. To assist in the VGGT's implementation, FAO has thus far issued important Technical Guides focusing on gender,²⁵ forestry, indigenous people,²⁶ agricultural investment, legal professionals and, in a preliminary version, fisheries.²⁷ The Technical Guide on agricultural investment was "developed in response to concerns regarding large-scale land acquisitions and the need to increase investment in agriculture" and "supports application of the [VGGT] at the national level by providing technical guidance on how to safeguard tenure rights in the context of agricultural investments, including in land."²⁸ It is specifically intended to:

focus[] on ensuring that appropriate safeguards are in place to protect legitimate tenure rights when agricultural investments are made. In particular, it addresses concerns that large-scale land acquisitions by private investors may put at risk the legitimate tenure rights on which some people depend for their livelihoods. Consistent with the [VGGT],

(5) Prevent tenure disputes, violent conflicts and corruption. They should take active measures to prevent tenure disputes from arising and from escalating into violent conflicts. They should endeavour to prevent corruption in all forms, at all levels, and in all settings. *Id.* para. 3.1.

²³ The principles of implementation include (1) human dignity; (2) non-discrimination; (3) equity and justice; (4) gender equality; (5) holistic and sustainable approach; (6) consultation and participation; (7) rule of law; (8) transparency; (9) accountability; and (10) continuous improvement. *Id.* para. 3B.

²⁴ See, e.g., paras. 5 (containing guidelines on policy, legal and organisational frameworks related to tenure); 11-12 (containing, with respect to transfers and other changes to tenure rights and duties, guidelines on markets and investments); 21 (containing guidelines on resolution of disputes over tenure rights). The VGGT "follow the format of other FAO voluntary instruments that set out principles and international accepted standards for responsible practices" which are accordingly "relatively short documents that provide frameworks that can be used when developing strategies, policies, laws, programmes and activities." *Id.* at v; see also VGGT para. 26.3 (noting that partners are encouraged to provide support, including "technical cooperation, financial assistance, institutional capacity development, knowledge sharing, and exchange of experience, assistance in developing national tenure policies, and transfer of technology").

²⁵ Technical Guide No. 1, Governing land for women and men: A technical guide to support the achievement of responsible gender-equitable governance land tenure (2013) at 4-5, 34, available at <http://www.fao.org/docrep/017/i3114e/i3114e.pdf> (providing "advice on mechanisms, strategies and actions that can be adopted to improve gender equity in the processes, institutions and activities of land tenure governance" consistent with the Convention on the Elimination of All Forms of Discrimination Against Women (1979) and noting *inter alia* that "the use of model leases can be particularly beneficial" for supporting gender-equitable leasing arrangements) (VGGT Technical Guide on gender).

²⁶ Technical Guide No. 3, Respecting free, prior and informed consent: Practical guidance for governments, companies, NGOs, indigenous peoples and local communities in relation to land acquisition (2014), at 3-5, 20, available at <http://www.fao.org/docrep/019/i3496e/i3496e.pdf> (providing advice on respecting and protecting free, prior and informed consent consistent with the UN Declaration on the Rights of Indigenous People (2007), describing how consultation can be carried out with those affected by land-use changes, and noting *inter alia* that "because in many indigenous areas land markets have often been absent, the terms on which lands should be fairly transferred from customary owners to investors – whether by rental, lease or sale – are unclear. In such circumstances, government agencies have a major responsibility to ensure fair play and to protect the interests of communities with weak or unsecured rights").

²⁷ The Technical Guides, including those not specifically discussed herein, are available at <http://www.fao.org/nr/tenure/information-resources/en/> (last accessed 29 Mar. 2016). UNIDROIT has also received an advance draft of the Technical Guide for investors, which is to be made available soon and addresses, *inter alia*, tenure rights, consultation and negotiation, grievances and dispute resolution, and transparency, identifying in particular what the VGGT covers, related risks, and how those risks can be managed and mitigated. See also M. Vidar, Presentation for Law, Justice and Development Week, "FAO's technical guides to the VGGT" (Nov. 2015) at 12, <http://www.unidroit.org/english/news/2015/20151120-wb-cf/vidar-pres-e.pdf> (presenting the upcoming Technical Guide for investors, as well as those for lawyers, agricultural investment and indigenous peoples).

²⁸ Technical Guide No. 4, Safeguarding land tenure rights in the context of agricultural investment: A technical guide on safeguarding land tenure rights in line with the [VGGT] for government authorities involved in the promotion, approval and monitoring of agricultural investments (2015) at 6, available at <http://www.fao.org/3/a-i4998e.pdf> (VGGT Technical Guide on agricultural investment).

*this guide promotes types of investment that do not result in the large-scale transfer of tenure rights to investors in ways that infringe the legitimate tenure rights of other people, particularly those who are vulnerable. To avoid such cases, the guide promotes investments that encourage partnerships with local tenure right holders.*²⁹

In particular, the Technical Guide provides *inter alia* key messages and guidance on agricultural investment and tenure in the following areas – (1) creating an enabling environment; (2) identifying the need for safeguards; (3) investment approval; and (4) investment monitoring – as well as offering other tools and resources. In doing so, it recognises the importance of land investment contracts. Indeed, one of the Technical Guide’s key points is that “[w]here regulatory frameworks or policy guidance are weak or in the process of development, investment agreements and contracts can serve as mechanisms for safeguarding tenure rights if they are written in ways that allow legal enforcement and are accompanied by adequate enforcement mechanisms.”³⁰ In this regard, the Technical Guide does briefly address the “[n]egotiation of land lease or sale”.³¹ As an additional resource, it provides a checklist of “provisions that should be included in lease agreements” but does not set forth model provisions.³²

19. For its part, the Technical Guide for lawyers and other legal service providers covers the role of law in giving effect to the VGGT’s provisions and recognises the importance of legal professionals in this regard.³³ It also provides more specific guidance in four areas: (1) how to appraise legal frameworks to assess the extent to which they are in line with the VGGT; (2) how to prepare or revise legislation where needed; (3) how to ensure that legislation is duly implemented; and (4) how to use the VGGT in the context of dispute settlement.³⁴ With regard to law-making, the Technical Guide recognises that “amending one tenure law may necessitate corresponding amendments to a number of other, related national laws” including, for example, “contract law, environmental laws, water laws, inheritance laws or local government laws”, and emphasises the importance of transparency, impact assessments, and grievance mechanisms.³⁵ With regard to making law work in practice, the Technical Guide notes *inter alia* the significant roles to be played by (a) States with respect to “supporting communities during negotiations with investors” and “establishing effective sanctions, including termination of investor-state contracts, for investors who fail to fulfil their contractual obligations under community-investor agreements”; and (b) legal service providers with respect to ensuring that there is a written “contract that can be enforced or voided according to national contract law” and includes “enforcement mechanisms and penalties[.]”

²⁹ *Id.* at 8; see also *id.* at 14 (citing VGGT, paras. 12-6).

³⁰ *Id.* at VIII; see also *id.* at 38 (“Laws pertaining to property, land registration, spatial planning, expropriation, contracts, concessions, inheritance, environmental protection, agriculture, forestry, water, gender, trade, investment, indigenous peoples and other issues depending on the country context should be reviewed to ensure consistency and coherence.”); *id.* at 82 (“Before agreeing to any investment, verify that all negotiated impacts and benefits, such as payments, hiring and training of local workers, and provision of health care, infrastructure, are clearly spelled out in the contract.”).

³¹ *Id.* at 61-65 (including a table which provides – in six steps – an example investment approval process).

³² Although the Technical Guide adapted the checklist – which is set forth in paragraph 95 below – from a presentation by Welthungerhilfe, a private aid organisation based in Germany, the Guide also refers to the IISD Guide to Negotiating Investment Contracts for Farmland and Water, which is discussed in paragraphs 73-75 below. See *id.* at 57, 63, 87; see also <http://www.welthungerhilfe.de/en/about-us/who-we-are.html> (last accessed 29 Mar. 2016) (describing Welthungerhilfe and its aid efforts, including disaster relief, reconstruction, and long-term development projects).

³³ Technical Guide No. 5, Responsible governance of tenure and the law: A guide for lawyers and other legal service providers (2016) at 6-8, available at <http://www.fao.org/3/a-i5449e.pdf> (Technical Guide for lawyers) (noting, e.g., with respect to business lawyers, that the VGGT may be “a useful tool for determining whether gaps in national law exist, for designing and drafting contracts to mitigate risks associated with gaps or inconsistencies in domestic law and for the undertaking of due diligence” and, with respect to lawyers working with international development agencies, that such lawyers “can help promote responsible governance of tenure through law-related projects” which “may involve assessing legal frameworks, providing technical assistance in law reform processes or supporting the implementation of existing law”).

³⁴ *Id.* at 3.

³⁵ *Id.* at 37, 47-51.

for example, for failure to pay rental fees or to provide agreed benefits.”³⁶ Lastly, regarding ways forward, the Technical Guide notes the importance of model laws and contracts in facilitating the VGGT’s use in legal practice.³⁷

20. Second, the CFS-RAI Principles, endorsed in October 2014, are intended to build on the VGGT and “to promote responsible investment in agriculture and food systems that contribute to food security and nutrition, thus supporting the progressive realization of the right to adequate food in the context of national food security.”³⁸ The CFS-RAI Principles set forth the following ten voluntary and non-binding principles together with explanatory paragraphs:

- (1) Contribute to food security and nutrition;
- (2) Contribute to sustainable and inclusive economic development and the eradication of poverty;
- (3) Foster gender equality and women’s empowerment;
- (4) Engage and empower youth;
- (5) Respect tenure of land, fisheries, and forests, and access to water;
- (6) Conserve and sustainably manage natural resources, increase resilience, and reduce disaster risks;
- (7) Respect cultural heritage and traditional knowledge, and support diversity and innovation;
- (8) Promote safe and healthy agriculture and food systems;
- (9) Incorporate inclusive and transparent governance structures, processes, and grievance mechanisms; and
- (10) Assess and address impacts and promote accountability.

21. The CFS-RAI Principles also address the roles and responsibilities of various stakeholders. Such stakeholders include: (a) States; (b) intergovernmental and regional organisations; (c) financing institutions, donors, foundations, and funds; (d) research organisations, universities, and extension organisations; (e) smallholders and their organisations; (f) business enterprises including farmers; and (g) civil society organisations; (h) workers and their organisations; (i) communities; and (j) consumer organisations.³⁹ In particular, the CFS-RAI Principles state that intergovernmental and regional organisations, such as UNIDROIT, “have a key role to play in promoting responsible investment in agriculture and food systems” and “are encouraged to integrate the Principles into their own policies, frameworks with member States, programmes, research,

³⁶ *Id.* at 66, 76.

³⁷ *Id.* at 104 (“Legal service providers can facilitate the dissemination and use of the Guidelines in legal practice by drawing on a variety of tools. These tools may include training materials and practice guides, a wide range of communication and capacity-building tools, Web-based and other technological applications, legal assessment tools, *model laws and contracts*, and codes of conduct developed by bar associations or multistakeholder groups.”) (emphasis added).

³⁸ CFS-RAI Principles, para. 10. In particular, the Principles seek to “(i) Address the core elements of what makes investment in agriculture and food systems responsible; (ii) Identify who the key stakeholders are, and their respective roles and responsibilities with respect to responsible investment in agriculture and food systems; and (iii) Serve as a framework to guide the actions of all stakeholders engaged in agriculture and food systems by defining Principles which promote much needed responsible investment, enhance livelihoods, and guard against and mitigate risks to food security and nutrition.” *Id.* para. 11.

³⁹ *Id.*, paras. 32-56. The CFS-RAI Principles also emphasise the “shared roles” of the various stakeholders in supporting and disseminating the Principles. *Id.* paras. 57-62.

outreach activities, technical assistance, and capacity building.”⁴⁰ Like the VGGT, many of the Principles address issues related to land investment, but only at a high level.⁴¹

22. In addition, both the VGGT and the CFS-RAI Principles play a key role in the CFS’ Global Strategic Framework for Food Security and Nutrition (GSF), a document which is approved annually and intended to improve coordination with CFS’ stakeholders.⁴² The GSF recognises governance and economic and production issues as structural causes of hunger and malnutrition,⁴³ as well as the importance of food security and nutrition to the realisation of the Millennium Development Goals (MDGs).⁴⁴ The GSF emphasises the importance of promoting responsible investment in agriculture and food systems and increasing smallholder-sensitive investment in agriculture, calling upon States, international organisations, and other stakeholders to take action in this regard.⁴⁵ The GSF also recognises the link between food security and climate change, noting the role of the UN Framework Convention on Climate Change (UNFCCC) and the importance of the UN Convention on Biological Diversity (CBD),⁴⁶ which are relevant to consideration of land investment issues.⁴⁷

⁴⁰ *Id.* para. 44.

⁴¹ See, e.g., *id.* Principle 1, para. 21 (noting the importance of responsible investment to “[i]ncreasing sustainable production and productivity of safe, nutritious, diverse, and culturally acceptable food, and reducing food loss and waste” and “[e]nhancing the fairness, transparency, efficiency, and functioning of markets”); Principle 2, para. 22 (noting how responsible investment “contributes to sustainable and inclusive economic development and poverty eradication”); Principle 5, para. 25 (noting that responsible investment “respects legitimate tenure rights ... in line with the [VGGT]”); Principle 9, para. 29 (noting that responsible investment “should abide by national legislation and public policies, and incorporate inclusive and transparent governance structures, processes, decision-making, and grievance mechanisms, accessible to all”); Principle 10, para. 30 (describing ways in which responsible investment “assess[es] and address[es] impacts and promote[s] accountability”); see also note 24 *supra* (regarding the VGGT).

⁴² CSF, Global Strategic Framework for Food Security and Nutrition (GSF), Fourth Version (2015) at 6, available at <http://www.fao.org/3/a-mo187e.pdf> (stating that “[t]he GSF is not a legally binding instrument. It offers guidelines and recommendations for catalyzing coherent action at the global, regional and country levels by the full range of stakeholders, while emphasizing the primary responsibility of governments and the central role of country ownership of programmes to combat food insecurity and malnutrition.”).

⁴³ *Id.* at 8 (noting, for example, inadequate growth in agricultural production; lack of an open, non-discriminatory, equitable, distortion-free, transparent multilateral trading system that promotes agriculture and rural development in developing countries; and continuing insecurity of land tenure and access to land, water and other natural resources, particularly for women farmers).

⁴⁴ *Id.* at 12. Land use and investment, moreover, are similarly covered in the UN Sustainable Development Goals (SDGs), including, for example, in SDGs 1 (End poverty in all its forms everywhere), 2 (End hunger, achieve food security and improved nutrition and promote sustainable agriculture), 12 (Ensure sustainable consumption and production patterns) 13 (Take urgent action to combat climate change and its impacts), 15 (Sustainably manage forests, combat desertification, halt and reverse land degradation, [and] halt biodiversity loss), and 16 (Promote just, peaceful and inclusive societies). SDGs, Goals, <http://www.un.org/sustainabledevelopment/sustainable-development-goals/> (last accessed 29 Mar. 2016).

