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**Item No. 4 on the Agenda: Update and determination of scope of certain projects on the
2020-2022 Work Programme**

(c) Legal Structure of Agricultural Enterprises

(prepared by the Secretariat)

<i>Summary</i>	<i>In the context of UNIDROIT's ongoing collaboration with FAO and IFAD in the area of private law and agricultural development, this feasibility study provides background related to the topic of Legal Structure of Agricultural Enterprises, takes stock of existing relevant initiatives and proposes next steps to evaluate whether a possible new UNIDROIT/FAO/IFAD instrument would be beneficial.</i>
<i>Action to be taken</i>	<i>The Governing Council is invited to take note of the analysis and to consider authorising the Secretariat to conduct further research and preliminary consultations with a view to convene a colloquium and subsequently establish a core expert group to define the potential scope, content, and form of such an instrument.</i>
<i>Priority</i>	<i>Medium</i>
<i>Related documents</i>	UNIDROIT 2009 – C.D. (88) 7 Add.6 ; UNIDROIT 2010 – C.D. (89) 7 Add.4 ; UNIDROIT 2010 – C.D. (89) 7 Add.5 ; UNIDROIT 2011 – C.D. (90) 9 ; UNIDROIT 2012 – C.D. (91) 8 ; UNIDROIT 2013 – C.D. (92) 7(b) ; UNIDROIT 2016 – C.D. (95) 13 rev ; UNIDROIT 2019 – C.D. (98) 14 rev.2 ; UNIDROIT 2019 – C.D. (98) 17

INTRODUCTION

1. Supported by both the Food and Agriculture Organization of the United Nations (FAO) and the International Fund for Agricultural Development (IFAD), the project regarding 'legal structure of agricultural enterprises' was selected by the Governing Council, at its 98th session (Rome, 8-10 May

2019),¹ to be developed during the 2020-2022 Work Programme² and approved by the General Assembly at its 78th session, with a medium priority level.³

2. The Governing Council recommended that the Secretariat conduct a stocktaking exercise and feasibility analysis with respect to the legal structure for investment in agriculture activities, in order to ascertain whether UNIDROIT could make a useful contribution.⁴ The purpose of this document is to provide a preliminary analysis of the present situation, to lay out a proposal for an initial way forward for the project, and to examine the suitability of organising a colloquium and establishing a new study group to further identify the most significant legal issues to be addressed in the project. It is envisaged that the work would be developed in collaboration with FAO and IFAD.

3. This document is structured as follows. Part I provides background on UNIDROIT's work in the field of private law and agricultural development and outlines the evolution of the topic on legal structure of agricultural enterprises. Part II provides a summary of recent international initiatives which may directly and/or indirectly influence the scope of UNIDROIT's future work. Lastly, Part III evaluates whether a new UNIDROIT/FAO/IFAD instrument would be of additional benefit and provides preliminary observations on legal issues to be considered.

I. BACKGROUND

The origin of the project

4. UNIDROIT's work in the field of private law and agricultural development began in 2009, when the Governing Council agreed that UNIDROIT's broad mandate in the field of private law gave the Institute a wide range of opportunities to contribute to the development goals established by the international community, and to create new synergies with other inter-governmental organisations in the field of agricultural investments and production.⁵ At its 89th session (10-12 May 2010), the Governing Council considered that the Secretariat could 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.⁶ The Council decided to recommend the inclusion of aspects of the private law of agricultural finance in the Work Programme of the Institute⁷ and this recommendation was endorsed by the General Assembly at its 67th session on 1 December 2010.⁸

5. The Secretariat thus initiated its informal consultations with FAO and IFAD. In addition, the Secretariat organised a Colloquium (Rome, 8-10 November 2011) on "Promoting Investment in Agricultural Production: Private Law Aspects" (the Colloquium), with a view to exploring the nature of the contribution that UNIDROIT might make to global efforts in the field of 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.⁹

6. The tripartite partnership between UNIDROIT/FAO/IFAD has been very successful thus far, and has resulted in the joint publication of the [Legal Guide on Contract Farming](#), adopted in 2015, and the future UNIDROIT/FAO/IFAD [Legal Guide on Agricultural Land Investment Contracts \(ALIC\)](#), which is

¹ At the 98th session of the Governing Council, the Secretariat proposed the following possible areas of future work in the field of private law and agricultural development: legal structure of agricultural enterprises; title to land; agricultural finance; community trust funds or similar mechanisms; and valuation of communal land. For more information see: [UNIDROIT 2019 – C.D. \(98\) 14 rev.2](#), para. 78-82.

