



GOVERNING COUNCIL
97th session
Rome, 2-4 May 2018

EN

UNIDROIT 2018
C.D. (97) 7(b)
Original: English
March 2018

Item No. 7 on the agenda: Private Law and Agricultural Development

**(b) Preparation of an international guidance document
on agricultural land investment contracts**

(Memorandum prepared by the Secretariat)

<i>Summary</i>	<i>This memorandum provides an update regarding work on the preparation of an international guidance document on agricultural land investment contracts</i>
<i>Action to be taken</i>	<i>To take note of the update</i>
<i>Related documents</i>	<i>UNIDROIT 2017 - C.D. (96) 6(b); UNIDROIT 2016 - C.D. (95) 7(b)</i>

INTRODUCTION

1. This memorandum offers, in five parts, an update regarding work on the preparation of an international guidance document on agricultural land investment contracts. Part I provides background on UNIDROIT'S work in this area. Part II describes recent developments. Part III offers an overview of the future instrument on agricultural land investment contracts as currently envisioned by the Working Group. Part IV summarises the next steps for the project. Lastly, Part V invites the Governing Council to take note of this update.

I. BACKGROUND

2. Following the adoption of the Legal Guide on Contract Farming at its 94th session (Rome, 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."¹

3. Pursuant to the Governing Council'S instruction, the Secretariat prepared the study. It included the requested stocktaking, examined whether a possible UNIDROIT instrument would be of additional benefit in the field and ultimately concluded that, "as a gap seem[ed] to exist" with respect to private law aspects of agricultural land investment contracts, "UNIDROIT would appear to be well placed to prepare an instrument on such aspects, using its private law expertise to build upon existing

¹ UNIDROIT 2015 – C.D. (94) 13, para. 68.

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.”²

4. Upon considering the feasibility study, the Governing Council, at its 95th session (Rome, 18-20 May 2016), recommended that work on an international guidance document on agricultural land investment contracts be included in UNIDROIT’s Work Programme for the 2017-2019 triennium as a high priority item.

5. Consistent with the Governing Council’s recommendation, the Secretariat organised, together with FAO and IFAD, an informal meeting held with experts and interested stakeholders at FAO on 20 October 2016,³ during the 43rd plenary session (Rome, 17-21 October 2016) of the Committee on World Food Security (CFS). The meeting’s purpose was to raise awareness about UNIDROIT’s work in this area and to solicit input on the scope, content and form of the possible instrument on agricultural land investment contracts. The input received, moreover, was taken into consideration in the formation of the Working Group and provided to that Group once constituted for its first meeting (Rome, 3-5 May 2017).

6. After the informal meeting, at its 75th session (Rome, 1 December 2016), the General Assembly approved the Work Programme for the 2017-2019 triennium, which included the work on agricultural land investment contracts as a high priority item.

II. RECENT DEVELOPMENTS

7. Following the General Assembly’s session, the Secretariat constituted the Working Group on agricultural land investment contracts.⁴ At the Working Group’s first meeting (Rome, 3-5 May 2017), the Group discussed, at the outset, four general considerations with respect to the work. First, regarding scope, the Working Group recommended that the future instrument should be in the form of a legal guide and focus on leases and concession agreements but, could – subject to future drafting – also address other types of contracts and also include or move on to, as future steps in the work, other possible forms, such as model provisions. Second, regarding existing initiatives, the Working Group discussed how such initiatives could guide the work, with particular emphasis on the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the context of National Food Security (VGGT), the Principles for Responsible Investment in Agriculture and Food Systems (CFS-RAI Principles), the UNIDROIT Principles of International Commercial Contracts and the UNIDROIT-FAO-IFAD Legal Guide on Contract Farming. Third, it was emphasised that the work was to build upon the co-operation enjoyed during the preparation of the Legal Guide on Contract Farming

² UNIDROIT 2015 – C.D. (95) 7(b), para. 103.

³ The draft agenda for the meeting is available at the following link: <https://www.unidroit.org/english/documents/2016/study80b/s-80b-inf-e.pdf>. Participants included representatives of FAO; IFAD; the World Bank; the French Ministry of Foreign Affairs and International Development; the German Federal Ministry for Economic Cooperation and Development (BMZ); the Japan International Cooperation Agency (JICA); the United States Agency for International Development; the Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ); the Columbia Center on Sustainable Investment (CCSI); the International Institute for Environment and Development (IIED); the International Institute for Sustainable Development (IISD); and the International Land Coalition (ILC).