⁴⁵ GSF, secs. IV(B)-(F) (recommending that States, international organisations, and other stakeholders, *inter alia*: reverse the decline in domestic and international funding for agriculture, food security and rural development in developing countries, and promote new investment to increase sustainable agricultural production and productivity; stimulate investment in smallholder agriculture, with close coordination between public- and private-sector investment; strengthen the access of small-scale food producers and others in the food value chain to financial and risk management instruments, such as innovative insurance, weather risk management, and finance schemes; and use internationally agreed standards elaborated by existing intergovernmental standard settings bodies).

⁴⁶ United Nations Framework Convention on Climate Change (1992), available at http://unfccc.int/files/essential_background/background_publications_htmlpdf/application/pdf/conveng.pdf (UNFCCC); Convention on Biological Diversity (1992), available at <https://www.cbd.int/doc/legal/cbd-en.pdf> (CBD); see also UN Convention to Combat Desertification (1994), available at <http://www.unccd.int/Lists/SiteDocumentLibrary/conventionText/conv-eng.pdf> (seeking, *inter alia*, to improve land productivity, to restore and preserve land, to establish more efficient water usage, and to improve the living conditions of those living in affected areas).

⁴⁷ See also generally United Nations Universal Declaration of Human Rights (1948), available at http://www.ohchr.org/EN/UDHR/Documents/UDHR_Translations/eng.pdf and the International Covenant on Economic, Social and Cultural Rights (1976), available at <http://www.ohchr.org/Documents/ProfessionalInterest/cescr.pdf>.

23. In all, the VGGT and CFS-RAI Principles do not provide detailed legal guidance on private law issues, instead establishing high-level principles and policy guidance to which future work on such issues is to be aligned. The VGGT Technical Guides, particularly those on agricultural investment and for lawyers, identify important linkages and offer more specific guidance regarding the need to provide supportive legal and administrative frameworks for such investment, but do not offer model provisions for land investment contracts.

(b) World Bank Group initiatives

24. Other organisations within the UN system apart from FAO and IFAD have also undertaken initiatives relevant to land investment. The World Bank Group's efforts, in particular, have taken varying forms, including the following four contributions.

25. First, the World Bank Group recently issued in June 2015 a discussion paper on the topic of "Investment Contracts for Agriculture: Maximizing Gains and Minimizing Risks".⁴⁸ The paper, a collaborative effort of the World Bank Group, UNCTAD, and the International Institute for Sustainable Development (IISD), examines the role of contracts,⁴⁹ together with domestic law and investment treaties, in promoting responsible agricultural investments, identifies three key stages in the contracting process (i.e. preparing for contract negotiations, drafting the contract, and monitoring and enforcement), and analyses the top five positive and negative outcomes from agricultural investments.⁵⁰ In concluding, the paper summarises, in two respective tables, ways in which key benefits can be maximised and key risks can be minimised at each of the three stages of the contracting process. It further concludes that "[t]his foundation of knowledge should be translated into concrete and detailed provisions in contracts or through other legal frameworks and mechanisms applying to investment."⁵¹

26. Second, the International Finance Corporation (IFC) issued, in January 2012, Performance Standards on Environmental and Social Sustainability (IFC Performance Standards).⁵² They are "directed towards clients," in particular the party responsible for implementing and operating the project that is being financed, or the recipient of the financing.⁵³ They "provid[e] guidance on how to identify risks and impacts, and are designed to help avoid, mitigate, and manage risks and impacts as a way of doing business in a sustainable way, including stakeholder engagement and disclosure obligations of the client in relation to project-level activities."⁵⁴

27. The eight Performance Standards, which are to be met throughout the life of an investment by IFC, are the following:

- (1) Assessment and Management of Environmental and Social Risks and Impacts;
- (2) Labor and Working Conditions;

⁴⁸ Smaller et al., *Investment contracts for agriculture: maximizing gains and minimizing risks* (1 June 2015), available at <http://documents.worldbank.org/curated/en/2015/06/24680795/investment-contracts-agriculture-maximizing-gains-minimizing-risks>.

⁴⁹ With respect to contracts, the discussion paper recognises that "[i]n this context, most often the contract will be between a national government and an investor; however, depending on the federal structure and land tenure system of a country, it may be between an investor and another party such as a state government, a communal leader, or a customary land holder. The configuration of parties thus needs to be adapted to different contexts." *Id.* at 1.

⁵⁰ *Id.* at 5. The three-step approach to the contracting process is based on the IISD Guide to Negotiating Investment Contracts for Farmland and Water, which is discussed in paragraphs 73-75 below.

⁵¹ *Id.* at 23.

⁵² IFC, *Performance Standards on Environmental and Social Sustainability* (Jan. 2012), available at http://www.ifc.org/wps/wcm/connect/c8f524004a73daeca09afdf998895a12/IFC_Performance_Standards.pdf?MOD=AJPERES (IFC Performance Standards).

⁵³ *Id.* at 2.

⁵⁴ *Id.*

- (3) Resource Efficiency and Pollution Prevention;
- (4) Community Health, Safety, and Security;
- (5) Land Acquisition and Involuntary Resettlement;
- (6) Biodiversity Conservation and Sustainable Management of Living Natural Resources;
- (7) Indigenous Peoples; and,
- (8) Cultural Heritage.

For each Performance Standard above, the following guidance is provided: an introduction, objectives, scope of application, and the particular requirements which are to be met. Many of the Standards address issues relevant to land investment. The World Bank Group's discussion paper on "Investment Contracts for Agriculture: Maximizing Gains and Minimizing Risks," for example, refers to IFC Performance Standards 1, 2 and 5, noting that they "provide guidelines for setting up proper grievance mechanisms" and that they "should be incorporated as provisions in the contract and the investor should report annually on grievances that have arisen and how they have been addressed".⁵⁵

28. Third, the World Bank Group, in August 2014, issued "A guide to Investor Targeting in Agribusiness," which seeks to help project leaders and governments attract agribusiness investments for job creation, poverty reduction, and environmentally and socially sustainable value chain development.⁵⁶ It provides guidance, templates, research resources and examples related to targeting and attracting agribusiness investors,⁵⁷ and identifies "common measures" for facilitating equitable and transparent access to land.⁵⁸

⁵⁵ Investment contracts for agriculture: maximizing gains and minimizing risks, *supra* note 48, at 21. In addition, the IFC's Access to Information Policy requires that extractive industry projects disclose their contracts. See also IFC, Access to Information Policy, available at http://www.ifc.org/wps/wcm/connect/corp_ext_content/ifc_external_corporate_site/ifc+projects+database/projects (last accessed 29 Mar. 2016).

⁵⁶ World Bank Group, A Guide to Investor Targeting in Agribusiness, (Aug. 2014) at 11, available at <http://documents.worldbank.org/curated/en/2014/08/24141465/investment-promotion-guide-investor-targeting-agribusiness>.

⁵⁷ *Id.* at 11-12.

⁵⁸ *Id.* at 45. Such measures include:

- Transparent laws and regulations for the lease or sale of land, including conditions on investors, land size, lease duration, and compensation in case of economic or physical displacement and resettlement.
- Creating a transparent inventory of available sites, through participatory mapping, with clear indications of ownership, plot size, and characteristics relevant to agribusiness (such as soil, climate, water infrastructure, potential squatting).
- Taking into account E&S risks, engaging with affected communities and broader authorities to see if a consensus can be derived on willingness to attract a particular investment, initial assessment of compensation and rehabilitation requirements, and other conditions.
- Establishing a clear and well-publicized allocation process and timeline, ideally using competitive tendering.
- Establishing draft lease and concession documents that clearly state the rights and obligations of all parties, incorporate social and environmental safe guards, and support project implementation monitoring and revocation clauses.
- Strengthening the governance framework around specific agribusiness subsectors, investment project monitoring capacity (including E&S issues), grievance mechanisms, and so on.

The guide further provides that such measures "should be taken in accordance with the [PRAI Principles] and never supersede the rights and well-being of a location's populace" and, as examples, refers *inter alia* to a Memorandum of Understanding between an agribusiness company and landowners from Sierra Leone and key recommendations from a model land concession framework in Liberia. *Id.* at 46; see also *id.* app. 32, Model Memorandum of Understanding between an Agribusiness Company and Landowners, available at http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2015/03/12/000477144_20150312100138/a

29. Fourth, the World Bank Group issued in 2015 a Report on Recommended PPP Contractual Provisions.⁵⁹ Although focused on infrastructure projects, the Report identifies key aspects and proposes provisions for public-private partnership (PPP) contracts on the following issues which could also be considered in the context of land investment contracts: (1) force majeure; (2) material adverse government action; (3) change in law; (4) termination payments; (5) refinancing; (6) lenders' step-in rights; (7) confidentiality and transparency; and (8) dispute resolution.⁶⁰

30. The World Bank Group's initiatives provide, to varying extents, legal guidance on land investment contracts, but also recognise the need for further work to translate such guidance into concrete and detailed provisions for contracts, including draft lease and concession documents.⁶¹

(c) Other UN initiatives

31. Lastly, other initiatives within the UN system are also relevant to land investment. Such initiatives include the following:

- The UN Global Compact, which calls on companies to "[d]o business responsibly by aligning their strategies and operations with Ten Principles on human rights, labour, environment and anti-corruption", to take action to advance broader societal goals, such the UN SDGs, and includes, as the world's largest corporate sustainability initiative, more than 12,000 signatories from 170 countries;⁶²
- Addendum to the Report of the Special Rapporteur, Olivier De Schutter, on the right to food entitled "Large-scale land acquisitions and leases: A set of minimum principles and measures to address the human rights challenge," which proposes eleven principles for host States and investors that "aim to ensure that negotiations leading to land acquisitions and leases comply with a number of procedural requirements, including the informed participation of local communities",⁶³

[ditional/071652160_20150276022942.pdf](http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2015/03/12/000477144_20150312100138/additional/071652160_20150276021537.pdf); *id.* app. 34, IFC Model Concession Framework Project, Consultation Report (Feb. 2009), available at http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2015/03/12/000477144_20150312100138/additional/071652160_20150276021537.pdf. In addition, with respect to local community engagement, the World Bank Group issued a report entitled "Community Development Agreement Model Regulations and Example Guidelines", which recognises that community development agreements "are increasingly being used by mining companies as a means to better define their relations and obligations with impacted communities" and provides draft model regulations in this regard "suitable for adoption into legislation or which can be modified for use as guidelines." World Bank Group, Community Development Agreement Model Regulations and Example Guidelines (June 2010), available at http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2011/05/02/000386194_20110502032111/Rendered/PDF/614820WP0P11781nal0Report0June02010.pdf.

⁵⁹ World Bank Group, Report on Recommended PPP Contractual Provisions (2015), available at http://ppp.worldbank.org/public-private-partnership/sites/ppp.worldbank.org/files/documents/150808_wbg_report_on_recommended_ppp_contractual_provisions.pdf.

⁶⁰ *Id.* at 3-4.

⁶¹ See, e.g., *supra* notes 51, 55, and 58 and accompanying text.

⁶² UN Global Compact – Our Mission, <https://www.unglobalcompact.org/what-is-gc/mission> (last accessed 11 Apr. 2016); see also note 44 *supra* (regarding UN SDGs).

⁶³ A/HRC/13/33/Add.2 (28 Dec. 2009) at 1; see also *id.* para. 33 (concluding in part that "[l]arge-scale investments in farmland can work to the benefit of all parties concerned, but that presupposes that an appropriate institutional framework is in place. If that is not the case at the time of the investment, the arrival of large investors may in fact make it less likely, not more, that such a framework will be set up in the future, since large investors may gain sufficient influence to avoid regulation that could curtail the pursuit of their own interests. It is therefore vital that the negotiations leading to such agreements comply with a number of procedural requirements ensuring informed participation of the local communities and therefore adequate benefit-sharing, and that the agreements themselves take into account human rights which could be negatively impacted by such investments. Agreements to lease or cede large areas of land should under no circumstances be allowed to trump the human rights obligations of the States concerned.").

- Addendum to the Report of the Special Representative of the Secretary-General, John Ruggie, on the issue of human rights and transnational corporations and other business enterprises entitled “Principles for responsible contracts: integrating the management of human rights risks into State-investor contract negotiations: guidance for negotiators,” which identifies ten principles together with their implications and a recommended checklist on (a) project negotiations, (b) management of potential adverse human rights impacts, (c) project operating standards, (d) stabilisation clauses, (e) additional goods or service provision, (f) physical security for the project, (g) community engagement, (h) project monitoring and compliance, (i) grievance mechanisms for non-contractual harms to third parties, and (j) transparency/disclosure of contract terms;⁶⁴
- Open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights, which has a mandate from the UN Human Rights Council “to elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises” and whose first two sessions, in July 2015 and October 2016, are “dedicated to conducting constructive deliberations on the content, scope, nature and form of the future international instrument”;⁶⁵
- The UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects and Model Legislative Provisions on Privately Financed Infrastructure Projects, which – although focused on infrastructure projects – seek to assist with the establishment of a legislative framework favourable to such projects and contain guidance on acquisition of land required for execution of a project and related issues;⁶⁶
- The UNCITRAL Model Law on Public Procurement, which contains principles and procedures aimed at avoiding abuses in the procurement process;⁶⁷ and
- The UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration and the related UN Convention on Transparency in Treaty-based Investor-State Arbitration, which seek to promote greater transparency in such arbitration, may lead to more information becoming available regarding arbitrations arising from land investments, and reflect a broader trend towards greater transparency in international investment.⁶⁸

⁶⁴ A/HRC/17/31/Add.3 (25 May 2011) at 1-3, 7; see also United Nations, Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy Framework” (2011), available at http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf (UN Guiding Principles on Business and Human Rights).

⁶⁵ IGWG on TNCs and Human Rights, <http://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Pages/IGWGOntnc.aspx> (last accessed 23 Apr. 2016).

⁶⁶ UNCITRAL, Legislative Guide on Privately Financed Infrastructure Projects (2001), available at <https://www.uncitral.org/pdf/english/texts/procurem/pfip/guide/pfip-e.pdf>; Model Legislative Provisions on Privately Financed Infrastructure Projects (2004), available at https://www.uncitral.org/pdf/english/texts/procurem/pfip/model/03-90621_Ebook.pdf. Regarding acquisition of land, see Legislative Guide, recommendation 45 and ch. IV, paras. 27-29, and Model Legislative Provision 32.

⁶⁷ UNCITRAL, Model Law on Public Procurement (2011), available at <https://www.uncitral.org/pdf/english/texts/procurem/ml-procurement-2011/2011-Model-Law-on-Public-Procurement-e.pdf>.

⁶⁸ UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (2014), available at <https://www.uncitral.org/pdf/english/texts/arbitration/rules-on-transparency/Rules-on-Transparency-E.pdf>; UN Convention on Transparency in Treaty-based Investor-State Arbitration (2015), available at <https://www.uncitral.org/pdf/english/texts/arbitration/transparency-convention/Transparency-Convention-e.pdf>.

These initiatives, though not tailored to land investment contracts, address matters which may warrant consideration in the context of preparing an instrument on private law aspects of such contracts.

2. Other Intergovernmental Organisation initiatives

32. There are other intergovernmental Organisation initiatives addressing land investment. The following such initiatives are discussed in alphabetical order by Organisation.