² [UNIDROIT 2019 – C.D. \(98\) 17](#), para. 288.

³ [UNIDROIT 2019 – A.G. \(78\) 12](#), para. 51.

⁴ [UNIDROIT 2019 – C.D. \(98\) 17](#), para.288.

⁵ For more information see: [UNIDROIT 2009 – C.D. \(88\) 17](#), para. 88 and [UNIDROIT 2009 – C.D. \(88\) 7. Add.6](#).

⁶ A set of preliminary documents for possible future work in the area of private law and development were submitted by the Secretariat in 2009

⁷ [UNIDROIT 2010 – C.D. \(89\) 17](#), paras. 112-115.

⁸ [UNIDROIT 2010 – A.G. \(67\) 9 rev.](#)

⁹ The Acts of the Colloquium were published in the *Uniform Law Review*. See XVII UNIF. L. REV. (2012-1/2).

submitted for adoption at this same meeting of the 99th session of the Governing Council (for full report see Agenda Item 10, C.D. (99) B.12).

7. In light of the finalisation of the ALIC project, the Governing Council, during its 98th session, reassessed the future areas of work in the field of private law and agriculture development and agreed to recommend that the General Assembly approve new work on legal structure of agricultural enterprises.

The debate around a project on legal structure of agricultural enterprises

8. The original discussion of the possible content of a project on legal structure of agricultural enterprises took place in the 2011 Colloquium after which the Secretariat prepared a memorandum summarising the main results of the debate, including the following excerpts:¹⁰

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

The structures involved in agricultural production are extremely varied: individual farms or, more often, collective farming, with a solid presence of agricultural co-operatives but also of partnerships or joint stock companies. Everywhere in the world, including in places where there is large-scale intensive farming, small and medium-sized farms¹¹ account for an important share of production (...).¹²

In the developing countries, most farmers are smallholders and the majority of the active population are farmers. In most cases, they depend on the informal economy and use the greater part of their output for subsistence purposes. Too poor to bear the cost and complexities of entering the formal market, they are also denied access to the protection and development opportunities such insertion would mean. Efforts must be made to reinforce their capacities at all levels. What is particularly important is that these persons and informal groups obtain recognised status as economic actors, which would give them access to both goods and financial markets and would have an impact at the legal, economic, fiscal and social level.¹³

An interesting example in this respect is the new professional statute recently adopted by the Organisation for the Harmonisation of Business Law in Africa (OHADA) – for “entreprenants”, which may benefit traders, artisans and the liberal professions, but also farmers: the qualification of “entreprenant” may be obtained by means of a procedure which is simple, quick and cheap and which enables the beneficiary to engage in a small activity implying certain simple obligations (in particular in terms of accountancy and for taxation purposes), as well as reduced risks, while farmers can exercise certain rights, including the right to farm their land on a long-term basis, to reduce their economic dependence and, if necessary, to change their status if the activity prospers.¹⁴

¹⁰ [UNIDROIT 2012 – C.D. \(91\) 8, paras. 20-26.](#)

¹¹ According to IFAD, some 450 million smallholders in the world provide means of subsistence for about 2 billion people – IFAD 2010, *Rural Poverty Report 2011*, IFAD, Rome.

¹² See the paper *Farm structure and market constraints: a focus on CEE and CIS countries* based on the presentation made by Zvi Lerman to the 2011 UNIDROIT Colloquium, published in the UNIF. L. REV. (2012-1/2), pp. 235-262.

¹³ See the paper *Bringing smallholder farmers into the value chain: opportunities and risks – a review of the legal issues* based on the presentation made by Rutsel S. Martha (IFAD) to the 2011 UNIDROIT Colloquium, published in the UNIF. L. REV. (2012-1/2), pp. 161-170.

¹⁴ See the paper *Le droit OHADA au soutien de l’entreprise Agricole* based on the presentation made by Daniel Tricot to the 2011 UNIDROIT Colloquium, published in the UNIF. L. REV. (2012-1/2), pp. 171-176.