⁴ The Working Group is chaired by Mr José Antonio Moreno Rodríguez, a member of the UNIDROIT Governing Council, and currently includes: Mr Lorenzo Cotula, Principal Researcher in Law and Sustainable Development at the International Institute for Environment and Development (IIED); Mr Daryono, Professor at Universitas Terbuka, Jakarta; Ms Bénédicte Fauvarque-Cosson, Professor at Université Paris 2; Mr James Gathii, Wing-Tat Lee Chair in International Law and Professor of Law at Loyola University Chicago School of Law; Ms Jean Ho, Assistant Professor at the National University of Singapore; Mr Pierre-Etienne Kenfack, Professor at Université Yaoundé 2; Ms Yuliya Panfil, Associate, Investments at Omidyar Network and Mr Virgilio de los Reyes, Professor, De La Salle University, Manila. The Working Group also includes representatives of FAO; IFAD; the International Land Coalition, a global alliance of civil society and farmers’ organisations, UN agencies, NGOs and research institutes; the World Farmers Organisation, made up of national producer and farm cooperative organisations; and the Private Sector Mechanism at CFS, which provides views on behalf of the wider private sector.

and be in complete harmony with FAO's policies, as UNIDROIT was only in the position to provide its private law expertise to build upon FAO's instruments. For co-operation with NGOs, civil society and the private sector, the Working Group considered how best to consult with civil society and private sector representatives, as such consultations were seen as important to ensuring that the future instrument would take into account the views of various stakeholders and provide useful guidance. Fourth, regarding target audience, the Working Group acknowledged that the future instrument was to contribute to the implementation of the VGGT and CFS-RAI Principles by providing private law guidance on agricultural land investment contracts and incorporating necessary safeguards into them and, in this way, could be targeted to legal counsels, in particular those representing investors, while at the same being drafted in a way that would make it useful for a broader audience. With respect to the VGGT in particular, it was emphasised that the future instrument could provide helpful guidance on consulting and contracting with legitimate tenure right holders in the negotiation process.⁵

8. Following those general discussions, the Working Group reviewed a preliminary draft outline of the future instrument on agricultural land investment contracts, which had been prepared by the UNIDROIT Secretariat for discussion purposes. The Group amended and provided expert input on the initial outline, which was attached to the report of the first meeting⁶ and would be subject to ongoing review. The initial outline called for a preface describing the future instrument's purpose, an introduction to agricultural land investment contracts, and chapters covering: (a) the relevant legal framework; (b) negotiation and formation, including the important issue of identifying legitimate tenure right holders; (c) the obligations of the parties, including development, financial, social and environmental obligations on investors; (d) non-performance; (e) transfer, renewal and termination; and (f) dispute resolution.

9. At the Working Group's second meeting (Rome, 13-15 September 2017), the Working Group discussed recent developments and general considerations in relation to the work, in particular with respect to the future instrument's scope and target audience and its alignment to existing initiatives. In this regard, the Working Group recommended that, subject to ongoing review, the future instrument should be a guide focusing on leases and concessions of agricultural land and that the guidance should be targeted to not just legal counsels for investors, but legal counsels for the various parties involved in those contracts. The Working Group then examined in detail an updated draft outline of the future instrument, which was revised according to the Group's input and attached to the report of the second meeting,⁷ as well as initial draft contributions for certain chapters. Regarding the organisation of future work, the Working Group considered possible events and other means for raising awareness about the work, consulting stakeholders and seeking their input. The Working Group then decided that the third meeting was to be held in Rome on 25-27 April 2018.

10. In addition, the Secretariat organised a second informal meeting that was held, in collaboration with FAO and IFAD, with experts and interested stakeholders at FAO on 11 October 2017 during the CFS' 44th plenary session (Rome, 9-13 October 2017).⁸ Like the previous informal

⁵ Legitimate tenure rights are those rights that, while not currently protected by law, are considered to be socially legitimate in local societies. Tenure, as a general matter, is the way that land is held or owned by individuals, families, companies or groups and can encompass "bundles of rights" (e.g. the right to occupy, use, develop, enjoy and withdraw benefits from the land; the right to restrict others' access to the land; or the right to manage, sell or bequeath the land). FAO, Responsible governance of tenure and the law – A guide for lawyers and other legal service providers, Governance of Tenure Technical Guide No. 5, at p. 19, available at <http://www.fao.org/3/a-i5449e.pdf>.

⁶ Report of the Working Group's First Meeting (Rome, 3-5 May 2017), UNIDROIT 2017 – Study 80B – Doc. 2, available at: <http://www.unidroit.org/english/documents/2017/study80b/wg/s-80b-02-e.pdf>.

⁷ Report of the Working Group's Second Meeting (Rome, 13-15 September 2017), UNIDROIT 2017 – Study 80B – Doc. 3, available at: <https://www.unidroit.org/english/documents/2018/study80b/s-80b-03-e.pdf>.

⁸ The draft agenda for the meeting is available at the following link: <https://www.unidroit.org/english/news/2017/171011-agric-land-inv-contracts-fao/agenda-e.pdf>. Participants included representatives of FAO; IFAD; the World Bank; the UK Department for International Development

meeting, which was held at FAO on 20 October 2016 during the CFS' 43rd plenary session, the meeting's purpose was to raise awareness about UNIDROIT's work in this area and to solicit input on the scope, target audience, form and content of the future instrument on agricultural land investment contracts. Participants reviewed and commented on the draft outline, and the input received was provided to the Working Group for consideration.