(a) African Union

33. The African Union has developed two initiatives on land investment. First, the Framework and Guidelines on Land Policy in Africa – jointly developed by the African Union Commission (AUC), the Economic Commission for Africa (ECA) and the African Development Bank (AfDB) in 2010 – is “to articulate some of the principles which should inform the development, content and implementation of land policies in African member states.”⁶⁹ The initiative emphasises future works by member States to make agriculture an engine of growth, noting that “[t]he African Union expects that member countries which are in the course of or are contemplating the initiation, review, revision or comprehensive development and implementation of all or part of policies designed to ensure that their land systems are fully integrated into national development processes, will find them a useful guide.”⁷⁰

34. Second, the Guiding Principles on Large Scale Land Based Investments in Africa – developed by the AU, AfDB, and the ECA in 2014 – provide “policy direction and guidance to inform Large Scale Land Based Investment in African agriculture.”⁷¹ The Guiding Principles “are articulated as a comprehensive, mutually reinforcing framework of principles formed around fundamental principles” and note that the individual operationalisation efforts are key.⁷²

⁶⁹ African Union, African Development Bank and Economic Commission for Africa, *The Framework and Guidelines on Land Policy in Africa* (2010) at para. 1.1.2, available at <http://www.uneca.org/publications/framework-and-guidelines-landpolicy-africa>.

⁷⁰ *Id.* at 41.

⁷¹ African Union, African Development Bank and Economic Commission for Africa, *Guiding Principles on Large Scale Land Based Investments in Africa* (2014) at para. 1.4, available at <http://www.uneca.org/publications/guiding-principles-large-scale-land-based-investments-africa>.

⁷² *Id.* para. 8.1. The six Fundamental Principles, for each of which additional Principles are provided, are as follows:

- (1) [Large scale land based investments (LSLBI)] respect human rights of communities, contribute to the responsible governance of land and land-based resources, including respecting customary land rights and are conducted in compliance with the rule of law.
- (2) Decisions on LSLBI are guided by a national strategy for sustainable agricultural development which recognizes the strategic importance of African agricultural land and the role of smallholder farmers in achieving food security, poverty reduction and economic growth.
- (3) Decisions on LSLBI and their implementation are based on good governance, including transparency, subsidiarity, inclusiveness, prior informed participation and social acceptance of affected communities.
- (4) LSLBI respect the land rights of women, recognize their voice, generate meaningful opportunities for women alongside men, and do not exacerbate the marginalization of women.
- (5) Decisions on the desirability and feasibility of LSLBI are made based on independent, holistic assessment of the economic, financial, social and environmental costs and benefits associated with the proposed investment, throughout the lifetime of the investment.
- (6) Member States uphold high standards of cooperation, collaboration and mutual accountability to ensure that LSLBI are beneficial to African economies and their people. *Id.* para. 1.5.

(b) APEC

35. The Guidebook on PPP Frameworks in the APEC Region, prepared in 2015, aims “to compile information on PPP frameworks in [Asia-Pacific Economic Cooperation (APEC)] member economies into a single information as a facilitatory tool for investment.”⁷³ In the event that an agricultural sector investment is established as a PPP project under national legislation, the Guidebook is intended to serve as a point of reference.⁷⁴

(c) The European Union

36. The European Union has two initiatives on land investment. First, the EU Land Policy Guidelines for support to land policy design and land policy reform processes in developing countries were elaborated by the EU Task Force on Land Tenure in 2004.⁷⁵ Experts, NGO representatives and Member States representatives participated in the development of the Land Policy Guidelines, which review the policy framework, provide policy advice, and identify operational guidelines for EU donors to support the design and implementation of land policy and administration in developing countries.⁷⁶ The operational guidelines, in particular, offer a list of questions and issues to be considered in assessing national policies, including on the policy, legislation, and institutional framework.⁷⁷

37. Second, a Study on the extent of farmland grabbing in the EU, which was requested by the European Parliament’s Committee on Agriculture and Rural Development in May 2015, covers the rise of large-scale land deals within the EU.⁷⁸ It examines aspects giving rise to this phenomenon, including the Common Agricultural Policy (CAP), food market and supply chains, and EU policies, and recommends that EU land governance be reformed consistent with the VGGT.⁷⁹

(d) G7

38. This intergovernmental forum has two initiatives relevant to land investment. First, it established in 2012 the New Alliance for Food Security and Nutrition (New Alliance), which is a shared commitment to achieve sustained inclusive, agriculture-led growth in Africa and is made up of representatives from African governments, development partners, the private sector, civil society, and farmers’ organisations.⁸⁰ Among other things, the New Alliance issued in 2015 an Analytical Framework for Land-Based Investments in African Agriculture, which is designed to help investors ensure that their land-based investments are inclusive, sustainable, transparent, and respect human rights.⁸¹ Building upon the VGGT, the Framework and Guidelines on Land Policy in Africa, and the Guiding Principles on Large Scale Land Based Investments in Africa, the Analytical

⁷³ Asia-Pacific Economic Cooperation, Guidebook on PPP Frameworks in the APEC Region (May 2015) at iv, available at http://publications.apec.org/publication-detail.php?pub_id=1638.

⁷⁴ *Id.* at 96 (including *inter alia* example from Papua New Guinea).

⁷⁵ EU Task Force on Land Tenure, EU Land Policy Guidelines for support to land policy design and land policy reform processes in developing countries (Nov. 2014), available at https://ec.europa.eu/europeaid/sites/devco/files/methodology-eu-land-policy-guidelines-200411_en_2.pdf.

⁷⁶ *Id.* at 1.

⁷⁷ *Id.* at 24-34.

⁷⁸ European Parliament, Study on the Extent of farmland grabbing in the EU (2015) at 11, available at http://www.europarl.europa.eu/RegData/etudes/STUD/2015/540369/IPOL_STU%282015%29540369_EN.pdf.

⁷⁹ *Id.* at 62-65.

⁸⁰ New Alliance, About, <http://www.new-alliance.org/about> (last accessed 29 Mar. 2016). Current New Alliance partner countries include Benin, Burkina Faso, Cote d’Ivoire, Ethiopia, Ghana, Malawi, Mozambique, Nigeria, Senegal, and Tanzania. See New Alliance, Countries, <http://www.new-alliance.org/countries> (last accessed 29 Mar. 2016).

⁸¹ New Alliance and Grow Africa, Analytical Framework for Land-based Investments in African Agriculture (2015), available at https://www.growafrica.com/sites/default/files/Analytical-framework-for-land-based-investments-in-African-agriculture_0.pdf.

Framework contributes to operationalise those principles by detailing and elaborating upon them.⁸² With respect to land investment contracts, the Framework emphasises the importance of impact assessments and transparency, and identifies questions that investors should ask and necessary actions they should take to correct deficiencies regarding contract negotiations (e.g. the legal authority of contract signatories, informed consent of local communities, community support and communication) and what the contract should contain (e.g. monitoring and grievance mechanism, remedies for non-performance, and environmental sustainability).⁸³

39. Second, this forum in 2014 initiated the CONNEX Initiative “to provide developing country partners with enhanced advisory support on how best to negotiate complex commercial contracts.”⁸⁴ The CONNEX Initiative has three pillars: (1) support an online platform for negotiation support, which is hosted by the Columbia Center on Sustainable Investment (CCSI);⁸⁵ (2) provide independent advisors for contract negotiations based on the CONNEX Code of Conduct;⁸⁶ and (3) focus on capacity-building of stakeholders.⁸⁷

(e) OECD

40. The Organisation for Economic Co-operation and Development (OECD) has developed three instruments relevant to land investments. First, the Guidelines for Multinational Enterprises, originally adopted in 1976, are a part of the OECD Declaration on International Investment and Multinational Enterprises and were most recently updated in 2011.⁸⁸ They provide non-binding principles and standards for responsible business conduct of enterprises in several areas (e.g. disclosure, human rights, employment and industrial relations, environment, combating bribery, bribe solicitation and extortion, consumer interests, science and technology, competition, and taxation).⁸⁹

41. Second, further to the OECD Guidelines, the OECD issued in 2016, in collaboration with FAO, Guidance for Responsible Agricultural Supply Chains.⁹⁰ The OECD-FAO Guidance seeks to help enterprises observe existing standards of responsible business conduct along agricultural supply chains, referring to those parts of the OECD Guidelines and other standards that are most relevant

⁸² Specifically, the Framework works in the following way:

The Framework is organized in a four-column table that follows the thematic structure of the FAO Guide [for investors which has not yet been issued and is discussed in note 27 above]. Column 1 contains a series of thematic recommendations contained in the FAO Guide, along with cross-references to relevant sections of the VGGT and of the Guiding Principles on Large Scale Land based Investment in Africa (LSLBI Fundamental Principles) prepared by AU, ADB and UNECA; Column 2 suggests a series of questions that an investor should ask to assess whether it is following the recommendations in Column 1; Column 3 suggests a series of actions that an investor must take to correct deficiencies identified by the answers to questions in Column 2; and Column 4 contains references to additional resources, including the operational guides [e.g. the Technical Committee on Land Tenure and Development and USAID Guides discussed in paragraphs 56 and 63-64 respectively below] developed to date by individual donors, that the investor could use to help implement the actions suggested in Column 3. *Id.* at 5.

⁸³ *Id.* at 9, 12-13, 15-16.

⁸⁴ Federal Ministry for Economic Cooperation and Development (BMZ), G7 Connex Initiative (Nov. 2015), available at http://www.bmz.de/g7/includes/Downloadarchiv/CONNEX_flyer_web-version.pdf.

⁸⁵ See para. 70 *infra* (describing the Negotiations Support Portal).

⁸⁶ BMZ, Code of Conduct of the G7 CONNEX Initiative, available at http://www.bmz.de/g7/includes/Downloadarchiv/150505_CONNEX_Code_of_Conduct_final.pdf.

⁸⁷ BMZ, G7 Connex Initiative (Nov. 2015), available at http://www.bmz.de/g7/includes/Downloadarchiv/CONNEX_flyer_web-version.pdf.

⁸⁸ OECD, Guidelines for Multinational Enterprises (2011), available at <http://mneguidelines.oecd.org/text/>.

⁸⁹ There are currently 46 adhering countries to the Declaration (34 OECD and 12 non-OECD economies). See OECD, About, <http://mneguidelines.oecd.org/about/> (last accessed 29 Mar. 2016).

⁹⁰ OECD and FAO, Guidance for Responsible Agricultural Supply Chains (2016), available at <http://www.oecd.org/daf/inv/investment-policy/rbc-agriculture-supply-chains.htm>.

to agricultural supply chains.⁹¹ The OECD-FAO Guidance provides (1) a model enterprise policy outlining the standards that enterprises should observe to build responsible agricultural supply chains; (2) a framework for risk-based due diligence describing the five steps that enterprises should follow to identify, assess, mitigate and account for how they address the adverse impacts of their activities; (3) a description of the major risks faced by enterprises and measures to mitigate those risks; and (4) guidance for engaging with indigenous peoples.⁹² With respect to land investment contracts, the OECD-FAO Guidance emphasises, in particular, commitments on transparency,⁹³ project design to avoid or minimise displacement,⁹⁴ and impact assessments.⁹⁵

42. Third, the OECD also issued, in 2014, a Policy Framework for Investment in Agriculture (PFIA).⁹⁶ It seeks to support countries in creating an attractive environment for investors and “to mobilise private investment in agriculture for steady economic growth and sustainable development.”⁹⁷ The Policy Framework provides guidance in ten areas susceptible to impacting the investment and, regarding investment policy, emphasises that such policy:

*directly influences the decisions of all investors. Transparency, policy coherence and non-discrimination can boost investor confidence. Secure access to land and water and effective mechanisms for enforcing contracts and compensating expropriation are also critical to attract further investment in agriculture.*⁹⁸

(f) UNIDROIT

43. UNIDROIT has elaborated two instruments for consideration in the context of land investment contracts. First, the UNIDROIT Principles of International Commercial Contracts (UNIDROIT Principles or the Principles), currently in their third edition from 2010,⁹⁹ represent a private codification or “restatement” of the general part of international contract law, covering virtually all of the most important topics of such law.¹⁰⁰ Although the Principles do not contain express provisions or comments on land investment contracts, they are formulated to “set forth general rules for international commercial contracts” in the “broadest possible sense, so as to include not only trade transactions for the supply or exchange of goods or services, but also other types of economic transactions, such as *investment and/or concession agreements*, contracts for professional services, etc.”¹⁰¹ They could, moreover, be applied to land investment contracts (e.g. if the parties have incorporated them wholly or in part into their contract or expressly referred to them as rules of law governing the contract; if the parties opt for “generally accepted principles of international commercial law” or similar formulations to govern their contract; if the contract is silent as to the

⁹¹ *Id.* at 12.

⁹² *Id.* at 3.

⁹³ *Id.* at 24 (“To the greatest extent possible, we will commit to transparency and information disclosure on our land-based investments, including transparency of lease/concession contract terms, with due regard to privacy restrictions.”).

⁹⁴ *Id.* at 24.

⁹⁵ *Id.* at 40 (noting that, “[a]s detailed in [the IISD Guide to Negotiating Investment Contracts for Farmland and Water, which is discussed in paragraphs 73-75 below], Environmental Impact Assessments (EIAs) are now firmly established practice for projects in a wide range of economic sectors.”).

⁹⁶ OECD, Policy Framework for Investment in Agriculture (July 2014), available at <http://dx.doi.org/10.1787/9789264212725-en>.

⁹⁷ *Id.* at 8.

⁹⁸ *Id.* at 13.

⁹⁹ UNIDROIT Principles of International Commercial Contracts (2010), available at <http://www.unidroit.org/english/principles/contracts/principles2010/integralversionprinciples2010-e.pdf> (UNIDROIT Principles).

¹⁰⁰ M.J. Bonell, “International Investment Contracts and General Contract Law: a Place for the UNIDROIT Principles of International Commercial Contracts?”, XVII UNIF. L. REV. at 141 (2012-1/2).

¹⁰¹ UNIDROIT Principles, Preamble & cmt. 2 (emphasis added).

governing law; or if the principles are used as a means of interpreting or supplementing applicable domestic law).¹⁰²

44. Various black letter provisions and comments of the Principles could be taken into account in the context of land investment contracts. For example, in connection with UNIDROIT's Colloquium (Rome, 8-10 November 2011) on "Promoting Investment in Agricultural Production: Private Law Aspects", it was observed that the Principles contain a number of provisions particularly suited to the needs of long-term and investment contracts and that some issues, in particular with respect to (1) contract formation, (2) validity, (3) performance and supervening events, and (4) termination.

