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## **Item No. 10 on the Agenda: Private Law and Agricultural Development**

### **Adoption of a Legal Guide on Agricultural Land Investment Contracts**

(prepared by the UNIDROIT Secretariat)

<i>Summary</i>	<i>Update regarding work on the preparation of an international guidance document on agricultural land investment contracts (ALIC)</i>
<i>Action to be taken</i>	<i>The Governing Council is invited to adopt the UNIDROIT/FAO/IFAD Legal Guide on Agricultural Land Investment Contracts, subject to possible minor adjustments during the process leading to the approval by the partner organisations, and to take note of the prospective programme of activities for the implementation of the Legal Guide in 2020-2021.</i>
<i>Mandate</i>	<i>Work Programme 2017-2019 renewed for Work Programme 2020-2022</i>
<i>Priority</i>	<i>High</i>
<i>Related documents</i>	<a href="#"><u>UNIDROIT 2016 - C.D. (95) 7(b)</u></a> ; <a href="#"><u>UNIDROIT 2017 - C.D. (96) 6(b)</u></a> ; <a href="#"><u>UNIDROIT 2018 - C.D. (97) 19, Item No. 7(b)</u></a> ; <a href="#"><u>UNIDROIT 2018 - C.D. (97) 7(b)</u></a> ; <a href="#"><u>UNIDROIT 2019 - C.D. (98) 5(a) rev.</u></a>

## **INTRODUCTION**

1. This document provides an update regarding work on the preparation of an international guidance document on agricultural land investment contracts (ALIC) and is made up of four parts. Part I relates the background on UNIDROIT's work in this area. Part II describes the recent developments, particularly with regard to the consultation process on the ALIC Zero Draft, which involved Member States, other organisations, and stakeholders, and the finalisation of the Legal Guide. Part III offers an overview of the future Legal Guide on Agricultural Land Investment Contracts – a copy of which is included in the Annexe II – in its now finalised form which is the result of revisions made on the basis of feedback received over the course of the consultation process. Part IV sets out future steps for implementation and lastly, Part V invites the Governing Council to adopt

the ALIC Legal Guide and to take note of the prospective programme of activities for the implementation of the Legal Guide in 2020-2021.

## I. BACKGROUND

2. Following the adoption of the Legal Guide on Contract Farming at its 94<sup>th</sup> 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.”<sup>1</sup> Pursuant to the Governing Council’s instruction, the Secretariat prepared the study. It included the requested stocktaking exercise, 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 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.”<sup>2</sup>

3. Upon considering the feasibility study, the Governing Council, at its 95<sup>th</sup> 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. 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,<sup>3</sup> during the 43<sup>rd</sup> 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. Moreover, the input was taken into consideration in the formation of the Working Group and provided to that Group once constituted.

4. After the informal meeting, at its 75<sup>th</sup> 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. Following the General Assembly’s session, the Secretariat constituted the Working Group on Agricultural Land Investment Contracts,<sup>4</sup> and the project proceeded to advance consistent with its high priority.

<sup>1</sup> [UNIDROIT 2015 – C.D. \(94\) 13, para. 68.](#)

<sup>2</sup> [UNIDROIT 2016 – C.D. \(95\) 7\(b\), para. 103.](#)

<sup>3</sup> 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).

<sup>4</sup> 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, Senior Fellow and Director, Future of Property Rights, New America; Ms Priscila Pereira de Andrade, formerly External Associate Professor and Researcher at University Center of Brasília and legal consultant at the International Institute for Sustainable Development (IISD) and currently UNIDROIT Legal Officer; and Mr Virgilio de los Reyes, Associate Dean and Professor, De La Salle University, Manila. The Working Group also includes representatives of FAO; IFAD; the International Land Coalition; the World Farmers Organisation; the Private Sector Mechanism (PSM) of the Committee on World Food Security (CFS); the Columbia

5. 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 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 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.<sup>5</sup>

6. 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 meeting<sup>6</sup> 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.

7. 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 Legal 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

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Center for Sustainable Investment (CCSI); the International Institute for Sustainable Development (IISD); and Welthungerhilfe.

<sup>5</sup> 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>.

<sup>6</sup> 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>.

draft outline of the future Legal Guide, which was revised according to the Group's input and attached to the report of the second meeting,<sup>7</sup> 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.

8. The Secretariat then 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' 44<sup>th</sup> plenary session (Rome, 9-13 October 2017).<sup>8</sup> Like the previous informal meeting, which was held at FAO on 20 October 2016 during the CFS' 43<sup>rd</sup> 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 Legal Guide. Participants reviewed and commented on the draft outline. Following that meeting, on 8 February 2018, the Working Group met via videoconference to discuss the input received, to review an initial draft of the Preface and Introduction of the future Legal Guide, and to consider the experts' questions and comments relating to their respective drafting responsibilities.

9. At the Working Group's third meeting (Rome, 25-27 April 2018), the Working Group began by discussing recent developments, including the Secretariat's presentation of the work at the World Bank's Annual Land and Poverty Conference (Washington, 19-23 March 2018), as well as some general considerations in relation to the work (e.g. scope and key themes). The Working Group then reviewed in detail drafts for the chapters and issues identified in the draft in-progress outline of the future Legal Guide on agricultural land investment contracts and considered, in connection with that review, various drafting issues to facilitate revisions (e.g. terminology to be used; the framing of guidance to be offered; the level of detail to be provided; and references to other instruments and sources). Lastly, the Working Group discussed next steps (e.g. remaining drafting and revising responsibilities; stakeholder engagement and consultations for input on the drafts; and the upcoming schedule for the work).<sup>9</sup>

10. At the Governing Council's 97<sup>th</sup> session (Rome, 2-4 May 2018), the Secretariat provided an update regarding the work on agricultural land investment contracts, in particular with respect to the Working Group's third meeting – which had occurred the previous week – and the current status of the draft Legal Guide, for which certain draft chapters were distributed to the members of the Council.<sup>10</sup> Following the Secretariat's update, the Governing Council considered the draft's status and provided guidance on the project's scope, the framing of the future Legal Guide's guidance, the nature of the obligations to which reference was made, and the treatment of the jurisdiction of courts of the State in which the agricultural land was located, all of which the Secretariat committed to provide to the Working Group.<sup>11</sup>

11. Following the Governing Council's 97<sup>th</sup> session (Rome, 2-4 May 2018), the Working Group held another videoconference on 2 July 2018 to discuss the guidance received from the Governing Council, drafting and revising notes prepared by the Secretariat for use by the experts in revising

<sup>7</sup> 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>.

<sup>8</sup> 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 (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).

<sup>9</sup> Report of the Working Group's Third Meeting (Rome, 25-27 April 2018), UNIDROIT 2018 – Study 80B – Doc. 4, available at: <https://www.unidroit.org/english/documents/2018/study80b/s-80b-04-e.pdf>.

<sup>10</sup> See UNIDROIT 2018 – C.D. (97) 7(b); UNIDROIT 2018 – C.D. (97) 19, paras. 96-120 (recording the Secretariat's presentation and noting that drafts of Chapters 1 (The Legal Framework, WP.2), 4 (Contractual Non-Performance, WP.11), 5 (Transfer and Return, WP.12) and 6 (Dispute Resolution, WP.13) had been circulated).

<sup>11</sup> UNIDROIT 2018 – C.D. (97) 19, para. 110 *et seq.*

their drafts, and various questions regarding the drafts and next steps. Building upon that videoconference and prior work, the experts and the Secretariat proceeded to prepare and revise various chapter and section drafts for the future Legal Guide.

12. At the Working Group's fourth meeting (Rome, 9-11 October 2018), the Working Group began by discussing recent developments, including a presentation of the work by Professor James Gathii at the panel on "Sustainable Investment in Agriculture" (Rome, 8 October 2018) during the IBA's annual conference, and the side event on "Improving Agricultural Investment Contracts and the Contracting Process" that took place during the CFS' 45<sup>th</sup> plenary session (Rome, 15-19 October 2018). The Group then conducted a detailed review of the drafts for all of the chapters and sections of the future Legal Guide, which were expected to be consolidated into a combined and substantially complete draft by January 2019. Lastly, the Group discussed next steps, including the plan for broad and extended consultations on the draft Legal Guide, for incorporating the input received and for finalising the Legal Guide.<sup>12</sup>

13. At the CFS Side Event (Rome, 18 October 2018), which was organised jointly with FAO and IFAD, Secretary-General Ignacio Tirado moderated a discussion by expert panellists – Ms Margret Vidar (FAO), Mr Charles Forrest (IFAD), Mr Lorenzo Cotula (IIED), Mr Brian Baldwin (PSM/CFS) and Ms Ilaria Bottigliero (IDLO) – regarding some of the key issues and safeguards addressed in the Legal Guide. Input was received from participants in the context of that discussion, and was in turn provided to the Working Group.<sup>13</sup>

14. Subsequently, the Secretariat also participated and lead two sessions in the World Bank's Law, Justice and Development (LJD) Week (5-9 November 2018), to pursue further collaboration with the World Bank Group and the Global Forum on LJD in this regard and to raise awareness about UNIDROIT's work. First, in a session entitled "UNIDROIT Secretary-General's Vision on Law and Development" on 7 November, the Secretary-General debated how UNIDROIT could support economic empowerment and achievement of the SDGs, together with Ms Nathalie Rey (Senior Counsel, Export-Import Bank of the United States of America) who discussed the (then) future MAC Protocol and with Ms Yuliya Panfil (then Investment Manager, Property Rights Initiative, Omidyar Network) who discussed the future Legal Guide on Agricultural Land Investment Contracts. Second, in a session entitled "Community of Practice on Private Law and Agricultural Development" on 8 November, the Secretary-General considered, together with Professor Thomas McInerney (Rule of Law for Development Institute, Loyola University Chicago School of Law), how the Global Forum's Community of Practice could promote UNIDROIT's work in this area, contribute to a fairer and more secure legal environment and respond to economic and social challenges in agriculture.

15. Following the Working Group's fourth meeting and building upon these promotional events, the Secretariat worked to consolidate and revise the various drafts of the future Legal Guide in coordination with Working Group members. A consolidated draft was made available to the Working Group in January 2019, after which members reviewed and inserted comments and edits on that draft. The Working Group then held another videoconference to discuss the progress of that consolidation and revision process, including any outstanding issues with respect to the Legal Guide's (a) structure; (b) content; (c) style, framing and tone; and (d) other issues, as well as the Secretariat's proposed plan for online and regional consultations to seek stakeholder input and for next steps with respect to the Legal Guide's review and finalisation. The consolidation process resulted in the ALIC Zero Draft which was the basis for the consultation process.

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<sup>12</sup> Report of the Working Group's Fourth Meeting (Rome, 9-11 October 2018), UNIDROIT 2018 – Study 80B – Doc. 5, available at: <https://www.unidroit.org/english/documents/2018/study80b/wg04/s-80b-wg04-05-e.pdf>.

<sup>13</sup> See CFS 45 Improving Agricultural Investment Contracts and the Contracting Process, <http://www.fao.org/cfs/home/plenary/cfs45/side-events/085/en/> (last accessed 17 March 2019) (containing a summary report regarding the event).



16. Given the various important issues treated by the draft Guide (e.g. land tenure, human rights, investment, sustainable development), it was determined that it should be submitted to broad and extended consultations to raise awareness about the Legal Guide and to seek stakeholder input on the draft in order to ensure a high-quality product that responds to actual needs and complies with ascertained best practices. On the basis of the feedback received, the draft would subsequently be revised in coordination with the Working Group prior to the Guide's finalisation and adoption. This course of action was endorsed by the Governing Council at its 98<sup>th</sup> session (Rome, 8-10 May 2019).

## II. RECENT DEVELOPMENTS – CONSULTATION PROCESS AND FINALISATION

17. The consultation process on the ALIC Zero Draft included various activities, such as regional events in Asia, Latin America, Africa, and online consultations. From 1 June to 31 October 2019, the ALIC Zero Draft was made available for comment and feedback as part of an online consultation on the UNIDROIT website, as was done for the UNIDROIT/FAO/IFAD Legal Guide on Contract Farming.

18. In addition to the online consultation on the UNIDROIT website, the ALIC Zero Draft was also featured on a number of other key online platforms in this area, including the Global Forum on Food Security and Nutrition (FSN Forum)<sup>14</sup> hosted by FAO (online consultation from 4 September to 8 October), the LandPortal.org<sup>15</sup>, and the Afronomics law website.<sup>16</sup> Comments were also welcomed through UNIDROIT, FAO and IFAD's social media networks (e.g. Facebook, LinkedIn, Twitter).

19. Through the online consultations, interested people and institutions were invited to share their feedback and inputs on the ALIC Zero Draft by sending comments concerning its general approach or on specific chapters, sections, or issues. Participants in the online consultations were asked to evaluate if there were sections in the draft Guide that appeared to be non-exhaustive or to have gaps and to explain how they would propose to bridge or clarify them. Participants were also asked to indicate if the draft Guide presented any sections with redundant content.

20. In total, over 50 comments were received online, including feedback from the Embassies of the Argentine Republic, the United States of America and China, as well as from FAO, the Organization of American States (OAS), the Beirut Bar Association and from NGOs (for example, FIAN International – For the right to food & nutrition). Detailed comments and recommendations were also received from professors and researchers from a number of universities such as the University of Groningen, Erasmus University Rotterdam, Southwest University of Political Science and Law – China, University of Ottawa, University of Aberdeen, Loyola University Chicago, Durham University, Columbia Center on Sustainable Investment, and Dalhousie University.

21. Thanks to the generous provision of a "micro-grant" from IFAD, a series of regional consultation events were also held around the world in collaboration with IFAD and FAO. The first regional event (Asia) took place in Beijing on 9 July 2019 at the University of International Business and Economics (UIBE). The event brought together governmental representatives, academics, legal experts, international organisations, and private sector stakeholders to examine the key issues addressed by the future Legal Guide. Session 1 of the workshop focused on introducing the Guide, addressing issues relating to land tenure rights and responsible investments as founding principles and discussing the Chinese legal context of agriculture and land investment. Session 2 further

<sup>14</sup> See <http://www.fao.org/fsnforum/activities/discussions/ALIC>. The Secretariat wishes to acknowledge the financial support provided by FAO to cover the fees linked to the FSN Forum consultation, made possible thanks to Mr. Michael Riggs of the Private Sector and Responsible Agricultural Investment (RAI) Unit, FAO, as well as Mr. Max Blanck of the FSN Forum and his team for their support in running the FSN forum discussion.

<sup>15</sup> See <https://landportal.org/news/2019/08/online-consultation-review-draft-legal-guide-agricultural-land-investment-contracts>.

<sup>16</sup> See <https://www.afronomicslaw.org/2019/09/29/symposium-on-unidroit-fao-ifad-draft-legal-guide-on-agricultural-land-investment-contracts-alic/>.

explored other key issues including the parties' obligations, IFAD's experience in the Asia Region, and remedies for non-performance and dispute resolution.

22. The second regional event (America) was held at the São Paulo University (USP) and gathered 40 participants from countries throughout Latin America including Brazil, Chile, Argentina, Bolivia, Guatemala, Mexico, Paraguay, and Uruguay, as well as private sector representatives such as the Brazilian Rural Society. The workshop was organized in two sessions with speakers and key discussants sharing their views on Agricultural Land Investment Contracts in Brazil and Latin America (Session 1) and presenting their comments and inputs for improvement of the Guide (Session 2).

23. Finally, a third regional event (Africa) was held at the Strathmore University Law School in Nairobi, gathering more than 40 experts from a number of African States, including Kenya, Ethiopia, Nigeria, Uganda, Tanzania, South Africa, and Sudan, as well as legal experts from international organisations such as UN Environment. This workshop was organized in four sessions: Session 1 provided an overview of the Guide and its primary objectives; Session 2 delved into the key issues of drafting and implementing responsible agricultural land investment contracts; Session 3 examined how to strike the right balance between the rights and obligations of the parties in Africa; and Session 4 explored remedies and dispute resolution in the context of agricultural land investment contracts.

24. The key recommendations gathered throughout the course of the consultations have been classified according to the issues raised and allocated based on the Guide's chapters most likely to be impacted. A number of more editorial recommendations encouraged a further streamlining of the content of the Guide to eliminate unnecessary repetition and to review the keywords inserted at the beginning of each paragraph to emphasise the main topics addressed.

25. In terms of general substantive recommendations, some contributors mentioned the need to further consider the different history of land tenure found in different countries and regions and the overlap between ownership, possession, property rights and the legitimization of territories to ensure that the ALIC Guide can be adapted to the challenges faced in the different regions of the world. For example, the challenges faced in Latin America may be different from those encountered in Africa. Some contributors highlighted that more focus should be placed on informal economic activities and on global value chains when assessing the impact of investment deals, while others recommended extending the duties and responsibilities arising from a contract to all the existing business relationships. For example, contracting parties should look at parent companies, affiliates, subsidiaries, etc. when doing due diligence. The need to review how the Guide presents the right to adequate food and its link to other human rights, was also pointed out as suggestion for review.

26. Specific recommendations were also received on a chapter-by-chapter basis. Several contributors mentioned that the first chapter of the Guide ("The Legal Framework") should be expanded to include more information on the application of extraterritorial jurisdiction and foreign law when compliance with public policy and mandatory rules of other State(s) is necessary and not available in the host country. Other contributors underlined the need to include more guidance in relation to "choice of law clauses" and "clauses of prevalence" to further explain the implications they may have when the most powerful contracting party might, for example, push for the selection of a law of a third country that is highly favourable to its interests, but has no connection whatsoever with the investment in question.

27. The second chapter, dedicated to "Parties, Contractual Arrangements, Due Diligence and Formation", was the object of several recommendations. It was noted that this chapter could further explain non-contracting parties' responsibilities and provide guidance on how to hold these other actors accountable for negative land investment impacts. Moreover, the inclusion of further guidance on how to address the obligations of corporate organisations and affiliates was also flagged.

28. Some participants highlighted the need to draw attention to the differences between indigenous peoples and minority groups, since the legal notion of indigenous peoples may not apply in all countries. In terms of contractual arrangements, some commentators drew attention to the need to include reference to family farming contracts besides community development agreements, as associated contracts to the main agricultural land investment contract. Several comments were also received concerning the ALIC Zero Draft's guidance on conducting impact assessments. For instance, one comment noted that it ought to include guidance on a human rights assessment to be conducted on a regular basis and that the sustainability assessment approach could provide a platform for the integrated consideration of the various layers of impact assessments (e.g. human rights, environmental, social, etc.).

29. The chapters of the Guide devoted to contractual non-performance, remedies, grievance mechanisms and dispute resolution, respectively Chapters 5, 6, and 7, attracted a large amount of comments. Among others, it was stated that the Guide should not focus solely on "contractual non-performance" as the basis for remedies since this may limit access to the remedy by affected communities or individuals, either because they are not contracting parties or because the harm suffered does not refer to the object of the contract. Further explanation of the rules of private international law and conflict of laws was recommended for the benefit of those who may not be familiar with them and some contributors also suggested mentioning that grievance mechanisms should include gender-sensitive criteria to verify that access to justice is adapted and appropriate to the needs of women – including those who face multiple and intersecting forms of discrimination.

30. The reports containing all of the comments and recommendations received from the online consultation and the regional consultation events were submitted to the Working Group members in February 2020 (see Annexe I for the list of and links to Consultation Reports). A drafting committee was established with a view to incorporate the inputs received into the Guide's final draft, which held a hybrid in-person and virtual meeting on 2-3 March 2020. On the basis of the feedback and comments received throughout the ALIC Zero Draft consultation process, members of the drafting committee reviewed each comment and recommendation received on a chapter-by-chapter basis and decided how the various chapters of the ALIC Zero Draft should be adapted accordingly. With a view to finalising the future Legal Guide, a number of issues were discussed, such as (a) terminology; (b) the framing of guidance; (c) the appropriate level of detail; (d) references to other instruments and sources; and (e) revisions of an editorial nature as to clarity of expression and user-friendliness. The Secretariat subsequently revised the ALIC Zero Draft in order to account for the decisions taken by the drafting committee on the basis of the feedback received throughout the consultation process.

### **III. THE FUTURE LEGAL GUIDE ON AGRICULTURAL LAND INVESTMENT CONTRACTS**

31. As set out in the document included in the Annexe, the future Legal Guide is to be used by legal counsels involved in the leasing of agricultural land (e.g. investment contracts, concessions, leases) in order to support the preparation, negotiation and implementation of agricultural land investment contracts that are consistent with the UN Guiding Principles on Business and Human Rights, VGGT, CFS-RAI Principles and other international instruments. The Legal Guide, 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 promote large-scale land acquisition, but will acknowledge that leases of agricultural land continue to occur and that they present many challenges. In doing so, the Legal Guide will seek to respond to the need for greater and more responsible agricultural investment by raising awareness about alternative investment models (e.g. contract farming) and by helping to ensure that stakeholders' rights, including those of legitimate tenure right holders, are both protected and respected.



32. Further to that purpose, the Legal Guide is to provide concise and innovative legal guidance that operationalises the UN Guiding Principles, VGGT, CFS-RAI Principles, and other international principles and standards in the following seven main areas:

- *Chapter 1 – The Legal Framework:* Various domestic sources of law (e.g. legislation, judicial decisions, regulations and, in some instances, customary rules) and international sources of law (e.g. international human rights treaties, investment treaties or soft law instruments) make up the applicable legal framework, together with the agricultural land investment contract. In some instances, however, there might be gaps in the State's laws or in the implementation of those laws which, for example, fail to respect the rights of legitimate tenure right holders or do not adequately protect the environment. The legal guidance is to assist with the evaluation of the applicable framework, the identification of gaps in that framework and the understanding of customary systems and rules.
- *Chapter 2 – Parties and Contractual Arrangements:* There are various possible parties to agricultural land investment contracts, and numerous stakeholders that could be affected by such contracts. Chapter 2 examines who the potential "contracting parties" and "other stakeholders" (e.g. local community, indigenous peoples, government agencies, service providers) involved are and then describes some of the contractual arrangements (e.g. investor-grantor contracts, multi-party contracts, community development agreement) they may decide to adopt. Key questions are presented to give guidance on how to conduct the process of "stakeholder mapping" and to also help identify potential investors and grantors.
- *Chapter 3 – Significant Pre-Contractual Issues in ALICs:* During an agricultural land investment different sequences of contracts may be envisaged (e.g. from one large lease contract upfront to a series of project development agreements) and each contractual stage may be subject to certain conditions depending on the applicable legal framework. The contracting process may also vary according to the identity of the parties (e.g. government-led contracting process or legitimate tenure right holder as the main grantor), which is also highly influenced by national law (e.g. which determines who has the legal power to allocate the land). In view of the importance of obtaining essential information related to the agricultural land investment before signature of a contract, the third chapter of the Guide presents the key elements of the precontractual processes regarding due diligence, feasibility studies and business plans, as well as impact assessments.
- *Chapter 4 – Rights and Obligations of the parties:* The ALIC – whether a single contract or series of related contracts – can set out provisions addressing not only the particular tenure and associated rights that are granted, but also necessary safeguards for any gaps in the State's law and for possible impacts of the investment. Chapter 4 aims to assist with the negotiation of provisions in various areas, such as land tenure, human and social rights – including food security, gender and youth – the environment, finance, investment protection and regulatory autonomy of States, and monitoring, implementation and transparency. To this end, legal guidance is provided on various safeguards, including innovative mechanisms for ensuring compliance with environmental requirements and for sharing the benefits arising from the leased agricultural land with any legitimate tenure right holders and local communities, including community development agreements or trusts, local employment or content requirements and outgrower schemes.
- *Chapter 5 – Managing the Contractual Relationship: Dealing with Non-Performance and Remedies:* 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.

- *Chapter 6 – Transfer of Rights and Obligations under the Contract and Return of Tenure Rights:* The transfer of leased agricultural land from one investor to another can raise various concerns, including whether the granted tenure and related rights are actually transferable, the transfer complies with any contractual limitations in this regard, 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 analyse possible provisions for addressing and minimising such concerns.

*Chapter 7 – Grievance Mechanisms and Dispute Resolution:* Understanding the types of grievances and disputes that commonly arise under agricultural land investment contracts and the various mechanisms for non-judicial and judicial dispute resolution can also help to create a more balanced and sustainable contract. For example, setting out and implementing grievance mechanisms, including for employees, legitimate tenure right holders and local communities, may reduce the risks of a particular agricultural investment and prevent conflicts. In the event that a dispute arises, however, having defined a dispute resolution procedure and related commitments in the contract – including, for instance, regarding expert determinations, negotiation, mediation, conciliation, arbitration and litigation – can ensure that disputes are resolved expeditiously and that the leased agricultural land does not lie fallow during that dispute. The legal guidance is to assist with understanding various grievance and dispute resolution possibilities and setting out efficient procedures in this regard.

#### **IV. FUTURE STEPS FOR THE IMPLEMENTATION OF THE ALIC LEGAL GUIDE IN 2020-2021**

33. Subject to the final approval of the ALIC Guide by the respective partner organisations, the Secretariat envisages the following tentative programme of activities (with the caveat that numerous meetings, conferences, and promotional events have been cancelled or postponed due to the ongoing global pandemic).

##### **A. Partnership with multilateral and other organisations**

34. The key players for the implementation of the Guide are the partner organisations, in the preparation of the Guide, FAO and IFAD, which are involved in development operations at country level. Discussions will be held with the partner organisations concerning a series of activities aiming at the preparation of implementation tools and organising capacity building projects.

35. The nature and scope of UNIDROIT's involvement will depend on the particular activities to be developed and the resources needed to implement them.

##### **B. Meetings, conferences, and promotion events**

36. Prospective events where the Legal Guide will be presented and discussed include:

- organisation of a launch event, with one day workshop with the participation of the working group experts, to take place in Rome, preferably at UNIDROIT (to be defined if in-person or remotely due to the COVID-19 situation);
- side event within the meeting of the Committee on Food Security, Rome, CFS 47, rescheduled to February 8-12, 2021;

- the 21<sup>st</sup> Annual World Bank Conference on Land and Poverty, postponed to March 22-26, 2021;
- meetings organised by the Italian Ministry of Foreign Affairs together with the other international legal organisations based in Italy.

## **V. ACTION TO BE TAKEN**

*The Governing Council is invited to consider and adopt the UNIDROIT/FAO/IFAD Legal Guide on Agricultural Land Investment Contracts, subject to possible minor adjustments during the process leading to the approval by the partner organisations, and to take note of the prospective programme of activities for the implementation of the Legal Guide in 2020-2021.*

**ANNEXE I****List of Consultation Reports****(Available on the UNIDROIT website)**

1. [Online Consultation](#) (1 June - 31 October 2019)
2. [Beijing Workshop](#) (9 July 2019)
3. [São Paulo Workshop](#) (9 August 2019)
4. [Nairobi Workshop](#) (23 October 2019)
5. [Consolidated Report](#)



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**UNIDROIT Working Group on  
Agricultural Land Investment Contracts**

UNIDROIT 2020  
Study 80B  
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## **UNIDROIT/FAO/IFAD**

### **Legal Guide on Agricultural Land Investment Contracts**

# **ALIC DRAFT**

September 2020





## FOREWORD

More and better investment in agriculture is essential for achieving food security, adequate nutrition and for reducing poverty. In seeking to attract agricultural investment, many governments and local communities have entered into Agricultural Land Investment Contracts (ALIC) with the goal of transferring the right to use – in some instances by sale, but more commonly by long-term lease – large parcels of land to investors and granting them extensive tenure and related rights. In practice, the implementation of some of these contracts may be problematic, revealing various shortcomings and sometimes resulting in more negative impacts than positive ones. In this context, such contracts have given rise to intense debates.

The Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security (VGGT) and the Principles for Responsible Investment in Agriculture and Food Systems (CFS-RAI Principles), endorsed by the Committee on World Food Security (CFS) in 2012 and 2014 respectively, set out principles and standards for the promotion of secure tenure rights, equitable access to land, and responsible agricultural investment that supports the progressive realization of the right to adequate food and the protection of the environment. In seeking to promote greater respect for tenure rights, there is a plethora of business models available along with various contractual arrangements, each of which present different advantages and disadvantages. However, the process of preparing, negotiating, and implementing agricultural land investment contracts in accordance with those principles and standards can be complex and may present challenges for investors, governments and local communities.

Mindful of the contractual challenges involved in implementing the VGGT and the CFS-RAI Principles and considering the importance of enhancing knowledge of the legal regime applicable to agricultural land investment operations, the International Institute for the Unification of Private Law (UNIDROIT), in collaboration with the Food and Agriculture Organization of the United Nations (FAO) and the International Fund for Agricultural Development (IFAD), have prepared this UNIDROIT/FAO/IFAD Legal Guide on Agricultural Land Investment Contracts (the ALIC Guide).

The ALIC Guide is the second international instrument adopted under the ongoing partnership in the area of private law and agricultural development, following the successful trilateral collaboration between UNIDROIT, FAO and IFAD, in the field of contract farming. By building upon the UNIDROIT Principles of International Commercial Contracts (UPICC) and the UNIDROIT/FAO/IFAD Legal Guide on Contract Farming, the ALIC Guide seeks to provide concise and innovative guidance to improve such contracts and operationalise international principles and

## *Foreword*

standards established by the VGTT and the CFS-RAI, as well as by the UN Guiding Principles on Business and Human Rights.

A Working Group was established under the auspices of UNIDROIT in 2017, comprising of internationally recognized legal scholars, practising lawyers, representatives of International Organisations, representatives of agribusiness, and other stakeholders. The group met in-person in Rome four times, as well as twice virtually to discuss and draft the ALIC Guide. The renowned experts who contributed to the three-year development process of the Guide represent a range of different backgrounds and legal cultures. In addition, to ensure a high-quality guidance instrument that responds to the actual needs and complies with ascertained best practices, broad and extended consultations were held during 2019 with stakeholders in Beijing (China), São Paulo (Brazil), Nairobi (Kenya), as well as through online consultations.

In line with the VGTT and the CFS-RAI Principles, the ALIC Guide promotes investments both by and with smallholder farmers, as well as partnerships with them and local communities. Instead of definitive transactions of tenure and related rights to investors through sales, the ALIC Guide encourages alternative models of agricultural investment involving a transaction for a specified period of time, such as leases. The ALIC Guide provides a framework that can be used when developing contracts, domestic policies, regulatory frameworks, and corporate social responsibility programmes, in responsible and inclusive ways.

We also wish to thank all those who submitted comments, made suggestions, and contributed at various stages to the development of this Guide.

We are confident that the ALIC Guide will be a useful tool and reference point for a broad range of users involved in agricultural development, and we hope that it will help create more responsible, equitable and sustainable relationships in the area of agricultural land investments.

UNIDROIT

FAO

IFAD

Rome, September 2020

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[To be updated]

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## **LIST OF ABBREVIATIONS AND ACRONYMS**

*[To be updated]*

CDA	Community Development Agreements
CESCR	UN Committee on Economic, Social and Cultural Rights
CFS	Committee on World Food Security
CFS-RAI Principles	CFS Principles for Responsible Investment in Agriculture and Food Systems
CISG	United Nations Convention on Contracts for the International Sale of Goods
CSO	Civil Society Organisation
CSR	Corporate Social Responsibility
EU	European Union
FAO	Food and Agriculture Organisation of the United Nations
FPIC	Free, prior and informed consent
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
IFAD	International Fund for Agricultural Development
IFC	International Finance Corporation
IIA	International Investment Agreement
ILC	International Law Commission
ILO	International Labour Organisation
ISO	International Organisation for Standardisation
IUCN	International Union for Conservation of Nature
MOU	Memorandum of Understanding
NCP	National Contact Point
NGO	Non-Governmental Organisation
OECD	Organisation for Economic Co-operation and Development
OHADA	Organisation for the Harmonisation of Business Law in Africa
RAI-KN	UNCTAD/World Bank Knowledge into Action Note
RSPO	Roundtable on Sustainable Palm Oil
SDG	Sustainable Development Goals
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development

*List of abbreviations and acronyms*

UNECA	United Nations Economic Commission for Africa
UNECE	United Nations Economic Commission for Europe
UNESCO	United Nations Educational, Scientific and Cultural Organisation
UNGP	United Nations Guiding Principles on Business and Human Rights
UNIDROIT	International Institute for the Unification of Private Law
UPICC	UNIDROIT Principles of International Commercial Contracts
VGGT	Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security
WB	World Bank
WFP	World Food Programme

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*List of abbreviations and acronyms*

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*List of abbreviations and acronyms*

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## INTRODUCTION

### **I. THE ROLE OF AGRICULTURAL LAND INVESTMENT CONTRACTS IN RESPONSIBLE AGRICULTURAL LAND INVESTMENT**

Intro. 1. More responsible investment, particularly in agriculture, is needed to achieve the Sustainable Development Goals (SDGs)<sup>2</sup> which aim to improve human lives while protecting the environment. The challenge of sustainable development is how to meet “the needs of the present without compromising the ability of future generations to meet their own needs”.<sup>3</sup> An estimated 140 billion USD in additional annual investment – including from public authorities and private sector investors – is required for agriculture and rural development in order to achieve, among others, SDG 1 (No poverty) and SDG 2 (Zero hunger).<sup>4</sup> Private sector investments in agriculture may potentially contribute to agricultural and rural development, but only if they occur in responsible ways that promote sustainable production systems as well as secure and equitable access to land, resources and livelihood opportunities.

Intro. 2. A number of voluntary international instruments, such as the “Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security” (VGGT) and the Committee on Food Security (CFS) “Principles for Responsible Investment in Agriculture and Food Systems” (CFS-RAI Principles), set out principles and internationally accepted standards for responsible practices and provide frameworks for developing strategies, policies, and laws. These guiding instruments acknowledge that responsible investments can play an important role in enhancing food security, eradicating hunger and poverty, and supporting the progressive realisation of the right to adequate food, which is intrinsically linked to other human rights, such as the right to health, to life, to education, as well as to employment. But they also set key parameters of responsible business conduct.

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<sup>2</sup> These goals are part of the [2030 Agenda for Sustainable Development](#) adopted at the United Nations Sustainable Development Summit on 25 September 2015.

<sup>3</sup> See the concept of sustainable development as proposed by the Report of the World Commission on Environment and Development: Our Common Future (Brundtland Report). World Commission on Environment and Development. 1987. [Brundtland Report](#), Chapter 1, Section 3, para. 27.

<sup>4</sup> The total amount of additional annual investments (including non-agricultural sectors and social protection) required to achieve SDGs 1 and 2 is an estimated 265 billion USD. See FAO, IFAD and the World Food Programme (WFP). 2015. [Achieving Zero Hunger](#), 2015, pp. iv-v.

## Introduction

Intro. 3. According to these voluntary international instruments, responsible investment in agriculture requires sustained engagement in a wide range of areas, including respect for gender equality, ensuring participation of youth, enhancing sustainable livelihood opportunities, in particular for smallholders and members of marginalised and vulnerable groups, creating decent work for agricultural and food workers, eradicating hunger and poverty, fostering social equality, promoting participation and inclusiveness, and increasing economic growth.<sup>5</sup> In addition, responsible investments should “do no harm, safeguard against dispossession of legitimate tenure right holders and environmental damage”.<sup>6</sup> While States should promote and regulate responsible business conduct, investors also have a “responsibility to respect national law and recognize and respect tenure rights of others and the rule of law”.<sup>7</sup>

Intro. 4. The need to increase both the quantity and quality of investment relates to different segments of agricultural value chains (e.g. inputs, production, aggregation, processing, and distribution). In seeking to attract investment in agricultural production and processing, some governments and communities have concluded with investors diverse forms of Agricultural Land Investment Contracts (ALICs). While these agreements vary considerably in both content and process, they typically have the effect of transferring to investors extensive tenure rights in land – in some instances land ownership but more commonly long-term lease or use rights – as well as various related rights. Depending on the situation, these transactions can affect large parcels of land.<sup>8</sup>

Intro. 5. While agricultural land investments can play a role in upgrading production and processing, many such investments have displaced existing tenure rights and land use strategies, and fostered conflict over competing land claims and visions of development. This is partly because, in many situations, ALICs have been negotiated or implemented in a way which fails to effectively recognise local tenure systems, engage with all holders of tenure rights, or properly balance different policy goals (e.g. promoting food security and gender equality; safeguarding the rights of legitimate tenure right holders; protecting the environment; and stimulating economic growth). There is a plethora of other business models, along with a range of contractual configurations, that enable

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<sup>5</sup> Committee on World Food Security (CFS). 2014. Principles for Responsible Investment in Agriculture and Food Systems ([CFS-RAI Principles](#)), para. 1.

<sup>6</sup> FAO. 2012. Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security ([VGGT](#)), para. 12.4.

<sup>7</sup> FAO. 2012. [VGGT](#), para. 12.12.

<sup>8</sup> The term “large” is not an absolute one, and what may qualify as a “large-scale” land investment depends, *inter alia*, on the relevant State within which the investment is made and the context of that investment.

investors to collaborate with small-scale rural producers. Each model presents different advantages and disadvantages, and varying suitability to diverse crops, ecologies and socio-political contexts, and fairness ultimately depends on the specific terms of collaboration. Careful consideration of the most appropriate approach and terms is essential to ensure both responsible investment and business viability.

Intro. 6. Where agricultural land investments do occur, properly thought through contracts – and the legal frameworks in which they operate – can help address some of the challenges. For example, prospective or contracting parties can contemplate and as needed, incorporate provisions into the contract to enhance the likelihood that anticipated benefits are realised and that negative impacts are avoided or mitigated. They can also structure the contracting process in ways that enable respect for legitimate tenure rights and maximise opportunities for public participation in decision making. Bearing this in mind, actions in preparation for and during all phases of an investment contract are critical to generating a positive outcome. Voluntary international instruments provide clear parameters of responsible business conduct, and these have direct implications for the way ALICs are developed and formulated. However, there is limited guidance on how to operationalise these instruments in investment contracts and contracting processes.

Intro. 7. In response to this context, the International Institute for the Unification of Private Law (UNIDROIT), the Food and Agriculture Organization of the United Nations (FAO) and the International Fund for Agricultural Development (IFAD) have decided to continue their collaboration in the field of private law and agricultural development, which began with the elaboration and adoption of a Legal Guide on Contract Farming in 2015,<sup>9</sup> to jointly develop a second legal guide – the UNIDROIT/FAO/IFAD Legal Guide on Agricultural Land Investment Contract (the ALIC Guide).

Intro. 8. The following sections introduces (I) a brief overview of the purpose and development process of the ALIC Guide, (II) an overview of the scope of the ALIC Guide, (III) the contractual arrangements covered, (IV) the parties and stakeholders involved in ALICs, and (V) a summary of the content of its various chapters.

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<sup>9</sup> UNIDROIT's work in the area of private law and agricultural development and its collaboration with FAO and IFAD traces its origins to a Colloquium on "Promoting Investment in Agricultural Production: Private Law Aspects" (8-10 November 2011). In 2015, the three organisations adopted a jointly developed Legal Guide on Contract Farming. More information on the UNIDROIT/FAO/IFAD Legal Guide on Contract Farming at <https://www.unidroit.org/studies/contract-farming>.

## **II. AN OVERVIEW OF THE PURPOSE AND DEVELOPMENT PROCESS OF THE ALIC GUIDE**

Intro. 9. Drawing upon UNIDROIT's private law expertise, in particular in the area of contract law, as well as on FAO and IFAD's legal and policy expertise in the areas of land tenure and agricultural investment, the UNIDROIT/FAO/IFAD Legal Guide on Agricultural Land Investment Contracts provides advice and guidance on the contractual relationship between the parties to the ALIC, as well as the relationships with other stakeholders. It covers every stage of the process, from the various pre-contractual phases to the conclusion of such investments, including performance, breach and termination of the contract.

Intro. 10. The guidance provided herein is consistent with – and elaborates upon – the international consensus reflected in a number of key instruments for land tenure, agricultural investment, human rights, and general principles of contract law which are themselves the result of broad and extensive international consultations. These instruments are:

- the UN Guiding Principles on Business and Human Rights (UN Guiding Principles), which were endorsed by the UN Human Rights Council in May 2011 and seek to prevent, address and remedy human rights abuses committed in business operations;
- the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security (VGGT), which were endorsed by the Committee on World Food Security (CFS) in May 2012 to promote secure tenure rights and equitable access to land, fisheries and forests as a means of eradicating hunger and poverty, supporting sustainable development and enhancing the environment;
- the CFS Principles for Responsible Investment in Agriculture and Food Systems (CFS-RAI Principles), which were endorsed by the CFS in October 2014 and promote responsible investment to improve food security and nutrition, thus supporting the progressive realisation of the right to adequate food;
- the Legal Guide on Contract Farming (LGCF), elaborated in cooperation between UNIDROIT, FAO and IFAD and adopted in 2015 as a tool to create a favourable, equitable and sustainable environment for contract farming; and

## *Introduction*

- the 2016 UNIDROIT Principles of International Commercial Contracts (UPICC) which represent an international codification or restatement of general principles of contract law.<sup>10</sup>

Intro. 11. In line with these instruments, the ALIC Guide promotes investments both by and with smallholder farmers, as well as partnerships with them and local communities. Rather than definitive transactions of tenure and related rights to investors, the Guide encourages alternative models of agricultural investments involving a transaction for a specified period of time. In particular, the Guide seeks to provide contractual guidance – in a manner consistent with the VGGT, the UN Guiding Principles, and the CFS-RAI Principles – to promote more responsible investment by supporting, amongst others, smallholder and gender sensitive investments, and by recommending the adoption of safeguard clauses which enhance food security and nutrition, seek to eliminate poverty, protect against dispossession of legitimate tenure right holders, protect against environmental risks and promote respect for human rights. The Guide also makes clear that contracts might not be able to address all possible issues and that, in many instances, it is preferable for certain issues to be dealt with primarily or exclusively in domestic law.

Intro. 12. The ALIC Guide is addressed to parties and legal professionals engaging in the preparation, negotiation, implementation, and review of ALICs. The Guide may also serve as a useful reference for other actors, including legislators, policymakers, government officials, public authorities, judges, arbitrators, mediators, public-interest legal service organisations, community organisations, law societies and international development organisations. The Guide was developed by a Working Group, set up under the auspices of UNIDROIT, which met four times in-person between 2017-2018, as well as twice online in 2019, and gathered renowned legal experts, academics, representatives of various International Organisations and other stakeholders from the farming and agribusiness sector, from different backgrounds and legal cultures.<sup>11</sup>

Intro. 13. The drafting process was inclusive and transparent, with the UNIDROIT Secretariat, together with FAO, IFAD and members of the Working Group,

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<sup>10</sup> The Guide will occasionally make reference to the UNIDROIT Principles in the text as representative of general principles of contract law, not intending to refer to their direct application. More information about the UPICC, including the text and an overview, is available on the UNIDROIT website at <https://www.unidroit.org/instruments/commercial-contracts/unidroit-principles-2016>.

<sup>11</sup> Meeting reports, including summaries of the Working Group's deliberations and lists of participants, are available on UNIDROIT's website for the project on agricultural land investment contracts at <https://www.unidroit.org/work-in-progress/agricultural-land-investment>.

participating in various conferences and events to raise awareness about the Guide and to seek stakeholder input, such as in the World Bank's Annual Land and Poverty Conference; the Committee on World Food Security (43<sup>rd</sup>, 44<sup>th</sup> and 45<sup>th</sup> plenary sessions); the International Bar Association's annual meeting and the World Bank's Law, Justice and Development Week. In addition, the invaluable feedback and recommendations received through broad consultations and workshops held in 2019<sup>12</sup> were incorporated into the final ALIC Guide.<sup>13</sup>

### **III. AN OVERVIEW OF THE SCOPE OF THE ALIC GUIDE**

Intro. 14. The Guide acknowledges that many ALICs are being negotiated with limited consultation, transparency, or accountability, often leading to contractual arrangements that violate legitimate tenure rights or fail adequately to address the social, environmental, or economic dimensions at stake. In seeking to improve the contracting process and the contracts themselves, the Guide discusses how to identify and involve equitably all relevant parties and stakeholders and to structure and draft the resulting contracts so that they effectively operationalise the international consensus reflected in the UN Guiding Principles, the VGGT and the CFS-RAI Principles. The focus is on ALICs with a specified duration (*e.g.* leases, concession agreements, public-private partnerships). The Guide does not promote the large-scale transfer of land and excludes sales of agricultural land from its scope for two chief reasons. First, in many jurisdictions time-bound transactions are known to be more common than sales since, for example, land ownership may remain vested with the State or foreign investors may be prohibited from owning land. Second, unlike sales, time-bound transactions of land entail ongoing obligations between the grantor of the tenure and the investors which receive those rights in exchange for payment and other obligations, thus requiring effective contractual provisions to spell out the rights and obligations of the parties over the duration of the contract.

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<sup>12</sup> The consultation process on the ALIC Zero Draft included a range of activities such as regional events in Asia, Latin America, and Africa, and online consultations. From 1 June until 31 October 2019 the ALIC Zero Draft was made available for comment and feedback as part of an online consultation held through the UNIDROIT website, as well as on a number of other key online platforms, including the Global Forum on Food Security and Nutrition (FSN Forum) hosted by FAO, the LandPortal.org, and the Afronomics law website. Comments were also welcomed through UNIDROIT, FAO and IFAD's social media networks. All the consultation reports are available at the UNIDROIT website.

<sup>13</sup> A drafting committee meeting was held in March 2020 to review and address the feedback received throughout the consultation process and the contributions of Margret Vidar, Lorenzo Cotula, and James Gathii are gratefully acknowledged. In particular, Lorenzo Cotula provided further invaluable input on several chapters and his dedication deserves special recognition.



Intro. 15. The guidance may be relevant to investments of different scales and to both domestic and foreign investors. It may also be used to support capacity development within governments and to raise awareness among legitimate tenure right holders and local communities regarding their rights. An ALIC may comprise a single contract or a series of contracts. In the latter situation, the contracts may relate to various steps in the investment process and may include related agreements. In promoting business models that are inclusive, the ALIC Guide covers arrangements that aim to share the investment's benefits with legitimate tenure right holders and local communities, whether through contractual provisions or in related agreements. These include community development agreements or trusts, local employment provisions, content or procurement requirements, as well as outgrower schemes in which, as a general matter, farmers on or next to the investment area engage in contract farming with the investors.

Intro. 16. The ALIC Guide highlights key themes, describes common contract terms, discusses issues that might arise in different legal systems and contexts and illustrates how they might be addressed in a way that promotes responsible agricultural land investment while seeking to avoid or minimise negative social, environmental and economic impacts. The guidance provided, however, is not meant to promote transactions of tenure and related rights to investors, nor is it to be construed in a manner as to interfere with mandatory domestic rules. While the Guide was not designed to provide a model for, or encourage the adoption of, special legislation by governments, insofar as the Guide identifies problems and points to possible solutions, it could nevertheless provide useful information to be considered when adopting regulatory or legislative provisions dealing with ALICs and related aspects.

Intro. 17. The legal discussion and analysis throughout the Guide follows a concrete approach based upon contract principles and practices, actual investment operations and input from a broad range of experts in areas such as contract law, land tenure, responsible agricultural investment, human rights and environmental protection. Due to its global audience encompassing many legal cultures and legal traditions, the ALIC Guide does not provide a comprehensive comparative law analysis and refrains from making specific references to individual States' domestic laws and citing case studies or quoting examples of contract clauses. It instead refers to relevant international instruments and guidance documents promulgated by inter-governmental organisations. In this manner, the Guide illustrates, to the extent possible, mandatory and default rules which may be applicable by analogy, but also includes references to international principles, standards and good contractual practices. Even if these may not be

mandatory, parties should be aware of and comply with them because they reflect the international consensus on land tenure, agricultural investment and related areas and are supportive of responsible and sustainable investment.

Intro. 18. Due to the sheer diversity of ALICs, the Guide maintains a certain level of generality regarding the various issues that might arise in practice. Indeed, ALICs must be tailored according to numerous factors (*e.g.* applicable laws and regulations, including whether they are implemented or sufficient; the nature of the tenure holder(s) concluding the contract; location of the land and the agricultural commodity to be produced). There are many options to consider, and no contract contains the same provisions or addresses all issues in an identical fashion. In taking a concrete approach, the Guide seeks to be comprehensive in terms of covering the main issues, while avoiding duplication of existing guidance by including reference to other international instruments and guidance documents promulgated by inter-governmental organisations.

#### **IV. CONTRACTUAL ARRANGEMENTS COVERED IN THE ALIC GUIDE**

Intro. 19. While acknowledging that the concept of ALICs can be very broad, in the context of this Guide it refers to a contract or a series of interrelated contracts involving a transaction of tenure and related rights for a specified period of time (excluding sales) between investors and the grantors of those tenure rights (*e.g.* leases or concession agreements), as well as related agreements between investors and other stakeholders such as local communities (*e.g.* community development agreement). In practice, as discussed further (Chapter 4.I.B), tenure of land may be held or owned by individuals, families, companies or groups and can encompass one or more rights within a “bundle 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).<sup>14</sup> Land holding does not necessarily need to be formally recognised in the written law of the domestic legal system. Some legitimate tenure right holders, for instance, may have their rights to and over land recognised through unwritten customs and practices. Moreover, it should be noted that ALICs may concern agricultural lands which are not necessarily used for the production of food but may serve other purposes such as agricultural bioenergy production.

Intro. 20. At the outset, it is important to recognise – in line with the VGGT and CFS-RAI Principles – that the Guide encourages alternative models of agricultural investments which do not involve the definitive transactions of tenure and related

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<sup>14</sup> FAO. 2016. Responsible governance of tenure and the law: a guide for lawyers and other legal service providers. [Governance of Tenure Technical Guide No. 5](#), p. 19.

rights to investors. This refers to investments both by and with smallholder farmers, as well as partnerships with them and local communities, such as through responsible contract farming or other supply arrangements.<sup>15</sup> This approach is consistent with the VGGT which explicitly encourage States to “support investments by smallholders as well as public and private smallholder-sensitive investments [...] [c]onsidering that smallholder producers and their organizations in developing countries provide a major share of agricultural investments that contribute significantly to food security, nutrition, poverty eradication and environmental resilience”.<sup>16</sup> It also bears mentioning that the various forms and models of investment are not necessarily mutually exclusive, and they are to be considered as an alternative to an investment involving a transaction of tenure and related rights or for possible use in connection with such an investment (e.g. a nucleus estate with contract farming arrangements in place with local farmers). Recognising that ALICs nevertheless continue to occur, this Guide seeks to provide contractual guidance to promote more responsible investment.

Intro. 21. The Guide focuses on contracts between investors and governments and between investors and local communities. In focusing on these two sets of contracts, the Guide places particular emphasis on protecting and respecting the rights of legitimate tenure right holders, who are to be consulted in the preparation, negotiation, and implementation of such contracts. Depending on the circumstances, such holders may be parties to ALICs or related agreements or may stand to benefit from those contracts as third-party beneficiaries with certain rights even though they are not parties to the contracts.

Intro. 22. Although ALICs between investors and private landowners – to the extent that such owners are not local communities – generally fall outside the Guide’s scope (see, e.g., the Guide’s description of the key term “grantor” below), some of the guidance may nevertheless be relevant to those contracts. As a general matter, such contracts might not require safeguards for tenure rights if the land is transacted through the market by a private owner, the parties are informed and not coerced, and there are no other holders of tenure rights with respect to that land. Where assessment indicates, however, that there are legitimate tenure right holders that might be impacted negatively by a transaction of tenure and related rights from a private owner or there may be other negative impacts (e.g. environmental, social or economic), the Guide could prove to be

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<sup>15</sup> The UNIDROIT/FAO/IFAD [Legal Guide on Contract Farming](#) (LGCF) provides detailed guidance on responsible contract farming models, which is – as a policy matter – a preferred model because it does not entail the transfer of tenure rights. Accordingly, it was the first instrument adopted in the UNIDROIT/FAO/IFAD collaboration in the area of private law and agricultural development.

<sup>16</sup> FAO. 2012. [VGGT](#), para. 12.2.

useful, in particular with respect to possible contractual safeguards to avoid or minimise those impacts.

## **V. PARTIES AND STAKEHOLDERS INVOLVED IN ALICS**

Intro. 23. The parties to an ALIC may include – depending upon the applicable law and the particular context – investors, governments, local communities, Indigenous communities, legal or legitimate tenure right holders and private landowners. With respect to parties and other stakeholders, the Guide employs the following key terms, for which summary descriptions are provided below.

Intro. 24. *Investors* in ALICs may be private sector entities (e.g. general investment or holding companies or specialised agribusinesses) or certain public sector entities (e.g. sovereign wealth funds and State-owned enterprises), that seek and enter into ALICs, or become party to existing contracts (e.g. through a merger or other acquisitions).

Intro. 25. *Grantor* refers to the government or local community, including traditional authorities, which grant tenure and any related rights with respect to particular agricultural land to the investor in exchange for payment and other obligations under an ALIC.

Intro. 26. *Government* refers to the public authority or authorities that are legally mandated to grant tenure and related rights to land within a given State. Public authorities whose mandate covers ALICs, for example, can include the presidency or the ministries of agriculture, land, environment, trade, economy, industry or foreign affairs, and regional or local governmental subdivisions, as well as traditional authorities if they have formal authority under domestic law.

Intro. 27. *Local community* refers to a group of people living next to, near, or on particular agricultural land. The community may be a legal or legitimate tenure right holder itself with respect to that land or represent such holders. The community may also involve Indigenous Peoples (e.g. making up all or parts of the community), traditional authorities or systems of tenure. For purposes of the Guide, the term does not refer to local governmental subdivisions, which are covered by the term “government”.

Intro. 28. *Traditional authority* refers to a customary leader or groups of leaders which may have either formal or informal authority over land, allocation of benefits and other investment-related decisions that impact the local community.

Intro. 29. *Legal tenure right holder* refers to an individual or collective holder whose rights to land – including ownership and customary rights – are recognised by the relevant domestic law.<sup>17</sup>

Intro. 30. *Legitimate tenure right holder* refers not only to an individual or collective holder whose rights to land are formally recognised by domestic law, but also to a holder whose rights, while not currently protected in the formal written law, are informally recognised and considered to be socially legitimate in local societies.<sup>18</sup> In some instances, the rights may be communal or overlapping (e.g. some hold rights to use the land for pasture or agriculture or to use trees or collect firewood in the forest, while others hold rights to travel across the land or to drive cattle across it to obtain water at a river). Some may hold temporary use rights (e.g. tenants farming on land owned by the State or others) or seasonal rights (e.g. pastoral communities who graze their livestock in the area on a seasonal basis).<sup>19</sup> It should be noted that legitimate tenure right holders is now an internationally accepted term, as is evidenced by it featuring as one of the guiding principles of responsible tenure governance in the VGGT.<sup>20</sup> Further, in using this term, consistent with the emphasis on protecting and respecting the rights of legitimate tenure right holders, the Guide most often refers to such holders whose rights are not recognised in the formal written domestic law. Legitimate tenure rights are in some jurisdictions recognised under unwritten customary laws and practices.

## VI. A SUMMARY OF THE CONTENT OF THE ALIC GUIDE

Intro. 31. The Guide contains seven chapters addressing important aspects of ALICs. The following paragraphs provide a brief overview of the main legal topics addressed in each of those chapters. A “checklist of key issues” which summarises the main guidance that contracting parties and other stakeholders should consider when envisioning a responsible agricultural land investment may be found in Annex I.