III. THE FUTURE INSTRUMENT ON AGRICULTURAL LAND INVESTMENT CONTRACTS

11. As currently envisioned by the Working Group and set out in the draft in-progress outline in the Annex, the future instrument is to be used by counsels working on the leasing of agricultural land – whether from a State, customary authority or private party – in order to support the preparation, negotiation and implementation of agricultural land investment contracts that are consistent with the VGGT, CFS-RAI Principles and other international instruments.⁹ The future instrument, which is to build upon the success of the UNIDROIT-FAO-IFAD Legal Guide on Contract Farming and the UNIDROIT Principles of International Commercial Contracts – will not endorse large-scale land acquisitions and will raise awareness about alternative investment models. In acknowledging that land acquisitions continue to occur, however, the instrument will help to ensure that leases of agricultural land are done responsibly and that stakeholders' rights, including those of legitimate tenure right holders, are both protected and respected.

12. With respect to content in particular, the future instrument is to address the following six main aspects:

- *The legal framework:* The future instrument is to set out various domestic sources of law (e.g. legislation, judicial decisions, regulations and, in some instances, customary rules) and various international sources (e.g. international human rights treaties, investment treaties or soft law instruments) that make up the applicable legal framework, together with the agricultural land investment contract. The legal guidance is to assist with the evaluation of the applicable legal framework and the identification of gaps in that framework, as well as the understanding of customary systems and rules.
- *Parties, formation and form:* As there are numerous stakeholders that could be affected by agricultural land investment contracts, difficult tasks for prospective investors could include: (a) identifying both the holders of legal title to the land and any holders of legitimate tenure rights with respect to that land; (b) consulting with those various holders, including in customary settings in which the roles of various authorities might not be clearly defined; and (c) conducting detailed feasibility studies and rigorous impact assessments, with respect to possible tenure, social and environmental impacts. The legal guidance is to assist with the identification of all tenure right holders (including both legal and legitimate right holders), determination of the contractual arrangements for taking into account those holders and the assessment of any possible impacts for which contractual safeguards would be needed. In so doing, the guidance is to pay particular attention to gender issues.

(DFID); the US Agency for International Development (USAID); the Private Sector Mechanism at CFS; the International Institute for Environment and Development (IIED); the International Institute for Sustainable Development (IISD); and the International Land Coalition (ILC).

⁹ As formulated by the Working Group, the future instrument is to address agricultural land investment contracts involving leases of land and related agreements and not those involving sales of land, for at least two reasons. First, leases are known to be more common than sales. Some States prohibit foreign investors from owning land generally or agricultural land specifically, and these prohibitions account in part for the greater prevalence of leases. Second, unlike sales, leases entail ongoing obligations between the host-State, legitimate tenure right holders, local communities or private landowners that grant the tenure and related rights, and the investors that receive those rights in exchange for payment and other obligations. These ongoing obligations allow for the incorporation of contractual safeguards and for the monitoring of them.

- *Obligations and rights of the parties:* The agricultural land investment contract can set out provisions addressing not only the particular tenure rights that are granted by the lease, but also necessary safeguards to ameliorate gaps in the host State's law and possible impacts of the investment. The legal guidance is to assist with the negotiation of provisions in various areas (e.g. land tenure; human rights, including food security, gender and youth; social obligations; the environment; finance; investment protection and regulatory autonomy of host States; and transparency, contract monitoring and implementation). Particular emphasis is to be placed upon possible safeguards, such as mechanisms for ensuring compliance with environmental requirements and for sharing the benefits arising from the leased agricultural land with legitimate tenure right holders and local communities.
- *Contractual non-performance:* As leases of agricultural land usually involve long-term contractual relationships, it is important to understand the risks inherent in a particular investment and to promote cooperation between the parties and stakeholders. The legal guidance is to analyse possible excuses and remedies for non-performance, thereby helping to ensure a more balanced and sustainable contract and to prevent conflicts.
- *Transfer and return:* The transfer of leased agricultural land from one investor to another can raise various concerns, including whether the granted tenure rights are actually transferable, the transfer complies with any contractual limitations, and such transfer is disclosed to the public. The return of leased agricultural land can also raise various concerns, including with respect to the condition in which the land is to be returned and whether there are any replanting obligations. The legal guidance is to flag issues in this regard and analyse possible contractual provisions for addressing them.
- *Dispute resolution:* Understanding the types of grievances and disputes that commonly arise under agricultural land investment contracts and the various mechanisms for resolving them can also create a more balanced and sustainable contract. Such mechanisms include grievance mechanisms, expert determinations, negotiation, mediation, conciliation, arbitration and litigation. The legal guidance is to assist with understanding various grievance and dispute resolution possibilities and setting them out in the contract.