45. Regarding contract formation, it was observed that Articles 2.1.1 (Manner of formation), 2.1.14 (Contract with terms deliberately left open), 2.1.15 (Negotiations in bad faith), and 2.1.17 (Merger clauses), as well as Comment 5 to Article 5.3.1 (Types of condition) with respect to closing procedures for complex, high-value transactions, could be particularly useful.¹⁰³ Some issues, however, could be considered further, including with respect to Article 1.1 (Freedom of contract) whether, in some circumstances, formal procurement proceedings should be encouraged, Article 1.2 (No form required) whether a writing should be required for transparency purposes, and Article 1.7 (Good faith and fair dealing) whether additional consultations and commitments regarding local communities are to be provided.¹⁰⁴

46. Regarding validity, it was observed that Articles 3.2.7 (Gross disparity), 3.3.1 (Contracts infringing mandatory rules), 3.3.2 (Restitution), and 7.4.13 (Agreed payment for non-performance) could be particularly useful in ensuring that the contract is valid, fair and sustainable.¹⁰⁵ Some issues, however, could be considered further, including with respect to Article 3.2.7 (Gross disparity) whether a disadvantaged party, as in Section 6.2 (Hardship), should request renegotiations and, if that fails, dispute resolution for adaption of the contract, prior to avoiding the contract or a term of it.¹⁰⁶

47. Regarding performance and supervening events, it was observed that Articles 1.8 (Inconsistent behaviour), 5.1.1-5.1.5 (on the obligations and duties arising from the contract and co-operation between the parties), 6.2.2-6.2.3 (on hardship), and 7.1.7 (Force majeure), could be particularly useful in maintaining a fair and sustainable contract and relationship between the parties, which would be essential in the context of long-term investments in land.¹⁰⁷ Some issues, however, could be considered further, including with respect to Article 7.17 what should occur when a force majeure situation arises from a food shortage in a host State.¹⁰⁸

48. Regarding termination, it was observed that Section 7.3 (on termination for non-performance) could be particularly useful in making clear that termination is a remedy of last resort and how the right to terminate a contract is to be exercised, as well as laying out the effects of termination.¹⁰⁹

49. In addition, the Working Group on Long-Term Contracts' proposed amendments and additions to the UNIDROIT Principles' black letter rules and comments, which are to be submitted to the Governing Council for consideration and adoption at its 95th session, could be particularly useful as well. Indeed, such amendments and additions adapt the Principles to take better into account

¹⁰² M.J. Bonell, *supra* note 100, at 142-145.

¹⁰³ *Id.* at 146-148.

¹⁰⁴ *Id.* at 148-149.

¹⁰⁵ *Id.* at 149-151.

¹⁰⁶ *Id.* at 151-152.

¹⁰⁷ *Id.* at 152-155.

¹⁰⁸ *Id.* at 155-158.

¹⁰⁹ *Id.* at 158.

the characteristics and needs of long-term contracts, such as land investment contracts, in particular with respect to contracts with evolving, open, or omitted terms, co-operation between the parties, force majeure, negotiations and good faith, post-contractual obligations, restitution, and termination for compelling reason.¹¹⁰

50. Second, the UNIDROIT/FAO/IFAD Legal Guide on Contract Farming, which was adopted in May 2015, provides detailed legal guidance on contract farming relationships.¹¹¹ The Guide, in general, provides guidance on (1) the legal framework; (2) parties, formation and form of the contract; (3) obligations of the parties; (4) excuses for non-performance; (5) remedies for breach; (6) duration, renewal and termination; and (7) dispute resolution. Even though the Guide is focused on contract farming, the guidance that it contains may be applicable more broadly.¹¹² Indeed, some of the content could be considered, together with content from other initiatives, for adaption and tailoring to the context of land investment contracts, including for example aspects of the applicable private law regime and the role of the regulatory environment,¹¹³ interested third parties,¹¹⁴ obligations relating to land as an input,¹¹⁵ community interests,¹¹⁶ force majeure and change of circumstances,¹¹⁷ and dispute resolution.¹¹⁸

51. To sum up, these initiatives of intergovernmental Organisations outside the UN system typically address land investment in general and only refer to private law issues peripherally or otherwise assume the existence of a private law framework. Though the New Alliance's Analytical Framework and the OECD-FAO Guidance do treat such issues, they do not offer detailed legal guidance on land investment contracts. While the UNIDROIT Principles and the Legal Guide on Contract Farming do offer, however, detailed legal guidance which could be useful in the context of land investment contracts, such guidance would have to be first analysed and tailored to that context.

B. Various States

52. A number of initiatives relevant to land investment, including projects and guidance documents, have been developed by States. This subpart surveys such initiatives from (1) France, (2) Germany, (3) Ghana, (4) the United Kingdom, (5) the United States of America, and (6) other States.

1. France

53. In France, a Technical Committee on Land Tenure and Development (Technical Committee), which is co-led by the French Ministry of Foreign Affairs (MAE) and the Agence Française de

¹¹⁰ See UNIDROIT 2016 – Study L – Misc. 32, para. 4 and Annexes 3-11 (the latter of which show in red the Working Group's recommended amendments and additions to the 2010 edition of the Principles).

¹¹¹ UNIDROIT, Legal Guide on Contract Farming (2015), available at <http://www.unidroit.org/work-in-progress-studies/current-studies/contract-farming>.

¹¹² *Id.* Introduction para. 3 ("Although primarily focused on legal considerations in the negotiation of agricultural production contracts, the Guide also lays the groundwork for the consideration of policy aspects, particularly in the broader areas of agricultural investment and micro-financing."); *id.* para. 23 ("[G]rowing global awareness on issues related to large-scale land acquisitions or long-term land leases has made potential contractors less likely to resort to such acquisitions in developing countries, fearing possible negative social or political backlash. In many situations, however, investors develop contract farming operations alongside direct farming on the plantations they control, mitigating risks both related to production and negative public reputation simultaneously").

¹¹³ See *id.* ch. 1.

¹¹⁴ *Id.* paras. 2:57-59.

¹¹⁵ *Id.* paras. 3:73-77.

¹¹⁶ *Id.* para. 3:172.

¹¹⁷ *Id.* ch. 4.

¹¹⁸ *Id.* ch. 7.

Développement (AFD) and composed of experts, researchers, and officials, has produced a number of works and tools addressing land issues in developing countries and the challenges they present.¹¹⁹ The following three initiatives are of particular note in the land investment context.

54. First, the Technical Committee approved in 2008 a White Paper entitled “Land Governance and Security of Tenure in Developing Countries”, which “offers a critical view of past and present interventions by French development practitioners, with an analytical framework to help improve understanding of land issues and their dynamics and develop intervention tools and methods that take account of local, national and global constraints.”¹²⁰ The Paper recognises the role of the EU’s Land Policy Guidelines and proposes seven complementary principles and, among other things, addresses the commodification and transfer of land rights.¹²¹

55. Second, the Technical Committee issued in 2010 a Research Paper entitled “Large-scale land appropriations: Analysis of the phenomenon and proposed guidelines for future action” which was developed together with members of GISA and led by AGTER, an association for improving governance of land, water and natural resources.¹²² The Paper contains proposals built on two principles: (1) “the need to defend existing property rights”; and (2) “the need to build ‘commonality’ by recognising collective rights in order to ensure that private individual rights and uses are compatible with the general interest (food security, biodiversity, claim, etc.).”¹²³ It encourages not only supporting the development of voluntary procedures, but also going beyond such measures.¹²⁴

56. Third, the Technical Committee issued in 2014 an Operational Guide entitled “Guide to due diligence of agribusiness projects that affect land property rights” which provides an Analytical Framework and accompanying explanations “designed to help AFD Group officers to carry out due diligence of proposed investment projects in low- and middle-income countries.”¹²⁵ The Analytical Framework, which is annexed to the Operational Guide, identifies key questions, as well as providing considerations and sources (e.g. the CFS-RAI Principles, the VGGT, the IFC Performance Standards, the Equator Principles, and the UN Guiding Principles on Business and Human Rights) for each, within five main sections of analysis: (1) the national framework for land governance; (2) the project and associated land contracts; (3) economic evaluation; (4) social component; and (5) environmental considerations. The Operational Guide concludes that, *inter alia*, “[c]ontractual clauses need to be specific, with clear conditions for their implementation, monitoring and control.”¹²⁶ It further notes that “[m]any contracts are deficient in this respect, leading to results that fall well short of expectations” and that “[t]his is another area where expert help can make a difference.”¹²⁷

¹¹⁹ For more information, see the portal on Financing and Development at <http://www.foncier-developpement.fr/> (last accessed 30 Mar. 2016).

¹²⁰ Technical Committee on Land Tenure and Development, Land Governance and Security of Tenure in Developing Countries (2009) at 10, available at <http://www.foncier-developpement.fr/publication/land-governance-and-security-of-tenure-in-developing-countries/>.

¹²¹ *Id.* at 43-46, 73-74.

¹²² Technical Committee on Land Tenure and Development, Large-scale land appropriations: Analysis of the phenomenon and proposed guidelines for future action (June 2010) at 3, available at http://www.foncier-developpement.fr/wp-content/uploads/CTF_2010_Land-appropriations-terres_version-anglaise.pdf; see also AGTER’s webpage, http://aqter.asso.fr/rubrique69_en.html (last accessed 30 Mar. 2016).

¹²³ *Id.* at 34-36.

¹²⁴ *Id.* at 45-53.

¹²⁵ Technical Committee on Land Tenure and Development, Guide to due diligence of agribusiness projects that affect land and property rights (Oct. 2014) at 9, available at: <http://www.foncier-developpement.fr/wp-content/uploads/Guide-to-due-diligence.pdf> (Technical Committee Operational Guide).

¹²⁶ *Id.* at 47.

¹²⁷ *Id.*

2. Germany

57. The Federal Ministry for Economic Cooperation and Development (BMZ) issued in 2012 a Strategy Paper entitled “Investments in Land and the Phenomenon of Land Grabbing: Challenges for Development Policy,” which is to guide Germany’s development policy in this area.¹²⁸ The strategy paper lays out principles for structuring investments in land and agriculture in such a way that there are sustained benefits for the development of the host country and local populations, emphasising with respect to land investment contracts the importance of free, prior and informed consent in contracting and that “[e]xisting land and water rights, including traditional and collective rights as well as those recognised under common law, should be acknowledged and laid down in purchase and lease contracts.”¹²⁹ It also identifies the following goals: (a) creation of a solid information base (e.g. promoting transparency in the land sector); (b) formulation and implementation of international guidelines;¹³⁰ (c) support for partner countries in terms of land policy and land management; (d) human capacity development; (e) cooperation with the private sector;¹³¹ and (f) insistence on sustainability.¹³²

3. Ghana

58. The Ghana Ministry of Food and Agriculture established in 2012 the Ghana Commercial Agriculture Project (GCAP), which is jointly funded by the World Bank and the United States Agency for International Development (USAID) and is to continue until 2019.¹³³ GCAP seeks to develop the agriculture sector in Ghana by moving from subsistence farming to commercial farming in a way that ensures wealth creation and food security in the country and increases access to reliable water, land, finance, agricultural inputs and output markets by smallholder and nucleus farmers in selected project intervention areas.¹³⁴

59. GCAP has developed publications that aim to facilitate socially responsible land investment practices, which are to be used together: (a) Recommendations for Large-Scale Land-Based Investment in Ghana (GCAP Recommendations Report);¹³⁵ (b) Community/Investor Guidelines for Large-Scale Land Transactions (GCAP Guidelines);¹³⁶ and (c) a Model Lease Agreement.¹³⁷ The

¹²⁸ Position of German development policy: Utilising the opportunities of responsible investments and preventing land grabbing (2012), available at http://www.bmz.de/en/publications/archiv/type_of_publication/strategies/Strategiepapier321_02_2012.pdf (BMZ Strategy Paper); see also the Federal Ministry for Economic Cooperation and Development, Biofuels: Opportunities and risks for developing countries (2011), available at https://www.bmz.de/en/publications/archiv/type_of_publication/strategies/Strategiepapier315_14_2011.pdf.

¹²⁹ *Id.* at 5-6.

¹³⁰ This includes, in particular, the VGGT (*see supra* paras. 16-0), PRAI (*see supra* note 17), and Framework and Guidelines on Land Policy in Africa (*see supra* para. 33). BMZ Strategy Paper at 7-8.

¹³¹ In this regard, the Strategy Paper notes that such cooperation “will support the implementation of partnership-based business models, such as contract farming, lease agreements which include profit sharing with land owners, joint ventures or management contracts whereby local farmers manage the land on behalf of a company.” BMZ Strategy Paper at 9.

¹³² In addition, BMZ signed a Declaration of Intent to establish a new Network of Excellence on Land Governance in Africa (NELGA) to better secure land rights across Africa with the United Nations Economic Commission for Africa (ECA) and the World Bank in July 2015. Press release on 13.07.2015, <http://www.bmz.de/20150713-1en> (last accessed 30 Mar. 2016) (noting that “NELGA will support the African Union’s Agenda on Land, in particular the use of the ‘Framework and Guidelines on Land Policy in Africa’ and the [VGGT].”).

¹³³ Ghana Commercial Agriculture Project, available at <http://www.qcap.org.gh/> (last accessed 30 Mar. 2016).

¹³⁴ *Id.*

¹³⁵ Recommendations for Large-Scale Land-Based Investment in Ghana (July 2015), available at <http://www.qcap.org.gh/index.php/downloads/publications/6-recommendations-for-large-scale-land-based-investment-in-ghana>.

¹³⁶ Community/Investor Guidelines for Large-Scale Land Transactions (July 2015), available at <http://www.qcap.org.gh/index.php/downloads/publications/5-communityinvestor-guidelines-for-large-scale-land-transactions> (GCAP Guidelines).

GCAP Recommendations Report discusses Ghana’s legal, policy, and institutional framework for commercial agricultural leasing, steps for realising successful farmland investment, and innovative models for inclusive commercial agricultural investment, as well as describing applicable legislative instruments, case law, and institutions. In this way, the Recommendations Report provides extensive background on the GCAP Guidelines and the Model Lease Agreement.

60. The GCAP Guidelines identify five phases of agricultural investment and offer recommendations and guidance on those phases for landowning communities, investors, and government/State actors.¹³⁸ The goal is to offer information for capacity building and best practices, so that communities are better prepared to engage and negotiate with other stakeholders.

61. The Model Lease Agreement is intended to “proactively address the specific challenges that investors, landowners, and affected communities often encounter in commercial agricultural land transactions in Ghana.”¹³⁹ Accordingly, the Model Lease Agreement contains provisions which distinguish it from traditional lease forms, including:

- Mechanisms for clarifying the rights granted to investors and specific rights reserved by landowning communities, so as to minimize misaligned expectations on all sides.
- Provisions on development of a communications plan that identifies how investors and communities will exchange information over the lifetime of the lease.
- Different options for monetary and non-monetary forms of compensation paid under the lease.
- Provisions for creation of a community land management committee that allows for a more open and participatory structure for managing the relationship between the investor and the community.
- Provisions on development of a grievance mechanism to resolve complaints and disputes between communities and investors.
- Strategic clauses for ensuring that the lease agreement and the ongoing relationship between the community and investor are open and transparent.
- Provisions for monitoring and enforcing environmental and natural resource management obligations.

¹³⁷ Model Commercial Agriculture Lease Agreement (July 2015), available at <http://www.gcap.org.gh/index.php/downloads/publications/7-model-commercial-agriculture-lease-agreement>. The GCAP Recommendations Report, the GCAP Guidelines, and the Model Lease Agreement were prepared under a consultancy implemented by Landesa, a US-based NGO which is further described in note 194 below. In addition, the GCAP also issued in 2013 a Resettlement Policy Framework, which seeks to provide “project stakeholders with procedures to address compensation issues as related to affected properties/livelihoods including land and income generated activities during project implementation”. See Ministry of Food and Agriculture, Ghana Commercial Agriculture Project (2013), available at <http://www.gcap.org.gh/index.php/downloads/publications/1-resettlement-policy-framework/file>.