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<sup>17</sup> FAO. 2016. [Governance of Tenure Technical Guide No. 5](#), pp. 19-20.

<sup>18</sup> *Ibid.*

<sup>19</sup> FAO. 2016. Responsible governance of tenure: a technical guide for investors. [Governance of Tenure Technical Guide No. 7](#), p. 17; see also FAO. 2016. [Governance of Tenure Technical Guide No. 5](#), pp. 19 *et seq.* (discussing social and legal legitimacy and legitimate tenure rights).

<sup>20</sup> FAO. 2012. [VGGT](#), 3A General principles, p. 3.

Intro. 32. The **first chapter** of the Guide examines the various sources of law (national,<sup>21</sup> regional, supranational, or international) that may define the legal framework applicable to an ALIC and related contractual agreements. It emphasises the interplay between the contract and domestic law and sets out the importance of conflict of laws rules to determine the applicable law, including the mandatory rules and default rules, which provide solutions when the contracting parties have left open contractual terms, or when their intentions need to be interpreted. Key issues covered include the importance of assessing the domestic law (e.g. legislation, judicial decisions, regulations and, in some instances, customary rules) of the State in which the investment is or will be made, and the need to identify issues or gaps in that law that might need to be addressed in the ALIC. For example, gaps in the State's laws or in their implementation could entail that legitimate tenure rights are not respected, or the environment inadequately protected, and at least some of these lacunae could be addressed in the ALIC. The Guide outlines some areas of domestic law which are generally applicable to these contracts, including, amongst others, provisions of general contract and law of obligations, administrative law, human rights law, environmental law, property law, land law, investment law, labour law, and fiscal law.

Intro. 33. **Chapter 2** of the Guide begins by examining who are the potential "contracting parties" and "other stakeholders" involved (from government agencies to local communities and Indigenous Peoples), and then describes some of the contractual arrangements (e.g. investor-grantor contracts, multi-party contracts, community development agreement) these actors may decide to adopt. The Guide recognises that ALICs typically involve a bilateral relationship between: (a) an investor looking to acquire tenure and related rights for the purposes of carrying out an agricultural investment; and (b) a grantor of those rights, who is generally the legal tenure right holder and seeks to transfer those rights to the investor in exchange for payment and other forms of consideration. However, depending on its size and location, an agricultural investment can affect many other people, both directly and indirectly. Accordingly, at the outset of the contracting process, it is important to identify the actors involved, whether as potential "contracting parties" or "other stakeholders" who will need to be consulted and engaged with.

Intro. 34. Considering the need to clearly identify both the legal title holder of particular agricultural land and any holders of legitimate tenure rights with respect to that land, the Guide devotes particular attention to the notion of legitimate tenure right holders, who are individuals or communities who live on, work on, or

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<sup>21</sup> Throughout this Guide, the terms national law and domestic law are used interchangeably.

otherwise occupy the land being transacted, and whose rights or occupancy claims are considered to be socially legitimate in local societies. Their relation to legal tenure right holders is also presented to clarify that legal counsels should broaden the range of tenure rights they consider when analysing the form, formation, and content of an ALIC, as well as the parties thereto. Key questions are presented to give guidance on how to conduct the process of “stakeholder mapping” and to also help identify potential investors and grantors.

Intro. 35. The conduct of due diligence – with respect to identifying possible parties and stakeholders, locating the land in question, examining the feasibility of the investment and the assessment of potential impacts – is an essential part of responsible agricultural land investment. When done properly, this allows for the involvement of legitimate tenure right holders and local communities and for the incorporation of necessary safeguards, both of which in turn support the realisation of the investment’s benefits and mitigation of its negative impacts. The need for consultation also features prominently in the Guide, which states who should be consulted, explains the quality of consultations and outlines the relevance, as well as the basic elements for active, free, meaningful and informed participation.

Intro. 36. **Chapter 3** provides an overview of the stages of contract formation, including tendering and bidding processes, negotiation, and gives guidance on the contractual form, content, and conditions. Given the complexity of ALICs, the Guide suggests that such contracts should always take the form of a written agreement, either as a single comprehensive contract or a series of contracts relating to various steps in the investment process.

Intro. 37. The ALIC – whether a single contract or series of related contracts – can set out provisions addressing not only the particular tenure and associated rights that are granted, but also necessary safeguards for any gaps in the State’s law and for possible impacts of the investment. **Chapter 4** aims to assist with the negotiation of provisions in various areas, such as land tenure, human and social rights, the environment, finance, investment protection and regulatory autonomy of States, and monitoring, implementation and transparency. Legal guidance is provided on various safeguards, including innovative mechanisms for ensuring compliance with social and environmental requirements and for sharing the benefits arising from the leased agricultural land with any legitimate tenure right holders and local communities.

Intro. 38. ALICs are typically long-term and complex contracts, and the parties and other affected stakeholders may encounter situations in which the rights and obligations contemplated will not be satisfactorily performed, whether as a result

of an event external to the parties' control or because of default or breach by one of the parties. **Chapter 5** of the Guide highlights the role contracting parties may play in establishing a contingency plan, in particular to build contractual mechanisms that can be adequately used. The Guide focuses on contractual remedies, but depending on the legal system, an aggrieved party may be entitled to seek relief outside the particular contract or related agreement as well, based for example on a tort action or otherwise regarding grounds for voidance of the contract (such as defects in consent, fraud or others). An overview is also provided regarding excuses for non-performance and remedies which may be available to contracting parties and other stakeholders (e.g. third-party beneficiaries), thereby helping to ensure a more balanced and responsible contract and to prevent conflicts.

Intro. 39. **Chapter 6** of the Guide addresses issues relating to the transfer of the investment project or rights and obligations under ALICs, particularly from one investor to another, and the return of the land at the end of such contracts. Such issues are important to consider, particularly for two reasons: first, to make certain that any transfers are handled in such a way that a project becomes or continues to be responsible and sustainable; and second, to ensure that the agricultural land remains productive and any rights to it are returned to those who granted them or otherwise released in favour of the investment project. The transfer of leased agricultural land from one investor to another can raise various concerns, including whether the granted tenure and related rights are actually transferable, that the transfer complies with any contractual limitations in this regard, and that 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 focuses on possible provisions for addressing and minimising such concerns.

Intro. 40. Understanding the types of grievances and disputes that commonly arise under ALICs and the various mechanisms for non-judicial and judicial dispute resolution can also help to create a more balanced and therefore more stable contract. For example, setting out and implementing grievance mechanisms, including for employees, legitimate tenure right holders and local communities, may reduce the risks of a particular agricultural investment and prevent conflicts. In the event that a dispute arises, however, having defined a dispute resolution procedure and related commitments in the contract – including, for instance, expert determinations, negotiation, mediation, conciliation, arbitration and litigation – can ensure that disputes are resolved expeditiously and that the leased agricultural land does not lie fallow during that dispute. The legal guidance presented in **Chapter 7** seeks to assist with understanding various grievance and dispute resolution possibilities and setting out efficient procedures in this regard.



## CHAPTER 1

### THE LEGAL FRAMEWORK

1.1. *Legal framework for ALICs.* An appropriate and effective legal framework is an important part of making agricultural investment more responsible and more sustainable, notably by incorporating the necessary safeguards to protect legitimate tenure right holders, human rights, livelihoods, food security and the environment. For agricultural investments, the legal framework generally consists of the ALIC itself and related contractual agreements, the national law of the host State in which the land is located, and international law. The law of the investors' home State may also have a bearing on the investment, for example with regard to legal requirements concerning investor due diligence or the disclosure of non-financial information.<sup>22</sup>

1.2. *Freedom of contract.* Freedom of contract entails that parties are free to enter into a contract and to determine its content as they see fit.<sup>23</sup> However, this freedom may be limited by mandatory requirements, and this is typically the case for ALICs involving governments and local communities and potentially affecting food security, human rights and environmental protection.

1.3. *Mandatory rules.* ALICs must comply with the applicable mandatory rules whether of national, international, or supranational origin.<sup>24</sup> Mandatory rules of national origin may derive from legislation or case law, depending on the jurisdiction, and they may concern a broad range of topics (e.g. particular form requirements for specific types of contracts; invalidity of penalty clauses; licensing

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<sup>22</sup> In some legal systems, present certain circumstances, parent companies may be held liable for the debts of their subsidiaries. Both in common law and civil law jurisdictions, for example, a court may "pierce the corporate veil" (*i.e.*, disregard the separate legal personality) of the parent company if it finds an appearance of impropriety through questionable share transfers or other fraudulent means of avoiding the subsidiary's liabilities. See also Committee on Economic, Social and Cultural Rights (CESCR). 2017. [General comment No. 24](#) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities; and FAO. 2012. [VGGT](#), para. 12.15, which highlights that when States invest or promote investments abroad, they should ensure that their conduct is consistent with the protection of tenure rights, food security, etc. See also FAO. 2016. [FAO Commodity and Trade Policy Research: Working Paper No. 52](#). Home Country Measures that Promote Responsible Foreign Agricultural Investment: evidence from selected OECD countries.

<sup>23</sup> UNIDROIT. 2016. UNIDROIT Principles of International Commercial Contracts ([UPICC](#)), Art. 1.1.

<sup>24</sup> On the different types of mandatory rules relevant for contract law see [UPICC](#), Art. 1.4, Comments 1 and 2.

requirements; environmental regulations; etc.). In some national systems, mandatory rules may also derive from general principles of public policy (e.g. prohibition of corruption, protection of human dignity, prohibition of discrimination on the basis of gender, race, or religion). Failure to comply with these rules incurs the risk of the parties' contract being found to be unenforceable. International or supranational mandatory rules are those derived from international treaties (e.g. human rights conventions), custom and general principles of law, or those adopted by supranational organisations.

1.4. *Customary systems.* Compliance with mandatory rules is not by itself sufficient to ensure a responsible agricultural investment. For instance, the law of a given State might not recognise – or its administration might fail to record – tenure rights of certain legitimate tenure right holders, such as Indigenous Peoples and other local communities, in particular where people access land and resources on the basis of customary tenure systems. The VGGT call on both state and non-state actors to respect all legitimate tenure rights, including those based on customary systems.<sup>25</sup> Failure to duly consider customary rules – even if not recognised by law – and the methods of planning and territorial development used by Indigenous Peoples and other communities with customary tenure systems could ultimately expose the investment to operational, reputational and financial risks.

1.5. *Non-binding norms.* While not legally binding, several international soft-law instruments provide authoritative guidance that responsible investors should consider. This includes operational standards developed by organisations such as the International Finance Corporation, and broader principles and guidelines such as the VGGT and the CFS-RAI Principles. At the national level, guidelines and strategic plans may also provide guidance on how investors can adopt responsible practices in the specific country context.

1.6. *Gaps in the legal framework.* Gaps in the applicable legal framework may occur, for example, where legislation is incomplete or lacks the necessary implementing regulations. In a broader sense, they may also occur where applicable law fails to provide effective solutions or protections. For example, legislation might lack provisions requiring the performance of impact assessments or mandating the protection of water quality from agricultural runoff such as fertilisers, pesticides, and livestock waste. Labour laws and regulations, as another example, might not adequately protect employees from poor working conditions or discrimination. Where gaps exist, and depending on the

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<sup>25</sup> FAO. 2012. [VGGT](#), paras. 3.2, 4.4, 5.3, 7.1, 9.1, 10.1.

circumstances, the ALIC may serve as a means to supplement legislation, at least in the short term.

1.7. *Importance of assessing the legal framework.* Legal professionals involved in ALICs should assess – both before the investment is made and throughout the investment’s duration – the legal framework to ensure compliance with mandatory rules, promote adherence to soft-law guidance, and identify possible gaps that contractual arrangements could fill. Legal professionals, moreover, must undertake due diligence to the best of their ability (see Chapter 3.I), regardless of whether it is specifically required by national law.<sup>26</sup> In many States, this responsibility likely overlaps with standards of professional responsibility, including the duty to uphold the rule of law.<sup>27</sup>

1.8. *Roadmap.* Part one of the Chapter examines some of the different sources of law which may form the legal framework applicable to the agricultural investment. In addition to the ALIC itself, it highlights the importance of the domestic law of the host State in which the investment is located and considers the role that international and supranational sources may play. Part two then identifies, as part of a careful assessment of the legal framework, a number of relevant areas of law that contracting parties should consider to ensure compliance with mandatory rules and adherence to non-binding norms, to identify issues or gaps that could be addressed in the ALIC or, as the case may be, to ultimately evaluate whether a particular investment should proceed in the first place.

## **I. SOURCES OF LAW**

1.9. *Introduction.* A clear understanding of the legal framework which will govern the ALIC is essential to the success, or failure, of that investment. While the parties enjoy the freedom to include a contractual choice-of-law clause to identify the law governing the contract, determination of the applicable law will ultimately depend on the relevant private international law rules (also referred to as conflict of laws in certain legal systems).<sup>28</sup> The law of the State in which the

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<sup>26</sup> FAO. 2012. [VGGT](#), para. 12.13; FAO. 2019. Due diligence, tenure and agricultural investment: a guide on the dual responsibilities of private sector lawyers in advising on the acquisition of land and natural resources. [FAO Legal Guide No. 1](#), Chapter 3.

<sup>27</sup> FAO. 2016. [Governance of Tenure Technical Guide No. 5](#), pp. 17-18.

<sup>28</sup> A corollary of freedom of contract is that parties may agree that different laws apply to different parts of their contractual agreement (*dépeçage*). The implications of a choice of law clause (or a governing law clause) should also be carefully analysed to avoid that a more powerful party pushes, for example, for the selection of a law of a third country that is highly

land is located is a crucial component of that framework, and is itself comprised of various domestic and international sources of law, with differing hierarchical order, that set forth the legally binding obligations as well as non-binding guidance applicable to an agricultural investment.

## **A. Domestic sources**

1.10. *The importance of domestic law.* At its best, domestic law creates a level playing field for all comparable investments, reflects policy choices made through democratic processes, and establishes transparent and public terms. Further, from the perspective of rights, obligations, and remedies with regard to agricultural investments, domestic law presents a distinct advantage in that it can be more inclusive of actors who are not direct parties to the ALIC. Where the domestic legal regime is well developed, an ALIC might only need to address a narrower set of issues (e.g. location of the land, rental rates, community development aspects, etc.). In other situations, however, the law of the State where the land is located might not address critical issues, or there might be gaps in its implementation. In these instances, an ALIC could include provisions addressing, to the extent possible, such issues or gaps.

1.11. *Domestic legal systems.* A State's legal system is typically based on its constitution, whether written or unwritten. The constitution establishes fundamental rules and rights with which all legislation must comply. It usually also contains rules on the organisation of the State's political, legislative, judicial, and administrative bodies and may recognise various legal orders within that State's boundaries. In federal systems, for example, regulation of contracts may sometimes lie with the political subdivisions, or it may be shared with the central government. Many States, moreover, recognise the concept of legal pluralism, allowing for certain communities to be regulated by specific customary rules on the grounds of tradition or personal, ethnic, territorial, or religious criteria. The scope and applicability of each particular legal order, and the manner in which possible conflicts between the various autonomous legal orders are to be solved, depends on the State's constitutional system.

1.12. *Legislation and judicial decisions.* The legislative branch of government usually passes "primary" legislation (e.g. statutes or acts) and the executive branch of government usually adopts "secondary" legislation, such as regulations, which implement the "primary" legislation and must comply with that legislation

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favourable to said party, but has no connection whatsoever with the agricultural investment project itself. For more information on the choice of law clause see Arts. 7-11 of the [Inter-American Convention on the Law Applicable to International Contracts](#), and Arts. 2-5 and Art. 11.2. of the [Hague Principles on Choice of Law in International Commercial Contracts](#).

and the constitution. The executive branch, in particular government agencies, might also adopt other instruments to implement the law, or provide guidance on implementation. The judicial branch, depending on the legal system, might also create law or establish interpretations of legislation in issuing judicial decisions (referred to as case law in some systems). Previous decisions constituting legal precedent may, for example, define how legal rules regarding various aspects of agricultural investments should be interpreted, which can have a bearing on existing or planned ALICs that involve similar factual circumstances.<sup>29</sup>

1.13. *General principles of contract law.* Domestic law typically comprises general principles of contract law that will apply in the context of ALICs. For example, the general requirement of fair dealing and that parties act in good faith creates a general presumption that the contracting parties will deal with each other honestly and fairly, and is generally considered to be of mandatory nature. While these general principles may be subject to different interpretations in various legal systems, those principles which have been recognised in international instruments enjoy broad recognition and acceptance.<sup>30</sup>

1.14. *Customary rules.* Rules and practices based on tradition, culture, territory, or religion play a significant role in many governance systems. Customary rules may be neither codified nor written, and may deal with matters such as personal status, family relationships, inheritance, community governance, and use of land and other natural resources, rights over livestock or seasonal rights to land for the grazing of livestock. These latter rights may also be collective and thus pertain to the whole community. With respect to ALICs, customary rules may define who holds tenure rights in a given locality, and thus who should participate in the contracting process. In some cases, customary rules may reflect exclusionary practices and may be inconsistent with human rights, for example, by prohibiting women from owning or inheriting land or from entering into contracts.<sup>31</sup>

1.15. *Recognition of customary rules.* Customary rules are recognised in certain States, whether by the State's constitution, statute, or judicial decision. The applicability and scope of these rules, how they are recognised, and how possible conflicts between customary and statutory rules are to be resolved, depend on each State's legal system. As the VGGT call on state and non-state actors to

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<sup>29</sup> FAO. 2016. [Governance of Tenure Technical Guide No. 5](#), pp. 30-31.

<sup>30</sup> [UPICC](#), Art. 1.7 (Good faith and fair dealing).

<sup>31</sup> For additional information see: United Nations Entity for Gender Equality and the Empowerment of Women (UN Women), Office of the United Nations High Commissioner for Human Rights (OHCHR). 2013. [Realizing women's rights to land and other productive resources](#).

respect legitimate tenure rights even if they are not currently protected by law,<sup>32</sup> the parties to an ALIC should respect tenure rights based on customary rules even if those rights or rules are not recognised under national law. The parties should also bear in mind that there may be differences, for example, between how a State's court interprets and applies customary rules and how local communities themselves interpret and apply those rules.

## **B. International sources**

1.16. *International treaties.* The sources of international law include treaties, custom and general principles of law. Depending on the jurisdiction, international norms may be part of a State's legal system and thus directly applicable to ALICs. Over the years, States have concluded numerous treaties on topics that can have a direct bearing on ALICs. For example, bilateral and/or multilateral treaties govern issues such as tax, trade, investment protection, human rights,<sup>33</sup> and environmental protection.<sup>34</sup> Depending on the location of the investment, the parties should also be aware of the existence of relevant regional conventions, for example on human rights.<sup>35</sup> In addition to establishing legally binding obligations (typically for the States that ratify them), treaties can also provide an important indicator of what is considered to be good practice and as such they can exert influence on national-level policy making and legal decision making, as well as on businesses (e.g. with regard to free, prior and informed consent, for investments affecting Indigenous Peoples).

1.17. *Customary international law and general principles.* Customary international law refers to obligations arising from general and consistent practices of States that they follow out of a shared sense of legal obligation (*opinio juris*). It may have a bearing on ALICs. In relation to human rights, for example, certain

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<sup>32</sup> FAO. 2012. [VGGT](#), para. 4.4.

<sup>33</sup> See, e.g., OHCHR. 1965. [International Convention on the Elimination of All Forms of Racial Discrimination](#); OHCHR. 1966. [International Covenant on Civil and Political Rights](#); OHCHR. 1966. [International Covenant on Economic, Social and Cultural Rights](#); OHCHR. 1979. [Convention on the Elimination of All Forms of Discrimination against Women](#); OHCHR. 1984. [Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment](#); OHCHR. 1989. [Convention on the Rights of the Child](#); and OHCHR. 1990. [International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families](#).

<sup>34</sup> See, e.g., UN. 1992. [United Nations Framework Convention on Climate Change](#); UN. 1992. [Convention on Biological Diversity](#).

<sup>35</sup> See, e.g., African Union. 1981. [African Charter on Human and Peoples' Rights](#); Organization of American States (OAS). 1969. [American Convention on Human Rights](#); European Court of Human Rights. Council of Europe. 1950. [European Convention on Human Rights](#).

treaty provisions may be considered to reflect generally accepted norms that all States must uphold, irrespective of whether they ratified the relevant treaty (e.g. the prohibition on slavery or the prohibition on genocide). The general principles of law – despite some uncertainty surrounding this category in both doctrine and jurisprudence – are generally defined as those principles that are applied in domestic legal systems around the world, such as the principle of *pacta sunt servanda*.<sup>36</sup>

1.18. *Judicial decisions.* Issued by international or regional courts (e.g. the International Court of Justice or the Inter-American Court of Human Rights), such decisions may usually only have binding effect between the parties to a particular case, but they often inform the interpretation of the law in more general terms, and this can have a bearing on responsible agricultural investment. For example, international courts have elaborated on the relevance of international norms concerning environmental impact assessments, in connection with investments that could have a significant transboundary adverse effect on other States.<sup>37</sup>

1.19. *Soft-law instruments issued by Inter-Governmental Organisations.* Inter-Governmental Organisations have adopted a number of international soft-law instruments that, unlike treaties, are not legally binding, but provide authoritative guidance. Soft-law instruments may define principles, guidance, standards, codes of conduct or other voluntary commitments. Instruments of relevance to ALICs include, among others, the UN Guiding Principles on Business and Human Rights, the VGGT, the CFS-RAI Principles, the Organisation for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises, the UN Global Compact and international instruments related to sustainable development.<sup>38</sup> While developed by different bodies through diverse processes, soft-law instruments often emerge from extensive consultative processes that can confer to them significant political legitimacy. They provide guidance on how responsible

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<sup>36</sup> [UPICC](#), Art. 1.3 (Binding character of contract).

<sup>37</sup> ICJ, *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, ICJ Reports 2010, pp. 82–83, paras. 204–205; ICJ, *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*; and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, Judgment, ICJ Reports 2015, p. 706, para. 104).

<sup>38</sup> World Commission on Environment and Development. 1987. Report of the World Commission on Environment and Development: Our Common Future ([Brundtland Report](#)); UN. General Assembly. 1992. [Rio Declaration on Environment and Development](#), proclaimed by the UN Conference on Environment and Development; United Nations Conference on Sustainable Development (UNCSD). 2012. [The Future We Want, Rio+20](#).

investors can avoid and mitigate negative impacts, minimise investment risk and achieve positive outcomes.<sup>39</sup>

1.20. *Other international documents.* Consideration should also be given to international guidance documents prepared by civil society organisations, non-governmental organisations, and private sector entities.<sup>40</sup> Such documents, similarly to the soft-law instruments discussed above, often promote awareness and implementation of the broad global consensus contained in inter-governmental instruments. In addition, private standards and multi-stakeholder certification schemes define international good practices for responsible investment. Examples include the standards of the Roundtable for Sustainable Palm Oil (RSPO) and, in the field of livestock production, the Farm Animals Responsible Minimum Standards (FARMS) Initiative's Responsible Minimum Standards (RMS).

## II. RELEVANT AREAS OF LAW

1.21. *Introduction.* As complex investment transactions, ALICs can intersect with national and international legal instruments in wide-ranging thematic areas. In addition to contract law, legislation governing land, labour, tax and the environment will also influence the rights and obligations of the parties. Legal rules in these areas set minimum standards that all investments must comply with (e.g. to respect land and labour rights). What follows is a non-exhaustive discussion of a few relevant areas of law.

1.22. *General contract and obligations law.* Broadly speaking, domestic contract law may govern the formation and validity of an ALIC. Applicable law may also determine mandatory rules that affect certain specific obligations, such as mechanisms to determine the amount of rental fees or their periodic revision. Contract law will also come into play as default regulation in the case of gaps in the ALIC, for example on issues such as the place of payment, its method,

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<sup>39</sup> As with regional treaties, the parties should be aware of regional soft-law instruments, e.g., the African Union, the African Development Bank and the United Nations Economic Commission for Africa (UNECA). 2014. [Guiding Principles on Large Scale Land Based Investments in Africa](#), which also set forth principles and standards applicable to ALICs.

<sup>40</sup> See e.g., International Institute for Sustainable Development (IISD). 2014. [The IISD Guide to Negotiating Investment Contracts for Farmland and Water](#); Columbia Center on Sustainable Investment (CCSI), International Senior Lawyers Project (ISLP). 2016. [Guide to Land Contracts: Agricultural Projects](#); International Institute for Environment and Development (IIED). 2016. [Foreign Investment, Law and Sustainable Development: A Handbook on Agriculture and Extractive Industries](#) (2<sup>nd</sup> Ed).



allocation of costs relating to payment, or consequences of partial or earlier performance.<sup>41</sup>

1.23. *General administrative law principles.* Where ALICs are concluded with governmental agencies, general administrative law may have a bearing on the transaction – for example, requiring authorities to conform to standards of legality and fairness. Depending on applicable law, the grant of tenure rights over publicly owned lands may be subject to a tendering process or result from a proposal by an investor, often referred to as an unsolicited bid. Tendering involves a competitive process, through which investment proposals are solicited and screened on the basis of certain criteria in order to identify the most suitable proposals and to determine which rights are granted and under which form (e.g. a concession agreement). Unsolicited bids, although not submitted in response to a particular solicitation of investment, may also be subject to a review process and screened. Applicable law may also regulate the establishment and conduct of government agencies responsible for monitoring compliance with contractual obligations.

1.24. *Transparency and anti-corruption laws.* In some countries, special legislation governs transparency of contracts concluded by government agencies, for example by mandating contract disclosure. Meanwhile, international treaties establish legally binding norms to prohibit and sanction corruption,<sup>42</sup> and national laws will typically sanction corruption and establish arrangements for prosecuting violations. Some corruption laws have extraterritorial effects, such as laws in the investor's home state that may be applicable to overseas activities. Transparency issues and rules are also relevant to the project implementation phase, all the way to dispute settlement. Certain international instruments govern transparency in the settlement of investor-state disputes; while focused on treaty-based disputes,

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<sup>41</sup> [UPICC](#), Chapter 6 on Performance in general.

<sup>42</sup> Parties may consider the following non-exhaustive list of international anti-corruption instruments. At the global level see, e.g., United Nations Office on Drugs and Crime. 2004. [United Nations Convention against Corruption](#). At the regional level, see, e.g., Organisation for Economic Co-operation and Development (OECD). 1997. [Convention on Combating Bribery of Foreign Public Officials in International Business Transactions](#); Organization of American States (OAS). 1996. [Inter-American Convention Against Corruption](#); African Union. 2003. [African Union's Convention on Preventing and Combating Corruption](#); Council of Europe. 1999. [Criminal Law Convention on Corruption](#) and [Civil Law Convention on Corruption](#); as well as the European Union's anti-corruption policy, outlined in Article 29 of the [Treaty on European Union](#) and carried out via two main instruments: EU. 1995. [Convention on the Protection of the European Communities' Financial Interests](#) and EU. 1997. [Convention against Corruption Involving European Officials or Officials of Member States of the European Union](#).

these rules could be adapted for the settlement of disputes based on contracts, including ALICs.<sup>43</sup>

1.25. *Land and property law.* A State's property law will typically govern tenure rights in land, including ownership, use rights, tenancies, possession, and security interests. It will also establish principles, rules and restrictions on acquisition and transfer of land. Meanwhile, the land administration system – which refers to the arrangements for applying and operationalising land tenure rules – may affect the planning and operation of an agricultural investment, with regard to issues such as the recording of tenure rights (e.g. land registration), land valuation and taxation, spatial planning, and adjudication or determination of tenure rights.<sup>44</sup> An effective land administration system provides tenure security to those who have legal and/or legitimate tenure rights and supports the operation of arrangements for transacting interests in land.<sup>45</sup> In some jurisdictions, restrictions apply on the acquisition of certain rights to land by foreign nationals.