The producer organisations – whatever the company form under which they are established – have as their vocation the pooling and strengthening of individual capacities. These organisations play different roles and their potential varies depending on whether they are informal groups, associations or other forms of civil society organisations, cooperatives, or commercial companies. But in order to contribute significantly to their members' development and to participate in the global reinforcement of the agricultural sector, they must be established and operate with a view to financial sustainability. A comparative study might be carried out in respect of these different entities using as key criteria members' participation, access to capital, decision-making procedures, the allocation of risks and responsibilities, and profit-sharing.¹⁵

The soundness of the development project and that of the farmers' organisation are a pre-condition not only for the commercial financiers to commit themselves, but also for "social finance", which is aimed at the sustainable development of smallholders in developing countries. In this respect, the farmers' organisation must be seen to put in place a specific business strategy coupled with an appropriate capitalisation plan (based on the self-financing principle of the organisation), incorporating principles of proportionality to encourage participation by individual members (participation in production, decision-making and profit-sharing), clear governance and decision-making structures, and professional financial control and management systems. The commercial partners may play an important role in improving the functioning and effectiveness of farmers organisations by means of programmes to strengthen capabilities, and by exchanges within the value chain.¹⁶

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

9. On the basis of the results of the 2011 Colloquium and the consultations that have taken place with experts from FAO and IFAD, the UNIDROIT Secretariat has acknowledged that, although the area of legal structure of agricultural enterprises presents a very wide range of legal aspects and concerns for many participants in the agricultural production process, there is a strong interest in considering integration, also at international level. In this respect, the Secretariat would propose that a careful study of the structures of agricultural enterprises, and the different coordination techniques that are being developed between them be considered within the context of future work at UNIDROIT.

Expressions of support for the project

10. Although the work related to the legal structure of agricultural enterprises was not expressly included in the Institute's previous work programmes, several Member States have shown their support and identified aspects related to this topic that UNIDROIT could consider addressing. It is worth

¹⁵ See the paper *Farmers' Organisations* based on the presentation made by Andres Miguel Cosialls Ubach to the 2011 UNIDROIT Colloquium, published in the UNIF. L. REV. (2012-1/2), pp. 235-262.

¹⁶ See the paper *Access to credit and equipment finance* based on the presentation made by Gerard van Empel to the 2011 UNIDROIT Colloquium, published in the UNIF. L. REV. (2012-1/2), pp. 235-262.

noting the Note Verbale of the Ministry of Justice of Hungary, dated 27 November 2015, which highlighted the importance of analysing if contractual practice of cooperatives could be improved by international harmonisation. In this respect, the Ministry of Justice especially noted the need to examine the legal structure of supply and sales cooperatives.¹⁷

11. In addition, by communication dated 3 December 2018, the United States Department of State acknowledged the significant accomplishments already achieved by the partnership between UNIDROIT, FAO and IFAD as well as the potential benefits of expanding the joint work “through the development of model legislative provisions that states could use to reform their domestic laws to ameliorate some of the legal issues that arise in this area and to establish a level playing field in discussions between investors and local communities”.¹⁸ In line with this approach, at the 98th session of the Governing Council representatives of FAO and IFAD remarked that “subjects such as legal structure of agricultural enterprises, agricultural finance and community trust funds, are all important areas which could be considered for future work, and are linked to one another in several ways”.¹⁹ Moreover, the representatives of FAO and IFAD emphasised that any new project in the field on private law and agricultural development should ensure utmost inclusivity for stakeholders such as rural small-scale farmers.

12. At the discussion of the 98th session, it was also asserted that a new guide could provide clarity and guidance on how to structure the activity of the enterprise, how to develop vehicles for agricultural investment and the use of agricultural land. It could also cover the need for land tenure, and would include analysis of public private partnerships.²⁰ Such a guide would be very useful for low- and middle-income countries, as well as improve the protections offered to farmers in all parts of the world.

13. Pursuant to the Governing Council’s instruction to the Secretariat to analyse the feasibility of the legal structure of agricultural enterprises project and noting the importance of avoiding duplication of the work done by other organisations, the rest of this document takes stock of some of the existing initiatives (Part II) and concludes by suggesting next steps which the work of UNIDROIT might take, so as to offer a useful instrument in this field (Part III).

II. SUMMARY OF EXISTING INITIATIVES

14. Some initiatives currently underway in a number of international organisations may directly or indirectly affect the definition of the scope of the project. The Secretariat notes that the outbreak of COVID-19 and its inherent significant disruptions have caused several of the preliminary discussions that had been planned with legal officers and technical experts of other international organisations to be postponed to the second semester of 2020. The initiatives mentioned below are therefore illustrative and subject to additional research on the part of the Secretariat.