¹³⁸ See note 222 *infra* (identifying the five phases).

¹³⁹ Model Lease Agreement at 1. It reflects “the main variants of land ownership and tenure systems across the country and also incorporates various principles and guidelines at the global level that seek to ensure responsible commercial agriculture investments.” *Id.* at 2 (citing, *inter alia*, the VGGT, the Equator Principles (see paragraph 81 below), IFC Performance Standards, and the World Bank’s Policy on Involuntary Resettlement (available at <http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/EXTPOLICIES/EXTOPMANUAL/0,,contentMDK:20064610~menuPK:64701637~pagePK:64709096~piPK:64709108~theSitePK:502184,00.html>)). With respect to the main variants of land ownership, the Model Lease addresses: “State and vested land” (e.g. land owned by or vested to the State); “Stool or skin land” (e.g. land collectively owned by an identifiable ethnic or tribal group); and “Family/clan land” (e.g. land belonging to a family with the head of the family acting as trustee for and on behalf of the members of the landowning family). *Id.* at 3.

- Inclusion on the lease form of signature lines for witnesses representing a broad range of community interests.¹⁴⁰

The Model Lease Agreement contains 24 sections, as well as Appendices on a community development plan and the conditions precedent to entering into a lease agreement, and provides summary explanations and model provisions for each.¹⁴¹ The Model cautions, however, that it “is not a substitute for fair and equitable negotiations between contracting parties,” may “require further refinement to comport fully with Ghanaian law and context,” and represents “just one step in the process of socially responsible commercial agriculture investment.”¹⁴²

4. The United Kingdom

62. As part of its LEGEND (Land: Enhancing Governance for Economic Development) programme which seeks to improve land rights protection and related knowledge, the Department of International Development (DFID) launched in 2015 a new fund to promote responsible land-based investments.¹⁴³ This new fund is based on the New Alliance,¹⁴⁴ is managed by KPMG, and is focused on the following seven countries: Ethiopia, Malawi, Mozambique, Nigeria, Tanzania, Zambia and Sierra Leone.¹⁴⁵ In addition, DFID is also supporting the preparation of a series of “step-by-step ‘how-to-guides’ called ‘Playbooks’ that can be used by multiple stakeholders to comply with internationally recognized standards and principles” on land governance and investment, including: (1) country-specific playbooks for stakeholders in Ghana and Tanzania; (2) model playbooks for stakeholders more generally; and (3) model playbooks tested in actual investment.¹⁴⁶

5. The United States of America

63. USAID published in 2015 “Operational Guidelines for Responsible Land-Based Investment” (Operational Guidelines).¹⁴⁷ The Operational Guidelines contain “USAID’s recommendations for best practices related to the due diligence and structuring of land-based investments, with the goal of reducing risks and facilitating responsible projects that benefit both the private sector and local communities” and “help companies to align their policies and actions with” the VGGT, the IFC Performance Standards, the UN Guiding Principles on Business and Human Rights, and other

¹⁴⁰ *Id.* at 1-2.

¹⁴¹ In particular, the Model Lease Agreement covers the following areas: (1) Parties and Recitals; (2) Definitions and Interpretation; (3) Location of Leased Land; (4) Terms of Agreement; (5) Grant of Rights; (6) Financial Compensation; (7) Non-Monetary Benefits; (8) Other Forms of Compensation; (9) Communications Between Parties and Affected Communities; (10) Community Land Management Committee; (11) Other Obligations of the Company; (12) Obligations of the Lessor/Landowner; (13) Availability of Information, Records, and Reports; (14) Environmental and Natural Resource Management Plan and Implementation; (15) Dispute Resolution and Community Grievance Mechanism; (16) Ownership of Company; (17) Subletting and Assignment of Rights; (18) Periodic Review; (19) Termination; (20) Force Majeure; (21) Notices; (22) Governing Law; (23) Entire Agreement; and (24) Signatures and Witnesses. *Id.* at 5-44.

¹⁴² *Id.* at 4.

¹⁴³ GOV.UK, International Development Funding, <https://www.gov.uk/international-development-funding/legend-piloting-responsible-land-related-investments> (last accessed 30 Mar. 2016).

¹⁴⁴ See para. 38 *supra* (discussing the New Alliance).

¹⁴⁵ LEGEND: piloting responsible land related investments, available at <http://landportal.info/partners/legend/kpmq-challenge-fund> (last accessed 30 Mar. 2016).

¹⁴⁶ See Responsible Investments in Property and Land – Landesa, <http://www.landesa.org/what-we-do/ripl/> (last accessed 23 Apr. 2016); Three Phases of Playbook Development – Landesa, <http://www.landesa.org/what-we-do/ripl/playbooks/> (last accessed 23 Apr. 2016). The Playbooks are being prepared by Landesa, which also prepared the GCAP Recommendations Report, the GCAP Guidelines, and the Model Lease Agreement. See *supra* note 137 (regarding the GCAP initiative) and *infra* note 194 (providing more information on Landesa).

¹⁴⁷ USAID, Operational Guidelines for Responsible Land-Based Investment (2015), available at <http://www.usaidlandtenure.net/documents/operational-guidelines-responsible-land-based-investment>.

relevant instruments.¹⁴⁸ The Operational Guidelines seek to describe best practices following the lifecycle of an investment.¹⁴⁹

64. Regarding contractual provisions, the Operational Guidelines recognise that land investment acquisition agreements¹⁵⁰ will likely follow a standard format,¹⁵¹ but provide additional recommendations.¹⁵² The Guidelines, however, also recognise that they are “not intended to provide a template for structuring a project contract or a benefits or community development

¹⁴⁸ *Id.* at 1.

¹⁴⁹ *Id.* 5-7; see also note 222 *infra* (laying out the five stages in an investment’s lifecycle). The Operational Guidelines also offer strategies for the mitigation of risks, including: (a) ensure neutrality in discussions, dialogue, and negotiations; (b) develop a robust stakeholder analysis and stakeholder engagement framework; (c) embrace sustained project sensitization and information sharing; (d) hold bilateral and collective dialogues with relevant public and private sector stakeholders, and with traditional authorities and community members; (e) build solutions from the grassroots up by engaging local people; (f) support regular and extensive community consultations and engagements, use face-to-face interactions and virtual engagements; (g) build strategic alliances with local champions; (h) debrief teams regularly and revise strategies as needed; and, (i) ensure comprehensive documentation that is shared with stakeholders.

¹⁵⁰ Regarding models for land acquisition, which are to be used only if an alternative to acquisition is not viable, the Operational Guidelines identifies positive and negative aspects for the following types: (a) concession; (b) direct purchase; (c) fixed-price lease; and (d) land for equity or other benefit-sharing arrangement. *Id.* at 40-41.

¹⁵¹ *Id.* at 46 (“specifying, among other things: parties to the agreement, obligations of each party, term/duration of the contract, termination provisions, location of the parcel/s, compensation and payment terms, renegotiation terms, provisions for assignment of rights, indemnity terms, notice, breach of contract provisions, and dispute resolution provisions”).

¹⁵² These recommendations include the following:

- Consider phased acquisition if, after careful consideration and efforts to keep acquisition to the minimum amount possible, the area being acquired remains large. In some cases, it may be more economically and socially expedient to acquire rights to a smaller area. As production is scaled, so could access to additional tracts of land.
- Specify how project lands will be administered and managed (e.g., specify community representation on, and responsibilities for, project oversight committees).
- Specify how the project will interact with governance institutions at the local, regional, and national levels.
- Identify any rights the community, groups, or individuals will retain (e.g., easements, use of roads, water sources, grazing) and for how long (e.g., only until the project begins, or during its operations).
- Create protocols for voluntary information sharing.
- Specify how decision-making authority will be allocated among local groups or representatives.
- Specify how negative impacts will be mitigated (e.g., if new water holes will be provided if traditional water sources are blocked, if the investor will provide some pastures or some crop lands). This should include provisions for environmental monitoring and rehabilitation to ensure land is returned in good condition.
- Specify what grievance mechanisms will be available.
- Specify whether the investor will post bonds or other guarantees in case of malfeasance or failure to meet obligations.
- Identify methods and processes for the transfer or assignment of rights under the contract.
- Specify any resettlement procedures and related compensation, however, resettlement should be a last resort, and considered only in extreme cases.
- Consider adopting collaborative contracting models that provide meaningful opportunities for women and men in the community to partner more directly in the project, while sharing risks and benefits.
- Specify the value of project benefits (e.g., jobs created, infrastructure developed or improved) if compensation is being taken into account. Be careful when structuring this contract feature to ensure that project benefits flow equitably to those most affected.
- Ensure that grievance or other dispute resolution mechanisms are accessible (particularly to women, indigenous peoples and other vulnerable groups) and transparent.
- Identify and provide clear language related to remedies in case of contract breach.
- Specify how progress against community commitments will be monitored and reported (such as in annual reports). *Id.* at 46-47.

agreement” and that they are primarily targeted to private sector companies operating in one of the New Alliance countries.¹⁵³

6. Other State initiatives

65. Various other States have position papers or other guidance available which may be of assistance. These include, for example, Canada’s International Development Research Centre’s work on the theme of food and agriculture,¹⁵⁴ China’s Ministry of Commerce and Ministry of Environmental Protection’s Guidelines for Environmental Protection in Foreign Investment and Cooperation;¹⁵⁵ the Japan International Cooperation Agency’s Position Paper on Agriculture and Rural Development;¹⁵⁶ the Norwegian Agency for Development Cooperation’s work on theme on agriculture and food security;¹⁵⁷ and the Swiss Agency for Development and Cooperation’s work on the theme on responsible land governance.¹⁵⁸

66. In all, the various State initiatives cover, to varying extents, the private law aspects of land investment contracts. The GCAP initiative, as well as the Technical Committee on Land Tenure and Development’s Operational Guide and USAID’s Operational Guidelines, provide detailed legal guidance, but for different purposes.¹⁵⁹ Such guidance, nevertheless, could serve as a basis for preparation of an instrument on land investment contracts.

C. Non-profit and private sector

67. There are many non-profit and private sector initiatives in the area of land investment. This subsection surveys (1) non-profit initiatives and (2) private sector initiatives respectively.

1. Non-profit initiatives

(a) Columbia Center on Sustainable Investment

68. The Columbia Center on Sustainable Investment (CCSI), a joint centre of Columbia Law School and the Earth Institute at Columbia University, focuses on sustainable international investment and has three main initiatives relevant to land investment contracts.¹⁶⁰ First, the Open Land Contracts database, organised by CCSI, the World Bank and UKaid, is a repository of publicly

¹⁵³ *Id.* at 2.

¹⁵⁴ International Development Research Center, http://www.idrc.ca/EN/Themes/Food_and_Agriculture/Pages/default.aspx (last accessed 30 Mar. 2016).

¹⁵⁵ Notification of the Ministry of Commerce and the Ministry of Environmental Protection on Issuing the Guidelines for Environmental Protection in Foreign Investment and Cooperation (1 Mar. 2013), available at <http://english.mofcom.gov.cn/article/policyrelease/bbb/201303/20130300043226.shtml> (establishing Guidelines for Chinese enterprises operating abroad “to further regularize their environmental protection behaviors in foreign investment and cooperation activities, timely identify and prevent environmental risks, guide enterprises to actively perform their social responsibilities of environmental protection, set up good international images for Chinese enterprises, and support the sustainable development of the host country” and addressing *inter alia* impact assessments and project monitoring).

¹⁵⁶ Japan International Cooperation Agency, Position Paper on Agriculture and Rural Development (13 Mar. 2013), available at [http://qwwweb.jica.go.jp/km/FSubject1201.nsf/3b8a2d403517ae4549256f2d002e1dcc/5f660159a9c0b19b49257b510007f3ea/\\$FILE/position_paper_en.pdf](http://qwwweb.jica.go.jp/km/FSubject1201.nsf/3b8a2d403517ae4549256f2d002e1dcc/5f660159a9c0b19b49257b510007f3ea/$FILE/position_paper_en.pdf).

¹⁵⁷ Norwegian Agency for Development Cooperation, Agriculture, <https://www.norad.no/en/tema/klima-miljo-og-naturressurser/matsikkerhet/landbruk> (last accessed 30 Mar. 2016).

¹⁵⁸ Swiss Agency for Development and Cooperation, Responsible land governance: a commitment to improve livelihoods, <https://www.eda.admin.ch/deza/en/home/themes-sdc/agriculture-food-security/responsible-land-governance.html> (last accessed 30 Mar. 2016).

¹⁵⁹ Specifically, the GCAP guidance is tailored to realise sound investments in Ghana, the Technical Committee’s Guide is targeted to AFD Group officers, and USAID’s Operational Guidelines are targeted to the private sector.

¹⁶⁰ See Columbia Center on Sustainable Investment, About us, <http://ccsi.columbia.edu/about-us/our-mission/> (last accessed 30 Mar. 2016).

available contracts for large-scale land, agriculture, and forestry projects.¹⁶¹ At this time, it contains 72 contracts from nine countries.¹⁶² Preliminary research on these contracts and provisions indicate that their quality and level of detail vary significantly.

69. Second, as accompanying texts for the Open Land Contracts database, the International Senior Lawyers Project (ISLP)¹⁶³ has prepared, in collaboration with CCSI, guides for understanding contracts that are made available on that online repository. This includes one entitled “Guide to Land Contracts: Agricultural Projects,” which aims to assist users “in understanding the technical provisions found in these contracts”.¹⁶⁴ To do so, it provides explanations for common provisions and a glossary of key legal and technical terms.¹⁶⁵ The Guide, however, notes that it “is not a guide to negotiating contracts, and does not provide model provisions.”¹⁶⁶

70. Third, the Negotiations Portal for Host Country Governments, also known as the Negotiations Support Portal, is an online platform which is supported by the CONNEX Initiative and seeks to assist “host countries in their planning, preparation for, negotiation, monitoring and implementation of complex investment projects”.¹⁶⁷ The Negotiations Support Portal, in organising existing resources, breaks down the process of land investment into a four stage roadmap and, for each step per stage, the Portal provides a description, key tools, useful resources, and support a listing of support providers.¹⁶⁸ In the contract negotiation stage, for example, the Portal advises that “[a] contract which is well-drafted, responsive to changing circumstances and fair to both parties is most likely to be sustainable and mutually beneficial to both parties.”¹⁶⁹

¹⁶¹ Open Land Contracts, available at <http://www.openlandcontracts.org/> (last accessed 30 Mar. 2016).

¹⁶² These figures are as of March 2016 and include the following countries: Cambodia, Cameroon, Democratic Republic of Congo, Ethiopia, Liberia, Sierra Leone, South Sudan and Timor Leste.

¹⁶³ For more information about ISLP, see <http://www.islp.org/>.

¹⁶⁴ ISLP, Guide to Land Contracts: Agricultural Projects (Mar. 2016) at 4, available at <http://ccsi.columbia.edu/2016/03/09/guide-to-land-contracts-agricultural-projects/>.