1.26. *Investment law.* A State's legal framework may include laws and regulations specifically intended to promote and protect investment, including foreign investment. This is the case, for example, of investment codes, but sectoral legislation may also contain relevant provisions. Meanwhile, international investment treaties (from bilateral treaties focused on investment, to regional trade agreements with an investment chapter) generally establish standards of treatment applicable to investors and investments originating from one State party and operating in another State party. For example, investment treaties typically require states to treat foreign investors or investments at least as favourably as investments by their own nationals or by nationals of other States.

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<sup>43</sup> See, e.g., UNCITRAL. 2014. [Rules on Transparency in Treaty-Based Investor-State Arbitration](#).

<sup>44</sup> For more information on recording land tenure rights, spatial planning (*i.e.* defining purposes for which land – including buildings and other structures – and other natural resources may or may not be used) and property valuation, see FAO. 2015. Safeguarding land tenure rights in the context of agricultural investments: A technical guide for government authorities involved with the promotion, approval and monitoring of agricultural investments. [Governance of Tenure Technical Guide No. 4](#), pp. 35-37; see also FAO. 2017. Creating a system to record tenure rights and first registration. [Governance of Tenure Technical Guides No. 9](#); FAO. 2017. Improving ways to record tenure rights. [Governance of Tenure Technical Guides No.10](#); and FAO. 2017. Valuing land tenure rights. [Governance of Tenure Technical Guide No. 11](#).

<sup>45</sup> FAO. 2015. [Governance of Tenure Technical Guide No. 4](#), p. 35, box 9 (stating that good land administration: "[g]uarantees ownership and security of tenure"; "[s]upports land and property taxation"; "[p]rovides security for credit"; "[d]evelops and monitors land markets"; "[p]rotects State lands"; "[r]educes land disputes"; "[f]acilitates land reform"; "[i]mproves urban planning and infrastructure development"; "[s]upports environmental management"; and "[p]roduces statistical data") (citing UNECE. 1996. Land administration guidelines).

They also require States to accord foreign investment minimum standards of treatment (e.g. "fair and equitable treatment"), and set standards for any expropriations to be lawful, typically requiring states to compensate investors at full market value. A growing minority of treaties also deals with investment liberalisation.

1.27. *Fiscal law.* The applicable tax and fiscal regime play an important role in the planning of an agricultural investment. Relevant law includes domestic legislation governing issues such as taxation and land rentals, and international treaties dealing with double taxation. In addition to determining how applicable payments are calculated, legislation would typically deal with issues such as tax administration, any relevant incentives, and the discretion available to taxation authorities. Relevant taxes may include those on profits earned in the host State, on payments made to suppliers and contractors, and on any applicable tax treatment at the investment's conclusion.

1.28. *Standard accounting practices.* In many States, companies are required by law to adhere to standard accounting practices that are internationally accepted and performed by professional accountants and auditors (e.g. International Accounting Standards (IAS) and International Financial Reporting Standards (IFRS)). If the applicable law lacks such a requirement, the ALIC can fill the gap by identifying an appropriate standard.

1.29. *Human rights law.* Various human rights instruments establish civil, cultural, political, social, economic, and environmental rights. States have a duty to respect, protect and fulfil such rights,<sup>46</sup> while investors have a corresponding responsibility to respect human rights and to identify, assess and remedy any negative impacts their conduct has on such rights.<sup>47</sup> Specific areas of human rights law that might be affected by agricultural investment include, *inter alia*: food security and the right to adequate food,<sup>48</sup> gender equality<sup>49</sup> and the socio-

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<sup>46</sup> Committee on Economic, Social and Cultural Rights (CESCR). 1999. Substantive issues arising in the implementation of the International Covenant on economic, social and cultural rights: [General Comment No. 12](#): The Right to Adequate Food (Art. 11 of the International Covenant on Economic, Social and Cultural Rights).

<sup>47</sup> OHCHR. 2011. UN [Guiding Principles on Business and Human Rights](#), principles 11-15.

<sup>48</sup> CFS. 2014. [CFS-RAI Principles](#), principle 1 ("Responsible investment in agriculture and food systems is essential for enhancing food security and nutrition and supporting the progressive realisation of the right to adequate food in the context of national food security"). See generally the work done by the [Special Rapporteurs on the Right to Food](#).

<sup>49</sup> FAO. 2012. [VGGT](#), para. 3B.4; CFS. 2014. [CFS-RAI Principles](#), principle 3.

economic empowerment of women,<sup>50</sup> rights of youth<sup>51</sup> and programmes in place to create opportunities for youth as employees and entrepreneurs, and the right to sufficient and safe water (see Chapter 3.IV.C).<sup>52</sup>

1.30. *Labour law.* National law will regulate employment and labour relations, for instance through constitutional provisions on the right to work and freedom of association, and through legislation governing employment conditions, the activities of trade unions, social benefits, health and safety, and other relevant aspects. Agricultural labour often involves special legislation to regulate the specificities that characterise employment in agriculture (e.g. seasonal employment). A large number of international treaties concluded over the years has established internationally binding rules on labour rights and relations – particularly the conventions associated with the International Labour Organisation (ILO). Key ILO conventions govern freedom of association, right to organise and collective bargaining, forced labour, child labour, equal remuneration and discrimination.<sup>53</sup>

1.31. *Environmental law.* All States, to varying extents, have laws and regulations in place to protect the environment (e.g. requiring impact assessments; preventing air, water or soil pollution; restricting the use of certain chemicals, or requiring the use of certain production techniques to conserve biodiversity, etc.). Further, numerous global instruments regulate issues such as biological diversity, biosafety, soil management, hazardous chemicals and pesticides, transboundary movements of hazardous wastes, protection of endangered species and certain habitats, climate change and desertification.<sup>54</sup>

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<sup>50</sup> FAO. 2018. [Gender opportunities and constraints in land-related agricultural investments](#).

<sup>51</sup> CFS. 2014. [CFS-RAI Principles](#), principle 4.

<sup>52</sup> CESCR. 2002. Substantive issues arising in the implementation of the International Covenant on economic, social and cultural rights: [General Comment No. 15](#): the right to water (Arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights).

<sup>53</sup> See, e.g., International Labour Organization (ILO). 1948. [Freedom of Association and Protection of the Right to Organise](#); ILO. 1949. [Right to Organise and to Bargain Collectively](#); ILO. 1930. [Forced Labour Convention](#); ILO. 1957. [Abolition of Forced Labour Convention](#); ILO. 1973. [Minimum Age Convention](#); ILO. 1999. [Worst Forms of Child Labour Convention](#); ILO. 1951. [Equal Remuneration Convention](#). ILO. 1958. [Discrimination \(Employment and Occupation\) Convention](#).

<sup>54</sup> See, e.g., UN. 1992. [Convention on Biological Diversity](#); see also Secretariat of the Convention on Biological Diversity. 2000. [Cartagena Protocol on Biosafety to the Convention on Biological Diversity \(Cartagena Protocol\)](#) and Secretariat of the Convention on Biological Diversity. 2010. [Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity](#)

Regional legal instruments also address the protection of the environment, and certain treaties establish rights of access to information, public participation in decision-making and access to justice in environmental matters.<sup>55</sup>

1.32. *Corporate social responsibility and social licence.* Companies may undertake commitments or activities not only to respect human rights obligations but to achieve broader social objectives, often as part of their corporate social responsibility (CSR) efforts or to achieve and maintain what is sometimes referred to as a “social license to operate”. Agricultural investments often involve impacts on local communities or Indigenous Peoples, and it is widely recognised that community relations are a critical factor in an investment’s ultimate success. In some countries, national law establishes legal requirements in this area, for example requiring investors to establish community development funds or develop community development agreements with local actors. In addition, international instruments encourage enterprises to observe certain international standards for responsible business conduct, for example in coordinating relations throughout their agricultural supply chains.<sup>56</sup>

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([Nagoya Protocol](#)); FAO. 2009. [International Treaty on Plant Genetic Resources for Food and Agriculture](#); FAO. 2017. [Voluntary Guidelines on Sustainable Soil Management](#); UN. 1998. [Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade](#); United Nations Educational, Scientific and Cultural Organization (UNESCO). 1971. [Convention on Wetlands of International Importance especially as Waterfowl Habitat](#); UN. 1994. United Nations [Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa](#); UN. 1992. [United Nations Framework Convention on Climate Change](#) and UN. 1997. [Kyoto Protocol to the United Nations Framework Convention on Climate Change](#).

<sup>55</sup> See, e.g., UN. 1998. [Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters](#); and UN. 2018. [Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean](#).

<sup>56</sup> See, e.g., OECD, FAO. 2016. [Guidance for Responsible Agricultural Supply Chains](#).



## CHAPTER 2

### PARTIES, STAKEHOLDERS, AND CONTRACTUAL ARRANGEMENTS

2.1. Overview. Mapping out who the actors are, their roles, and how they relate to each other is an important first step to understand the contracting process. This Chapter begins by examining who are the potential contracting parties to an ALIC, and other stakeholders involved in or affected by the contract, and then describes some of the contractual arrangements that may be adopted.

2.2. Roadmap. Part I provides a brief introduction to the notion of legitimate tenure right holders – a unique group of stakeholders whose rights are to be duly considered in the contracting process. It also identifies possible contracting mechanisms for protecting and respecting their rights. Part II introduces the contracting parties and other stakeholders who, while not signatories to the contract, play an important role in the formation and eventual implementation of the contract. Part III provides an overview of the various contractual arrangements.

#### I. THE NOTION OF LEGITIMATE TENURE RIGHT HOLDERS

2.3. *Introduction.* An ALIC typically involves a bilateral relationship between: (a) an investor (e.g. corporation or individual) seeking to access, use and control land and related tenure rights for the purposes of carrying out an agricultural investment; and (b) a grantor of those rights, who is generally the legal tenure right holder (e.g. government, individual or local community) that seeks to transfer those rights to the investor in exchange of consideration in the form of payment and other conditions regarding the management of the land. However, agricultural land investments may potentially also involve or affect distinct individuals or communities – called legitimate tenure right holders – and, in line with several international guiding instruments, such as the CFS-RAI and the VGGT, their rights and interests should also be considered.<sup>57</sup>

2.4. *Definition.* Legitimate tenure right holders are individuals or communities who live on, work on, or otherwise occupy, use or claim the land being transacted, and whose rights or claims are considered to be socially legitimate in local societies. Recognising individuals or local groups who occupy land is essential to avoid irresponsible investment practices whereby customary land is deemed to be “empty” or pertaining solely to the State. The notion of legitimate tenure right

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<sup>57</sup> CFS. 2014. [CFS-RAI Principles](#), principle 5; FAO. 2012. [VGGT](#), para. 12.10.

holders calls for counsels to broaden the range of the tenure rights they consider when analysing the form, formation, and contents of an ALIC, as well as the parties thereto.<sup>58</sup>

2.5. *Relation to legal tenure right holders.* In some cases, legitimate tenure right holders also possess formal legal rights to the land they occupy or use, making them the legal tenure right holders. Depending on the scope of the legal tenure rights afforded, an ALIC in such contexts could involve a bilateral agreement between the investor and the legal/legitimate tenure right holder. In many countries, however, national law does not adequately recognise and protect certain legitimate tenure rights. In some cases, the law does formally recognise those rights but defects in land registration systems result in certain actors being excluded from legal protection in practice. As a result, certain individuals or groups of people do not hold legal title to the land, even if their claims to that land are considered socially legitimate. Relevant international instruments indicate that the rights of these legitimate tenure right holders should be considered alongside those of the legal tenure right holders.

2.6. *Gender equality.* In certain countries, there may be no social or legal recognition of land ownership by women. Similarly, tenure systems that are considered to be legitimate in local societies may exclude or marginalise certain groups. Therefore, even the notion of legitimate tenure right holders may, in some instances, be restrictive. Fundamentally, it is important to bear in mind that the notion of legitimacy has elements of acceptability which may vary from one jurisdiction to another. The VGGT expressly recognise gender equality as an essential principle to contribute to responsible governance of tenure of land.<sup>59</sup> They also clarify that policies and laws that ensure tenure rights should be non-discriminatory and gender sensitive.<sup>60</sup> In addition, ALICs should acknowledge these differences in the treatment of women and men and contracting parties may consider taking specific measures to achieve *de facto* equality when necessary.

2.7. *Involving legitimate tenure right holders in the contracts.* Legitimate tenure right holders may be involved directly in the ALIC or indirectly in related agreements in various ways – including in multi-party contracts, multi-party transactions through related agreements, and investor-grantor contracts as third-party beneficiaries – all of which are discussed in more detail in Part II.C below.

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<sup>58</sup> FAO. 2016. [Governance of Tenure Technical Guide No. 5](#), pp. 9, 13, 20 *et seq.*

<sup>59</sup> FAO. 2012. [VGGT](#), para. 3B.4.

<sup>60</sup> FAO. 2012. [VGGT](#), para. 4.4.



## **II. CONTRACTING PARTIES AND OTHER STAKEHOLDERS**

2.8. *Importance of identification of stakeholders.* At the outset of the contracting process, it is important to identify the actors involved, whether as potential contracting parties or other stakeholders who will need to be consulted. The task of identifying all relevant stakeholders may be complicated by problems such as a lack of clear, accurate, and up-to-date land records, inaccurate survey boundaries, or a multitude of overlapping ownership and use claims, some of which may not be formally recorded. Despite these difficulties, ascertaining the actors' identities and the location and nature of their rights and obligations related to the land in question is crucial. Understanding who will be affected and the range of likely impacts is a prerequisite for carrying out an effective impact assessment (See Chapter 3.IV). Special requirements apply if the investment affects Indigenous Peoples or involves resettlement.

2.9. *Stakeholder mapping.* The process of identifying the key actors and their respective roles and responsibilities in connection with a responsible investment is sometimes called stakeholder mapping. A stakeholder is a person, entity or collectivity – with an interest or concern in something – who can be primary (*i.e.* they are directly affected by the investment) or secondary (*i.e.* they are indirectly affected). In the case of agricultural land investments, common stakeholders include the following:

- legal landholders (as attested to by official records);
- legal landholders whose holdings may not have been registered;
- customary and legitimate landholders;
- seasonal or temporary landholders (*e.g.* pastoralists);
- renters;
- seasonal workers;
- easement or right of way holders (*e.g.* communities who traverse the land in question to access water sources);
- farmers' cooperatives or other organised groups;
- traditional authorities;
- statutory government agencies;
- men and women who live outside the investment area but have claims to resources in the area;

- adjacent landholders whose property value or ingress/egress may be impacted by the investment;
- and men and women who may have spiritual or cultural ties to the investment area, particularly if they are Indigenous.

2.10. *Conducting stakeholder mapping.* It is important to conduct stakeholder mapping with the help of trusted local advisers who are familiar with both customary and statutory land tenure arrangements, and familiar enough with the local community to gather and provide accurate and up-to-date landholding information. Such local advisers may be trusted members of the local community (e.g. Village Council or Chief), or local experts or civil society organisations that work in or with the local community. In addition, in performing such mapping and generating the related data, the parties should comply with any applicable data protection and privacy regulations.

2.11. *Representation.* Due to informational and power asymmetries inherent in many local communities, the local authority or leader may not effectively represent the interests of all potential legitimate tenure right holders or the broader local communities; this is of particular importance when considering the interests of vulnerable populations. It is therefore important to develop arrangements that enable various stakeholders representing different concerns to have their voices heard in the process, including women, youth, elders, Indigenous groups, pastoralists, or other groups who use land in non-traditional ways. Trusted local advisers can help to identify the full range of stakeholders, including those whom the parties may otherwise have overlooked. The local advisers, together with the parties, should be able to research any necessary historical and ethnographic information with respect to the land in question.

2.12. *Key questions.* During stakeholder mapping, it is important to identify the potential contracting parties and other stakeholders involved as well as what their interests are, and how they relate to one another. Key questions to ask include:

- Have all stakeholders with interest in the land and resources been identified for consultation?
- Have the interests of all stakeholders been clearly identified?
- Have all parties with legal rights to the land been identified?
- Have all parties with legitimate rights to the land been identified?

- What records exist that document the land rights in the project area? Do they document customary and secondary rights? Which rights are undocumented?<sup>61</sup>
- Do any of the potential contracting parties' and other stakeholders' interests in the land conflict? If not currently, have they in the past? What is the risk of future conflicts arising, and, in particular, what is the risk of the investment exacerbating these conflicts?<sup>62</sup>
- How do the potential contracting parties and other stakeholders value the land (e.g. in economic, social, and spiritual terms) and what do they consider as fair value for the land?
- How will the contemplated investment affect each potential contracting party' and other stakeholders' interests in the land? What are the key concerns in this regard?
- What are the expectations and needs of the potential contracting parties and other stakeholders regarding the land?

2.13. *Timeline of the use and ownership of the land.* In answering the above questions, it is useful to construct a timeline of the use and ownership of the land in question. Further guidance on how to specifically identify potential investors (a), grantors (b), legitimate tenure right holders (c) and other stakeholders (d) is presented below. The focus of the identification exercise depends on who the legal counsel represents: for example, identifying legal and legitimate tenure rights holders, as well as other stakeholders, would be particularly relevant for legal counsel representing the investor, or a government agency acting as the grantor.

#### **A. Investors**

2.14. *In general.* Investors are primarily private sector entities, such as general investment or holding companies or specialised agribusinesses but can also be public sector entities such as sovereign wealth funds and State-owned enterprises. They may establish complex financial and management structures, particularly in the context of a foreign investment, and many States require the investor to

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<sup>61</sup> Unwittingly impinging on legitimate but undocumented land rights of local communities has the potential to create significant risks for the investment. For this reason, if the answer to this question is "no" then the investor should commission an independent participatory mapping process to identify all such rights. If no reliable maps exist, and the investor does not feel it can conduct such mapping, the investor should strongly consider cancelling or moving the project to another area.

<sup>62</sup> If land conflicts are unable to be resolved, the investor should strongly consider cancelling or moving the project to another area.

establish a domestic entity as a condition for receiving the grant of tenure and related rights.

2.15. *Corporations.* A private investor may be an individual or group of individuals, but more likely a corporation specialised in agribusiness or that may have holdings across multiple industries. In the latter case, the corporation may make the investment through an affiliate specifically dedicated to agricultural investments, or an affiliate (e.g. a subsidiary) especially created for the purposes of this particular investment.

2.16. *State-owned enterprises and wealth funds.* The investor may also be a State-owned enterprise or a sovereign wealth fund. A State-owned enterprise is a business enterprise in which the State has significant ownership or control. For the purpose of this guide, a sovereign wealth fund may be generally understood as a State-owned legal vehicle established for investing money, often derived from a country's reserves, set aside for the ultimate purpose of benefiting that State's economy and citizens, as well as, at times, for the purpose of fiscal stabilisation. Sovereign wealth funds are often funded from central bank reserves, revenue generated from exports of natural resources and other commodities, or from other State-owned or controlled assets. State-owned enterprises and sovereign wealth funds are usually both highly regulated in their home States; an investment involving these vehicles may trigger additional regulatory and legal requirements, as well as potential diplomatic and policy considerations for the government of the host State in which the investor is investing or seeking to invest and the investor's home State, if different.

2.17. *Nationality.* The investor may be a national of the State in which the land is located, or a foreign national. Foreign nationality may involve restrictions on owning or leasing land and may potentially have tax and liability implications. It may also determine the application of specific legal instruments, such as bilateral investment treaties, and different dispute resolution mechanisms. A private corporation wishing to make an agricultural investment abroad may decide to establish a local subsidiary to be the contracting party. Alternatively, a multinational corporation might enter the contract itself, while establishing a local subsidiary to operate the investment.

2.18. *Corporate organisation disclosure.* The investor should disclose a complete and accurate statement of its corporate organisation, most often as an exhibit in the contract or filing with the relevant regulatory body in the investor's home State. The statement of corporate organisation will often identify the Directors and Senior Officers of the company, as well as each person who is the beneficial owner of more than a specified percentage of the company's shares or voting

rights.<sup>63</sup> The transactional model and corporate organisation structure adopted may have an adverse impact on the participation of local communities. The contracting parties and stakeholders should therefore envision, ideally, a structure which allows for a more participatory and cooperative approach. Most jurisdictions specify the interval at which the investor must review this exhibit (e.g. annually) to ensure the information contained therein is accurate (See Chapter 4.V.A.5) and also require that the investor immediately disclose any change of control that occurs leading up to the investment or during the life of the investment (See Chapter 6.I.B).

2.19. *Affiliates.* The investor should disclose the identity of each of its affiliates, the relationship of the affiliate to the investor, and the jurisdiction in which the affiliate is organised. For the purpose of this Guide, an “Affiliate” is defined as an entity that directly, or indirectly through one or more intermediaries (such as accounting firms and their practitioners), controls, is controlled by, or is under common control with the investor. “Control” means the ability, directly or indirectly, to determine, the management or policies of an entity, whether through the exercise of voting power (often but not always through ownership of more than 50% of the share capital of a company), by contract or otherwise. The investor should also disclose any transactions with affiliated parties, in particular the nature and amount of such transactions. The investor must review these disclosures also regarding its sphere of influence periodically (e.g. annually) to ensure the information contained therein is accurate.

2.20. *Investment chain.* Beyond the corporate structure, it is important to consider the investment chain that lies behind the ALIC – the range of lenders, financiers, buyers and other actors that, in effect, make the investment possible.<sup>64</sup> While actors located in this wider investment chain are typically not a party to the ALIC, their identity can have significant implications throughout the investment cycle, for example in connection with demands for accountability and redress.

## **B. Grantors**

2.21. *In general.* The grantor is the legal tenure right holder that transfers tenure and related rights to the investor for a specified period of time. While ALICs take many forms and can involve multiple parties, the Guide focuses on contracts

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<sup>63</sup> Beneficial ownership thresholds are determined in compliance with domestic regulatory requirements. For example, in some States, the beneficial ownership threshold is 5%, whereas in others that threshold is 25%.

<sup>64</sup> FAO, IIED. 2014. [Understanding agricultural investment chains: Lessons to improve governance](#).

between investors and governments and between investors and local communities.

2.22. *Government as grantor.* It is common for the government to be the grantor because in many countries the State is the legal owner of all or most of the land. In other States, while private land ownership exists, the land identified for foreign agricultural investments is often held in State land banks. In addition, transfers of land larger than a certain acreage, or transfers to foreign investors, may only be undertaken by the State.

2.23. *Governmental authority.* The government is most often represented by the ministry or administrative body charged with the responsibility of allocating land or governing land investments.<sup>65</sup> Common examples include the Ministry of Land, the Ministry of Finance, the Ministry of Agriculture, the Ministry of Forestry, the Ministry of Environment, or an Investment Promotion Agency. While these agencies may conclude the contract on behalf of the Government, other administrative bodies may be in charge of granting specific authorisations and approvals. In addition, several government entities operating at different administrative levels may be involved in the contracting process or be identified as the party to the contract.

2.24. *The local community and private landowners as grantors.* If a local community or a private landowner is the legal tenure right holder, depending on the scope of their tenure rights they may act as the grantor in the ALIC – for example, if they have freehold rights to the land in question, or long-term occupancy rights that allow for transfers. Where the grantor is a local community or private landowner, the contract would be a private transaction between two parties, one being the investor and the other being the individual grantor, or an individual, organisation or association representing the community grantor. However, even when the legal tenure right holder is a private individual, group or community, the government will often play a role in the investment by facilitating contact and arrangements between investors, local officials, and members of the community impacted by the investment. The government may also play the role of verifying the validity of the legal tenure right holder's claim to the land (e.g. through title registration search) and may be helpful in ascertaining legitimate tenure right holders or any other affected parties.

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<sup>65</sup> It should be noted however that while these ministries may be the contract signatories on behalf of the Government, other administrative bodies – such as the public land registry – may be in charge of granting specific authorisations and approvals.

### **C. Legitimate tenure right holders as contracting parties**

2.25. *In general.* Legitimate tenure right holders, even if not legal tenure right holders with respect to particular land,<sup>66</sup> may hold a multitude of rights — including freehold rights, long-term occupancy rights, lease rights, easements or other rights of way, or seasonal use rights — within the footprint of the proposed investment. Investors must identify and consult with legitimate tenure right holders prior to making an investment, and the latter ought to have the right to decide if they wish to become a contracting party. The key here is to recognise they have the capacity to freely choose whether to enter an ALIC, rather than being “brought into”, or “included”, in a contracting process that is primarily driven by others.

2.26. *Organisation.* Legitimate tenure right holders may have the rights to land individually, communally, through family ownership structures, or through a combination of structures. Furthermore, the land in question may be administered by parties other than the legitimate tenure right holders themselves (*e.g.* the land may be administered by a community organisation, by a Chief or other traditional authority).

### **D. Other stakeholders**

2.27. *In general.* In addition to the contracting parties, an agricultural investment often involves or affects other stakeholders. While these actors may not be a party to the contract, it is important to understand their rights and interests in the context of the investment. This section briefly examines a few prominent stakeholder groups of which the contracting parties should be aware.

2.28. *Local community.* A “local community” may often comprise of several groups rather than a single homogenous group. In the context of ALICs, the local community may refer to a group of people living on or near the land being considered for investment. The local community may be a legal or legitimate tenure right holder itself and may be a grantor (see section B above), or it may simply reside within or near to the footprint of the investment, without having any rights to the land in question. However, even if the local community does not have formal, customary, or other legitimate tenure rights to the land, it may be impacted by the investment (*e.g.* a community living downstream, who may be impacted by water abstraction or pollutants). In such cases, the investor and the grantor should identify and consult the members of the local community prior to

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<sup>66</sup> See Part I above (describing the notion of legitimate tenure right holders and the relationship between them and legal tenure right holders).

concluding the ALIC. In some cases, the local community may be granted rights under the ALIC as third-party beneficiaries or related agreements may be adopted.

2.29. *Indigenous Peoples.* If members of the impacted local community include Indigenous Peoples or other self-identifying minorities,<sup>67</sup> the principle of Free, Prior and Informed Consent (FPIC) entails that they must be consulted and affirmatively provide their consent before the establishment of any project that directly affects their lands or resources.<sup>68</sup> In several jurisdictions, the use of FPIC is becoming an increasingly accepted practice in relation not just with Indigenous Peoples but with any local communities (see Chapter 3.II.B).

2.30. *Government agencies.* While the contract may be signed by a single government agency, it will most likely implicate multiple agencies at various levels of government. These agencies may be responsible for granting permits, conducting environmental and other assessments, acting as liaisons between the investor and local communities, or providing investment-related services such as electricity. The parties should have a clear understanding of which agencies are impacted by various components of the investment, and which agencies have the authority to sign the investment contract or any related agreements on behalf of the government.

2.31. *Other stakeholders.* Other third-parties may include, *inter alia*: subcontractors; various service providers; affiliates; banks or other creditors; notaries; insurers; certification providers; and supply chain participants.

### III. CONTRACTUAL ARRANGEMENTS

2.32. *Investor-grantor agreements.* Many ALICs involve bilateral transactions between the investor and the grantor. These contracts can take many forms and follow different models. However, it is most common for the rights and obligations relating to a land investment – particularly a large land investment – to be documented in a written contract or series of contracts (e.g. investment contracts, concession agreements or leases).

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<sup>67</sup> Self-identifying minorities are afforded protection under Article 1 (Right of self-determination) and Article 2 (Free disposal of natural wealth and resources) of both the UN. 1966. [International Covenant on Civil and Political Rights \(ICCPR\)](#) and the UN. 1966. [International Covenant on Economic, Social and Cultural Rights \(ICESCR\)](#).

<sup>68</sup> FAO. 2014. Respecting free, prior and informed consent: Practical guidance for governments, companies, NGOs, indigenous peoples and local communities in relation to land acquisition. [Governance of Tenure Technical Guide No.3](#).