Rome-based Agencies: FAO and IFAD

15. A large part of the work done by FAO and IFAD has thus far been focused on the implementation of broad policy objectives in the field of agricultural development, such as the promotion of agriculture for purposes of poverty alleviation, food security, legal empowerment of small farmers and social development of rural populations. However, FAO and IFAD have also paid particular attention to small businesses and microenterprises in support of the empowerment of specific categories of persons, such as women and young entrepreneurs. Their work has found that farming businesses tend to be established informally and that incorporation under a specific legal form is not a common practice nor a legal requirement. Producers tend to develop small to medium-sized

¹⁷ [UNIDROIT 2016 – C.D. \(95\) 15](#), para. 278.

¹⁸ [UNIDROIT 2019 – C.D. \(98\) 14 rev.2](#), Annex 2.

¹⁹ [UNIDROIT 2019 – C.D. \(98\) 14 rev.2](#), para. 277.

²⁰ [UNIDROIT 2019 – C.D. \(98\) 17](#), para. 278.

enterprises, including family-managed undertakings, without carefully considering the legal structures of their business.

16. At FAO, for example, the Agrifood Economics Division (ESA) is developing a methodology that assesses the business models of small food manufactures and is looking at management issues, as well as at challenges related to agripreneurship in several countries.²¹ Some of FAO's technical guides have summarized the main opportunities and risks related to certain business models for agricultural enterprise (e.g., management contracts, sharecropping, joint venture, farmer-owned businesses and cooperatives),²² highlighting the challenges to access global supply chains, alternative markets (e-commerce) and barriers to entry, such as complex administrative licensing requirements and regulatory frameworks entailing timely and costly business registration procedures which discourage entrepreneurship (e.g., the time needed to set up a limited liability company can range from half a day in New Zealand to 84 days in Eritrea). Access to finance is also highlighted as a significant challenge that rural entrepreneurs face, having to negotiate with risk-averse banks that demand unrealistic collateral, credit arrangements and contracts. These technical guides, however, fail to provide detailed analytical guidance regarding the legal structure established for each business model, a private-law analysis of the optimal legal structures in terms of efficiency for each different case, or any potential private law issues that may arise in the implementation, on the ground, of these business structures (including both legal form and contractual practice).

17. Together with FAO technical units, the Development Law Service of FAO has published legal studies on rules and principles related to land tenure, marketing of agricultural products, agricultural cooperatives²³, international joint ventures in agriculture,²⁴ and legislative approaches to sustainable agriculture and natural resources governance.²⁵ Some of these legal studies have identified several types of contractual arrangements to organise the agricultural production sector (contracts for land use, joint ventures, employment contracts and producers' agreements with cooperatives).²⁶ While some studies identify the limited inclusion of smallholders in certain business models, such as joint ventures, they have not explored, through the lens of private law, why the decision-making authority and the allocation of risks are unbalanced even when joint ventures entail co-ownership. One of the key issues faced in relation to the private law aspects of legal structures of agricultural enterprises is the difficulty to successfully enforce, on the owners/participants of such enterprises, the regulation of agribusiness enterprises, and the need for established adequate (internal) mechanisms to do so.

18. IFAD's mandate focuses on country-specific solutions and finances specific programmes, such as value chain development projects involving small scale producers and private enterprises, with a particular focus on small to medium-sized local enterprises. As a result, IFAD's funded projects have the aim of stimulating the establishment of mutually beneficial partnerships with small rural producers involving legally binding contracts between two or more parties to better regulate risk-sharing, the pooling resources, and profit-sharing. To improve the outcomes for all engaged parties, IFAD has been promoting the concept of Public-Private-Producer Partnerships (4Ps), as a more integrated way of doing business. According to IFAD, a "4P arrangement ensures that smallholder producers are respected partners and not relegated to the receiving end of public-private partnerships (PPPs)".²⁷ From IFAD's perspective, contractual arrangements through 4Ps can facilitate the financial integration of smallholders and rural small and medium-sized enterprises, as well as attract additional resources and support from banks, equity investors, input suppliers, and equipment leasing firms. In addition, the adoption of these "4Ps business models" has also received support from FAO's Investment Center

²¹ FAO, [Agripreneurship across Africa – Stories of inspiration](#), 2019.