¹⁶⁵ The areas covered include: definitions; parties; contract term; contract area; rights granted and obligations imposed; conduct of operations; infrastructure; security; representations and warranties; capitalisation and permitted debt; rental fees, taxes, and other payments; environmental obligations (e.g. impact assessments and management plans); social obligations (e.g. consultations, resettlement, local employment and procurement, community agreements, and grievance mechanisms); monitoring and audits; anti-bribery and corruption; assignment and novation; change of control; confidentiality and publicity; stabilisation; dispute resolution force majeure; indemnification; termination; disposition of assets; notice; amendments and periodic review; and governing law. *Id.* at 7-29.

¹⁶⁶ *Id.* at 4 (referring users “seeking either a negotiating guide or model provisions” to the IISD Guide to Negotiating Investment Contracts for Farmland and Water which is discussed in paragraphs 73-75 below); see also Guide to Forestry Contracts: Understanding Key Provisions (Oct. 2015), available at <https://s3-us-west-2.amazonaws.com/openlandcontracts/Guides/Guide+to+Forestry+Contracts.pdf>.

¹⁶⁷ The Negotiations Portal, available at <http://negotiationsupport.org/about> (last accessed 30 Mar. 2016). The Negotiations Portal is supported by the G7’s CONNEX initiative. It covers not just agriculture, but includes broadly issues related natural resources, such as mining and oil and gas.

¹⁶⁸ See para. 93 *infra* (setting forth Negotiations Portal’s four-stage roadmap).

¹⁶⁹ See Negotiation Portal, <http://negotiationsupport.org/roadmap/negotiate-contract-draft-negotiate-and-review-contractual-provisions> (last accessed 30 Mar. 2016). In addition, CCSI also makes available other resources, particularly regarding extractive industries, which could potentially be informative on land investment contracts to the extent that they address common issues. See “Mining Contracts: How to read and understand them” and “Oil Contracts: How to read and understand them” (2013), available at <http://www.resourcecontracts.org/page/resources>; “Natural Resource Contracts as a Tool for Managing the Mining Sector”, available at <http://ccsi.columbia.edu/2015/07/23/natural-resource-contracts-as-a-tool-for-managing-the-mining-sector/>; “Local Content Laws & Contractual Provisions” (2015), available at <http://ccsi.columbia.edu/work/projects/local-content-laws-contractual-provisions/> (last accessed 30 Mar. 2016).

(b) Environmental Law Alliance Worldwide

71. The Environmental Law Alliance Worldwide (ELAW)¹⁷⁰ published in 2013 a guidance document entitled “Natural Resource Contracts: A Practical Guide”¹⁷¹. ELAW prepared the Guide to “help public-interest advocates understand natural resource contracts”¹⁷² and it provides analysis of risks regarding particular contractual terms, including by offering examples of contractual texts. The Guide treats extractive and agricultural contracts together, though it provides more examples regarding the former, and addresses a range of issues which may arise in connection with such contracts.¹⁷³

(c) International Institute for Environmental Development

72. The International Institute for Environmental Development (IIED) is an international development and environment policy research organisation.¹⁷⁴ IIED has worked extensively on land investment issues and has published a wealth of resources on such issues, including, for example, the following:

- “Foreign investment, law and sustainable development: A handbook on agriculture and extractive industries”, which provides guidance on investment preparedness and promotion, getting a fair economic deal, addressing social and environmental issues, placing people at the centre of investment processes, and looking at the bigger picture in using the law to make foreign investment work for sustainable development;¹⁷⁵
- “Land deals and investment treaties: Visualising the interface” and “Land rights and investment treaties: Exploring the interface”, which explores and analyses the influence of international investment treaties on land acquisitions and rights and notes the importance of being aware of such treaties in connection with drafting land investment contracts;¹⁷⁶
- “Following the Money: An advocate’s guide to securing accountability in agricultural investments”, which provides guidance in the broader context of investment projects and covers potential pit-falls which may require attention, as well as providing a framework for advocates to influence investment projects;¹⁷⁷

¹⁷⁰ ELAW was established in 1989 to help “communities speak out for clean air, clean water, and a healthy planet.” See <https://www.elaw.org/> (last accessed 30 Mar. 2016).

¹⁷¹ ELAW, Natural Resource Contracts: A Practical Guide (Nov. 2013), available at https://www.elaw.org/system/files/Natural_Resource_Contracts_Guide.pdf.

¹⁷² *Id.* at 1.

¹⁷³ *Id.* (including the following sections and issues: (1) where & when (e.g. contract negotiation, contract term, contract area, public access to contract area, land rights, resource company activities, use of natural resources in contract area, and infrastructure); (2) environmental & social (e.g. human rights, environmental protections, employment); (3) fiscal (e.g. fiscal provisions, common tax avoidance tactics, capital structure, local content, stabilisation, contract renegotiation, and most favourable treatment); (4) transparency (e.g. confidentiality and maintaining records); and (5) dispute resolution (e.g. resolving conflicts, the role of investment treaties, and grievance mechanisms).

¹⁷⁴ See IIED, <http://www.iied.org/> (last accessed 30 Mar. 2016).

¹⁷⁵ Cotula, Foreign investment, law and sustainable development: A handbook on agriculture and extractive industries (2016), available at <http://pubs.iied.org/12587IIED.html?c=land>.

¹⁷⁶ Cotula and Berger, Land deals and investment treaties: Visualising the interface (2015), available at <http://pubs.iied.org/12586IIED.html?c=land>; Cotula, Land rights and investment treaties: Exploring the interface (2015), available at <http://pubs.iied.org/12578IIED.html?c=land>.

¹⁷⁷ Blackmore et al., Following the Money: An advocate’s guide to securing accountability in agricultural investments (2015), available at <http://pubs.iied.org/12583IIED.html?c=land>.

- “Understanding agricultural investment chains: Lessons to improve governance”, which was jointly published with FAO to promote implementation of the VGGT and offers guidance by drawing on case studies to set forth an “investment chains” approach to corporate structures, governments communities and intermediaries, and business partners;¹⁷⁸
- “Land deals in Africa: What is in the contracts?”, which analyses land deals across Africa to examine land investment contracts, the parties to those contracts, their disequilibrium, and the need for safeguards for local populations;¹⁷⁹ and
- “Land grab or development opportunity? Agricultural investment and international land deals in Africa”, which was prepared in collaboration with FAO and IFAD, examines trends in land deals in Africa, analyses characteristics of such deals (e.g. participants and process, nature of land transfers, economic benefits, requirements around production models and marketing, investment protection, land takings, and remedies for affected people) and offers recommendations for stakeholders.¹⁸⁰

(d) International Institute for Sustainable Development

73. The International Institute for Sustainable Development (IISD) is an independent, non-profit organisation which seeks to provide “practical solutions to the challenge of integrating environmental and social priorities with economic development.”¹⁸¹ In 2014, it published “The IISD Guide to Negotiating Investment Contracts for Farmland and Water”, which was prepared as “a legal and policy tool for governments and communities that are involved in negotiating investment contracts with foreign investors.”¹⁸² Specifically focused on long-term leases of land, the Guide is based on the review of contracts, including 71 from Africa, six from Asia and one from Latin America.¹⁸³

74. The Guide is broken into two parts. The Guide’s first part is dedicated to preparations for negotiations. It examines the legal framework for investment contracts, in particular discussing the relationship between such contracts and domestic laws and investment treaties, negotiating dynamics, and issues in the pre-negotiation phase.¹⁸⁴

¹⁷⁸ Cotula and Blackmore, *Understanding agricultural investment chains: Lessons to improve governance* (2014), available at <http://pubs.iied.org/12574IIED.html?c=land>.

¹⁷⁹ Cotula, *Land deals in Africa: What is in the contracts?* (2011), available at <http://pubs.iied.org/12568IIED.html?k=contracts&r=p> (2011).

¹⁸⁰ Cotula and Blackmore, *Understanding agricultural investment chains: Lessons to improve governance* (2014), available at <http://pubs.iied.org/12574IIED.html?c=land>.

¹⁸¹ See IISD, <http://www.iisd.org/about/about-iisd> (last accessed 30 Mar. 2016).

¹⁸² Smaller et al., *The IISD Guide to Negotiating Investment Contracts for Farmland and Water* (Nov. 2014), available at http://www.iisd.org/sites/default/files/publications/iisd-guide-negotiating-investment-contracts-farmland-water_1.pdf (IISD Guide).

¹⁸³ *Id.* 3

¹⁸⁴ More specifically, the IISD Guide provides the following steps for the pre-negotiation phase:

- (1) Identifying the country’s rural development and food security needs.
- (2) Understanding and mapping the land tenure and water rights systems at the proposed site.
- (3) Understanding the economics behind the proposed project, including the value of the natural resources.
- (4) Conducting a thorough screening of the investor. This includes assessing the investors’ financial capacity, business plan, technical expertise, agricultural experience, experience in dealing with local communities and their ability to conduct impact assessments.
- (5) Engaging with the community living on and around the proposed project site.
- (6) Conducting a high-level screening of potential economic, social and environmental impacts and defining the scope of issues to be covered in a more rigorous assessment.

75. The Guide's second part contains a model contract.¹⁸⁵ It provides model provisions and accompanying commentaries on various issues, including: legal definitions; tenure and ownership (e.g. term and rights, exclusion of mineral rights, inspection of project site, books, records and other information, and security); feasibility study and impact assessments (including business and management plans); financial issues (e.g. rent and royalties, tax incentives and customs duties, accounts and records, audit, debt-equity ratio, and transfer pricing); economic and social development obligations (e.g. employment, outgrower schemes, creation of processing facilities, local business development plan, and community development agreements); environmental obligations (e.g. domestic environmental laws, commitment to continuous improvement of production methods, water-use permits and fees, soil management, and pollution and chemical management); stabilisation provisions; grievance mechanisms and dispute settlement; disclosure; periodic review; assignment; termination; and monitoring and enforcement (e.g. transparency and public information and reporting, monitoring, and implementation).¹⁸⁶ Overall, the IISD Guide is a significant contribution to land investment contracts as it provides both model provisions and references to applicable international instruments such as the VGGT and IFC Performance Standards.

76. In addition, IISD has prepared other publications on the theme of agriculture, water and investment, including, for example:

- "Water-Energy-Food Nexus and Agricultural Investment: A sustainable development guidebook", which provides a framework for the design and management of land investments that increase water, energy, and food security;¹⁸⁷
- "The Global Response to Foreign Investment in Agriculture", which provides an overview, in the form of a policy brief, on various global initiatives on land investment;¹⁸⁸
- "Investment Contracts for Farmland and Water: 10 Steps", which identifies 10 key steps for stakeholders to follow when negotiating a contract for land or water with foreign investors;¹⁸⁹ and
- "Foreign Investment in Agriculture: Some Critical Contract Issues", which advocates for investment contracts to be embedded within national legal systems and for a contracting approach that respects local community needs, customs, and processes.¹⁹⁰

¹⁸⁵ The IISD Guide is inspired by the International Bar Association's "Model Mine Development Agreement (MMDA 1.0)" initiative. See Model Mine Development Agreement (MMDA 1.0), available at <http://www.mmdaproject.org/>. See IISD Guide at 8 (The MMDA "is an important reference for people drafting contracts for agricultural investments. There are some striking similarities in the contracts that are being signed by investors from the mining sector and those seeking land for agricultural production. They both involve transfer of land to the investor with the corresponding concerns about rights of local land users. They both involve significant use of water resources and potential pollution of waterways. They both include financial considerations, including payment of rent, royalties, customs duties, taxation, financing and accounting. They also both include trade considerations, including applicable tariffs, allowances for importing machinery and manpower, and the export of goods.").

¹⁸⁶ See IISD Guide, pt. 2, *supra* note 182.

¹⁸⁷ IISD, Water-Energy-Food Nexus and Agricultural Investment: A sustainable development guidebook (2014), available at <https://www.iisd.org/library/water-energy-food-nexus-and-agricultural-investment-sustainable-development-guidebook>.

¹⁸⁸ C. Smaller, The Global Response to Foreign Investment in Agriculture (2014), available at https://www.iisd.org/sites/default/files/publications/global_response_foreign_investment_ag_en.pdf.

¹⁸⁹ C. Smaller, Investment Contracts for Farmland and Water: 10 Steps (2013), available at <https://www.iisd.org/library/investment-contracts-farmland-and-water-10-steps>.

¹⁹⁰ H. Mann, Foreign Investment in Agriculture: Some Critical Contract Issues (2012), available at http://www.iisd.org/pdf/2012/uniform_law_review_foreign_inv_ag_2012.pdf.

(e) Other non-profit initiatives

77. There are numerous other NGOs that provide policy beliefs, recommendations, and advocacy on land investment. They include, for example, the International Land Coalition,¹⁹¹ the Land Matrix,¹⁹² the Land Portal Foundation,¹⁹³ Landesa,¹⁹⁴ Namati,¹⁹⁵ Oxfam,¹⁹⁶ and the World Farmers Organisation.¹⁹⁷ In addition, other NGOs and voluntary organisations often establish responsible business standards and provide certifications for their respective industry.¹⁹⁸

78. In all, perhaps due to the relative absence of comprehensive legal guidance on land investment contracts from international Organisations, non-profits have stepped in to provide guidance in this field. That guidance, moreover, comes in different forms, including model provisions, guidance documents, and contracts and contractual provisions with respect to which non-profits have played a critical role in facilitating their availability.

¹⁹¹ The International Land Coalition, the Secretariat of which is hosted by IFAD, is an international network of civil society and farmers' organisations, as well as intergovernmental Organisations, that seeks "to realise land governance for and with people at the country level, responding to the needs and protecting the rights of women, men and communities who live on and from the land." See International Land Coalition, <http://www.landcoalition.org/en/our-strategy-2016-21> (last accessed 30 Mar. 2016).

¹⁹² The Land Matrix, an online public database on land deals, is an observatory of decisions over land and investment around the world. See Land Matrix, <http://www.landmatrix.org/en/> (last accessed 30 Mar. 2016). Launched in 2012, it monitors deals "[e]ntail[ing] a transfer of rights to use, control or ownership of land through sale, lease or concession" that cover an area of 200 hectares or more and have been concluded since 2000. See <http://www.landmatrix.org/en/about/#what-is-a-land-deal> (last accessed 30 Mar. 2016). It currently covers, for example, more than 1200 land deals regarding transnational investment in agriculture, but Land Matrix notes that its "dataset is inherently unreliable" and addresses on its website the reliability of the data. See <http://www.landmatrix.org/en/about/#how-reliable-is-the-data> (last accessed 30 Mar. 2016).

¹⁹³ The Land Portal Foundation, a public benefit organisation based in the Netherlands and hosted by the University of Groningen, administers the Land Portal website, which "allows for the collection, sourcing, and searching of otherwise fragmented and inaccessible data and information on land governance and land use from diverse sources, produced by governments, academia, international organizations, indigenous peoples and NGOs." See About the Land Portal, <http://landportal.info/about> (last accessed 23 Apr. 2016).

¹⁹⁴ Landesa, a rural development institute, has prepared, for example, an issue brief entitled "Land rights and agricultural productivity", which emphasises the value of property rights to land for rural people and its relationship to agricultural productivity. See "Land rights and agricultural productivity" (2012), available at <http://www.landesa.org/wp-content/uploads/Landesa-issue-brief-on-land-rights-and-agricultural-productivity.pdf>.