IV. NEXT STEPS

13. As of this writing, the third meeting of the Working Group on agricultural land investment contracts is to take place at UNIDROIT's seat on 25-27 April 2018.¹⁰ All of the chapters and issues identified in the draft in-progress outline included in the Annex are currently being drafted by members of the Working Group, with drafts to be submitted to the Secretariat by the end of March 2018. The Secretariat, in turn, intends to circulate those drafts to the Working Group by early April 2018, with a revised draft annotated agenda identifying the various drafts and proposing a provisional order of business for reviewing them in detail at the meeting. In connection with reviewing those drafts, the Secretariat has suggested that the Working Group might wish to discuss various drafting issues to facilitate revisions, including, for example: (a) terminology to be used; (b) the

¹⁰ Prior to the Working Group's third meeting, the Secretariat will be participating in a panel presentation and related events at the World Bank's Annual Conference on Land and Poverty (Washington, 19-23 March 2018) – which is on the topic of "Land Governance in an Interconnected World" – in order to raise awareness about the future instrument on agricultural land investment contracts and to seek input on it. More information about the conference is available at the following link (<https://www.conftool.com/landandpoverty2018/sessions.php>). In addition, the Secretariat's paper and Powerpoint presentation on the future instrument is available at the following link (https://www.conftool.com/landandpoverty2018/index.php?page=browseSessions&form_session=219&presentations=show).

framing of guidance to be offered; (c) the level of detail to be provided; and (d) references to other instruments and sources.

14. Following that meeting, it is currently envisioned that the Working Group, with the Secretariat's assistance, is to revise the draft of the future instrument in accordance with the input received, both from the meeting and from outreach to stakeholders. It is further anticipated that a substantially complete draft of the future instrument is to be ready for further review and input in the summer of 2018. As currently contemplated, there is to be a fourth Working Group meeting in the fall of 2018 to review that draft and a side event during the CFS' 45th plenary session to seek further input on it from stakeholders, as well as an open Internet consultation by which the draft is to be made publicly available on UNIDROIT's website for review and submission of comments.

15. In addition, it is expected that the draft is to be considered at regional consultation events held around the world, in coordination with Working Group experts at the end of 2018 and in early 2019. The input received from the CFS side event, the open Internet consultation and the regional consultation events is to be incorporated by the Secretariat in coordination with the Working Group. Following that consultation, review and revision process, the Secretariat is to prepare the draft instrument for submission to the UNIDROIT Governing Council for adoption.

16. In presenting this memorandum during the Governing Council's session, the Secretariat intends to provide an update on the Working Group's deliberations and related developments at its third meeting. The Secretariat may also provide additional documentation for that session as an addendum to this document.

V. ACTION TO BE TAKEN

17. *The Secretariat requests that the Governing Council take note of this update on the work on an international guidance document on agricultural land investment contracts.*

ANNEX**Draft In-Progress Outline
for the Future Instrument on Agricultural Land Investment Contracts****PREFACE** [see, e.g., Legal Guide on Contract Farming, Preface]

- I. Overview and purpose
 - A. Brief summary of the Guide
 - B. Statement that the Guide seeks, *inter alia*, to:
 - Respond to the need for greater investment in agriculture for food security and nutrition [CFS-RAI Principle 1];
 - Support responsible agricultural investment, which incorporates necessary safeguards to protect legitimate tenure right holders, human rights, livelihoods, food security and the environment and is consistent with the objectives of social and economic growth and sustainable human development [VGGT, para. 7.1 et seq., 12.1 et seq.; CFS-RAI Principles 2-10];
 - Respond to capacity constraints of host-State governments and the balance of power between investors and host-State governments; and
 - Support tenure holders' knowledge of their rights, protection of those rights by host-State governments and respect of those rights by investors.
- II. Approach and how to use the Guide
 - A. Approach is for UNIDROIT – in light of its particular private law expertise and in collaboration with FAO and IFAD – to provide legal guidance on agricultural land investment contracts, incorporating necessary safeguards into them, and implementing and monitoring them in six stages (i.e. the legal framework; parties, formation and form; obligations and rights of the parties; contractual non-performance; transfer and return; and dispute resolution)
 - B. Guide is to further the implementation of the VGGT and CFS-RAI Principles by serving as a reference tool for legal counsel and is to contain references to practical operations, contract practices and international instruments (e.g. VGGT; CFS-RAI Principles; UPICC)

INTRODUCTION [see, e.g., Legal Guide on Contract Farming, Introduction]

- I. General introduction to agricultural land investment contracts
 - A. The notion of agricultural land investment contracts, including why such contracts are important and being treated in the Guide
 - B. Issues that have been identified with respect to such contracts

- Tenure rights in general [see, e.g., Munro-Faure and Palmer, An Overview of the Voluntary Guidelines on the Governance of Tenure, LAND TENURE JOURNAL (2012)]
 - Rights of legitimate tenure right holders not being protected by host-State governments or respected by investors, including difficulties in identifying such holders
 - Gaps and difficulties in the implementation of domestic laws
- II. Scope of the Guide
- A. Description of various agricultural land investment contracts in practice, such as leases, concessions/investment agreements, purchases (i.e. a more technical discussion than in Part I.A above)
- Various possible parties and contractual arrangements (including JVs, PPPs, etc.)
 - Briefly highlight complexities in such arrangements
- B. Identification of those contracts falling within the Guide's scope, specifically leases and concessions/investment agreements for agricultural land
- Identifying, with examples, what falls within the scope of the Guide
 - Setting out key definitions [agricultural land investment contract, investor, host-State government, legal tenure right holder, legitimate tenure right holder – with cross-reference to glossary]