²² FAO, [Governance of tenure technical guide n°4](#): Safeguarding land tenure rights in the context of agricultural investment, 2015, p. 15-16

²³ FAO, *Agricultural cooperatives: key to feeding the world*, 2012.; FAO, *Agricultural cooperatives: paving the way for food security and rural development*, 2012.

²⁴ FAO, *Legal aspects of international joint ventures in agriculture*, Legislative study 45, 1990.

²⁵ FAO, [Legislative approaches to sustainable agriculture and natural resources governance](#), Legislative study 114, 2020.

²⁶ FAO, [Enabling regulatory frameworks for contract farming](#), Legislative study 111, 2018, p. 17.

²⁷ IFAD (2016), [How to do public-private-producer partnerships \(4Ps\) in agricultural value chains](#), p. 2.

which believes that “the 4P financing instruments also address the missing middle phenomenon – i.e. rural enterprises too small to obtain loans from commercial banks and development finance but too large to access microcredit schemes”.²⁸

19. IFAD has developed some guidance documents on how to design 4Ps, and has identified different business models that may be established within the partnership framework, including contract farming schemes, a joint-venture shareholding scheme, or a cooperative-led model. However, a legal analysis of the pros and cons of each one of these business models in terms of membership, access to capital, decision-making procedures, allocation of risks and responsibilities, as well as regulation of profit-sharing is lacking. This constitutes an apparent gap with respect to preparing for and implementing enterprises, which include smallholders and legitimate tenure right holders.

United Nations Commission on International Trade Law (UNCITRAL)

20. UNCITRAL is currently developing several instruments that are relevant to work on legal structure of agricultural enterprises, in particular, we note the work being carried out by UNCITRAL Working Group I (WG I) on Micro, Small and Medium-sized Enterprises (MSMEs). In this regard, UNCITRAL has organized a series of colloquiums to investigate the possibility of working on legal aspects of microfinance to promote financial inclusion²⁹, microbusiness³⁰, as well as public-private partnerships.³¹

21. At its forty-sixth session, the UNCITRAL Commission recommended that WG I initially focus on the issue of simplification of incorporation³² and on good practices of business registration that facilitate the establishment of MSMEs. Besides these topics, on 25-26 March 2019 a colloquium was held to explore the need for a harmonized approach to multiparty contracts and contractual networks³³, which may constitute an alternative form of integration to corporate-like models, such as limited liability companies and to enable cooperation between MSMEs.³⁴

22. Participants to the colloquium agreed that, while bridging the gap between contract law and company law is relevant, identifying the “legal vacuum that would require developing a new legal tool was difficult” and “it would not be desirable to create a single model of collaboration given the differences in practices and traditions among industries and jurisdictions that seemed to respond to the needs of the businesses”.³⁵ Some space for work was identified for “the creation of default contractual rules and options, including as regards liability, responsibilities, entry and exit, and non-performance applicable to the different models of collaboration among MSMEs and allow them to save costs”. However, WG I decided that this topic would not be recommended to the Commission in the context of the current work.³⁶

23. Under its current mandate, WG I has finalized the Legislative Guide on Key Principles of a Business Registry³⁷, which was adopted by UNCITRAL in 2019, and is in the final process of drafting

²⁸ FAO, Investment Center, [Public-private producer partnerships to increase farmers' incomes in Benin – PADAAM](#).

²⁹ UNCITRAL (2011), [Legal and regulatory issues surrounding microfinance](#), A/CN.9/727.

³⁰ UNCITRAL (2013), [Microfinance: creating an enabling legal environment for microbusiness and small and medium-sized enterprises](#), A/CN.9/780.

³¹ UNCITRAL (2013), [Possible future work in the area of public-private partnerships \(PPPs\)](#), A/CN.9/779.

³² UNCITRAL (2013), [Report of the UN Commission on International Trade Law](#), 46th session, para. 321.

³³ UNCITRAL (2018), [Contractual networks and economic development: a proposal by Italy for possible future work by UNCITRAL on alternative forms of organization to corporate-like models – advanced proposal](#), A/CN.9/954.

³⁴ UNCITRAL (2019), [Report of the Colloquium on contractual networks and other forms of inter-firm cooperation](#), A/CN.9/991.

³⁵ UNCITRAL (2019), [Report of the Colloquium on contractual networks and other forms of inter-firm cooperation](#), A/CN.9/991, para. 42.

³⁶ UNCITRAL (2019), [Report of Working Group I \(MSMEs\) on the work of its thirty-second session](#), A/CN.9/968, para. 51.