¹⁹⁵ Namati, a grassroots legal advocates organisation, has published works with a particular focus on local community empowerment, including a "Community Guide: Protecting Community Lands and Resources", which provides guidance for local communities in building relationships with others. See Namati, "Community Guide: Protecting Community Lands and Resources" (2013), available at <http://www.sdiliberia.org/sites/default/files/publications/SDI-NAMATI%20Community%20Guide.pdf>; "Community Land Protection Facilitators Guide" (2016), available at <https://namati.org/resources/community-land-protection-facilitators-guide/> (offering guidance for "advocates working to help communities protect their customary claims and rights to land and natural resources").

¹⁹⁶ Oxfam is an international confederation of 17 organisations working in more than 90 countries on *inter alia* inequality, natural resources and sustainability issues. See Oxfam International, <https://www.oxfam.org/en/explore/issues-we-work-on> (last accessed 30 Mar. 2016).

¹⁹⁷ The World Farmers' Organisation (WFO) "aims to bring together all the national producer and farm cooperative organisations with the objective of developing policies which favour and support farmers' causes in developed and developing countries around the world." See WFO, About, www.wfo-oma.com/about-wfo.html (last accessed 30 Mar. 2016); <http://www.wfo-oma.com/news/feeding-the-planet-energy-for-life-the-farmers-perspective.html> (last accessed 30 Mar. 2016).

¹⁹⁸ See, e.g., Forest Stewardship Council (FSC), <https://ic.fsc.org> (last accessed 30 Mar. 2016) (setting out best practices through – and by certifying compliance with – the FSC Principles and Criteria, which address (1) compliance with laws; (2) workers' rights and employment conditions (including having mechanisms for resolving grievances and for providing fair compensation); (3) indigenous peoples' rights; (4) community relations; (5) benefits from the forest; (6) environmental values and impacts; (7) management planning; (8) monitoring and assessment; (9) high conservation values; and (10) implementation of management activities); Round Table on Responsible Soy (RTRS), <http://www.responsiblesoy.org> (last accessed 30 Mar. 2016) (promoting responsible production, processing, and trading of soy through *inter alia* the RTRS Standard for Responsible Soy Production and the RTRS Grievances Procedure); and Roundtable for Sustainable Palm Oil (RSPO), www.rspo.org (last accessed 30 Mar. 2016) (providing eight Principles for growers to be RSPO-certified, as well as related criteria, indicators, and guidance).

2. Private-sector initiatives

79. There are also significant private sector initiatives relevant to land investment. Such initiatives include important commitments on transparency and self-regulation.

80. First, regarding transparency, more and more contracts are becoming publically available, including by way of private sector transparency initiatives. As noted above, there are now online databases of land contracts, such as Open Land Contracts for large-scale agricultural and forestry projects and Resource Contracts for petroleum and mineral contracts.¹⁹⁹ In general, more contracts relating to extractive industries are available, due in part to efforts by the Extractive Industries Transparency Initiative.²⁰⁰

81. Second, regarding self-regulation, there are various initiatives which warrant consideration in this context. Such initiatives include, for example:

- “Principles for Responsible Investment”, which is an investor initiative in partnership with the UN Environment Programme’s Finance Initiative and the UN Global Compact that has developed six Principles for Responsible Investment, seeks “to understand the investment implications of environmental, social and governance issues and to support signatories in intergrating these issues into investment and ownership decisions”, and currently has more than 1,400 signatories from over 50 countries;²⁰¹
- “Principles for Responsible Investment in Farmland”, which is an initiative launched by five pension funds, subsequently opened up to equity funds, that establishes the following five principles for such investment: (1) promote environmental sustainability; (2) respect labour and human rights; (3) respect existing land and resource rights; (4) uphold high business and ethical standards; and (5) report on activities and progress;²⁰²
- “Equator Principles” which are a ten-principle risk management framework adopted by financial institutions for determining, assessing and managing environmental and social risk in projects and providing a minimum standard for due diligence to support responsible risk decision-making;²⁰³

¹⁹⁹ Open Land Contracts, see para. 69 *supra*; Resource Contracts, <http://www.resourcecontracts.org> (last accessed 30 Mar. 2016).

²⁰⁰ The Extractive Industries Transparency Initiative is “a global Standard to promote open and accountable management of natural resources.” For further information, see <https://eiti.org/document/factsheet> (last accessed 30 March 2016). For example, the Liberia Extractive Industries Transparency Initiative is committed to disclosing contracts, which are available at <http://www.leiti.org.lr/contracts-and-concessions.html>. See also Comité Technique de Revue des Titres et Conventions Miniers, <http://www.contratsminiersguinee.org/about/projets.html> (last accessed 30 Mar. 2016) (making available extractive industry contracts signed by the Republic of Guinea since independence in 1958).

²⁰¹ Principles for Responsible Investment at 4, available at http://d2m27378y09r06.cloudfront.net/viewer/?file=wp-content/uploads/PRI_Brochure_2015.pdf (committing, under the Principles, to (1) incorporate environmental, social, and corporate governance (ESG) issues into investment analysis and decision-making processes; (2) be active owners and incorporate ESG issues into ownership policies and practices; (3) seek appropriate disclosure on ESG issues by the entities in which signatories invest; (4) promote acceptance and implementation of the Principles within the investment industry; (5) work together to enhance effectiveness in implementing the Principles; and (6) report on activities and progress towards implementing the Principles); see also *supra* note 62 and accompanying text (regarding the UN Global Compact).

²⁰² See Responsible Investment in Farmland, available at <http://www.unpri.org/viewer/?file=wp-content/uploads/Guidance-for-Responsible-Investment-in-Farmland.pdf>.

²⁰³ The ten Principles relate to: (1) Review and Categorisation; (2) Environmental and Social Assessment; (3) Applicable Environmental and Social Standards; (4) Environmental and Social Management System and Equator Principles Action Plan; (5) Stakeholder Engagement; (6) Grievance Mechanism; (7) Independent Review; (8) Covenants; (9) Independent Monitoring and Reporting; and (10) Reporting and Transparency. See Equator Principles (2013), available at http://www.equator-principles.com/resources/equator_principles_iii.pdf. As of March 2016, 82 financial institutions in 36 countries have adopted the Equator Principles, covering over

- “The Global Reporting Initiative”, which aims to facilitate transparency and accountability by companies, as well as some governmental and non-profit organisations, and to provide stakeholders with a comparative framework with which to assess the value of disclosed information;²⁰⁴ and
- “Respecting Land and Forest Rights: A Guide for Companies”, which was produced by the Interlaken Group, a forum composed of representatives of companies, investors, international organisations, and civil society groups, with support from the Rights and Resources Initiative “to support companies aiming to align their operations with the [VGGT]”.²⁰⁵

82. These initiatives, among others, address aspects highly relevant to agricultural investment and provide the private sector’s perspective upon such aspects.²⁰⁶

III. FEASIBILITY OF A POSSIBLE UNIDROIT INSTRUMENT

83. Having taken stock of the existing initiatives, the Secretariat believes that a possible UNIDROIT instrument on land investment contracts would be both of added value and highly feasible, primarily for the following two reasons. First, UNIDROIT could prepare an instrument usefully supplementing the work developed thus far through the existing initiatives. Second, such preparation would be highly feasible because existing initiatives provide a solid basis for developing that instrument, in particular for considering and determining its scope, content and form. Each reason is described more fully below.

A. Adding value to existing international Organisation initiatives

84. A possible UNIDROIT instrument on the private law aspects of land investment contracts would be of additional benefit. Existing initiatives by international Organisations do not provide detailed legal guidance on such aspects of land investment contracts, and there remains significant space for a meaningful contribution by UNIDROIT.

85. The majority of initiatives provide high-level principles and, to varying extents, related policy guidance that is to be followed to ensure that land investments are made in an equitable, sustainable, and successful way.²⁰⁷ Indeed, no international Organisation has provided comprehensive legal guidance on the private law aspects of land investment contracts, though State, NGO, and private sector initiatives have made important contributions in this regard.²⁰⁸ With respect to the VGGT, for example, the Technical Guide on agricultural investment briefly addresses such aspects, but does not provide comprehensive guidance or model provisions, instead offering a brief, one-page checklist of “necessary information” to be included in a land lease adapted from the

70 percent of international project finance debt in emerging markets. See <http://www.equator-principles.com/index.php/about-ep/about-ep> (last accessed 30 Mar. 2016).

²⁰⁴ See www.globalreporting.org (last accessed 30 Mar. 2016).

²⁰⁵ The Interlaken Group and the Rights and Resources Initiative (RRI), *Respecting Land and Forest Rights: A Guide for Companies* (2015), available at <http://www.interlaken.org/downloads/Guide.pdf>.

²⁰⁶ In addition, although focused on extractive industries, the International Council on Mining and Metals, which “bring[s] together 23 mining and metals companies as well as 34 national and regional mining associations and global commodity associations to address core sustainable development challenges”, has produced guides – addressing *inter alia* company-community relations and lessons learned from land acquisitions and resettlement – which may be useful. See International Council on Mining and Metal, <http://www.icmm.com/> and <http://www.icmm.com/publications> (last accessed 30 Mar. 2016).

²⁰⁷ See, e.g., *supra* note 17 (PRAI Principles), paras. 16-17 (VGGT), paras. 20-21 (CFS-RAI Principles), para. 31 (Minimum principles and measures to address human rights challenge and Principles for responsible contracts).

²⁰⁸ See, e.g., paras. 56 (Technical Committee Operational Guide), 59-61 (GCAP Recommendations, Guidelines, and Model Lease Agreement), 63-64 (USAID Operational Guidelines), 69-70 (CCSI’s Guide to Land Contracts and Negotiations Portal), 71 (ELAW Practical Guide), 73-75 (IISD Guide).

work of Welthungerhilfe and referring to the IISD Guide.²⁰⁹ The Technical Guide for lawyers, moreover, provides some guidance on private law aspects, but does not offer model provisions.²¹⁰

86. There is, moreover, a recognised need for further work. The lack of detailed guidance for implementation of the various principles arising from existing initiatives has been noted.²¹¹ Many of the existing initiatives, moreover, acknowledge that further work is necessary, both expressly and impliedly.²¹² As recognised, for instance, in the background section to a zero draft of the CFS-RAI Principles, those Principles:

*are neither detailed guidelines nor legal norms. Rather, they are a reference point for States and other stakeholders, to reinforce the validity of existing legal frameworks at country or international levels, and potentially develop new legal positions. In addition, they presuppose a number of broader principles and values that should inspire any specific guidelines. These include human rights (understood as universal, indivisible, interrelated and interdependent), including in particular the right to adequate food. They also build on the human rights and good governance principles of equity and non-discrimination, gender equality, social inclusion, accountability, the rule of law, transparency and meaningful participation in decision-making.*²¹³

As another example, the World Bank Group's discussion paper on "Investment Contracts for Agriculture: Maximizing Gains and Minimizing Risks" acknowledges that the "foundation of knowledge" set forth in that paper "should be translated into concrete and detailed provisions in contracts or through other legal frameworks and mechanisms applying to investment."²¹⁴ The World Bank Group's guide to "Investor Targeting in Agribusiness", moreover, emphasises *inter alia* "[e]stablishing draft lease and concession documents that clearly state the rights and obligations of all parties, incorporate social and environmental safe guards, and support project implementation monitoring and revocation clauses" and "[s]trengthening the governance framework around specific agribusiness subsectors, investment project monitoring capacity (including E&S issues), grievance mechanisms, and so on."²¹⁵

²⁰⁹ See *supra* para. 18, in particular note 32.

²¹⁰ See *supra* para. 19.

²¹¹ See, e.g., *supra* note 188 (concluding that "[t]he result of all these efforts is a rich and diverse body of information and guidance for governments, investors and communities on how to make investment yield better results for all. Importantly, the initiatives that have been launched since 2009 are mutually supportive. There is a broad consensus on what is needed to enhance the positive outcomes from investment and reduce the negative impacts. The challenge for the principles is that they are not specific enough to implement and are voluntary. The greatest challenge to the financing initiatives is their ability to genuinely support and invest in small-scale farmers. The task now is to translate the principles into specific reforms and turn them into concrete action on the ground. IISD is committed to making this happen.") (emphasis added); EBG Capital, "Responsible Investments in Agriculture: Overview of Private Sector-related Initiatives" (Aug. 2014) at 8, available at http://ebg-capital.com/pdf/Responsible_investments_in_agriculture_Overview_final.pdf (noting the "[l]ack of detailed guidance on how the VGGT can be implemented on the ground by the different players"); Narula, *The Global Land Rush: Markets, Rights, and the Politics of Food*, 49 STANFORD J. INT. L. 101, 153 (2013) (observing that a "problem with the [CFS-]RAI Principles' approach to consultations is that significant problems in the implementation and enforcement of consultation-related rules and outcomes-i.e., contracts-are insufficiently addressed.").

²¹² See, e.g., *supra* notes 33 at 103-104 (VGGT Technical Guide for lawyers); 51 (Investment Contracts for Agriculture: Maximizing Gains and Minimizing Risks), 55 (IFC Performance Standards), 58 (Guide to Investor Targeting in Agribusiness), 63 (Minimum principles and measures to address human rights challenge), 64 (Principles for responsible contracts), 70 (Framework and Guidelines on Land Policy in Africa), 72 (Guiding Principles on Large Scale Land Based Investments in Africa).

²¹³ CFS, Background document on Principles for responsible agricultural investment (rai) in the context of food security and nutrition, Zero Draft, at 2, http://www.fao.org/fileadmin/templates/cfs/Docs1112/rai/Principles_responsible_agricultural_investments_Background_Document_Zero_Draft.pdf.

²¹⁴ See para. 25 *supra*.

²¹⁵ See note 58 *supra*.

87. Accordingly, UNIDROIT could make a meaningful contribution by supplementing existing international Organisation initiatives and preparing an instrument focused on the private law aspects of land investment contracts. There is currently no such instrument, and UNIDROIT could formulate it so that it is aligned to and furthers the many important initiatives already undertaken, in particular implementation of the VGGT and the CFS-RAI Principles.

B. Building upon existing initiatives renders potential work highly feasible

88. Although supplementation by UNIDROIT of existing initiatives would be of additional benefit, that conclusion does not imply that those initiatives are in any way lacking. Instead, those initiatives would render highly feasible UNIDROIT's preparation of an instrument operationalising, among others, the VGGT and the CFS-RAI Principles in the area of private law and land investment contracts as they provide a wealth of guidance and information from which UNIDROIT could draw to determine the instrument's proper scope, content, and form and to expedite its preparation.

1. Scope

89. The majority of existing initiatives have a broad scope, dealing with, for example, ranges of issues related to land investment, tenure or both. By contrast, those few initiatives which treat land investment contracts more specifically are in most instances tailored to land leases.²¹⁶ The existing initiatives addressing this point could be used to consider and determine what types of land investments the potential instrument should cover (e.g. concessions, leases, etc.). USAID's Operational Guidelines, for example, state the following in this regard:

[t]his guide does not endorse large-scale acquisitions of land. USAID strongly recommends that investors consider smaller-scale projects or alternatives that avoid or limit the transfer of land and resource rights, such as contract farming and smallholder out-grower schemes, in place of large-scale investments. Increasingly, research shows that these alternatives can lead to positive economic and social outcomes.