2.33. *Legitimate tenure right holders.* Recognising and respecting legitimate tenure rights can have reverberations for investment contracts. Depending on the situation, legitimate tenure right holders may be: (A) a contracting party (e.g. through a multi-party contract or set of contracts); (B) a party to a separate agreement that, while related to the ALIC, does not involve transfer of tenure rights, such as a Community Development Agreement (CDA); or (C) as third-party beneficiary of the contract. Multi-party contracts and related agreements allow the legitimate tenure right holders to negotiate directly with the investor, agree upon mutually beneficial commitments, and create a mechanism for enforcing those commitments. Contracts in which the legitimate tenure right holders qualify as third-party beneficiaries confer certain rights upon those holders and provide access to remedy in the event of a violation of those rights.

#### **A. Multi-party contract structures**

2.34. *Legitimate tenure right holder as a contracting party.* Legitimate tenure right holders may wish to be included as contracting parties, in addition to the investor and the grantor, to the contract, or the set of contracts, that effects the transfer of tenure and related rights. Legitimate tenure right holders may be represented by a single legal entity, for example a community body, a landowners' association, a customary governance structure, or an elected representative. Alternatively, individual legitimate tenure right holders may be listed as parties to the contract, either in place of or in addition to the representative body.

2.35. *Representation.* If the legitimate tenure right holders are represented by a single legal entity, that legal entity may have pre-dated the investment, or may have been created specifically for the purposes of the investment. In either case, it is common to have a separate document laying out the rights and obligations between the legitimate tenure right holders and their representative. Such a document will formally designate the legal representative and may stipulate the scope of the representative's authority and the way the representative consults with and informs the legitimate tenure right holders it represents. The agreement may be documented by way of a contract or otherwise (e.g. through a unilateral granting authority);<sup>69</sup> if the legal representative is a community or customary body, by way of a board or council resolution. The applicable law will determine how authority is granted and regulated (including to what extent rules on agency and representation come into play).

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<sup>69</sup> Whether if it is a contract or a unilateral document granting authority to the representative depends on the legal system.

2.36. *Tripartite contracts.* A tripartite contract, or set of contracts, will typically contain rights and obligations sections for the investor, the grantor (*i.e.* legal tenure right holder) and the legitimate tenure right holder respectively. The obligations of the legitimate tenure right holders may include, for example, non-interference and similar covenants aimed at ensuring cooperation between the legitimate tenure right holders and the investor; while their rights may include their continued access to land and resources in the concession area so long as this access is not inconsistent with the operation of the investment.

## **B. Community development agreements**

2.37. *Legitimate tenure right holder as a party to a related agreement.* A second way in which legitimate tenure right holders may wish to participate in an ALIC is through a separate agreement that, while not representing a tenure transaction, nonetheless addresses related issues, such as a CDA. A related agreement is often concluded directly between the legitimate tenure right holder and the investor, though the grantor may be involved as well.

2.38. *Link between the ALIC and the related agreement.* The related agreement should be explicitly referenced in the contract, often in a sub-section titled “Community Development Agreement” or similar, within the “Investor Obligations” or “Company Obligations” section.<sup>70</sup> Similarly, the related agreement should reference the contract, most commonly in the “Recitals” or similar section containing the “Whereas” clauses at the beginning of the related agreement. A material breach of the related agreement may constitute, in turn, a breach of the ALIC itself.

2.39. *Purpose.* The related agreement generally stipulates the rights and obligations of the investor vis-à-vis the legitimate tenure right holders, and in particular stipulates the economic and social benefits due to such holders in exchange for access to the land and resources to which they have rights, and for other community support for the investment. The benefits provided to the legitimate tenure right holders are determined through the consultation and negotiation processes and may often include, *inter alia*: financial remuneration (*e.g.* payment per hectare of land used), with the contract describing the method of disbursing such funds and the parties to whom the funds are due; specific training or employment commitments for the benefit of local community

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<sup>70</sup> If the CDA has not been completed by the investment contract signing date, then a reference can be inserted to a CDA “to be concluded” within a certain number of days of the Effective Date of the investment contract.

members; development of contract farming arrangements,<sup>71</sup> and the provision of certain social infrastructure and services (e.g. building and staffing a school or a recreational centre).

2.40. *Negotiation of a related agreement.* It is important that all consultations and negotiations with respect to a CDA recognise and address the information and power asymmetries often at play between the legitimate tenure right holder and the investor.

2.41. *Content of the related agreement.* The related agreement may begin with a description of the relationship envisioned between the investor and the legitimate tenure right holder, setting the tone for the rest of the agreement. It may set out the relationship between the different parties to the agreement, as well as these parties' representatives and specify that the relationship is based on principles of cooperation, mutual respect, and good faith. For instance, if the legitimate tenure right holders are represented by bodies such as community councils or associations, the related agreement may describe the nature of such representation, and the functions of said representative body. The related agreement may then describe the structure of the ongoing relationship created between the investor and the legitimate tenure right holder, including frequency and form of communications and information sharing, and the process for making any joint investment decisions. The related agreement may describe the rights and obligations of each party, including the rights of the investor to access the land and resources referenced in the contract, and the benefits due to the legitimate tenure right holder.<sup>72</sup> The related agreement may also stipulate party rights and obligations with respect to monitoring, evaluation, and dispute resolution.

2.42. *Multiple related agreements.* It is possible for an ALIC to involve more than one related agreement. For example, the investor may enter into separate CDAs with different groups of legitimate tenure right holders, particularly if the benefit arrangements negotiated with these groups differ from one another. It is also possible for a related agreement to exist even in cases in which the legitimate tenure right holders are parties to the contract by way of a tripartite contract structure.

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<sup>71</sup> UNIDROIT/FAO/IFAD. 2015. [Legal Guide on Contract Farming](#), pp. 13 *et seq.*

<sup>72</sup> Sometimes the CDA will be the instrument in which the selection of such land/resources, and detailed conditions of access and use, are described. Other times, this information will be contained in the ALIC itself, or a third linked contract dealing specifically with transfer of land.

### **C. Contracts with legitimate tenure right holders as third-party beneficiaries**

2.43. *In general.* Contracts may confer rights upon third parties who are not signatories to the contract but stand to benefit if the contract is fulfilled (referred to as third-party beneficiaries) and who, under certain circumstances, have the legal right to enforce the contract or seek remedy in case the contract is breached.<sup>73</sup>

2.44. *Recognition and rights.* In jurisdictions that recognise the third-party beneficiary principle, the investor and the grantor may enter into bilateral contracts that create rights for legitimate tenure right holders as third-party beneficiaries. These rights can relate, *inter alia*, to compensation, social benefits, consultation or provision of information, easements or other rights of way, and compliance with certain environmental standards. Moreover, these rights may be made subject to conditions or limitations stipulated by the contracting parties and included in the contract.<sup>74</sup>

2.45. *Costs of involvement.* It is important to note that these types of participatory approaches, such as seeking the involvement of third-party beneficiaries, carry both financial and organizational costs for which the parties must account. While these processes can be time-consuming and cumbersome, they are considered good practice as not doing them properly may lead to future disputes, protests, and legal challenges which could have serious impacts on the smooth implementation of the ALIC.

2.46. *Governments and third-party beneficiaries.* The fact that the government is a party to many contracts may make it easier for legitimate tenure right holders to demonstrate that certain provisions of the contract were entered into for their benefit. For example, some courts have held that if the government is a party to a contract entered into for their benefit, then its citizens may have rights as third-party beneficiaries.

2.47. *Investors and third-party beneficiaries.* Several recent international instruments, most prominently the VGGT and the CFS-RAI Principles, recognise that investors are responsible for respecting legitimate tenure rights holders and equitable access to land in the context of agricultural investment. More generally,

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<sup>73</sup> See e.g. [UPICC](#), Art. 5.2.1 (1): the “beneficiary” is the third-party upon which the parties to a contract may confer, by express or implied agreement, a right. According to the UPICC, a third-party beneficiary must be identifiable with adequate certainty by the contract but need not be explicitly named in the contract, nor be in existence at the time the contract is made.

<sup>74</sup> See [UPICC](#), Art. 5.2.1 (2).

the UN Guiding Principles on Business and Human Rights recognise that investors have a responsibility to respect human rights. Taken together, these instruments imply that ALICs should respect the rights of legitimate tenure right holders specifically and local communities more generally and, subject to the applicable law, may support treating such holders and communities as third-party beneficiaries of contracts to which they are not parties, with regard to contractual provisions aimed at ensuring adherence to this international guidance. Identifying and accounting for such holders and communities is now part of the due diligence that those advising investors undertake to avoid disputes, unrest and protests that may arise from failing to fully consider the rights of those holders and communities.

2.48. *Remedies for breaches.* Not all legal systems offer equitable remedies for cases where the investor breaches the provision granting third-party rights. In some jurisdictions the third party-beneficiary may have a direct contractual right to make a claim for specific performance or damages, as if it were a party to the contract (see Chapter 5.III.C). In this case, and depending on the circumstances, the third-party beneficiary would be in a position to seek remedy against the relevant ALIC contracting party if their rights are impinged upon.<sup>75</sup> The third-party beneficiary may also choose to renounce the right conferred upon it.<sup>76</sup>

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<sup>75</sup> The [UPICC](#), for example, distinguish between third-parties who happen to benefit from the contract, and beneficiaries who are granted rights under the contract; in the case of an implied intention, the question will be solved through interpretation of the contractual terms taking into account the circumstances of the case (Comment to Art. 5.2.1). See also Art. 5.2.2 on the need to identify the beneficiary with adequate certainty.

<sup>76</sup> See e.g. [UPICC](#), Art. 5.2.6, expressing the general principle that the contract between the parties will create rights for the beneficiary without the need for acceptance by the beneficiary, who may, however, renounce any right conferred upon it, since it cannot be forced to accept.



## CHAPTER 3

### SIGNIFICANT PRE-CONTRACTUAL ISSUES IN AGRICULTURAL LAND INVESTMENT CONTRACTS

3.1. *Diversity of contracting processes in different jurisdictions.* Given the important role played by national law in regulating agricultural land investments, the contracting processes may vary significantly from one country to another. Moreover, different sequences of contracts may be envisaged (e.g. ranging from one large lease contract upfront to a series of agreements) and each contractual stage may be subject to certain conditions. As national law determines who has the legal power to allocate the land, the contracting process may also vary according to the identity of the parties (e.g. government-led contracting process or local communities as the main grantor).

3.2. *Roadmap.* In view of the importance of obtaining essential information related to the agricultural land investment before signature of a contract, the first four sections of this chapter present the key elements of the pre-contractual processes regarding due diligence (I), consultations (II), feasibility studies, business plans, investment proposals and land valuation (III), as well as impact assessments (IV) while the last sections provide an overview of the fundamental stages of contract formation (V) which should be undertaken only after the prospective contracting parties have duly considered all of the investments' potential impacts and benefits.

#### I. DUE DILIGENCE

3.3. *Importance of due diligence in ALICs.* The conduct of due diligence – with respect to identifying possible parties and stakeholders, locating the land in question, examining the feasibility of the investment and the assessment of potential impacts – is an essential part of responsible agricultural land investments. When done properly, due diligence allows for the identification of potential risks and for incorporation of necessary safeguards to address them. In the context of governance of tenure of land, the VGGT recommend that proper due diligence should be undertaken irrespective of whether it is specifically required under national legislation.<sup>77</sup> Moreover, legal counsels and other professionals should aim at ensuring that the due diligence process meets

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<sup>77</sup> FAO. 2012. [VGGT](#), para. 12.13.

international standards, including with regards to the protection of tenure rights in the area of agricultural investment.<sup>78</sup>

3.4. *Process and elements of due diligence.* The due diligence process allows parties to gather a wide range of information enabling them to verify, evaluate and determine whether the investment should proceed, and if yes, under which conditions and with which safeguards. Proper due diligence is relevant for all contracting parties, meaning that it concerns not only the investor but also governments and other stakeholders. For instance, the grantor may wish to conduct due diligence on the investor and its proposed activities. While the elements of due diligence will vary according to the nature of the business, they generally include carrying out a review of national laws, tenure rights as well as actual and potential impacts on a number of areas including human rights, various social and economic issues, and the environment.<sup>79</sup>

3.5. *Legitimate tenure rights.* To be effective, land tenure due diligence needs to look beyond the legal paperwork (e.g. to establish the “chain of title”) and also consider the social dimensions of tenure rights. This would include effective engagement with local communities to identify legitimate tenure rights and the investment’s potential impacts on those rights.

## II. CONSULTATIONS

### A. Quality of consultation

3.6. *Quality in consultation processes.* Standards of quality in consultation processes are key. Relevant international instruments shed light on several important parameters. As discussed, the VGGT is only one of a number of international instruments that provides important markers.<sup>80</sup> The following paragraphs elaborate on a number of key points from the VGGT and its guidance on how to conduct good consultation processes in practice.

3.7. *Prior to decisions being taken.* Consultations should happen before decisions related to ALICs are taken. In other words, not on the basis of an ALIC already concluded (*post facto*), but before the contract has been concluded (*ex ante*). It is also important to leave enough time for the consultation’s results to

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<sup>78</sup> FAO. 2019. Due diligence, tenure, and agricultural investment: a guide on the dual responsibilities of private sector lawyers in advising on the acquisition of land and natural resources. [FAO Legal Guide No. 1](#).

<sup>79</sup> For illustrative examples of due diligence elements see OECD. 2018, [OECD Due Diligence Guidance for Responsible Business Conduct](#).

<sup>80</sup> FAO. 2012. [VGGT](#), para. 3B.6.



*Significant pre-contractual issues in agricultural  
land investment contracts*

be taken meaningfully into account in the context of investment-related decisions. Further, it is an accepted good practice that consultations should not be a one-time occurrence but rather an ongoing process throughout the lifecycle of the investment. The investor should view community consultation as part of a consistent and sustained set of actions for obtaining and maintaining a social license to operate in the community.

3.8. *Two-way communication.* The consultation should facilitate dialogue and exchange of information, instead of consisting of a one-way communication from the investor, or the grantor, to the people consulted. In other words, the consultation should present opportunities for meaningful feedback and questions about the investment. Depending on the situation, the investor and/or the grantor should develop a formal mechanism to collect such feedback. It also means that the investor and/or the grantor should respond to the contributions received in a timely manner and give those contributions due consideration in investment-related decisions.

3.9. *Taking into consideration existing power imbalances between different parties.* Relations between investors and local actors (e.g. local government bodies, tenure rights holders, affected people) typically involve power imbalances and differentiated access to resources, information, and expertise. Government support to the project can compound these imbalances. The VGGT explicitly recognise such power imbalances, as well as social differentiation and the need for affected people to access professional (e.g. technical and legal) support in investment processes. The investor or the government, or the parties collectively, should ensure that affected people have the support necessary to conduct meaningful consultation, including by financing neutral third-party professionals (e.g. lawyers) to advise communities.

3.10. *Ensuring active, free, effective, meaningful, and informed participation.* "Active" participation refers to there being space for affected people to articulate their views, concerns and aspirations, and for these to be considered. Further, participation is "free" if the consultation is conducted free of coercion, manipulation, undue influence, or pressure. This concept is also reflected in the FPIC principle, which applies to investments that affect Indigenous Peoples (see Section B below regarding FPIC). Many international instruments refer to consultation being "meaningful", including the UN Guiding Principles.<sup>81</sup> Generally speaking, "meaningful" consultations are considered to be voluntary, inclusive, collaborative, equitable, timely, and transparent.

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<sup>81</sup>

OHCHR. 2011. UN [Guiding Principles on Business and Human Rights](#), para. 18 (b).

3.11. *Access to information.* Significant informational asymmetries often exist between the investor and the government on the one hand, and local landholders and impacted communities on the other hand. Local communities may lack complete and timely information about the investment's location, size, scope, timeline, operational model, projected revenue, projected costs, risks, benefits, and milestones, and there may be informational asymmetries within the communities themselves. At the outset of consultations, the community must be provided access to this information, with exception made for any information deemed to be commercially sensitive or otherwise confidential (see Chapter 4. V. B. 2(c) regarding confidential information). It may be useful to consider using Frequently Asked Questions (FAQs) to streamline the information, vernacular radio notices, local advisors (for disconnected communities). It is also important to note that in some cases giving too much information to the communities can be overwhelming.

3.12. *Translation.* To conduct meaningful consultations, the investor or the government, or the parties collectively, should ensure the community has full understanding of the proposed investment by providing consultation documents in a language the community can access. Translation may therefore play a fundamental role in the context of ALICs, both in the negotiation process and in documenting consultations. Language barriers can be addressed by including a neutral translator and by ensuring that translated documents accurately reflect the intent of both parties.

3.13. *Access to expertise and legal support.* The local community may also lack the legal support or capacity to fully appreciate the risks and benefits of the investment, as well as key terminology to be used in the contract or related agreement. As discussed, the investor or the government, or the parties collectively, should ensure affected people have access to the expertise necessary for them to understand and elaborate the information received. Parties may agree to finance a neutral third-party lawyer to represent the community. Some businesses cover the cost of assistance provided to the local actors with whom they (or their business partners) engage. But unless properly structured, these arrangements can expose service providers to conflicts of interest, raise questions about lines of accountability, and ultimately affect the quality of the services. To ensure that professionals are truly independent of the business and accountable to their real clients, there is a need to develop new mechanisms (e.g. trust funds over which the business has no control, or contributions to basket funds that apply beyond individual projects). Assistance must also be available beyond project approval, for example to support monitoring of compliance and to deal with any grievances.

3.14. *Link to negotiations.* Community consultations will often lead to negotiations that result in enforceable community-based agreements (see Section V.A below regarding negotiations). The results of consultation may be documented through a CDA, which if negotiated prior to the signing of the ALIC can be incorporated therein (see Chapter 2.III.B above regarding multi-party transactions through related agreements).

## **B. Free, prior, and informed consent (FPIC)**

3.15. *In general.* If the investment affects Indigenous Peoples, the FPIC principle is relevant. This is affirmed in the UN Declaration on the Rights of Indigenous Peoples,<sup>82</sup> and reiterated in the VGGT.<sup>83</sup> Free, prior and informed consent is the “collective right of Indigenous Peoples to make decisions through their own freely chosen representatives and customary or other institutions and to give or withhold their consent prior to the approval by government, industry or other outside party of any project that may affect the lands, territories and resources that they customarily own, occupy or otherwise use”.<sup>84</sup>

3.16. *Application.* The FPIC requirement is particularly stringent where the proposed investment can result in the relocation of Indigenous Peoples. Indeed, Article 10 of the UN Declaration on the Rights of Indigenous Peoples states: “[i]ndigenous peoples shall not be forcibly removed from their lands or territories. By implication, no relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return”.<sup>85</sup> Outside situations involving relocation, and “bearing in mind the principle of self-determination and the provisions of the UNDRIP as a whole, states should obtain consent on matters of fundamental importance for the rights, survival, dignity and well-being of Indigenous Peoples”.<sup>86</sup>

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<sup>82</sup> UN [Declaration on the Rights of Indigenous Peoples](#) (UNDRIP). 2007. Art. 32(2): “States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources”.

<sup>83</sup> FAO. 2012. [VGGT](#), para. 12.7.

<sup>84</sup> FAO. 2014. Respecting free, prior and informed consent: practical guidance for governments, companies, NGOs, indigenous peoples and local communities in relation to land acquisition. [Governance of Tenure Technical Guide No. 3](#), p. 4.

<sup>85</sup> UN [Declaration on the Rights of Indigenous Peoples](#) (UNDRIP). 2007. Art. 10.

<sup>86</sup> FAO. 2014. Respecting free, prior and informed consent: practical guidance for governments, companies, NGOs, indigenous peoples and local communities in relation to land acquisition. [Governance of Tenure Technical Guide No. 3](#), p. 5.

3.17. *Elements.* The basic elements of FPIC are defined as follows: free implies no coercion, intimidation, or manipulation; prior implies consent that is sought far enough in advance of any authorisation or commencement of activities, and respecting the time requirements of indigenous consultation and consensus processes; informed implies that all information relating to the activity is provided to the indigenous peoples, in an objective, accurate, and understandable manner; and consent implies that Indigenous Peoples have agreed to the activity that is subject to the consultation.

3.18. *Implications.* If FPIC is applicable, a proposed investment would need to affirmatively secure the consent of Indigenous communities if it is to proceed in ways that can affect their lands or resources. In effect, this gives Indigenous communities the right to say no to a project being implemented on their territory. While the VGGT refer to FPIC in connection with Indigenous Peoples, they in practice promote consensual solutions across the board, which is also key if a venture is to enjoy local support and succeed in the longer term. Further, the notion of FPIC has been increasingly applied as good practice in responsible investment practices beyond the context of Indigenous Peoples.<sup>87</sup>

3.19. *Further guidance.* Detailed operational guidance is available on how to implement FPIC in practice, including in the context of agricultural land investment contracts.<sup>88</sup>

### **III. FEASIBILITY STUDIES, BUSINESS PLANS, INVESTMENT PROPOSALS, AND LAND VALUATIONS**

3.20. *In general.* Conducting feasibility studies (A), preparing business plans (B), reviewing investment proposals (C), and conducting land valuation (D) are recognised as good practices for agricultural land investment. These tools generate the information and evidence base that is essential for drafting ALICs,

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<sup>87</sup> FAO. 2014. Respecting free, prior and informed consent: practical guidance for governments, companies, NGOs, indigenous peoples and local communities in relation to land acquisition. [Governance of Tenure Technical Guide No. 3](#), pp. 7 *et seq.*

<sup>88</sup> FAO. 2016. [Governance of Tenure Technical Guide No. 7](#), pp. 34 *et seq.*; see also FAO. 2016. [Free Prior and Informed Consent: an indigenous peoples' right and a good practice for local communities](#), p. 13 ("FPIC is a specific right that pertains to Indigenous Peoples and is recognised in the United Nations Declaration on the Rights of Indigenous Peoples. It allows them to give or withhold consent to a project that may affect them or their territories. Once they have given their consent, they can withdraw it at any stage. Furthermore, FPIC enables them to negotiate the conditions under which the project will be designed, implemented, monitored and evaluated. Organisations contributing to this manual hold the view that all project-affected peoples have the right to be part of decision-making processes in ways that are consistent with the principles underlying the right of FPIC").

particularly in the case of new as opposed to existing leases of land, and they also enable all the actors involved to make informed decisions in a manner that assures transparency in the contractual process. Their purpose is “not only to avoid negative social and environmental impacts, but also to create mutually beneficial economic relationships with the affected communities”.<sup>89</sup>

## **A. Feasibility Studies**

3.21. *Feasibility Studies.* Feasibility studies provide technical, economic, and financial information to enable an investor and a grantor to understand and evaluate the economic, commercial, and non-economic opportunities and challenges of an agricultural land investment. By examining the legal, operational, financial, and other factors, a feasibility study helps to determine a project’s commercial and technical viability and lays the foundation for producing a business plan. It also helps with identifying the risks a project may pose to the environment or to stakeholders such as legitimate tenure rights holders, local communities, or indigenous groups. To this end, it can help an investor identify important elements such as the rights of legitimate tenure right holders or other stakeholders who, while not holding legal tenure rights, have legitimate claims on the land by virtue of customary, indigenous, occupational rules or practices or by the operation of another source of claim over the land.

3.22. *Typical steps and good practice.* Typical steps in a feasibility study include: (a) compilation of all relevant data; (b) analysis of alternatives to achieve the goals of the project; (c) detailed examination of costs and benefits of project effectiveness; (d) preliminary design; and (e) detailed risk assessments including those relating to environmental and social impacts. For a feasibility study to be reliable, an investor should hire independent third parties with specialised knowledge and skills with regard to each of these aspects of an investment contract. When properly conducted, a feasibility study gives an investor an “independent opinion of risks and potential mitigation measures”.<sup>90</sup>

3.23. *Rationale.* A feasibility study is necessary for several reasons. First, it often forms an important basis for government approvals. Second, it provides information that could play a significant role in discouraging speculative acquisitions of land where it is clear that the type of risks posed by such acquisitions to stakeholders and to the environment far outweigh the benefits of a project. Third, the information produced is often included in the contract between an investor and the grantor. Fourth, it is recommended as a good practice

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<sup>89</sup> FAO. 2016. [Governance of Tenure Technical Guide No. 7](#), p. 6.

<sup>90</sup> FAO. 2015. [Governance of Tenure Technical Guide No. 4](#), pp. 56-57.

to mitigate risks such as dispossession of individuals or communities from their land, and to avoid or mitigate other adverse impacts. For this reason, a feasibility study also helps to determine a project's viability. For example, it can help establish the appropriateness of planting particular crops (for food, energy, domestic consumption, or export markets) in the right agronomic zones or whether an investment is based on unrealistic assumptions. From this perspective, a feasibility study should also evaluate the risk of over-accumulation of land where the same investor or any of its affiliates may have already acquired tenure rights in the same country/area.

3.24. *Regulatory requirements.* Feasibility studies and business plans as well as impact assessments are often required under national or international law and are important tools to manage risks that investment contracts may pose to the environment or to legitimate tenure right holders and local communities.<sup>91</sup> Collectively they provide important foundations for contractual provisions.<sup>92</sup> Even where national law does not require them, feasibility studies and business plans may be required where investors and governments have third-party funding.

## **B. Business plans**

3.25. *Business plans.* A business plan organises the information gathered from a feasibility study as part of the investment project's marketing, operating, management and financial strategies. Much of this information underpins various contractual provisions – including those relating to the financing of the project or to the commitments between investors and legitimate tenure right holders or local communities in relation to the project – which are more fully discussed in Chapter 4. Depending on the nature of the agricultural land investment, a business plan may also include the services, production techniques, markets and clients, human resources, organisation, requirements, financing, and source of funds for an

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<sup>91</sup> Weak enforcement and monitoring of domestic laws *ex ante* should not discourage investors from conducting feasibility and business plans because of the benefits they provide. Notably, Principle 23(a) of the UN [Guiding Principles on Business and Human Rights](#) provides that businesses should “comply with all applicable laws and respect internationally recognised human rights, wherever they operate”.

<sup>92</sup> The practice of conducting feasibility studies does not imply that investors have pre-investment obligations rather it reflects an internationally agreed practice that investors engage in to protect the value of their investment. In addition, VGGT Technical Guide No. 4 on Safeguarding land tenure rights, notes that agricultural land investments may be negatively impacted where “Legitimate tenure rights have been overridden, families have lost of their homes and livelihoods ... [and] disputes over tenure rights have escalated to violent conflicts resulting in deaths and political unrest”. Such protests may not only affect the project's success but may also result in reputational and economic harm for the investor. FAO. 2015. [Governance of Tenure Technical Guide No. 4](#), p. vi.

investment project.<sup>93</sup> A business plan should also address the project's contributions to the social, environmental and sustainable development of the host State in general and the local community in particular. Some funding agencies require investors to prepare a business plan because this helps to establish a project's viability and profitability.

3.26. *Financial information.* For some types of investments, a contract may require an investor to provide verified periodic reports such as profit and loss statements (see Chapter 4.V.B.2.(a)) regarding monetary obligations. Providing these reports ought to be anticipated in a business plan as: first, it would alert the grantor if the investor is experiencing financial stress and may therefore be unable to meet its obligations; and second, new investments or start-ups may experience financial stress before becoming viable and profitable enterprises, and such stress ought to be anticipated in the business plan. Such planning can help an investor lower the risk of project failure.