³⁷ UNCITRAL (2019), [Legislative Guide on Key Principles of a Business Registry](#).

the future Legislative Guide on an UNCITRAL Limited Liability Organization (UNLLO),³⁸ adaptable to all forms of business or commercial activities.³⁹ While WG I recognised that cooperatives may constitute an option for the formalisation of informal MSMEs, it did not focus its work on the agricultural sector and did not explore the specific legal obstacles faced by rural MSMEs.

Other relevant initiatives

24. Other initiatives within the UN system may also be relevant to highlight the importance of undertaking work on legal structure of agricultural enterprises. Such initiatives include the work of the Special Rapporteur on the right to food, Olivier De Schutter, who noted in two of his reports that “better access to markets is key to improving livelihoods for many small-scale farmers in developing countries” and that “contract farming rarely encourages farmers to climb up the value chain and move into the packaging, processing or marketing of their produce”.⁴⁰ The report examined other business models that could be more inclusive, such as farmer-controlled enterprises, joint ventures and direct-to-consumer food marketing practices⁴¹. In another report, entitled “*Agribusiness and the right to food*”, the Special Rapporteur called for the establishment of an appropriate legal framework that stimulates the creation of a wider range of options for smallholders to undertake their agribusiness, such as through cooperatives which have better access to loans for infrastructure investment.⁴²

25. Regarding the role of cooperatives more specifically, the International Labour Organisation (ILO) is contributing to the development of a public international cooperative law through the elaboration of international guidance documents which aim at stimulating and assisting national governments in the adoption or review of national legislation regarding cooperative law. In this sense, it is worth mentioning the role of the Recommendation No. 193 in particular, which consists of an international policy guideline for the promotion of cooperatives.⁴³ It is further noted that the United Nations Department of Economic and Social Development coordinated the 2012 International Year of Cooperatives to acknowledge the relevance of cooperatives for poverty alleviation, food security and economic growth in several sectors including agriculture. Cooperatives, as a business model, may improve the agricultural productivity of farmers and facilitate access to markets, savings, credit, insurance and technology. As a result, in 2013 the UN Secretary-General recommended the identification of strategies to establish or improve national legislative frameworks in support of cooperative growth.⁴⁴

26. Mindful that any work undertaken by UNIDROIT should avoid duplication of efforts in this field, it is noted that some important work has been carried out by international organisations in recent years to assist domestic legislators and policy-makers to improve, for example, their legal frameworks for small and medium-sized enterprises. However, on the basis of the preliminary research conducted, no international organisation has been found to have done work, or to be undertaking work in the area of formulating legislative advice exclusively regarding the private law aspects of legal structure of agricultural enterprises. This constitutes a significant gap in terms of specific legal analysis of the governance aspect of contractual arrangements adopted within the different business models in the agricultural sector.

³⁸ UNCITRAL (2020), [Draft Legislative Guide on an UNCITRAL Limited Liability Organization](#), A/CN.9/WG.1/WP.118

³⁹ Recommendation n°2, UNCITRAL (2020), [Draft Legislative Guide on an UNCITRAL Limited Liability Organization](#), Appendix I.

⁴⁰ UN, 66th session of the General Assembly, *Report on the right to food: towards more equitable value chains – alternative business models in support of the right to food*, [A/66/262](#).

⁴¹ UN, 66th session of the General Assembly (2011), *Report on the right to food: towards more equitable value chains – alternative business models in support of the right to food*, [A/66/262](#).

⁴² UN Human Rights Council (2010), *Agribusiness and the right to food*, [A/HRC/13/33](#), p. 11-12.

⁴³ ILO (2002), R193 – [Promotion of cooperative recommendation](#).

⁴⁴ UN General Assembly (2013), Report of the Secretary-General, [Cooperatives in social development and the observance of the International Year of Cooperatives](#), A/68/168, para. 80 (b).

III. Feasibility of a new UNIDROIT/FAO/IFAD guiding instrument

Thematic continuity and synergy in the area of private law and agricultural development

27. The work on legal structures of agricultural enterprises would seem to be a natural follow up from the Legal Guide on Contract Farming (LGCF) and the future Legal Guide on Agricultural Land Investment Contracts. The work on legal structures would benefit from the previous work in continuing some of the analyses undertaken in the above-mentioned guides; as an example, the section on “Forms for conducting an agricultural production activity” included in Chapter 2 the LGCF⁴⁵ is a natural precedent that accentuates the complementary features of the three UNIDROIT/FAO/IFAD instruments.