*This guide recognizes, however, that large-scale acquisitions are occurring, and will continue to occur, and in this context provides advice and highlights best practices relating to structuring such acquisitions in the most sustainable way possible.*²¹⁷

The IISD Guide, as another example, similarly provides that:

[i]mportantly, leasing farmland is not the only option for investment in agriculture. There are alternative farming and investments that have proven to be economically profitable and more socially and politically acceptable than large-scale land investments. They should be thoroughly explored before pursuing large-scale land deals, and incorporated in government investment strategies for the agriculture sector. Joint ventures, farmer-owned cooperatives or businesses, management contracts, contract farming or "outgrower schemes," although not without their own drawbacks, have become a preferred farming model for many agribusinesses and supermarket retailers. ... Nevertheless, the reality is that contracts are being signed between states and investors (or between local chiefs and investors). This guide provides options for

²¹⁶ See, e.g., *supra* paras. 61 (GCAP Model Lease Agreement) and 75 (IISD Guide's Model Contract for long-term lease of farmland).

²¹⁷ USAID Operational Guidelines, note 147 *supra* at 1-2 (also noting that "[s]ome out-grower and contract farming models have not performed as well as hoped. Therefore, in pursuing alternatives to large-scale acquisitions, it is important to identify the best models for your particular project").

*ensuring that such contracts contribute to long-term benefits for all stakeholders involved.*²¹⁸

90. Further to what types of land investments the potential instrument should cover, another consideration would also have to be with respect to land ownership. While in some States land may be privately owned, in other States, particularly developing countries, land may be State-owned. In the former situation, investors could negotiate, for example, land leases with private holders and related stakeholders. Whereas in the latter situation, investors could negotiate, for instance, concession agreements with the relevant government entity and related stakeholders.²¹⁹

91. Building on existing initiatives, the precise scope of the instrument could be limited to a particular type of land investment contracts or address a broader range of such contracts. In addition, a similar statement, such as those from USAID and IISD above, recommending and promoting alternatives to land acquisitions, such as contract farming, could be included and emphasised at the beginning of any possible instrument.²²⁰

2. Content

92. Various existing initiatives have offered both roadmaps for the land investment contracting process and lists of matters to be covered by the contracts themselves. With respect to the contracting process, the various approaches for setting forth and describing that process could be used to consider and determine the appropriate one to adopt and how such an approach should be tailored to best address private law aspects of land investment contracts.

93. There are numerous existing approaches. The World Bank Group's discussion paper on "Investment Contracts for Agriculture: Maximizing Gains and Minimizing Risks", for example, identifies the following three key stages in the contracting process: (1) preparing for contract negotiations; (2) drafting the contract; and (3) monitoring and enforcement.²²¹ CCSI's Negotiations Portal, however, adopts a four-stage roadmap, including: (1) setting the legal and policy framework (e.g. government policies and strategies, legislative and regulatory frameworks, and sector-wide analyses); (2) pre-negotiation (e.g. feasibility studies, impact assessments, and tender process and financial structure); (3) contract negotiation (e.g. prepare for the negotiations, assemble a negotiation team, develop a negotiation position, and contract negotiation); and (4) implementation & monitoring (e.g. monitoring, implementation, and grievance mechanisms).²²²

²¹⁸ IISD Guide, note 182 *supra* at 3. See also VGGT Technical Guide on agricultural investment, para. 18 *supra* (discussing inclusive investment models, such as contract farming, management contracts, tenant farming/sharecropping, joint ventures, and farmer-owned businesses and cooperatives).

²¹⁹ See Investment Contracts for Agriculture: Maximizing Gains and Minimizing Risks, *supra* note 49 (stating that "most often the contract will be between a national government and an investor; however, depending on the federal structure and land tenure system of a country, it may be between an investor and another party such as a state government, a communal leader, or a customary land holder"); see also *supra* note 139 (covering the main variants of land ownership in Ghana).

²²⁰ See also *supra* note 29 and accompanying text (setting forth similar statement from the Technical Guide on agricultural investment).

²²¹ See para. 25 *supra*.

²²² See para. 70 *supra* (regarding CCSI's Negotiations Support Portal); see also GCAP Guidelines, *supra* note 136 at 1-2 (laying out the following five phases: (1) preparing for commercial agricultural investment; (2) initial engagement between community and investor; (3) impact assessments; (4) negotiation and consent; and (5) monitoring and enforcement of the Agreement); USAID Operational Guidelines, *supra* note 147 at 5-7 (laying out the following five stages: (1) due diligence (e.g. mapping, impact assessments, understanding land tenure framework); (2) stakeholder engagement (to "raise awareness" and "consult"; (3) mapping ("to identify land claims, occupancy patterns, land uses, existing natural assets, and active land disputes"); (4) contract negotiations (to engage with a broad group of stakeholders in a transparent and participatory manner); and (5) project operations (to continue engagement, monitor, and establish grievance mechanisms)).

The Analytical Frameworks produced by the New Alliance and the Technical Committee on Land Tenure and Development could be useful in this regard as well.²²³

94. The approach chosen could influence the amount of legal guidance that is to be provided, as breaking the contracting process into more steps would likely, although not necessarily, entail providing more guidance. On the one hand, if it would be decided to address the applicable legal framework separately and not as part of preparing for contracting negotiations, such a decision may entail a more detailed discussion of land investment contracts, domestic law, and international investment treaties and the relationship between them, for which UNIDROIT would have much existing material to analyse, synthesise, and further develop.²²⁴ On the other hand, a more concise instrument could be developed, such as one focused less on various contractual steps but more on model contractual provisions.

95. With respect to the matters to be addressed in the contract, certain initiatives have already provided lists and, in a few instances, model provisions, on such matters.²²⁵ First, these lists could be used for consideration of what particular matters should be covered. The VGGT Technical Guide on agricultural investment, for instance, contains the following list of “necessary information” to be included in a land lease:

Parties to the lease agreement, including guarantors;

Description of the area to be leased, including its total extent;

Duration of the lease – start and termination dates;

Terms for extension/renewal of the lease;

Purpose of the investment;

Time limit for development by the investor, and penalties for failure to develop;

Description of possessory rights, including limitations on the uses and activities that the investor may engage in;

Timing and form of lease payments, and interest accrual on late payments;

Frequency of rent revisions and method of calculating adjustments to the rent;

Compensation rates for crops, structures or other items on the land, and periods of compensation (e.g. on entry, annual, at exit);

Details of rehabilitation and resettlement plans for land users who do not hold legitimate tenure rights;

Contribution to or payment of the legal expenses of the community or holder(s) of legitimate tenure rights through an “arms length” fund;

Conditions under which the lessor can enter the property to inspect the investor’s activities and monitor lease compliance;

Final court of litigation;

Dispute-resolution mechanisms;

Terms for renegotiation;

²²³ See, e.g., *supra* paras. 38 (New Alliance), 56 (Technical Committee on Land Tenure and Development).

²²⁴ See, e.g., *supra* paras. 72 and 76 (listing IIED and IISD publications in this regard).

²²⁵ See, e.g., *supra* note 32 (VGGT Technical Guide on agricultural investment), paras. 43-49 (UNIDROIT Principles), note 141 (GCAP), note 165 (CCSI), note 173 (ELAW) and para. 75 (IISD Guide).

*Assignment or transfer of the lease conditions, including stipulation of the condition on which land is to be returned and the liabilities for deterioration.*²²⁶

96. In reviewing the various lists, it would be possible to identify those matters warranting treatment in a possible UNIDROIT instrument. For example, some matters, such as force majeure, are covered in some initiatives, but not in others.²²⁷ As noted above in connection with the UNIDROIT Principles, it was observed that force majeure in the context of land investment contracts warranted further consideration.²²⁸

97. For instances where the initiatives offer model provisions, those provisions could be analysed in detail and, to the extent necessary, further developed and modified.²²⁹ They could thus serve as a basis for UNIDROIT's work and be analysed against the land investment contracts which have been made available thus far.²³⁰ In this regard, the role of the private sector generally and private sector transparency initiatives specifically would be very important to identifying best practices and developing model provisions for land investment contracts. In this way, existing initiatives and contractual practices could be synthesised into a new, universal instrument tailored to such contracts.

3. Form

98. There are various options to consider regarding form, including a legal guide, model contractual provisions, model legislative provisions, a combination of those options, or other possibilities. With respect to a legal guide, this could, as previously envisaged, provide "in-depth legal analysis" and serve as "a repository of 'best practices' especially designed for land investment contracts" to be used "in drafting contracts, and as a reference for national legislators engaged upon improving the domestic legislative and regulatory framework."²³¹ As the stocktaking exercise in Part II above shows, an abundance of general guides and handbooks already exist or are currently being developed. Thus, the usefulness of any UNIDROIT-developed guidance document would derive not from replicating what has already been produced, but from focusing on private law aspects of land investment contracts.

99. With respect to model contractual provisions, there appears to be a particular need as international Organisations have thus far refrained from developing such provisions.²³² Instead, a

²²⁶ VGGT Technical Guide on agricultural investment, note 28 *supra* at 87 (citing Welthungerhilfe, "Policy guidelines on large-scale land acquisitions," presentation to Bo District Council, Sierra Leone (24 May 2014)).

²²⁷ Compare IISD Guide, para. 75 *supra* (not containing a force majeure clause) with GCAP Model Lease Agreement, para. 61 (containing a section on force majeure).

²²⁸ See para. 47 *supra* and accompanying text (observing that an open issue for further consideration is force majeure in the context of food shortages).

²²⁹ For example, the GCAP Model Lease Agreement, which acknowledges that it meant to "address the specific challenges that investors, landowners, and affected communities often encounter in commercial agricultural land transactions in Ghana", could be analysed, compared to other provisions and practices and, if useful, modified to be applicable more broadly. See para. 139 *supra*.

²³⁰ See, e.g., *supra* para. 68 (Open Land Contracts).

²³¹ See *supra* para. 7 (excerpting UNIDROIT 2011 – C.D. (91) 8, para. 47).

²³² See, e.g., *supra* note 25 (addressing the VGGT Technical Guide on gender which recognises that "model leases could be particularly beneficial" for supporting gender-equitable arrangements, but does not provide such a model); note 37 (addressing the VGGT Technical Guide for lawyers which recognises the importance of "model laws and contracts" to the VGGT's dissemination and use but does not provide such models); note 72 (discussing the AU's Guiding Principles on Large Scale Land Based Investments in Africa, which at page 10 recognise that "[c]ontracts ... should clearly identify the rights and obligations of all parties. These rights should be formulated in specific and enforceable terms and should provide effective arrangements for monitoring compliance and sanctioning non-compliance including contract termination in case of material non-compliance"); para. 86 (discussing need for "translating" World Bank initiatives "into concrete and detailed provisions in contracts or through other legal frameworks and mechanisms applying to investment" and for "[e]stablishing draft lease and concession documents that clearly state the rights and obligations of all parties, incorporate social and environmental safe guards, and support project implementation monitoring and

few State and non-profit initiatives have stepped in to offer such provisions,²³³ some of which have been cited by international Organisations²³⁴ and could serve as a starting point for analysis, synthesis, and development into an international instrument.

100. With respect to model legislative provisions, UNIDROIT could prepare and offer a model law addressing private law aspects of land investment contracts in order to improve the legislative and regulatory environment governing such contracts.²³⁵ In this regard, it has been noted, for instance, that “[t]he best guarantee to achieve positive benefits from foreign investment is a solid foundation of domestic laws that are properly enforced”²³⁶ and a model law could contribute to achieving this foundation with respect to land investment contracts. Such work would, based on the stocktaking exercise, be novel and could be aligned to the guidance contained in existing initiatives, in particular the VGGT, including the Technical Guides, and the CFS-RAI Principles.

101. In addition, UNIDROIT could pursue a combination of these options or consider other possibilities, for example focusing on a particular aspect of land investment contracts, such as model provisions and related guidance on grievance mechanisms,²³⁷ community development agreements,²³⁸ or assignment and termination.²³⁹

102. Lastly, it should be noted that, to best build upon existing initiatives, UNIDROIT could seek assistance from experts who have worked on key initiatives and, in this way, bring together the necessary expertise to prepare a significant and meaningful contribution in this important field.

IV. CONCLUSION

103. For the reasons stated above, the Secretariat’s stocktaking exercise indicates that the private law aspects of land investment contracts have not been sufficiently addressed by existing initiatives. As a gap seems to exist in this regard, UNIDROIT would appear to be well placed to prepare an instrument on such aspects, using its private law expertise to build upon existing initiatives, bring together key experts, and develop, in collaboration with the Rome-based food and agriculture organisations of the United Nations system and other institutions, valuable guidance for farmers, communities, investors, governments, and other stakeholders. In particular, among the various options, this study indicates that the preparation of model provisions for land investment

revocation clauses”); para. 95 (noting that VGGT Technical Guide on agricultural investment provides list of matters to be covered in investment contract, but not model provisions).

²³³ See, e.g., *supra* para. 85.

²³⁴ See, e.g., *supra* notes 32 (noting that the VGGT Technical Guide on agricultural investment refers to the IISD Guide), 95 (noting that the OECD-FAO Guidance for Responsible Agricultural Supply Chains refers to the IISD Guide with respect to environmental impact assessments).

²³⁵ See, e.g., *supra* note 37 (regarding importance of “model laws and contracts”).

²³⁶ See, e.g., *Investment Contracts for Agriculture: Maximizing Gains and Minimizing Risks*, *supra* note 49 at 3.

²³⁷ UNIDROIT, for example, could elaborate upon the IFC Performance Standard’s guidelines on grievance mechanisms. See para. 27 *supra* (regarding the IFC Performance Standards); see also note 198 *supra* (referencing, for example, the RTRS Grievances Procedure, which provides a mechanism for addressing complaints against RTRS members).

²³⁸ UNIDROIT could develop, in the context of agricultural investment, detailed legal guidance on community development agreements, which can take various forms and seek to create a legal framework for engagement and interaction between the investor and the local community. See, e.g., *supra* note 58 (discussing the World Bank Group’s Community Development Agreement Model Regulations and Example Guidelines, which focus on the mining sector), para. 64 (referring to community development agreements in the context of USAID’s Operational Guidelines) and 182 (discussing the IISD Guide, which addresses community development agreements in Part 2, section 8.5).

²³⁹ UNIDROIT could develop detailed legal guidance, for example, seeking to reduce uncertainty and related disputes that arise with respect to the assignment of rights under a land investment contract or termination of such a contract, which often results in the productive land subject to such uncertainty or dispute lying fallow.

contracts, together with concise explanatory comments, could both add value to the important work conducted thus far and further the implementation of the VGGT, the CFS-RAI Principles, and other initiatives.

104. *In light of this conclusion, the Secretariat requests that the Governing Council take note of the feasibility study and consider whether this topic should be retained in the UNIDROIT Work Programme for the 2017-2019 triennium and, if so, which level of priority it should recommend the General Assembly.*