3.27. *Link with impact assessments.* A well-designed business plan done in conjunction with the performance of appropriate impact assessments (see section IV below on impact assessments) can help adapt a project to avoid harms associated with evictions and expropriation of land that might not have otherwise been foreseen. For example, it may flag the need to reduce the amount of land used or to make provision for legitimate tenure right holders to continue use of some of the land.<sup>94</sup>

### **C. Investment proposals**

3.28. *In general.* Investors typically seek a grant of tenure and related rights by making a proposal to a prospective grantor, whether a government, a legal/legitimate tenure right holder or a local community. The proposal – often known as a bid – may have been solicited by the grantor or may have been unsolicited. Once received, depending on the grantor and the applicable law, that bid may be subject to varying levels of public procurement and screening requirements, which can be very important to ensuring the proposed project's success. The failure to review and sufficiently screen investment proposals can lead to the acceptance of investors who might not have the necessary financial means, technical expertise or willingness to avoid or mitigate negative impacts through appropriate safeguards, thereby reducing the likelihood of a responsible agriculture land investment project.

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<sup>93</sup> United Nations Conference on Trade and Development (UNCTAD). 2002. [How to prepare your business plan](#), p. 3.

<sup>94</sup> FAO. 2016. [Governance of Tenure Technical Guide No. 7](#), p. 14.

3.29. *Unsolicited bids.* Having identified particular land suitable for an agricultural project, investors may, on their own initiative, express their interest in a grant of tenure and related rights. In order to allow for further due diligence, consultations, impact assessments and negotiations, the investor's proposal should reflect a range of information, including the investor's financial situation and expertise (e.g. agricultural and management); the suitability of the land and feasibility of the project; and the proposed project's alignment with development priorities in that State or community.

3.30. *Solicited bids.* A government and local community may issue a call for investment to solicit proposals from investors. This should be made in a transparent manner, together with a clear description of the selection procedure which screens the proposals that are received in order to select the proposal most likely to result in a responsible and sustainable investment and culminate in the grant of tenure and related rights. For governments, such a call and selection procedure may be part of a tendering process.

3.31. *Applicability of tendering.* Tendering typically refers to a process through which governments invite proposals for projects, screen them and ultimately make a selection, typically resulting in the grant of tenure and related rights in the form of a concession agreement. The law applicable to tendering, as well as the specific processes, vary from government to government.<sup>95</sup> Tendering has been more commonly used in other industries (e.g. infrastructure projects, extractives) and, despite growing use in the agricultural investment context, unsolicited bids remain more common.

3.32. *Investor screening.* Screening commonly consists of several stages.<sup>96</sup> A first stage involves a review of the investor's initial proposal, including considering its alignment with development plans, the proposed site and the investor's financial situation and expertise (e.g. capitalisation, previous experience with infrastructure projects), as well as obtaining the initial views of any legitimate tenure right holders and local communities. A second stage involves screening the investor's business plan and identifying the appropriate due diligence and impact assessments to be conducted. A third stage involves verifying compliance with those requirements and ultimately concludes with the negotiation and signing of the contracts. Various tools and guidance are available to those involved in the

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<sup>95</sup> See FAO. 2015. [Governance of Tenure Technical Guide No. 4](#), p. 62, table 5 (showing an "Example of an investment approval process" including the various phases, outputs and approval authorities).

<sup>96</sup> UNCTAD, World Bank. 2018. [Screening Prospective Investors](#). Responsible Agricultural Investment (RAI) Knowledge into Action Notes, No. 6, pp. 3-4.



screening process, both in general<sup>97</sup> and for agriculture<sup>98</sup> and infrastructure<sup>99</sup> specifically.

3.33. *Importance of transparency.* There is a growing trend in favour of making the screening and selection processes more transparent. Where public information regarding such processes is lacking, there is the potential to harm relations between the investor and legitimate tenure right holders and local communities from the beginning.<sup>100</sup> Openness in these processes can help to avoid such harm and to combat corruption.<sup>101</sup> Information about the investor, impact assessments and mitigation plans, as well as any contracts and related agreements, should all be made available to legitimate tenure right holders and local communities. This transparency may be subject to the redaction of confidential information (including in contracts and related agreements) which is addressed further in Chapter 4.V in connection with monitoring and reporting obligations.

#### **D. Land valuations**

3.34. *Land systems approach.* To ensure viable agricultural investment projects, the prospective parties have to ascertain that the land identified in the feasibility study is both available and suitable to the particular type of investment envisaged.<sup>102</sup> The CFS-RAI Principles provide some benchmarks with regard to the process of determining the suitability of a given piece of land. First, attention and due consideration should be given to legitimate tenure right holders and how they may need to use the land and its natural resources during the investment.<sup>103</sup> Second, it is essential to verify the availability of and conditions of access to natural resources.<sup>104</sup> Third, there should be respect for cultural heritage sites and systems and recognition of the role of indigenous property and traditional

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<sup>97</sup> See UNCITRAL. 2014. [Model Law on Public Procurement](#); UNCITRAL. 2014. [Guide to Enactment of the UNCITRAL Model Law on Public Procurement](#).

<sup>98</sup> UNCTAD, World Bank. 2018. [Tools for screening prospective investors](#). Responsible Agricultural Investment (RAI) Knowledge into Action Note, No. 7.

<sup>99</sup> UNCITRAL. 2001. [Legislative Guide on Privately Financed Infrastructure Projects](#), pp. 61 *et seq.*

<sup>100</sup> UNCTAD, World Bank. 2018. [Screening Prospective Investors](#). Responsible Agricultural Investment (RAI) Knowledge into Action Notes, No. 6, p. 3; see generally UNCTAD, World Bank. 2018. [Public transparency](#). Responsible Agricultural Investment (RAI) Knowledge into Action Notes, No. 10.

<sup>101</sup> See generally OECD. 2016. [Preventing Corruption in Public Procurement](#).

<sup>102</sup> FAO. 2012. [VGGT](#), pp. 30-31.

<sup>103</sup> CFS. 2014. [CFS-RAI Principles](#), principle 5.

<sup>104</sup> *Id.*, principle 6.

knowledge communities may have in relation to natural resources placed in the land for biodiversity conservation and support for genetic diversity.<sup>105</sup>

3.35. *Valuation.* Under the VGGT, States should ensure that appropriate systems are used for the fair and timely valuation of tenure rights.<sup>106</sup> In addition, policies and laws should ensure that valuation systems consider non-market values, such as those relating to social, cultural, religious, spiritual, gender and environmental dimensions.<sup>107</sup> This is particularly important in the acquisition of customary rights to land. Land investment projects that are particularly invasive of cultural heritage, religious, aesthetic, or symbolic interests and benefits in land ought to explore alternative sites. Recommended good practices for establishing the value of land slated for an agricultural investment should include collecting and documenting tenure rights, such as land titles, tax records, maps and photos, boundaries of villages and communities, number of people who are landowners or users, resources available and in use, cultural sites, and current activities on each parcel of land.<sup>108</sup> Such collection and documentation can occur in connection with stakeholder mapping and consultations (see Chapter 2.II and Section II above).

3.36. *Challenge of non-market valuation.* Estimating the non-market value of tenure rights, including those interests and benefits in land, is a challenging but vital undertaking.<sup>109</sup> Non-market valuation is usually done during expropriation of tenure rights to estimate compensation.<sup>110</sup> According to the VGGT Technical Guide on Valuation, there is no need to estimate monetary values for non-market values when the tenure rights are not transferred or where there is no significant change in the use of land.<sup>111</sup> When tenure rights are subject to transactions, the valuation of non-market assets is a challenging and often highly subjective task because there is no comparable evidence upon which to draw.

3.37. *Involving affected stakeholders in non-market valuation.* As detailed in the FAO Governance of Tenure Technical Guide No. 11 on valuing land tenure rights, non-market valuation is a delicate task and valuers should begin by recognising that “money is not the typical means of exchange” nor measure of value when

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<sup>105</sup> *Id.*, principle 7.

<sup>106</sup> FAO. 2012. [VGGT](#), para. 18.1.

<sup>107</sup> *Id.*, para. 18.2.

<sup>108</sup> *Id.*, para. 17.1.

<sup>109</sup> FAO. 2017. [Governance of Tenure Technical Guide No. 11](#), p. 4. For the definition of non-market value, see p. 12 of the mentioned Guide.

<sup>110</sup> *Id.*, pp. 13, 58.

<sup>111</sup> *Id.*, p. 67.

seeking to quantify what is by its very nature an intangible value.<sup>112</sup> “A key task is gathering evidence on which to base the estimation”<sup>113</sup> which can be done by means of a contingent valuation approach in which participants are asked “to state their willingness to pay for a non-market tenure right or willingness to accept compensation for the loss of that right”.<sup>114</sup> To this end, in-person interviews and questionnaire surveys are often utilised with questions calibrated to capture society’s perception of value, as oppose to a given individual’s perception of value. The costs for compensating natural resources and related rights of access and use for local communities and indigenous groups should be reflected in the monetary obligations to be borne by investors in ALICs (see Chapter 4.II.A regarding monetary obligations).

3.38. *Creating mutually beneficial outcomes.* When agricultural land investments underestimate the value of agricultural land to local communities, Indigenous Peoples and vulnerable groups including women and youth, the likelihood of undesirable impacts increases. Such impacts include forced evictions, hunger and poverty when agricultural investments result in loss of homes, and sources of livelihoods like lands, fisheries and forests.<sup>115</sup> This could in turn trigger disputes that could undermine project feasibility and result in economic and reputational risks for investors.

3.39. *Compulsory acquisition and expropriation in general.* Expropriation, or compulsory acquisition in some States,<sup>116</sup> is the act of a government or relevant authority that acquires tenure rights for a public purpose without the willing consent of those holders.<sup>117</sup> It is an act which may be necessary, for example, for social or economic development (e.g. to build roads or hospitals) or for environmental protection (e.g. to build sewage facilities or to create preserved areas).

3.40. *Expropriation and due diligence.* Although expropriation falls within a government’s regulatory mandate, planning or making an agricultural investment on land that is to be expropriated or has already been expropriated – as a result of which or for which people are evicted – should prompt a responsible investor to carefully reconsider that investment. Indeed, evictions and resettlements have

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<sup>112</sup> *Id.*, p. 68.

<sup>113</sup> *Id.*, p. 69.

<sup>114</sup> *Ibid.*

<sup>115</sup> See FAO. 2012. [VGGT](#), Preface, p. v.

<sup>116</sup> See FAO. 2008. [Compulsory acquisition of land and compensation](#). Land Tenure Studies No. 10.

<sup>117</sup> FAO. 2016. [Governance of Tenure Technical Guide No. 5](#), p. 51.

been identified as high-risk factors which indicate that an investment ought perhaps not proceed.<sup>118</sup> Further, forced evictions even where the land is owned by the government would be inconsistent with the obligations of the right to housing for States that have ratified the International Covenant on Economic, Social and Cultural Rights.<sup>119</sup>

3.41. *Expropriation and valuation.* The VGGT provides extensive guidance on expropriation and the related obligation to provide compensation,<sup>120</sup> including, *inter alia*: expropriating rights only where required for a public purpose as defined by law and allowing for judicial review; ensuring that the planning and process for expropriation is transparent and participatory and minimises disruptions to livelihoods, in particular those of the poor or vulnerable; ensuring a fair valuation of the expropriated rights and prompt compensation; where expropriated land goes unused, first offering it back to original tenure right holders; endeavouring to prevent corruption; and where evictions are considered to be justified for a public purpose, exploring feasible alternatives in consultation with those affected, taking appropriate measures to provide adequate alternative housing, resettlement or access to productive land, and conducting evictions and relocations in a manner that is consistent with a State's duty to respect, protect and fulfil human rights.<sup>121</sup>

#### IV. IMPACT ASSESSMENTS

3.42. *The relevance of impact assessments.* Impact assessments are an essential part of managing risks and mitigating potential negative impacts of an investment.<sup>122</sup> There are different types of impact assessments that may need to be performed, depending on the particular investment's nature, size and context. Performance of such assessments allows for the parties to consider their findings and to identify pro-active measures to avoid or mitigate negative impacts. Impact assessments are generally underpinned by domestic or international law and are

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<sup>118</sup> FAO. 2016. [Governance of Tenure Technical Guide No. 7](#), p. IX (including, among other high-risk factors, that "[t]he government originally acquired the land by expropriation, or the project requires expropriation to make it available for development, causing, in either case, local people to be evicted" and that "[t]he project design requires the large-scale transfer of land rights from local people, possibly resulting in many people being involuntarily or even voluntarily resettled").

<sup>119</sup> United Nations Committee on Economic, Social and Cultural Rights (CESCR). 1997. [General Comment No. 7: the right to adequate housing \(Art.11.1\): forced evictions](#).

<sup>120</sup> FAO. 2017. [Governance of Tenure Technical Guide No. 11](#), p. 65. See also FAO. 2012. [VGGT](#), paras. 16.1-16.9.

<sup>121</sup> FAO. 2012. [VGGT](#), paras. 16.1-16.9.

<sup>122</sup> *Id.*, para. 12.10.

increasingly recognised as a good practice for investors, even where they are not required by law. Agricultural land investments should identify and address potential social and environmental impacts, for example on traditional farming practices (such as the ability of smallholders to use their seeds and traditional methods of production) and on legitimate tenure rights to land, soil, water, biodiversity, fisheries and forests. These assessments ought to be conducted *ex ante*, by independent experts.<sup>123</sup>

3.43. *Guidance.* The VGGT call for independent impact assessments to be conducted in agricultural land investments with a view to safeguarding tenure rights, food security and the progressive realisation of the right to adequate food, livelihoods and the environment.<sup>124</sup> Moreover, Principle 10 of the CFS-RAI Principles recommends that responsible investments should incorporate mechanisms to assess economic, social, environmental, and cultural impacts, especially regarding vulnerable actors.<sup>125</sup>

3.44. *A holistic, integrated, and participatory approach.* There is a growing body of international guidance on impact assessments suggesting that good practice favours undertaking this exercise in a holistic manner.<sup>126</sup> There is also a trend for diverse impact assessments to be conducted simultaneously, including those regarding environmental impacts, social impacts, human rights impacts, cultural impacts, economic impacts, and the impacts on intellectual property rights related to plant breeders' rights. Indeed, a more comprehensive framework reflects the interdependence of biophysical, socio-economic, and human rights concerns, and contributes to encouraging proactive measures rather than merely seeking to mitigate negative impacts.<sup>127</sup> The adoption of an integrated impact assessment approach centred around sustainability may provide a platform for the holistic consideration of the various layers of impact assessments.

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<sup>123</sup> *Ibid.*

<sup>124</sup> FAO. 2012. [VGGT](#), para. 12.10 provides that "when investments involving large-scale transactions of tenure rights, including acquisitions and partnership agreements, are being considered, States should strive to make provisions for different parties to conduct prior independent assessments on the potential positive and negative impacts that those investments could have on tenure rights, food security and the progressive realisation of the right to adequate food, livelihoods and the environment. States should ensure that existing legitimate tenure rights and claims, including those of customary and informal tenure, are systematically and impartially identified, as well as the rights and livelihoods of other people also affected by the investment, such as small-scale producers".

<sup>125</sup> CFS. 2014. [CFS-RAI Principles](#), principle 10.

<sup>126</sup> For example, see OECD. 2010. [Guidance on Sustainability Impact Assessment](#).

<sup>127</sup> UNCTAD. World Bank. 2017. Agriculture Global Practice: Discussion Paper 12. [The impact of larger-scale agricultural investments on local communities](#): updated voices from the field.

3.45. *Participation and accountability.* Guidance increasingly points towards participatory impact assessment, where the stakeholders take an active role. Making impact assessments public increases accountability for investors and States.<sup>128</sup> For example, independently and transparently conducted impact assessments can provide baseline data for diverse stakeholders to monitor and measure impacts over project duration. Further, they provide an investor with the opportunity to assess necessary changes to their project and to communicate the results to stakeholders.

3.46. *Essential elements.* For an impact assessment to be more than a mere “box-ticking” exercise, it should include, amongst others, the following essential elements:

- identification of all legitimate tenure holders and other stakeholders likely to be affected;
- mechanisms for ensuring participation of those likely to be affected;
- a review and appeal mechanism to handle any grievances concerning the impact assessment; and
- management and monitoring plans for mitigating possible negative impacts.

3.47. *Roadmap.* As discussed, a holistic approach can best identify and address the impacts of agricultural land investments. That said, the following paragraphs provide more detailed guidance on several types of impact assessments that contracting parties and stakeholders ought to consider:<sup>129</sup> (A) environmental, (B) social and (C) human rights.

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<sup>128</sup> Notably, some information such as financing in a business plan may constitute confidential business information and may under applicable law be exempt from disclosure. See OHCHR. 2011. UN [Guiding Principles on Business and Human Rights](#), principle 21.

<sup>129</sup> The types of impacts assessments described in this section are not exhaustive and contracting parties, as well as other stakeholders ought to consider other impact assessments for which guidance is not herein included, such as for Economic Impact Assessments. Economic evaluations of large-scale development projects are useful decision-making tools for implementation and several different methods of economic evaluation could be undertaken (e.g. the “reference price” method focuses on measuring the benefits to the community by calculating the impact of the project on net growth in income based on theoretical prices of the goods produced and means of production consumed; the “effects” method focuses on how the project’s additional value is distributed between economic agents.

## **A. Environmental**

3.48. *Environmental impact assessments (EIA)*. The CFS-RAI Principles encourage States and investors to consider the environmental impacts arising from agricultural investments.<sup>130</sup> They further encourage States and investors to conserve and to manage sustainably natural resources, increase resilience, and contribute to reducing environmental risks. To this end, States and investors can conduct a cumulative effects assessment by taking the following steps: preventing or minimising negative impacts on air, land, soil, water, and forests; conserving biodiversity and restoring ecosystems; reducing waste; increasing resilience of agriculture, food systems and habitats to adapt to climate change; reducing greenhouse gas emissions to mitigate climate change and integrating traditional and scientific knowledge. In addition, if the planned investment project is likely to have a significant adverse transboundary environmental impact (e.g. air pollution, international waterways), the host-State is obligated under customary international law to notify and consult with potentially affected States (see Chapter 1.I.B).

3.49. *Integrated approach to EIA*. An integrated approach to EIA is internationally recognized as good practice and calls for different aspects to be considered beyond the impacts on the environment *per se*, including human rights, social, economic and cultural impacts related to the environment.<sup>131</sup> For example, projects funded by the International Finance Corporation (IFC) are subject to the IFC's Performance Standard 1 which recommends that investors adopt an Environmental and Social Management System (ESMS) approach to managing environmental and social risks and impacts on an ongoing basis.<sup>132</sup>

3.50. *Environmental impacts that may be assessed*. In carrying out an EIA, contracting parties should be aware of the other entities involved and the investor ought to identify the area of influence, the presence of disadvantaged or vulnerable groups, as well as potential impacts on any associated infrastructure (e.g. railways, roads, utilities). With a view to addressing these potential impacts, investors ought to prepare management programmes that create operational procedures, practices, plans, and legal agreements to address risks and impacts. These should also include environmental and social action plans with measurable targets as well as procedures for conducting monitoring and review, as well as for

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<sup>130</sup> CFS. 2014. [CFS-RAI Principles](#), principle 6 (Conserve and sustainably manage natural resources, increase resilience, and reduce disaster risks).

<sup>131</sup> UN Environment. 2019. [Guidelines for Conducting Environmental Assessments](#), p. 12.

<sup>132</sup> IFC. 2012. [Performance Standards on Environmental and Social Sustainability](#), p. 2.

stakeholder engagement (see Chapter 4.III regarding rights and obligations of the parties with respect to the environment).

3.51. *Strategic Environmental Assessment (SEA)*. The SEA focuses on proposed actions at a policy, programmatic or legislative level, meaning that it tends to focus on the bigger picture. Generally, if a SEA has been conducted, the EIA can draw many elements from it, thus potentially rendering the EIA faster and easier to conclude. For instance, the SEA can be applied to agricultural policies to ensure that environmental considerations are properly accounted for when implementing those policies through the specification of activities requiring an EIA. However, to avoid a race to the bottom regarding EIA/SEA standards, neighbouring countries should also consider developing minimum requirements at the regional level.

3.52. *Public consultation*. An EIA is ineffective unless it is conducted within the context of a robust public consultation process. Ensuring this is done correctly will depend on the specifics of the proposed investment in question, having regard for the national legal framework, the existence of strong environmental standards, and long-term strategies.<sup>133</sup> Inclusivity is a key element for effective public participation: women, youth, indigenous people and their communities, as well as small holders have a vital role in environmental management and sustainable development.<sup>134</sup>

## **B. Social**

3.53. *Social Impact Assessments (SIA)*. Legal requirements for investors to conduct SIAs are less common, but there is growing experience with SIAs, and many EIA requirements are interpreted and applied as including the social dimensions. SIAs can assist States and investors to identify and address all relevant social impacts, including the impacts the investment may have on the rights of local communities and Indigenous Peoples. In this respect, a robust SIA can enable the parties to avoid or minimise displacement, and/or to take actions that can mitigate adverse impacts, for example by providing for the continued use of the land for subsistence purposes insofar as not inconsistent with the operation of the investment (e.g. livestock, water, crops, game).

3.54. *Contribution to sustainable development*. SIAs can also help calibrate the design of the investment to maximise its contribution to sustainable and inclusive

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<sup>133</sup> For a global overview of legislation concerning environmental impact assessments, see: UN Environment. 2018. [Assessing Environmental Impacts - A Global Review of Legislation](#).

<sup>134</sup> UN. General Assembly. 1992. [Rio Declaration on Environment and Development, proclaimed by the UN Conference on Environment and Development](#), principles 20-22.



economic development and the eradication of poverty.<sup>135</sup> Effective participation by affected stakeholders in the SIA process is essential if the assessment is to properly identify and address social impacts. Guidance on consultation and FPIC (see Chapter 3.II), and on complaints systems (see Chapter 7), is relevant to designing participatory SIA processes.

### **C. Human rights**

3.55. *Purpose of Social Purpose of Human Rights Impact Assessments (HRIA).* Many investors now routinely conduct HRIA as part of their enterprise risk management.<sup>136</sup> These assessments allow investors to identify the risks to the human rights of individuals and communities who may be affected by a project. They foreground a rights-based approach that proceeds by identifying who the right-holders and duty bearers are and promote accountability for violations of these rights by the duty bearers. Moreover, by making human rights an explicit basis for their assessment, they broaden the range of impacts measured further than in other types of impact assessments, particularly by including those who are most vulnerable and disadvantaged. The advantage of this approach lies in how it disaggregates impacts along lines such as “sex, age, location, ethnicity, participation in the informal economy, or other relevant factors”.<sup>137</sup>

3.56. *Importance and benefits.* The VGGT recommend the conduct of HRIA “because all human rights are universal, indivisible, interdependent and interrelated [and because] the governance of tenure of land, fisheries and forests should not only take into account rights that are directly linked to access and use of land, fisheries and forests, but also all civil, political, economic, social and cultural rights”.<sup>138</sup> HRIA ensure that human rights issues are placed on the contracting parties’ agenda, which helps to strengthen governmental and investor

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<sup>135</sup> *Id.*, principle 5.

<sup>136</sup> The Commentary to principle 17 of the UN [Guiding Principles on Business and Human Rights](#) provides that “[h]uman rights due diligence can be included within broader enterprise risk management systems, provided that it goes beyond simply identifying, managing material risks to the company itself, to include risks to rights holders”.

<sup>137</sup> United Nations Economic Commission for Africa (UNECA). 2017. Report: [The Continental Free Trade Area \(CFTA\) in Africa: a Human Rights Perspective](#), p. 14.

<sup>138</sup> FAO. 2012. [VGGT](#), para. 4.8. See also FAO. 2015. [Governance of Tenure Technical Guide No. 4](#), p. 59. Further, principle 19 of the UN [Guiding Principles on Business and Human Rights](#) provides that “in order to prevent and mitigate human rights impacts, business enterprises should integrate the findings from their impact assessments across relevant internal functions and processes and take appropriate action...[which]...will vary according to: (i) Whether the business enterprise causes or contributes to an adverse impact, or whether it is solely because the impact is directly linked to its operations, products or services by a business relationship; (ii) the extent of its leverage in addressing the impact”.

accountability for human rights. Stringent contractual conditions on the timing of project finance, for instance, may constrain an investor's ability to respect human rights (see Section V.B below regarding conditions). This may arise because such time constraints to deliver a project may inform decisions that impose controls over suppliers and contractors in a manner that might violate worker rights. In short, a HRIA puts human rights risks on the same footing as social, environmental, technical, and economic risks that are measured in other types of impact assessments, business plans and feasibility studies. However, unlike other types of impact assessments in which trade-offs between various risks and benefits of a project may be proposed, a HRIA proceeds from the premise that "human rights are not merely another topic" which could be set off against other interests.

3.57. *State duty to protect human rights.* States have a duty to respect, protect and fulfil human rights and to provide remedies for negative impacts. States should take additional steps to protect against any abuses of these rights by non-State actors that receive substantial support or service from the State. Under the UN Guiding Principles on Business and Human Rights, the State's duty in this regard includes making sure that private actors do not violate these rights on their territory.<sup>139</sup> This also means that States have a duty to ensure that private actors respect human rights.<sup>140</sup>

3.58. *Investor responsibility to respect human rights.* In accordance with Principle 11 of the UN Guiding Principles on Business and Human Rights, business enterprises have the responsibility to respect and avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved. The International Bar Association, for example, has endorsed the UN Guiding Principles' treatment of human rights due diligence under which businesses map their human rights risks in their activities and business relationships. The complex investment structures – or investment webs – that involve several actors and subsidiary companies need to be accounted to prevent and address human rights issues. In addition, FAO has endorsed the UN Guiding

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<sup>139</sup> UN [Guiding Principles on Business and Human Rights](#), principle 1 provides that "States must protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises. This requires taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication".

<sup>140</sup> Under the general principles of the UN [Guiding Principles on Business and Human Rights](#): (a) States' have obligations to respect, protect and fulfil human rights and fundamental freedoms; (b) The role of business enterprises as specialised organs of society performing specialised functions, are required to comply with all applicable laws and to respect human rights; (c) and third, there is a need for rights and obligations to be matched to appropriate and effective remedies when breached.

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Principles in various ways, including through its guidance document entitled “Due diligence, tenure and agricultural investment: A guide to the dual responsibilities of private sector lawyers advising on the acquisition of land and natural resources”.<sup>141</sup>

3.59. *Rights covered.* HRIA can be used to measure impacts on substantive, as well as procedural human rights protected by international, regional and national human rights instruments.<sup>142</sup> In the context of agricultural land investments, substantive human rights to be evaluated include, among others, those related to the right to property;<sup>143</sup> the right to adequate food;<sup>144</sup> the right to respect of privacy, family, home;<sup>145</sup> rights to a fair wage; safe and healthy working conditions;<sup>146</sup> the right to culture;<sup>147</sup> the rights of indigenous peoples;<sup>148</sup> and the right to water and sanitation which derives from the right to an adequate standard

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<sup>141</sup> FAO. 2019. Due diligence, tenure and agricultural investment: a guide on the dual responsibilities of private sector lawyers in advising on the acquisition of land and natural resources. [FAO Legal Guide No. 1](#).

<sup>142</sup> See, e.g., OHCHR. 1966. [International Covenant on Civil and Political Rights](#); Organization of American States (OAS). 1969. [American Convention on Human Rights](#); European Court of Human Rights, Council of Europe. 1950. [Convention for the Protection of Human Rights and Fundamental Freedoms](#); African Union. 1981. [African Charter on Human and Peoples' Rights](#).

<sup>143</sup> See, e.g., UN. General Assembly. 1948. [Universal Declaration on Human Rights](#), Art. 17 At the regional level, see, e.g., African Union. 1981. [African Charter on Human and Peoples' Rights](#) which provides in Art. 14, “the right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community”; in Art. 21(1) that “all peoples shall freely dispose of their wealth and natural resources”; in Art. 21(5) that “States parties to the present Charter shall undertake to eliminate all forms of foreign economic exploitation particularly that practiced by international monopolies so as to enable their peoples to fully benefit from the advantages derived from their national resources”; and in Art. 22(1) that “all peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind”.