28. While the content, scope and form of the potential new instrument would still require further definition, the Secretariat would propose to build upon the gaps identified in certain international initiatives (see section II above), and to further promote the thematic continuity and synergy it has developed over the years with the collaboration of FAO and IFAD in the field of private law and agricultural development. The following paragraphs aim to provide some initial ideas to help define further the scope of the project. It is submitted, however, that the preferred course of action would be to define the scope following a colloquium hosted by the three partners and held with experts on the subject matter, in the coming months.

Consideration of possible topics for analysis and UNIDROIT’s expertise

29. In reviewing FAO’s guidance documents, as well as those from other organisations operating in this field, there seems to be a need to devise legal channels to establish enterprises that are more inclusive of smallholder farmers and that protect legitimate tenure right holders. This might be achieved through detailed private law guidance, including an analysis of how those enterprises are to be set up and regulated internally. The relevance of UNIDROIT’s expertise becomes particularly evident with regard to the gap identified in the existing legal analysis of critical issues such as the development of business vehicles for agricultural contracts and how different agricultural enterprises establish their contractual arrangements to internally organise their formation, operation, dissolution and handling of eventual disputes.

30. From a different perspective, legal forms are very relevant to access capital markets and financial resources. Both public and private institutions lending or transferring resources associated with long term investments consider the legal form a precondition to evaluate credit worthiness. A legal guide should consider access to financial resources as one of the main objectives when setting the organisational or contractual infrastructure.

31. In a world of global trade, agricultural enterprises do not operate in isolation. Even medium and small enterprises in this area already are or might be interested in accessing global supply chains, where most of the trade occurs. This involvement would often require becoming part of a web of entrepreneurial relationships which can be impaired by the choice of an inadequate or unsuitable legal form. The legal form is not only a necessary precondition for efficient internal operation of individual enterprises but also to access markets, domestic and global. Organizational and financial stability are preconditions of engagement in long term collaboration among enterprises operating in global chains.

32. Agricultural enterprises are often asked to comply with regulatory requirements concerning sustainability of processes and product more than ever. Such requirements frequently call for collaboration with other enterprises along the chain as it is the case for environmental and social

⁴⁵ This section of the LGCF notes that there are legal forms specifically designed for agricultural producers and that each particular form entails a range of different rights and obligations, depending on whether they represent a legal structure for exploiting a single undertaking or whether they are used as a pool of several undertakings. See the [Legal Guide on Contract Farming](#), p.43- 49.

programs which require certification. The selection of the enterprise's legal form and the possibility to collaborate to ensure compliance with regulations is key to include stakeholders and increase access to market opportunities.

33. By focusing on the private law aspects, the preparation of a new UNIDROIT/FAO/IFAD instrument could provide a useful and unique addition to the existing guidance material. An instrument of this sort would set out various options available to countries with different legal traditions and discuss their relative advantages and disadvantages in light of the overall objective of more inclusive farming business models. It could include also common rules for enterprises acting in multiple jurisdictions. In particular, it would seem paramount to define which principles should be in place to favour mutual recognition when agricultural enterprises operate in global chains.

34. The Institute's approach in this new project should continue to provide input from the point of view of contract law, with which it is familiar and has a solidly established expertise. Further, the Institute is also well positioned to participate in a private law analysis of corporate structures. The development of new legal and contractual guidance that elaborates upon the business models presented in FAO and IFAD's technical guides (e.g., management contracts, sharecropping, joint ventures, farmer-owned businesses and cooperatives⁴⁶), to determine their pros and cons for the inclusion of smallholders, and to identify and define from a legal standpoint the more efficient organisational models would add to the existing state of the art. Noting that each of these business models are not mutually exclusive and that they can often be interlaced, UNIDROIT, in cooperation with FAO and IFAD, might consider examining how different contractual relationships are established throughout the supply chain and consider developing guidance to support "collaborative contracting models" which improve smallholders' capacity to contract as *entrepreneurs*.

35. Contractual networks may provide both incentives for cooperation and reduce the risks of opportunistic behavior along the supply chain. This governance aspect may play an important role in vertical networks, when the latter coordinate supply of inputs in accordance with agreed cooperative plans. Unfair practices are not absent in contractual networks; however, fairness may therein be promoted through adequate governance structures based upon a balanced mix of participation and accountability. A thorough analysis of these aspects ought to be given expert consideration.