CHAPTER 1 – THE LEGAL FRAMEWORK

- I. Introduction
- A. Freedom of contract
- B. Limitations on that freedom for agricultural land investment contracts
- Mandatory rules from various sources – domestic and foreign
 - Relevant areas
- II. Sources
- A. Domestic sources [VGGT Technical Guide No. 4 at 33 et seq.]
- Rules and principles of law (e.g. from legislation, judicial decisions or regulations)
 - Customary rules and usages
- B. International sources

- International treaties (e.g. ICCPR, ICESCR, CERD, CEDAW, CRC, ICRMW or bilateral/multilateral investment treaties binding for the respective State Parties) [VGGT Technical Guide No. 4 at 32]
- Soft law instruments (e.g. VGGT; CFS-RAI Principles; UPICC)
- Guidance documents (including standards documents) [e.g. OECD-FAO Guidance for Responsible Agricultural Supply Chains]

III. Relevant areas of law and regulation

- Land tenure/administration
- Human rights (including food security, gender and labour)
- [Social obligations / Protecting and respecting rights]
- Environment (including water)
- Finance (e.g. tax, accounting rules and anticorruption measures)
- Protection of investment (including national investment codes and IIAs) and regulatory autonomy
- Transparency, compliance and monitoring (including tendering process [CFS-RAI Principle 9; VGGT Technical Guide No. 4 at 47 et seq., 61 et seq.])
 1. Need for a competitive, inclusive and transparent process involving all stakeholders
 2. Draft contract publication/disclosure [VGGT, para. 11.7; UN Principles for responsible contracts, no. 10; IISD Model Contract, para. 12.0]

CHAPTER 2 – PARTIES, FORMATION AND FORM

- I. Identification of the possible parties to the contract and relevant stakeholders (including processes for doing so)
 - A. Types of parties and relevant stakeholders [CFS-RAI Principle 5; VGGT para. 12.1 et seq.; UN Principles for responsible contracts, nos. 1-2, 7; VGGT Technical Guide No. 5 at 20 et seq.; VGGT Technical Guide No. 7 at 38; ISLP/CCSI Guide, part 2.2]
 - Investor(s)
 - Transparency in the identity and nationality of each party, including issue of beneficial ownership
 - Corporate organisation [GCAP Model Lease, Section 16]
 - Need for due diligence and FPIC (including cross references to Parts II and III below)
 - Legal tenure right holder(s) (e.g. host-State government, community, private individual)

- Legitimate tenure right holder(s) [VGGT, paras. 3.2, 9.1]
 - Other possible parties or relevant stakeholders (e.g. local officials or public notaries)
- B. Types of contracts or options (including with respect to third parties and an introduction to community development agreements [cross-reference to Chapter 3.IV.G below])
- II. Feasibility studies [GCAP Model Lease, Appendix 1; IISD Model Contract, para. 6.1]
- A. Suitable land availability (including access to necessary resources) and valuation [VGGT, para. 18.1 et seq.; VGGT Technical Guide No. 4 at 37; VGGT Technical Guide on valuation (forthcoming)]
- B. Development of a business plan
- III. Impact assessments [CFS-RAI Principle 10; VGGT paras. 3.2, 12.10; IFC Performance Standard 1; Right to Food Guidelines, para 17.2; VGGT Technical Guide No. 4 at 56 et seq.; VGGT Technical Guide No. 7, parts 2-3, 6; IISD Model Contract, para. 6.2]
- A. Land tenure (including legitimate tenure rights)
- B. Human rights and social aspects (including food security [CFS-RAI Principles 1-2; VGGT, paras. 12.1, 12.4, 12.12], gender and labour)
- C. Environment [GCAP Model Lease, Appendix 2] (including impacts on water and other natural resources and access to those resources [CFS-RAI Principles 5-6])
- IV. Contract formation and form [Legal Guide on Contract Farming at 57; UPICC, Chapter 2]
- A. Capacity and consent
- B. Role of those who intervene or assist in contract negotiation
- C. Required contract form and content and consequences for breach of such requirements, as well as any formalities for leases of agricultural land

CHAPTER 3 – OBLIGATIONS AND RIGHTS OF THE PARTIES

- I. Introductory section
- A. Recognising that not all agricultural land investment contracts (which might actually be a single contract or a series of contracts) would require or include clauses on all of the topics identified below, depending on the type of contact, the parties to that contact, and other circumstances
- B. Recognising that the topics might not be addressed in this order
- C. Introducing the key parameters and themes from Chapter 1.III above (i.e. land tenure/administration; human rights (including food security, gender and labour); [social obligations / protecting and respecting rights]; environment (including

water); finance; protection of investment and regulatory autonomy; and transparency, compliance and monitoring)