<sup>144</sup> See OHCHR. 1966. [International Covenant on Economic, Social and Cultural Rights](#), Art. 11.

<sup>145</sup> See OHCHR. 1966. [International Covenant on Civil and Political Rights](#), Art. 17.

<sup>146</sup> See, e.g., UN. General Assembly. 1948. [Universal Declaration on Human Rights](#), Art. 23 and 24 and OHCHR. 1966. [International Covenant on Economic, Social and Cultural Rights](#), Art. 7.

<sup>147</sup> See UN. General Assembly. 1948. [Universal Declaration on Human Rights](#), Art. 27.

<sup>148</sup> International law foresees a number of instruments aimed at the recognising and protecting the rights of Indigenous Peoples including, e.g., UN [Declaration on the Rights of Indigenous Peoples](#) (UNDRIP). 2007.

of living.<sup>149</sup> Procedural human rights to consider would include: public consultation; access to information; and access to justice.

3.60. *Collection of information affecting human rights.* The performance of HRIA allows for the collection of information on how proposed business activities might affect human rights.<sup>150</sup> They can also measure impacts on social rights and livelihood,<sup>151</sup> as well as quality of life. Impacts on the latter can be measured by socio-economic indicators such as income and employment levels as well as by infrastructure and service provision. The cultural impacts of a project on values, belief systems, customary laws, languages, customs, social organisation, and traditions can also be considered in an HRIA, particularly where indigenous communities would be impacted by an investment project and where small holders have particular farming traditions and seed uses.

3.61. *Gender impact analysis.* In addition, based on the right to equal treatment and the prohibition of discrimination, a HRIA should include criteria to evaluate gender equality and poverty. A gender impact analysis should be held with the full participation of rural women and with respect for their free, prior and informed consent.

3.62. *Access to food.* A HRIA can also assess the extent to which agricultural investments affect local access to food, especially if an investment project causes a loss of access to land on which the food is grown.<sup>152</sup> Principles 1 and 2 of the CFS-RAI Principles encourage responsible investments as a means of contributing to food security and nutrition,<sup>153</sup> which includes supporting the right to adequate food. This type of impact assessment should also consider farmers' rights, especially the interest of small holder farmers, in seeking to avoid undermining their ability to earn a livelihood (e.g. when they are required to buy seeds which may be economically unfeasible).

3.63. *Food impact assessment (FIA).* An investment that does not undermine the right to food would ideally have the following effects: increased sustainable production and productivity of safe and nutritious food; reduced food waste; improved income and reduced poverty; enhanced fairness, transparency, and efficiency in the markets; enhanced food utilisation through access to clean water,

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<sup>149</sup> See OHCHR. 1966. [International Covenant on Economic, Social and Cultural Rights](#), Art. 11. See also: UN. General Assembly. 2010. Resolution 64/292 [The human right to water and sanitation](#).

<sup>150</sup> FAO. 2015. [Governance of Tenure Technical Guide No. 4](#), pp. 58-59.

<sup>151</sup> *Id.*, p. 60.

<sup>152</sup> FAO. 2016. [Governance of Tenure Technical Guide No. 7](#), p. 53.

<sup>153</sup> CFS. 2014. [CFS-RAI Principles](#), pp. 11-12.

sanitation, energy, technology, childcare, healthcare, and education. Further, a FIA may help to meet the VGGT's goal of encouraging States and investors to acknowledge that sustainable investments are essential to improving food security. They may provide information about whether States are promoting responsible investments in land, fisheries, and forests that not only protect the right to food, but also safeguard against dispossession of right holders and environmental damage, support local communities, create employment and diversify livelihoods.<sup>154</sup>

3.64. *Impact on intellectual property rights (IPR)*. The link between IPR and land rights is a crucial one to bear in mind. Prior to proceeding with an ALIC, the parties should consider the implications of IPR, such as those arising from the application of the World Trade Organization (WTO) Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) and the breeder-focused protection regime proposed by the International Union for the Protection of New Varieties of Plants (UPOV). In this regard, investors should give due consideration to local communities' traditional knowledge and seed conservation techniques.

3.65. *Adaptability*. Ultimately, to ensure maximum effectiveness, each HRIA should be tailored to a given investment's particular context. According to the UN Guiding Principles, while all enterprises have a responsibility to respect human rights, "the scale and complexity of the means through which enterprises meet that responsibility may vary according to these factors and with the severity of the enterprise's adverse human rights impacts".<sup>155</sup> Further, Principle 24 of the UN Guiding Principles provides that business enterprises ought to prioritise the prevention and mitigation of those adverse human rights impacts that are the "most severe or where delayed response would make them irremediable".<sup>156</sup>

3.66. Once the prospective contracting parties have given thorough and due consideration to the various components which comprise the pre-contractual preparatory phase, which, as seen above, may include things like the due diligence process, carrying out consultations, conducting feasibility studies, preparing business plans and investment proposals, and conducting impact assessments in order to have a full picture of the proposed investment's potential

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<sup>154</sup> FAO. 2012. [VGGT](#), para. 12.4.

<sup>155</sup> OHCHR. 2011. UN [Guiding Principles on Business and Human Rights](#), principle 14.

<sup>156</sup> This prioritisation is also reflected in the OECD, FAO. 2016. [Guidance for Agricultural Supply Chains](#) which recommends that enterprises establish strong management systems to identify, assess and prioritise adverse environmental, social and human rights impacts and to categorise risks by low, medium or high risk depending on the context and type of enterprise. This in turn sets the stage for designing and implementing strategies to respond to the risks so identified.

impacts and benefits, should they decide to move forward with the project, the next stage in the process concerns the additional steps such as the negotiations and the appropriate form, content and related conditions which lead up to the actual formation of the contract, as described below.

## **V. CONTRACT FORMATION**

3.67. *Introduction.* The process of contract formation consists of a series of stages, including preliminary exchanges of information, ongoing consultations, and negotiations. This process shapes the rights and obligations to be set forth in the contract and which will subsequently bind the parties over the course of the contract's duration (see Chapter 4).

3.68. *Importance of good faith.* While not universally accepted as a binding principle of contract formation, as a generally accepted good practice, the whole contract formation process should be carried out in good faith and in a fair and transparent manner.<sup>157</sup> Good faith may involve adopting (or refraining from) certain conduct,<sup>158</sup> and may also have implications for the kinds of information that should be communicated during the negotiation phase.<sup>159</sup>

3.69. *Roadmap.* This section addresses key aspects of contract formation in the context of ALICs, including (A) negotiations and (B) form, content and related conditions.

### **A. Negotiations**

3.70. *In general.* Negotiations involve two or more prospective parties who discuss and seek agreement on the terms which will regulate their relationship, including means for communication and notice, the various rights and obligations of the parties, mechanisms for monitoring compliance and plans for raising complaints and resolving disputes.

3.71. *Participation.* As a general matter, the contract formation process should include not just the investor and the grantor (e.g. government or local community), but also any legitimate tenure right holders who have rights to the land being transacted. The contract formation process is inherently linked with the conduct of due diligence, including the identification of possible parties and stakeholders (see Section I above). All participants should have proper legal

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<sup>157</sup> [UPICC](#), Arts. 1.7 (Good faith and fair dealing) and 2.1.15.

<sup>158</sup> See, e.g., *Id.*, Art. 1.8 (Inconsistent behaviour).

<sup>159</sup> See, e.g., *Id.*, Art. 2.1.15, Comment 2.

representation, including not just formal representation but counsel and advice, and access to the information generated by impact assessment and related exercises.

3.72. *Parameters and process.* To ensure that the negotiations are conducted in a transparent and inclusive manner, participants should generally agree on the process, including the location, language, and timing for meetings, as well as the overall timeframe. The negotiations may proceed in different ways with, for example, various phases of negotiations resulting in a sequence of contracts or more extended negotiations resulting in a comprehensive main agreement, both of which may also involve any related agreements with legitimate tenure right holders. As noted in Section III.C above, tenure and related rights granted by a government may be subject to a tendering process.

3.73. *Entire agreement clause.* As the negotiations and timeline for the investment may result in a series of contracts, some parties opt to include an “entire agreement” clause in the final contract. Such a clause states that the parties’ entire agreement is reflected in the contract and, subject to its specific terms, operates to exclude any separate contracts and provisions. The purpose of which is to enhance certainty and predictability with respect to the parties’ rights and obligations under the contract. These clauses should be considered very carefully and, if used, the final written document should indeed reflect the parties’ entire agreement. In situations where multiple contracts are used, the parties should similarly ensure that those contracts are coherent and consistent in order to minimise the possibility for misunderstandings and disputes

3.74. *Key issues.* Two further key negotiation issues are (1) validity and (2) representation and assistance in negotiations.

## **1. Validity**

3.75. *In general.* In seeking to ensure that the contract or series of contracts, as well as any related agreements, are valid and enforceable at law, the parties should be aware of any validity requirements under the national or otherwise applicable law. Some of the most common validity requirements are sketched out below.

3.76. *Capacity and consent.* The parties, whether natural persons or legal entities, must have legal capacity to enter into ALICs and related agreements and must give valid consent at the time of contract formation. Consent defects and relative remedies are also governed by mandatory provisions of national law. In this regard, a potentially sensitive issue relates to whether all of the parties had a sufficient understanding of the contractual terms and their implications when

entering into a contract or related agreement. Lack of informed consent may amount to a defect in consent (e.g. it may be interpreted as a mistake, either of fact or of law, or fraud, making the contract voidable or allowing for other remedies). Because illiteracy and language barriers are common obstacles, the circumstances of the parties' dealings – including, for example, whether contracts, agreements and related information were made available in a local language or whether there were facilitators to assist – will play a determining role in assessing whether informed consent was indeed absent, what particular grounds can be invoked under the applicable law, and the consequences regarding the contract and the available remedies.

3.77. *Fraud and mistake.* To build successful long-term relationships, good practice would recommend that the parties act in a transparent manner and – prior to the conclusion of the contract or related agreement – provide each other with relevant information regarding not only performance of the contract but also implications and risks thereof. Contracts and agreements induced by mistake or fraud may also be voidable by the aggrieved party under national or otherwise applicable law. With respect to mistake, the erroneous belief must relate to the facts or the law existing at the time of contract formation, not to a party's prediction or judgement regarding the future.<sup>160</sup> Thus, an incorrect judgement regarding, for instance, future production yields and related revenues would not give rise to a mistake rendering the ALIC voidable. Moreover, the mistake must be of such seriousness (i.e. not immaterial or minor)<sup>161</sup> that enforcement of the contract as it is would not be acceptable, or the other party is not deemed to deserve protection because of its involvement in the mistake.<sup>162</sup> Similarly, with respect to fraud, a representation by one party may indeed be fraudulent if it is intended to lead the other party into error and thereby to gain an advantage to the detriment of the other party.<sup>163</sup>

3.78. *Duress and undue influence.* Improper pressure during the negotiations in the form of threats, duress or undue influence may also render the contract voidable. Subject to the applicable law, a threat that presents to the aggrieved party no reasonable alternative but to consent to the bargain could emanate from the other party or from an entity external to the negotiations.<sup>164</sup> In some instances, economic duress or business compulsion may qualify as an improper threat. However, if the other contracting party is unaware of the improper

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<sup>160</sup> See [UPICC](#), Art. 3.2.1 (Definition of mistake).

<sup>161</sup> See *Id.*, Art. 3.2.2 (Relevant mistake).

<sup>162</sup> See *Id.*, Art. 3.2.2 and comments.

<sup>163</sup> See *Id.*, Art. 3.2.5 (Fraud).

<sup>164</sup> See *Id.*, Art. 3.2.6 (Threat)



pressure and has acted in material reliance upon the contract or related agreement, avoidance by the aggrieved party is precluded. Undue influence may arise in situations in which one party is under the domination of another or, by virtue of the relationship, it may be reasonably assumed that the aggrieved party had engaged in negotiations inconsistent with its own welfare. In the agricultural context, for example, situations in which the government seeks to grant tenure and related rights to land with the active support of the military but without the support of legitimate tenure right holders and the local community could undermine the contract's validity. Further, changing market conditions could, in certain circumstances, lead to claims of economic duress. The party claiming duress must generally demonstrate that its acceptance of contract terms was involuntary, and that the circumstances provided no alternative and were the result of the other party's wrongful acts. Wrongful acts may include threats to deprive one of a livelihood, or threats to institute criminal or regulatory actions, in order to secure a private benefit. Ultimately, claims are very context-specific and depend upon multiple factors (e.g. claims may be only for avoidance in some countries while in others, the judge may adapt the contract; in the case of gross disparity, the UPICC envisage both claims), the parties and stakeholders (e.g. what constitutes duress for a government will be much different than for a local community), and the particular circumstances of the land, proposed project and negotiations.

## **2. Representation and other assistance in negotiations**

3.79. *In general.* In the context of negotiations, it is important that the roles of the various parties, stakeholders and their respective legal counsel are understood and that any conflicts of interest be avoided (e.g. counsel for an investor also advising legitimate tenure right holders regarding their rights and interests).

3.80. *Consent and representation.* In connection with capacity and consent, those who represent the parties or stakeholders in negotiations must be properly authorised, especially if they are to provide consent on behalf of others.<sup>165</sup> Depending on the requirements of national law, documentation typically designates the legal representative, describes the scope of the representative's authority and the manner in which the representative consults with and informs the tenure right holders represented. The representative's authority should be clearly established, and investors in particular should be sure that those with whom they are negotiating properly represent and can provide consent on behalf of the other parties or stakeholders.

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<sup>165</sup> For general rules and commentary on the authority of agents and representation, see [UPICC](#), Chap. 2.2.

3.81. *Inclusivity.* Representation could be a sensitive issue for governments, local communities, and legitimate tenure right holders. For governments, it may not be clear which ministry, ministries or even level of government should be included in the negotiations and which one is empowered to consent to the contract.<sup>166</sup> Additionally, proper consent to the contract by one ministry does not necessarily imply that another ministry will issue a required permit (see Chapter 4.V.A.1 regarding permits and licenses). For legitimate tenure right holders and local communities, there may be customary rules, for example, that restrict the rights of women and youth to be involved and share their views in consultations and negotiations. Local communities, as another example, may be made up of various groups and members who do not share the same views on the project. The parties should ensure that all voices are represented in the consultations and negotiations process because the project's success will depend on the backing of a diverse range of stakeholders (see Chapter 2.II and Section II above).

3.82. *Investors' negotiation team.* In assembling a negotiation team, investors' legal counsel should include local counsel, which can provide valuable assistance navigating and interpreting the national legal system (see Chapter 1.I.A). Investors should be aware, however, that not all local counsel may be familiar with customary rules for allocating land and resource rights in all areas in that State. In such instances, investors should engage other experts, including land tenure experts familiar with the specific investment area. Such experts could be key not only to supporting the investor's understanding, but also to an ongoing consultation process.

3.83. *Governments' negotiation team.* In negotiating an ALIC with an investor, the government should ensure that its negotiation team includes legal counsel and representatives of the various ministries and levels of government which may be involved in the transaction, while also specifying which entity and counsel leads the negotiations (e.g. Attorney General's office, development agency). There should be coordination across those ministries and levels as well as a clear negotiating mandate, including the limits of that mandate. The government should work with the investors to ensure ongoing consultations with legitimate tenure right holders and local communities, whose involvement may be facilitated by the government or a public-interest legal service provider (e.g. Non-governmental Organisations (NGOs) or Civil Society Organisations (CSOs) that provide legal services) and could result in those holders and communities becoming a party to the contract or a related agreement, or a third-party beneficiary (Chapter 2.III). For contracts between investors and local communities, the government can

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<sup>166</sup> See FAO. 2015. [Governance of Tenure Technical Guide No. 4](#), p. 27, table 4 (providing an overview of [g]overnment authorities and their potential roles).

similarly support consultations and ultimately the negotiations. In both contexts, however, the interests of the government may not align with those of local communities, so assistance from a public-interest legal service provider is advisable.

3.84. *Local communities' negotiation team.* Before entering into negotiations with an investor, local communities should ensure that their negotiation team includes legal counsel, absent which they may not receive sufficient advice on the process and proposed terms or could feel forced into signing contracts. In such situations a local community may receive support from the government or a public-interest legal service provider. It is important to note that legal service providers can provide local communities and their members with crucial assistance in a number of regards. In the lead-up to negotiations, they can inform community members about their rights to consultations (see Section II above) and about feasibility studies, business plans, due diligence and impact assessments. They can also help members of local communities to screen the investor, to arrive at a shared position on whether to accept or reject the investment, to develop the desired contractual terms and to seek particular benefits. They can help a local community to make submissions at public hearings for permits and licenses and, if needed, to seek judicial review of decisions in that regard. After negotiations are complete, they can ensure that the contract is written and enforceable or voided according to national law. Legal service providers can also help to set up mechanisms and accounts for the management of any payments received from the investor, as well as oversight of those mechanisms and accounts.

## **B. Form, content, and conditions**

3.85. *Form.* Given the complexity of ALICs, such contracts should always take the form of a written agreement, either as a single comprehensive contract or a series of contracts relating to various steps in the investment process, generally in sequence. As a matter of good contracting practice, concise contracts are encouraged as a means to improve the clarity, completeness, enforceability, and effectiveness of the parties' agreement. Care should be taken to reduce complexity where possible and to ensure that parties and stakeholders with limited literacy skills fully understand the terms.<sup>167</sup> This in turn promotes transparency, open communication and close collaboration, which are key tenets not only at the contract formation stage, but throughout the contractual relationship.

3.86. *Freedom of contract.* The widely recognised principle of freedom of contract provides that parties are free to enter into a contract and to determine

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<sup>167</sup> See [UPICC](#), Art. 3.2.7(1)(a) on gross disparity.

its specific content.<sup>168</sup> That freedom, however, is limited by mandatory rules (see Chapter 1) which may restrict party autonomy.<sup>169</sup> It is therefore in the parties' interest to address issues relevant to their contractual relationship in a complete and detailed manner. To this end, a checklist of issues for them to consider is included in the Executive Summary.

3.87. *Content, interpretation, and avoidance.* In practice, the parties' freedom of contract may also be overshadowed by the concrete lack of economic freedom to negotiate specific terms or reject a lawful, yet economically unbalanced contract. This gives rise to a concern that non-negotiable contracts of adhesion are often drafted in favour of the stronger party. Accordingly, domestic rules on contract interpretation<sup>170</sup> may entail that any ambiguity will be construed against the contract drafter.<sup>171</sup> Conversely, where a literal-minded reading of a contractual term would give a party more than is reasonable with respect to the contract as a whole, the applicable law may permit a more liberal interpretation. In instances of gross disparity, when accepted by the applicable law, the affected party may avoid the contract or ask a court to modify it in accordance with reasonable commercial standards of fair dealing.<sup>172</sup> In practice, the economic efficiency and the practical meaningfulness of *ex post facto* (i.e. after the fact has occurred) protection of the grantor through litigation may be questionable in view of limited practical accessibility to the courts and, especially for local communities and legitimate tenure right holders, the discounted value of relief available.

3.88. *Suspensive and resolute conditions.* The parties may make their contract or one or several obligations arising under it dependent on the occurrence or non-occurrence of a future uncertain event. A provision to this effect is called a condition.<sup>173</sup> A condition may be imposed by law, such as a public permit or license requirement (e.g. water use). The parties may introduce a provision making the contract or their contractual obligations arising under it dependent upon a permit or license being granted, which qualifies as a condition. In general, there are two types of conditions of which parties should be aware: suspensive and resolute conditions. For the former, the contract or contractual obligation is made to

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<sup>168</sup> See *Id.*, Art. 1.1 (Freedom of contract).

<sup>169</sup> *Id.*, Art. 1.4 (Mandatory rules).

<sup>170</sup> For general rules on interpreting international commercial contracts, see [UPICC](#), Chap. 4.

<sup>171</sup> See [UPICC](#), Art. 4.6 (Contra proferentem rule).

<sup>172</sup> See *Id.*, Art. 3.2.7 (Gross disparity).

<sup>173</sup> In some systems, "condition" means a major term of the contract but that is not the sense in which the term "condition" is used. A condition, moreover, is not what civil law systems call "terms", which designate the amount of time (or the precise date) during which the contract will be operative.

depend upon the occurrence of a future uncertain event, so that it takes effect only if the event occurs. In some systems, this type of condition is known as “condition precedent”. For the latter, the parties to the contract agree that one or both of them may, under certain circumstances, have the right to terminate the contract. When a contract subject to a resolutive condition comes to an end as a result of the fulfilment of the resolutive condition, the parties will often have performed, fully or in part, their obligations under the contract. The question then arises whether, and, if so, under which rules, the parties have to make restitution of what they have received (see Chapter 6.II).<sup>174</sup>

3.89. *Conditions and good faith.* Whether a party is under an obligation to use all reasonable efforts to bring about the fulfilment of a condition is a matter of interpretation. The parties themselves may expressly provide for the observance of the principle of good faith as regards all the events upon which completion of the transaction is conditional; or they may choose to go beyond this minimum standard and impose a duty to use “their best efforts to bring about the fulfilment of the conditions as soon as practicable”.<sup>175</sup> If this duty is breached, the available remedies are determined in accordance with the contractual provisions, the particular circumstances of the case and the general rules on remedies that are applicable according to the law which governs the contract (see Chapter 5).<sup>176</sup> A party who, contrary to the duties of good faith and fair dealing or cooperation, prevents the condition from being fulfilled may not rely on the non-fulfilment of the condition.<sup>177</sup>

3.90. *Consequences of breach of required form or content.* Where the applicable law establishes particular form and content requirements, such law typically also specifies the consequences of non-compliance with such requirements. Breach of those requirements may result in various sanctions depending on the applicable law, ranging from avoidance of the contract as a whole to civil or even criminal penalties. Some legal systems may allow for revision of the contract by a court.

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<sup>174</sup> See, e.g. [UPICC](#), Arts. 5.3.5 (Restitution in case of fulfilment of a resolutive condition), 7.3.6 (Restitution with respect to contracts to be performed at one time), and 7.3.7 (Restitution with respect to long-term contracts).

<sup>175</sup> *Id.*, Art. 5.3.3 (Interference with conditions).

<sup>176</sup> *Id.*, Art. 5.3.3.

<sup>177</sup> *Id.*, Art. 5.3.4 (Duty to preserve rights).

## CHAPTER 4

### RIGHTS AND OBLIGATIONS OF THE PARTIES

4.1. *Overview.* Agricultural land investments often create expectations of benefits, for example in the form of job creation and development of infrastructure, while also potentially creating adverse social, environmental and economic impacts that need to be properly identified and addressed. On several occasions, reality has fallen short of expectations, harming livelihoods and the environment, and leading to disputes that delayed or even stalled project implementation. Depending on the context, addressing these issues may require fundamental changes to the ways in which investments are made – including, in legal terms, the nature of the contracting parties, the structure of the contracting process, and the extent to which those who stand to be most directly affected can shape the events. Clearly defining the parties' rights and obligations in any contracts and related agreements is a key component of the investment's success.

4.2. *Contractual content in general.* Broadly speaking, ALICs involve an exchange: the grantor allocates resource rights to the investor in return for certain commitments. Carefully thinking through these commitments is an important step towards integrating the project's key parameters into its core contractual and institutional arrangements – as opposed to corporate philanthropy at the fringes. Well-crafted contracts can help ensure that the expectations of all actors are properly aligned, translate promises into enforceable obligations, and ultimately provide a more solid foundation for mutually beneficial investment. The project's feasibility study and its social, human and environmental impact assessment, as well as consultation with legitimate tenure right holders and other affected people including FPIC where relevant, should provide the foundations of any contractual provisions (see Chapter 3). Generally, applicable law will affect the bounds of what the parties can negotiate,<sup>178</sup> and any contractual arrangements would need to comply with domestic law and be tailored to the particular legal context (see Chapter 1).<sup>179</sup>

4.3. *Filling in the gaps.* In many contexts, contracts can play a useful role in seeking to complement national law. For example, where domestic legislation may

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<sup>178</sup> Besides any domestic law provisions having a bearing on this issue, the OECD Guidelines for Multinational Enterprises state that enterprises should "[r]efrain from seeking or accepting exemptions not contemplated in the statutory or regulatory framework related to human rights, environmental, health, safety, labour, taxation, financial incentives, or other issues" (OECD. 2011. [OECD Guidelines for Multinational Enterprises](#), para. II (5)).

<sup>179</sup> FAO. 2012. [VGGT](#), para. 12.8.

fall short of international standards, the contract can require the investor to comply with specified international standards. Circumstances may also require the parties to negotiate certain socio-economic obligations that are tailored to the nature of the investment – for instance, with regard to any investor commitments to carry out specified processing activities in the country.

4.4. *Roadmap.* The Chapter broadly describes the various rights and obligations that may be set forth in ALICs and related agreements according to the areas of law relevant to agricultural investment, including: (I) land tenure; (II) social and economic issues; (III) environment; (IV) protection of investment and regulatory autonomy; and (V) implementation and monitoring.

## **I. LAND TENURE**

4.5. *Introduction.* The rules relating to land tenure are generally established by the laws in force in the State in which the land is located. It bears mentioning that for those ALICs into which the parties have inserted a clause dealing with choice of law or governing law, careful consideration must be given to the interaction between the chosen applicable law and the host State law regarding land tenure; in particular, with regard to those aspects which are of public order and are therefore mandatory. With respect to land tenure, the contract should include information regarding: (A) the location and description of the land; (B) tenure and related rights; (C) project development; and (D) duration and renewal.

### **A. Identification of the land**

4.6. *In general.* The land for which the tenure and related rights are to be granted for a specified period of time should be clearly and accurately identified in the contract (e.g. total size; boundaries; geospatial data). Locating and describing the land, in a transparent way, allows the parties and stakeholders to have the same understanding as to the land that is the subject of the contract.

4.7. *Identifying the land.* The land should be identified by a clear delineation process involving both qualified professionals and the local community. The contract should indicate the acreage granted, the location of the land, and all necessary elements allowing for easy identification and location. In some States, for example, there are defined plans for agricultural development by which the lands to be allocated are predefined and made available to investors by the government or local community, which in turn allocates the land to investors based on proposals, screening and the government or community's development objectives. In other States, by contrast, the preliminary identification of the land may be a part of the application, in that investors specify the particular land in

which they are interested and request tenure and related rights to it, and the government or local community then reviews that application. Under either approach, the exact identification of the land may involve i) a social process, based on effective engagement with legitimate tenure right holders and local communities; ii) a land survey, which is generally carried out by an attested public official, typically a surveyor; and ultimately iii) a legal process, for example to register the land or effect its transfer.

4.8. *Additional land.* The parties may wish to subsequently expand the project by increasing the area of land, which is a possibility the contract may contemplate. Investors may request broad portions of land to ensure a basis for the future expansion of activities. Therefore, including a clause in the investment contract regarding additional land, such as an “option” or “preference” clause, might help to ensure that a project does not initially take up more land than it can feasibly use. The review process allows for (a) any legitimate tenure right holders with respect to that additional land to continue using it and (b) the additional land to be granted only if the investment project is progressing successfully in a responsible manner (see Section C below regarding project development), and subject to effective engagement with legitimate tenure right holders and local communities in the additional land area (see Chapter 3.II). Such clauses, however, should not have the opposite result of excluding legitimate tenure right holders from using additional adjoining land by holding it for potential expansion of a project.

4.9. *Option clause.* With an “option clause”, the parties agree that the investment project can be expanded to additional land at the investor’s option if, *inter alia*, the project has been developed in accordance with the business plan, the interests of any legitimate tenure right holders, key performance indicators, and the project’s overall timeline. For such a clause, the parties should specify the type and time of the notice to be provided and the terms for the rights to additional land to be granted.