36. UNIDROIT could seek to build upon the discussions held during the colloquium organised by UNCITRAL WG I on contractual networks. In particular, it could consider analysing what one of the delegations proposed as deserving further consideration, namely, "the governance aspect of contractual networks and multiparty contracts as a mechanism to help address inequality"⁴⁷, focusing this analysis specifically on the field of agriculture development. For instance, this future work may focus on the "potential cooperators mode of organisation which will permit them to develop their activities in an autonomous manner".⁴⁸

37. In short, the project could, tentatively, work on the contractual and corporate side of the different business models envisaged in FAO's and IFAD's guidance documents. Further, and in particular, it may consider addressing the following question from a private law perspective:

- (i) **improving access to market** - which would be the optimal legal structure to promote access to adequate domestic and global agricultural markets by smallholders;
- (ii) **increasing the size of agricultural enterprises** - how can contractual and company networks, either directly or through collaboration within and across agricultural commodities increase the size of agricultural enterprises;

⁴⁶ FAO, [Governance of tenure technical guide n°4](#): Safeguarding land tenure rights in the context of agricultural investment, 2015, p. 15-16.

⁴⁷ UNCITRAL (2019), [Report of Working Group I \(MSMEs\) on the work of its thirty-second session](#), A/CN.9/968, para. 51.

⁴⁸ ILO, Hagen Henry, (2005), [Guidelines for Cooperative Legislation](#), p.12

- (iii) **easing access to critical resources and insurance** - another question which follows up naturally with the contractual and institutional approach of the project would concern which legal instruments are best suited to promote access to capital, know-how, and technology. In addition, and based on our preliminary research, consideration could be given to including ways to ease access to insurance, which is so relevant in the agricultural sector (i.e., which legal forms are best suited to favour the access to insurance markets);
- (iv) **cover unfair commercial practices** - finally, it could be important to cover unfair commercial practices in agrifood activities, in the context of the legal structures and contractual networks considered.

Challenges and next steps

38. One of the challenges faced by the project on legal structure of agricultural enterprises, similarly to the Legal Guide on agricultural land investment contracts, is the existence of a strong public law element to be considered in conjunction with the private law analysis. For instance, certain jurisdictions would consider the setting up of a company to be a matter of mixed public and private law. In addition agricultural enterprises are often subsidized by the government and their legal structure matters to defining the type and objective of subsidies. These challenges might seem to be, however, only an apparent hurdle, since the line between private and public law is thin, and it is present in other UNIDROIT instruments, with special intensity in other instruments of the law and agriculture area.

39. The Secretariat recognises the sensitive nature of some aspects of the areas identified above. Following previous practice (Contract farming and ALIC) it is at this stage not suggested that any work in these areas should aim at the unification or even harmonisation of domestic rules. The Governing Council may wish to consider that UNIDROIT could nevertheless make an important contribution to domestic law reform and the modernisation of certain aspects of domestic legal systems regarding agricultural enterprises for smallholders. The main objective would be to formulate balanced guidance drawn on international experience and offering options, as appropriate, to facilitate adaptation to the domestic legal systems to global trade of agricultural commodities. As with the two previous instruments, a legal guide would seem to be the most adequate outcome, although there is no need to close this issue at this initial stage of development of the project.

40. The future work on legal structure of agricultural enterprises could start by the organisation of a colloquium with experts to discuss the questions identified and briefly described in this document.

IV. ACTION TO BE TAKEN

41. *The Governing Council may wish to maintain the medium priority status previously approved by the General Assembly for this project in the 2020-2022 Work Programme, as well as authorise the Secretariat to continue taking stock of other initiatives and consulting with the Secretariats of FAO, IFAD, UNCITRAL and other relevant organisations, with a view to identifying the main legal issues concerning legal structure of agricultural enterprises.*

42. *As a first step, the Secretariat would envisage organising a colloquium, before the end of 2020 or in the first quarter of 2021, to discuss and specify the private law aspects that might be addressed in the project and to confirm the desirability of developing a uniform instrument on the subject matter.*

43. *As a second step, based on the results of the future consultations and the colloquium, the Secretariat would consider setting up a core, limited group of experts to assist in the preparation of a document defining the scope of a new UNIDROIT/FAO/IFAD international guidance document and the next steps of the project, to be presented at the Governing Council's 100th Session.*