II. Land tenure

A. Location/description of the land [GCAP Model Lease, Section 3; ISLP/CCSI Guide, part 2.4]

- Identification (e.g. total size; boundaries; geospatial data)
- Option for additional land and right of first refusal for such land

B. Tenure rights [GCAP Model Lease, Section 5; IISD Model Contract, para. 5.1; ISLP/CCSI Guide, part 2.5]

- Identification of rights (cross-reference to Chapter II) and highlighting the importance of the issue

18. Grant of tenure rights

- Rights of use (e.g. land; water, including specification of water commitments and drought events; and underground resources)
- Rights of entry and control (e.g. who owns improvements; fixtures; etc.) [UNCITRAL PFIP Guide at 108 et seq.]
- Rights withheld (e.g. limitations on exclusivity/use; rights of way; continued access, etc.) [UNCITRAL PFIP Guide at 111 et seq.]

19. Grant of related rights

- Right to access and use utilities [GCAP Model Lease, Section 11]
- Rights to import (e.g. supplies; equipment)
- Rights to market, transport and export (e.g. agricultural production)

C. Duration and renewal [GCAP Model Lease, Section 4; IISD Model Contract, para. 5.1]

- Start and end dates
- Drawbacks of limitations on period [UNCITRAL PFIP Guide at 151 et seq.]
- Renewal and renegotiation (e.g. terms for extension/renewal of the lease, including key performance indicators and incentives for renewal) [GCAP Model Lease, Section 4]

D. Conditions [UPICC, Chapter 5.3]

- Overview, including suspensive and resolute conditions [ISLP/CCSI Guide, part 2.3]
- Permits and licenses [GCAP Model Lease, Sections 5, 14]

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- E. Purpose of the investment/Land management issues [VGGT Technical Guide No. 4 at 87]
- Identification of use
 - Indicative business plan
- F. Land development obligations [GCAP Model Lease, Section 11]
- Introduction: Investments that are not duly implemented can frustrate hopes for jobs, public revenues and social infrastructure (as applicable), and more generally create opportunity costs (other land users could have better developed the land). In some contexts, authorities choose to regulate land use activities (e.g. crop choice, processing) in order to pursue certain goals (e.g. meet domestic demand for a given commodity, or promote in-country processing). So, multiple policy considerations may be involved, depending on the context: (a) discourage speculative acquisitions; (b) timely implementation; or (c) promote specific land use activities.
 - Development plans and related clauses
 - Land use provisions (e.g. specifying forms of land use, and the investor cannot make material changes to the land use envisaged in the contract without prior authorisation in writing from the other party, sometimes with the clarification that the authorisation cannot be unreasonably withheld)
 - Local processing (i.e. provisions to encourage local processing, including via incentives, or to require the investor to explore feasibility of local processing at least in part)
 - Contract monitoring (with cross reference to transparency and monitoring below)
- G. Infrastructure [ISLP/CCSI Guide, part 2.7]
- III. Finance/Financial obligations [GCAP Model Lease, Section 6; IISD Model Contract, para. 7.0 et seq.; ISLP/CCSI Guide, part 2.11]
- A. Introduction: Public revenues are an important way in which the host country can benefit from investments. They can influence a government's ability to provide public services, and ultimately to contribute to inclusive sustainable development. Important role of national legislation (tax law). Agricultural land investment contracts often include provisions on public revenues. These govern issues such as types of revenue streams, applicable rates, monitoring arrangements.
- B. Types of public revenues (e.g. land rental fees; water fees; corporate income tax (charged on the company's profits); royalties (based on the value of production, or more rarely on production volume); withholding tax (tax deducted from payments made by the company to other persons located outside the country); dividends (in joint ventures))
- C. Policy choices
- D. Fixed income versus revenue sharing models

- E. Other contractual issues (e.g. timing and form of monetary payments, and interest accrual on late payments; mechanisms for periodic revisions; and capitalisation)
- IV. [Social obligations / Protecting and respecting rights] [GCAP Model Lease, Section 7; ISLP/CCSI Guide, part 2.13]
- A. Introduction (e.g. widely recognised that community relations are an important factor in the project's ultimate success; "social license to operate" debate; at the same time, relations with communities often one of the most difficult issues in agricultural land investments; developments in contractual practice to address these challenges)
- B. Local/domestic food security [CFS-RAI Principles 1-2; VGGT, para. 12.12]
- C. Land acquisition
- Provisions aimed at minimising extent of land acquisition
 - Provisions on compensation (conceptually distinct from benefit sharing and including compensable items (e.g. land, crops, structures or other items existing on the land), compensation rates, mechanisms, and timing; role of national law, for example, in defining compensable items and applicable rates; however, national law may fall short of international law (e.g. as reflected in human rights law jurisprudence) and international standards)
 - Provisions on continued access to land and resources for local stakeholders insofar as not inconsistent with project activities (with cross-reference to Chapter 3.B above)
- D. Employment [CFS-RAI Principles 2-4; GCAP Model Lease, Section 7; IISD Model Contract, para. 8.1 et seq.]
- Quality and quantity of jobs created through the project
 - Access to employment (i.e. contract provisions establishing priority or even exclusivity for local nationals in relation to specified roles (e.g. unskilled labour) and priority or sliding scales for hiring of local nationals in relation to other roles (e.g. technical, managerial))
 - Capacity support commitments on the part of the investor may be needed in order to achieve these targets (e.g. training for local nationals so they can take up technical or managerial roles)
 - Gender aspects, including possible mechanisms to handle gender segregation in agricultural labour force and promote women's access to skilled positions, as well as youth aspects
 - Monitoring mechanisms and reporting requirements
- E. Local content (e.g. provisions that require the company to prioritise domestic suppliers when sourcing goods and/or services for the agricultural investment) [CFS-RAI Principle 2; IISD Model Contract, para. 8.4]
- F. Outgrower schemes [CFS-RAI Principles 1-2, 8; GCAP Model Lease, Section 7; IISD Model Contract, para. 8.2]

- Contractual arrangements whereby small-scale farmers grow crop around the nucleus plantation to supply the commercial operation
 - Contractual practice with provisions requiring investor to develop an outgrower scheme where this responds to local development priorities (and arrangements for community engagement in the development of the scheme)
 - Basic terms of company-farmer relations (e.g. pricing formulae (possibly linked to international price indices where available), lending arrangements; tenure aspects (outgrowers farming own or company land; if the latter, farmers' tenure security on company land); gender issues (e.g. in outgrower selection, especially where growers farm company land))
 - Reporting requirements and monitoring arrangements
- G. Community development funds or social infrastructure [CFS-RAI Principle 9; GCAP Model Lease, Sections 8-9; IISD Model Contract, para. 8.5]
- Investor obligations in relation to establishing and financing a community development fund, or to provide social infrastructure (e.g. schools, clinics).
 - Policy choices at stake
 - Mechanisms to identify local priorities and translate them into contractualised action, including relevance of community-development agreements (between company and community) and relation / cross-referencing with main investment contract
 - Community development funds
 - Reporting requirements and monitoring arrangements
- H. Protecting and respecting cultural heritage [CFS-RAI Principle 7]
- V. Environment [CFS-RAI Principle 6; IFC Performance Standard 6; GCAP Model Lease, Section 14; IISD Model Contract, para. 9.0 et seq.; ISLP/CCSI Guide, part 2.12]
- A. Introduction
- Agricultural land investments often associated with environmental risks and impacts
 - Key role of national law in setting rules, institutions and processes (e.g. specialised agencies dealing with environmental aspects; impact assessment requirements in many jurisdictions; terms of environmental liabilities, and who can activate them (e.g. administrative sanctions/penalties vs tort liability for damage suffered by private actors))
 - In some contexts, national law not in line with international standards and, in these cases, the contract can provide an opportunity to complement national legislation
- B. Impact assessment and management plans
- C. Applicable standards

- D. Water, including terms for water abstraction (quantity, timing, payments)
 - E. Waste management
 - F. Project closure
 - G. Monitoring, sanctioning and remediation
- VI. Protection of investment and regulatory autonomy
- A. Expropriation and respect for regulatory space [placeholder for resettlement]
 - B. Physical security [UN Principles for responsible contracts, no. 6; GCAP Model Lease, Section 12; IISD Model Contract, para. 5.4; ISLP/CCSI Guide, part 2.8]
 - C. Stabilisation and security of rights, including the importance of legal security for bankability and respect for regulatory space [UN Principles for responsible contracts, no. 4; IISD Model Contract, para. 10.0; ISLP/CCSI Guide, part 2.19]
- VII. Transparency, compliance and monitoring [GCAP Model Lease, Sections 11-12; ISLP/CCSI Guide, part 2.6]
- A. Insurance
 - B. Recordkeeping and audits [IISD Model Contract, para. 5.3]
 - C. Circumstances under which the lessor can enter the property to inspect the investor's activities and monitor compliance [IISD Model Contract, para. 5.3]
 - D. Conservation of premises
 - E. Monitoring [UN Principles for responsible contracts, no. 8; VGGT Technical Guide No. 4 at 70 et seq.; VGGT Technical Guide No. 7 at 68-69; GCAP Model Lease, Section 13; ISLP/CCSI Guide, part 2.14]
 - Performance guarantees [UNCITRAL PFIP Guide at 136-140]
 - Environmental performance bonds
 - Reporting requirements and access to information / disclosure, transparency / revenue transparency [VGGT, paras. 6.9, 11.7; UN Principles for responsible contracts, no. 10; VGGT Technical Guide No. 7 at 45 et seq.; IISD Model Contract, para. 12.0, 16.0 et seq.; ISLP/CCSI Guide, part 2.18]
 - Between the parties
 - Between the parties and the public
 - Protection of confidential information
 - Delivery of notices [GCAP Model Lease, Section 21; ISLP/CCSI Guide, part 2.25]
 - F. Amendments and periodic review (e.g. every 5 years, variations of certain indexes) [GCAP Model Lease, Section 18; IISD Model Contract, para. 13.0; ISLP/CCSI Guide, part 2.26]

CHAPTER 4 – CONTRACTUAL NON-PERFORMANCE

- I. Excuses for non-performance [Legal Guide on Contract Farming, Chapter 4]
 - A. Particular importance in long-term contracts and underlying legal issues
 - Force majeure versus change of circumstances
 - Anticipating the risk (e.g. contractual allocation of risks through force majeure clauses; price revision clauses and price adjustment mechanisms; types of clauses (adverse factors/adverse events))
 - Insurance and other risk mitigation schemes
 - B. Force majeure [UPICC, art. 7.1.7; GCAP Model Lease, Section 20; ISLP/CCSI Guide, part 2.21]
 - General notion
 - Qualifying events and burden of proof, including natural events (e.g. storm, fire, epidemics), governmental acts impeding fulfilment of obligations and other disturbances
 - Consequences
 - C. Changes of circumstances in general/risks [UPICC, Chapter 6.2; UNCITRAL PFIP Guide at 140 et seq.; VGGT Technical Guide No. 7 at VIII-X; Equator Principle 1]
 - General notion
 - Qualifying events, including possible link to renegotiations and periodic review
 - Consequences
 - D. Additional considerations for host-State governments
- II. Remedies for breach [Legal Guide on Contract Farming, Chapter 5]
 - A. Types of breach and types of contractual clauses on remedies
 - Breach by the investor (Legal right holder, Legitimate tenure right holder)
 - Interference by the other party [UPICC, art. 7.1.2]
 - Contractual clauses on remedies (exemption clauses; penalty clauses [UPICC, art. 7.4.13])
 - B. Overview of remedies
 - Remedies in kind (performance, corrective actions)
 - Withholding performance [UPICC, art. 7.1.3]
 - Termination and restitution [UPICC, Chapter 7.3; GCAP Model Lease, Section 19; IISD Model Contract, para. 15.0; ISLP/CCSI Guide, part 2.23]

- Damages [UPICC, Chapter 7.4], including full compensation and foreseeability
 - Interests and late payments
- C. The role of the aggrieved party's conduct (e.g. price reduction or additional period for performance) [UPICC, art. 7.1.5]
 - D. The breaching party's right to cure and cure by non-performing party [UPICC, art. 7.1.4]
 - E. Renegotiation, including co-operation between the parties [UPICC, art. 5.1.3]
 - F. Additional considerations for host-State governments

CHAPTER 5 – TRANSFER AND RETURN [Legal Guide on Contract Farming, Chapter 6]

- I. Transfer of obligations and rights / assignment [UPICC, Chapter 9; VGGT Technical Guide No. 4 at 75; GCAP Model Lease, Section 17; IISD Model Contract, para. 14.0; ISLP/CCSI Guide, part 2.16]
 - A. Transferability of obligations and rights (including change of control [ISLP/CCSI Guide, part 2.17])
 - B. Legality of transfer
 - C. Limitations on transfer
 - D. Importance of disclosure
- II. Return [UNCITRAL PFIIP Guide at 168 et seq.; ISLP/CCSI Guide, part 2.24]
 - A. Stipulation of the condition in which land is to be returned, including replanting obligations (e.g. maintenance of tree crops, subject to or in line with the business plan)
 - B. Liabilities for deterioration

CHAPTER 6 – DISPUTE RESOLUTION [CFS-RAI Principle 9; VGGT, paras. 3.2, 21.1-21.6; Legal Guide on Contract Farming, Chapter 7; VGGT Technical Guide No. 4 at 72-74; VGGT Technical Guide No. 5 at 87 et seq.; VGGT Technical Guide No. 7 at 39 et seq.; GCAP Model Lease, Section 15; IISD Model Contract 11.0 et seq.; ISLP/CCSI Guide, part 2.20]

- I. Disputes arising under agricultural land investment contracts
 - A. The importance of access to justice
 - B. The provision of access to justice
- II. Non-judicial dispute resolution
 - A. Grievance mechanisms, including for local communities and employees [CFS-RAI Principle 9; UN Principles for responsible contracts, no. 9]
 - B. Expert determination (e.g. price of processing or of crops, in the event that the project involves processing or an outgrower arrangement respectively)

- C. Negotiation and mediation
 - D. Conciliation
 - E. Arbitration (e.g. factors to consider, such as what investors might seek and what host States might oppose; considerations with respect to governing law and transparency of proceedings) [GCAP Model Lease, Section 22; ISLP/CCSI Guide, part 2.27]
- III. Judicial dispute resolution
- A. Domestic courts
 - B. International courts
- IV. Enforcement of settlements or decisions resolving a dispute

[POSSIBLE ANNEXES OR FUTURE STEPS (e.g. checklist of issues, model provisions, detailed guidance on community development agreements or local supply contracts, etc.)]