4.10. *Preference clause.* With a “preference clause”, sometimes referred to as a “right of first refusal clause”, the parties agree that the investor may have priority over all other applicants if the grantor decides to make available tenure and related rights to an adjoining parcel of land, provided that the investor pays additional rent or meets other obligations (*e.g.*, financial, economic or social). Where the interests of all parties and stakeholders are taken into consideration and balanced, the clause may be a useful means of expanding a successful project. Such an option might also disincentivise the investor from trying at the outset to obtain rights to more land than it can feasibly use. Similar to an option clause,



the parties should specify the procedure and the terms for the rights to additional land to be granted.

## **B. Tenure and related rights**

4.11. *Overview.* The grant of tenure and related rights generally lays out how the investor may use the land, as well as any other resources (e.g. water, minerals, and timber) and infrastructure. Some ALICs grant broad rights, but parties are encouraged to negotiate carefully the grant of rights and to specify the relevant rights in the contract. Failure to do so often gives rise to conflict between investors, grantors and legitimate tenure right holders. Contractual provisions should be informed by the findings of due diligence and impact assessment exercises, including with respect to the rights of and possible impacts on any legitimate tenure right holders (see Chapter 2.I). As a safeguard for such holders, the parties may expressly grant, withhold or reserve rights for legitimate tenure right holders (e.g. for continued access to the land for passage, water, pasturing or collection of fruits) – either as parties to the contract or a related agreement or as third-party beneficiaries (see Chapter 2.III) – in order to ensure protection of and respect for those holders' rights.

### **1. Tenure rights**

4.12. *In general.* In granting tenure rights (e.g. rights of possession, use, access, and transfer, along with associated responsibilities and restraints),<sup>180</sup> the parties should consider not only land aspects, but other resources and any existing or future facilities and infrastructure that may be built for the project. Clear and specific provisions on these issues may help to prevent misunderstandings, grievances, and possible disputes. Parties should however always consider the applicable legal framework and be aware of the extent to which contractual terms relating to tenure rights and rights to use of other resources and infrastructure will be valid and enforceable (see Chapter 1).

4.13. *Land use.* The contract should clarify when the land is to be made available to the investor, the duration of the right to use the land, the type of investment or activity for which the land has been granted, and the permitted uses of the land, including construction of facilities on that land itself. Subject to the investor obtaining any necessary permits and licenses (see Chapter 4.V.A.1), the contract generally grants the investor the right to possess and use the land for the specified agricultural activities. The investor typically holds the rights of possession and use

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<sup>180</sup> FAO. 2002. [Land tenure and rural development](#), Land Tenure studies No. 3, para. 3.1.

throughout the contract's duration, provided that the limits foreseen in that grant of rights are respected and the parties fulfil their other obligations. The investors' rights of possession and use should take into account the rights of any legitimate tenure right holders, for example, by being limited in certain ways (e.g. through a grant of rights to such holders in the contract – either as a party or a third-party beneficiary – or by withholding rights to safeguard those holders)

4.14. *Land access and control.* When land tenure and related rights are granted temporarily to an investor – i.e. the land is not sold to the investor – the investor's rights are limited by the grantor's right to ascertain that the investor's access and use does not infringe upon certain fundamental rights. The grantor thus has an interest in knowing if the investor is meeting its commitments regarding the manner in which the land is used (e.g. respecting use constraints or growing the agreed crops). Hence the importance for the contract to define rights of access, including the right of the grantor or possibly others to inspect the land.

4.15. *Rights to other resources.* The contract should address the extent to which the investor can use other resources in the project area, including resources above ground (e.g. timber), resources below ground (e.g. oil, gold) and water, as well as fisheries. In some instances, broad grants of rights to investors have unknowingly or mistakenly included broad rights to resources on the land, which can lead to negative impacts on the environment (e.g. timber extraction) or on local communities who might need those resources. Grantors should ensure that only those resource rights that are intended to be granted are indeed conveyed to investors.

4.16. *Resources above ground.* The contract should specify the investors' rights to use resources above ground, including forests, which may still be used by legitimate tenure right holders for hunting or other sources of food and livelihoods. In particular, use of forests for timber is an issue that the parties should consider and, if applicable, address in the contract in a manner consistent with domestic law. There are cases of what were ostensibly agricultural investments actually having served as a means for investors to gain access to forests to be harvested for commercial purposes. Parties can prevent such occurrences by expressly specifying in the contract whether an investment project may use timber found in the investment area for facilities or other purposes.

4.17. *Resources below ground.* A general grant of rights to land might create confusion with respect to rights to underground mineral resources (e.g. oil, natural gas, metals), which may be very valuable and the extraction of which can generate negative impacts. In some States, all resources below ground belong to the government, whereas in others, they belong to the owner of the land above. In

all instances, the contract should address in a clear fashion rights with respect to underground mineral resources. One option is to include an “exclusion clause” specifying that the grantor reserves all rights with respect to such resources and stating the modalities of notice and compensation for loss of land due to exploitation of such resources. If the parties intend to allow for investors to extract resources below ground in connection with an agricultural investment, safeguards should be put in place (e.g. for legitimate tenure right holders, local communities, and the environment).

4.18. *Water.* An investment project’s use of water can have significant impacts on legitimate tenure right holders, local communities, and the environment. Where the grantor is a government with responsibility for governing natural resources, the contract should: (i) specify the extent of the right of use of surface water, ground water or both according to the needs determined by the project’s feasibility studies and impact assessments (see Chapter 3.III and IV); and (ii) indicate the modalities of water usage, the necessary quantities, and specify the corresponding fees, procedure for adjustments and protections that must be in place. Where the grantor is a local community, while that community might not have responsibility for water governance, the parties should nevertheless consider the water sources and quantities to be used in the contract in order to minimise confusion and avoid grievances and disputes with members of that community.

4.19. *Rights withheld.* The parties should consider whether the grantor would like to continue using the land in certain ways or having access to it. The parties should similarly consider how any legitimate tenure right holders or local communities are using the land in question, whether before an investment project is undertaken or as part of an existing project. In consultation with such holders and communities, and in accordance with the applicable domestic law, the parties can expressly withhold or reserve certain rights in the contract to safeguard particular uses (e.g. growing crops in a specific area) or access (e.g. passage, access to water, fisheries or pasturing) by those holders and communities. Another option would be to grant these particular rights to those holders and communities (i.e. in the contract or a related agreement with them as a party or as third-party beneficiaries). Respecting legitimate tenure rights in this way can help ensure the project’s smooth operation and minimise or avoid any negative impacts.

## **2. Grant of related rights**

4.20. *Rights not linked to land and natural resources.* Related rights are those that are not directly linked to the land and resources for which tenure rights are granted, but are necessary for the investment to be properly implemented. Such

rights may include rights, *inter alia*, (a) to access facilities and utilities; (b) to use and build infrastructure; and (c) to import goods, export, transport, and market production.

(a) *Access to facilities and utilities*

4.21. *Facilities.* The parties should contemplate how any existing facilities are to be used or whether they may be removed, as well as whether the investor will have rights to construct new facilities. For existing facilities, the parties should consider installations or buildings, such as those that might hamper use of the land or that are being used by legitimate tenure right holders, and specify any rights of use and any rights withheld with respect to those facilities, as well as issues of maintenance. With respect to building rights, the parties should consider any facilities that may need to be constructed for the project, including any rights of use, rights withheld and maintenance responsibilities. Facilities may need to be built, for example, for processing of the agricultural production. The parties should also consider how the various facilities may be transferred or returned (see Chapter 6).

4.22. *Essential utilities.* The parties should consider how much water and electricity the project can use, as well as how much waste it is expected to produce, and expressly address in their contract access to essential utilities (*e.g.* water, electricity, and waste management). They should also analyse whether any related rights are needed in this regard (*e.g.* to construct electrical lines or pipes to access local utilities systems) which ought to be reflected in the contract.

4.23. *Utilities clauses.* Rights to essential utilities may involve the investor's use of public or private water and electrical systems. The contract could contain clauses relating to:

- the installation of passageways necessary to access the project site, the installation of water pump systems, electricity networks or water supply pipes;
- the modalities of passage of water supply pipes;
- the requirements for waste management; and
- the installation modalities of channels or any element necessary for optimal operation of the project in accordance with the feasibility studies and impact assessments.

4.24. *Overcoming difficulties.* The parties should ensure that the contract contains any clauses needed to provide relevant information or specify ways of overcoming difficulties. For example, the local water or electrical systems may not

offer solutions to cover all the difficulties which could hamper the investment's activity, in which case these issues should be clearly regulated in the contract. In some instances, water or electrical systems may need to be installed across adjoining land in order for those utilities to reach the project area, or the systems may generally be inadequate. Where such access is needed or the systems are inadequate, the parties should also contemplate these issues and provide for solutions in the contract, as appropriate and necessary.

*(b) Infrastructure*

4.25. *In general.* Infrastructure includes both general infrastructure (e.g. public roads) and investment-specific infrastructure (i.e. built to support the investment project).<sup>181</sup> The contract should address the rights and obligations of the parties with respect to existing infrastructure and to the construction of new infrastructure. These aspects partly depend on the nature of the contracting parties. If the grantor is the government, for example, the parties could consider infrastructure needs and uses on a larger scale, because the government generally maintains responsibility for infrastructure and public works, whereas a local community might not have such responsibility. The feasibility study and impact assessments should inform the contract development, including to protect and respect the rights of any legitimate tenure right holders (see Chapter 3.III and IV).

4.26. *Existing infrastructure.* The parties should endeavour to put to good and effective use existing infrastructure systems (e.g. roads, water, irrigation, waste disposal), whether those systems are publicly or privately held. At the same time, parties should be cognisant of how the contemplated use will impact that infrastructure and its current users and seek to avoid or minimise any negative impacts. Accordingly, the investor's specific rights of use should be defined with respect to specific sets of infrastructure, such as the maximum weight of trucks that may use particular roads. In addition, the parties should consider, if needed, whether and how improvements could be made to existing infrastructure.

4.27. *New infrastructure.* The investment project may require new infrastructure to be built. The right to build should be clearly defined in the contract in a manner that addresses any necessary limitations and safeguards. The parties should identify who owns any newly constructed infrastructure (e.g. the investor, government, or local communities), including whether a co-ownership structure could be agreed. The ownership rights should be defined to

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<sup>181</sup> See UNCITRAL. 2001. [Legislative Guide on Privately Financed Infrastructure Projects](#).

specify the owner, the duration of ownership, and the circumstances in which ownership may lapse. Where the infrastructure is to be co-owned, it is important to clarify the legal vehicle (e.g. company, cooperative, trust) for that co-ownership. As ownership may not be indefinite and could revert with end of the contract, the parties should address issues of ownership with respect to transfer (e.g. to a new investor), reversion of the land at the contract's end or upon termination. In some situations, it may be necessary to offer compensation to the investor for infrastructure-related investments on compulsory acquisition, reversion, or termination. Other matters to be considered include the potential need for land acquisition (i.e. expropriation) in connection with that construction (see Chapter 3.III.D) and the requirement to use local content, the importation of equipment whether wholly or partially, and the corresponding obligations with respect to the maintenance and repair of the infrastructure.

4.28. *Maintenance, repair, and fees.* The parties should consider obligations of maintenance, repair, and collecting fees with respect to infrastructure. For government-owned infrastructure, the government could charge fees to cover, *inter alia*, maintenance and repair costs for the provision of that infrastructure. Where commercial rates are applicable for electricity, water, and other supplies, they ought to be well defined for the investor's information and considered in connection with the investor's business plan. The parties may wish to consider whether fees could be waived by the government in exchange for a commitment by the investor to invest in infrastructure. Private-sector infrastructure financing may involve the charge of user fees to cover investment, operations and maintenance costs. It may be advisable, for example, to charge fees for use of the infrastructure and to use all or part of those fees to hire local employees to maintain and further develop the infrastructure. Capacity development and training in infrastructure operations and maintenance should also be included. When agreeing to the construction of new infrastructure, the parties should also agree on responsibility for the maintenance and repair of such infrastructure.

4.29. *Access rights.* In addition to defining the rights of the investor and grantor, the parties should consider the rights of legitimate tenure right holders and local communities to existing and new infrastructure (e.g. to travel on an existing or new road that would be within the project area; or to use water resources). As required, the parties should ensure that those rights are incorporated into the contract, regardless of whether the legitimate tenure right holders and local communities are party to the contract or a related agreement, or are third-party beneficiaries (see Chapter 2.III).

4.30. *Third-party financing.* Third-parties such as development funds focused on promoting responsible agricultural investment may provide capital for

infrastructure development, subject to certain and varying requirements. The rights and obligations of any third-party financiers should, like that of the overall investment project, be properly aligned with the project's responsible and sustainable investment approach.

4.31. *Development obligations and social infrastructure.* Infrastructure construction and improvements may be just one aspect of clauses dealing with broader project development and social infrastructure concerns. As for the former, the infrastructure aspects of those clauses could also be subject to key performance indicators. Regarding the latter, the contract may contain a clause requiring the investor to build or otherwise support what is known as social infrastructure, such as contributing to the development of a school or hospital for the local community (see Section II.E below).

4.32. *Monitoring and compliance.* Infrastructure-related obligations, as with other obligations under the contract, should be monitored and subjected to compliance checks, including with respect to acquiring and maintaining the necessary permits or licenses (see Section V.A.1 below). The parties should consider the permits or licenses from governmental authorities, organs, and administrative bodies (e.g. environmental authorities, road management authorities, planning and construction departments, public works departments) that may be needed and specify those needs in the contract for clarity. Subject to compliance with the permit and license requirements, the process should be handled in a timely manner, and the permits and licenses should not be unreasonably withheld. To achieve a level of certainty in this regard, the parties should outline all prerequisites and future obligations associated with the receipt of permits and licences.

4.33. *Allocation of risks, non-performance, and dispute resolution.* The contract should clearly define the participants' obligations and the allocation of the risks connected to the infrastructure. Where necessary third-parties bear liabilities and indemnifications, they should be involved in the contractual phases (see Chapter 3.V). In order to cover liabilities and risks connected to the infrastructure, parties involved should consider providing for insurance in the contract. Obligations for specific sets of infrastructure needs to be settled and the responsible parties identified. A party's failure to meet its contractual obligations with respect to infrastructure may give rise to a breach of contract and a remedy for the aggrieved party or it may be excused (see Chapter 5). In order to promote a sustainable relationship, the parties should consider potential non-performance situations that could arise in connection with the various infrastructure rights and obligations and address them in the contract. Similarly, the parties should consider mechanisms to resolve disputes relating to shared infrastructure (see Chapter 7).

(c) *Import, export, market access and transport*

4.34. *In general.* Consideration of import, export, market access and transport issues are important to ensure an investment's success. This may cover a number of matters such as the import of necessary inputs for the agricultural production and transporting and ultimately getting that production to market for sale. If the grantor is the government, the parties could likely address these issues in detail, because the government generally has responsibility for such issues, whereas a local community might not. Where the grantor does not have such responsibility, the parties could discuss them with a government representative and should nevertheless consider the extent to which the applicable domestic law impacts the project's operation as well as whether and how the contract should provide clarification with respect to these issues.

4.35. *Import.* The contract should specify ways of sourcing seeds and other imported goods (e.g. equipment and materials). Investors typically require equipment and machinery, which is often imported. Given that import duties or other taxes and fees may constitute a serious obstacle to commencing and continuing activities, and the issue should be considered during contract negotiations. Accordingly, the parties may wish to address these issues as early as the negotiation phase and to include specific terms in the final contract agreement.

4.36. *Export.* Some domestic laws may establish incentives or other means for facilitating the export of agricultural products from investors operating within that State, generally through an investment incentive law. When not clearly regulated by generally applicable law, it is advisable for investors to negotiate the export conditions for the products of their activity with the government which has responsibility in this regard. In the context of that negotiation, the parties should specify in the contract any applicable measures (i.e. export bans or limitations on export) if a food security situation were to arise in the host State (see also Chapter 5.II regarding excuses for non-performance).

4.37. *Market access.* Some laws restrict access to local markets in order to protect local producers. This may not pose a problem for investors only interested in places to grow their products with a pre-determined, foreign market. But market access restrictions may be an important consideration for investors not focused exclusively on the export market. It is important for the parties to consider market access interests to clarify terms and conditions for access to a suitable end market for the agricultural production in question.

4.38. *Transport.* The parties should consider transport-related issues, in particular the means (e.g. road, rail) by which the production is to be delivered to



markets and to warehouses and ports for distribution and, if necessary, export, as well as related costs. Transport rights should be specified in the contract, together with any infrastructure commitments in this regard.

### **C. Project development**

4.39. *In general.* ALICs typically grant the investor the exclusive right to conduct specified commercial agriculture operations within the designated land area (though as discussed, the contract can provide that members of the communities living on or around the concession still have the right to use certain resources consistently with traditional custom and practice, or to conduct agricultural activities on unutilised lands). Investments that are not duly implemented can frustrate expectations and create opportunity costs – because land that could have been used for other purposes is tied up, or other operators could have better developed the same project. Grantors therefore have an interest in contractual provisions that discourage speculative acquisitions and establish clear milestones and timelines for project implementation. Some grantors also wish the contract to regulate the nature of land use activities in order to pursue certain goals.

4.40. *Establishing parameters.* To address these concerns, ALICs can establish clear parameters for project implementation. Well-crafted clauses require the investor to implement the project according to a specified development plan and they establish clear timelines for compliance as well as sanctions for non-compliance. This may include, for example, clauses that set quantitative targets to incrementally expand the cultivated land area or build and operate a processing facility. Where the grantor is a public authority, it may wish also to specify the crops the project will produce (*e.g.* crops for food or energy production), as part of a public policy to meet domestic demand for a given commodity.

4.41. *Targets.* For these provisions to be effective, they should complement any input-based targets (*e.g.* capital contributions) with output-oriented ones (*e.g.* based on volume or sale value of production). The targets should be aligned with the findings of the feasibility study and the content of the investment's development plan (see Chapter 3.III). Further, these clauses should be accompanied by commensurate reporting requirements (see Section V.B.2 below), by performance-related bonds or other means to promote and encourage compliance where relevant, and powers for the grantor to carry out inspections and sanction non-compliance.

4.42. *Compliance timeframes.* Some domestic land laws provide that investors only acquire tenure and related rights if they comply with certain project development commitments within a specified period of time (*e.g.* two to five

years). Such provisions respond to a policy objective to promote productive land use. But they tend to be a blunt instrument for long-term investments whose duration vastly exceeds the statutory period. In these situations, the contract should identify implementation milestones, timelines, and reporting requirements, as well as sanctions for non-compliance, throughout the duration of the project (see Section D below regarding duration and renewal).

4.43. *Implementation issues.* Depending on the nature of the investment, additional provisions may be needed to address implementation issues that arise in the final phase of the project. For instance, in an agroforestry plantation where tree ownership is transferred to the grantor at contract expiry, arrangements may be needed to ensure that towards the end of the contract the investor has continued incentives to manage the farm sustainably, including ongoing replanting. Project closure also raises specific issues which, depending on applicable domestic law, may require dedicated contractual provisions.

4.44. *Indicators of performance.* In addition to quantitative targets, project development clauses should also provide qualitative indicators of performance. Many contracts only do so in very general terms, by requiring, for example, the investor to adhere to “good farming practices”. While potentially helpful in clarifying the parties’ expectations, such clauses can raise questions about their precise meaning and implications. More effective clauses link qualitative performance indicators to specified international standards whenever these are available (all the while recognising that these standards generally have to be domesticated and enhanced in the light of the specific country context). The parties should also foresee an independent (*i.e.* not government led) mechanism for performance evaluation to track adherence to international standards.

4.45. *Incentives.* Besides sanctioning non-compliance, some contracts also create incentives for the investor to comply with desirable parameters. For instance, some clauses condition certain benefits to the investor’s demonstrably meeting the relevant targets within deadline. Relevant benefits may include favourable consideration of the investor’s requests to extend the project area or the duration of the contract.

4.46. *Coordination with other provisions.* Project development clauses need to be coordinated with other relevant contractual provisions. Duration and renewal clauses, if used together with project development clauses, should be consistent. Escape clauses, also known as clauses addressing excuses for non-performance, should deal with situations in which the investor cannot comply with the agreed development plan due to certain supervening events materialising (see Chapter 5.II.A regarding force majeure). Other relevant clauses partly depend on the

objectives that underpin the project development clauses. For example, if the grantor wishes the contract to specify the nature of permitted economic activities (e.g. the type of crop to be produced) in order for the project to help meet local demand for a given commodity, the contract should also determine whether, and under what terms, the investor can export that produce. The parties should also give due consideration in their negotiations to related matters such as monitoring (see Section V.B below) and the various remedies for breach of contract (non-performance) by the investor (see Chapter 5.III.C).

#### **D. Duration and renewal**

4.47. *Duration in general.* The optimal duration of a grant of tenure or related rights depends on various factors, such as the parties' particular circumstances, how the investment would affect the rights of legitimate tenure right holders, the crops to be planted, current and expected market prices for those crops or the time needed for the investor to repay its debts and amortise the initial investment. For example, certain nut trees (e.g. pistachios or pecans) take more than five years from the time of planting to achieve sufficient quantities consistent with commercial production. In such situations, restricting the duration of the contract to a very short period might prevent responsible agricultural investments in such crops. Whereas some national legislations contain duration periods with which the contract must comply, it is generally the contract that establishes the duration, as well as the terms for renewal.

4.48. *Duration established by legislation.* Some States' laws restrict the overall duration of grants to tenure and related rights to State-owned land to a certain number of years or establish an initial period of time at the end of which a project can be assessed and the duration extended. Such restrictions may establish a general period of time for all concessions (i.e. where the government is the grantor) or a specific duration for projects in particular sectors, such as agriculture, in order to avoid the land being reserved without use and to monitor any negative impacts. Limitations on the duration determined by domestic law vary, and parties should be aware that in instances they may be rather short (e.g. five years). Where present, the parties, in following the applicable law, are to comply with that limit and should refer to it in the contract for clarity, even when not stipulating another duration consistent with the applicable law.

4.49. *Contractual duration.* As long as the duration of the grant is consistent with domestic law, the parties are free to determine the duration in the contract, which will depend on the circumstances. In practice, some contracts provide for very long duration periods with the additional possibility of a renewal (e.g. 99 years with a renewal option), though parties should be aware that such extended

terms may effectively amount to a sales contract in disguise and that overly long contract durations unrelated to the economics of the investment are contrary to responsible business practice. The parties are advised to clearly define the investment's duration in the contract according to the production cycles and types of activities in order to allow full debt repayment and to achieve a sustainable and responsible investment, in a manner consistent with domestic law. Contract duration clauses should be aligned with any project development (see Section C above) or periodic review (see Part V.A.5 below) clauses. The duration should explicitly include both a start and end date. The start date (*i.e.* the day the contract takes effect) may, for example, be the date on which all of the parties sign the contract or the date when certain conditions have been fulfilled (see Chapter 3.V.B regarding conditions).

4.50. *Renewal in general.* At the end of the applicable duration of the grant of land tenure and related rights, the contract either ends (see Chapter 6.II) or is subject to renewal in accordance with the contract's terms. In practice, the end of such contracts typically does not mean the end of the activity, which may have become significant and sustainable. In drafting the contract, the parties may wish to anticipate potential difficulties relating to the end of the contract's duration and avoid protracted renegotiations by including a renewal or extension clause. Such clauses set out both the process and requirements for renewal and extension. Regarding the process, the parties should specify how and by when notice is to be provided to one another of an intention to renew or extend the contract, how long that renewal or extension might last, how many times the contract can be renewed or extended, and whether renewal or extension would be accompanied by a modification of any of the other contractual terms (*e.g.* rental fees). Regarding the requirements, the parties should consider making renewal or extension contingent upon satisfaction of all of the contractual obligations or on the basis of specified key performance indicators.

4.51. *Renewal and return.* If some of the granted land remains unused at the time of renewal and is unlikely to be used, parties could stipulate that the tenure and related rights to that particular portion be returned to the legal and legitimate tenure right holders (see generally Chapter 6). The expiration of an initial period of time, however, should not be used as a means for the government to take control of a successful project.

4.52. *Renegotiations.* If the parties do not include a renewal clause or the clause does not anticipate a particular issue that arises, the parties' desire to extend or renew a contract may involve renegotiations, with or without dispute resolution mechanisms (see Chapter 7). Those renegotiations should be conducted in good faith and in a timely and inclusive manner in order to avoid protracted negotiations

and disagreements and ensure that the agricultural investment remains productive, sustainable, and responsible.

## **II. SOCIAL AND ECONOMIC ISSUES**

4.53. *Introduction.* In discussing the contractual provisions that determine the substantive rights and obligations of the parties in social and economic matters, two caveats should be kept in mind.

4.54. *The issues covered are vast and complex, and contractual practice differs widely:* Such variation reflects not only diversity in the applicable law, but also in the relevant commodities, the business configurations, and other contextual factors. For example, the contractual provisions that determine the rights and obligations of the parties in social and economic matters will differ considerably depending on whether the business involves a long-term lease, a joint venture or a processing facility that primarily sources from small-scale rural producers. Contracting parties also often have different preferences. As a result of this complexity and diversity, the following paragraphs aim at identifying key issues to consider rather than provide detailed guidance on specific clauses or arrangements.

4.55. *While issues are discussed separately for the purpose of clarity, in practice those issues are often closely interlinked and trade-offs can potentially arise between different areas:* For example, investor obligations to develop social or public infrastructure could have impacts on the financial package (e.g. parties agreeing that part of the economic benefits are provided in kind rather than in the form of revenues). These trade-offs require considered choices, and contracting parties may legitimately take different approaches. However, domestic and international law sets parameters the parties cannot derogate from in their negotiations,<sup>182</sup> for example, concerning respect for labour and human rights.

4.56. *Roadmap.* This Part considers those practices, issues and trade-offs that can arise with respect to social and economic matters, but in order to understand these specific rights and obligations it is necessary to analyse them in the context of the contract as a whole. In doing so, it addresses possible contractual provisions and related guidance with respect to: (A) monetary contributions; (B) employment creation, access to jobs and labour rights; (C) local content and processing; (D) contract farming, outgrower schemes and supply chain relations; (E) and community development funds and social infrastructure.

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<sup>182</sup> UN. 2015. [Principles for Responsible Contracts](#). Integrating the Management of Human Rights Risks into State-Investor Contract Negotiations.

## **A. Monetary contributions**

4.57. *In general.* Monetary contributions are one possible type of economic consideration in ALICs. They can take different forms, depending on the nature of the contract. Land rental fees are a common type of revenue stream. They can be calculated based on a flat rate, which the investor must pay to the grantor irrespective of project performance (fixed-income models); as a share of production or profits (revenue- or profit-sharing models); or as a combination of both fixed-income and revenue sharing components. In joint ventures, the grantor may be entitled to dividends from the joint-venture company. Depending on the circumstances, other monetary contributions may also apply to relations between the investor and the grantor. As a broader point, throughout the contractual negotiation process parties should pay close attention to the question of which currency the payments are to be made in, along with related issues such as who assumes risks associated with exchange rate fluctuations.

4.58. *Revenues.* In addition, the investor will in most cases be required to contribute revenues to public authorities. This may include fees related, for example, to water abstraction and to environmental and other permits. It also usually includes taxes such as corporate income tax and duties on the importation and exportation of inputs and produce. Where the government is the grantor, these multiple revenue streams – from land rental fees to taxes – may be folded into the same financial package.

4.59. *Contractual provisions.* Domestic law tends to play a prominent role in governing monetary obligations (see Chapter 4.II.A). Notwithstanding the role of domestic law, ALICs, as is the case generally with long-term contracts, very often do contain provisions dealing with monetary obligations. These can help clarify applicable payments as determined by domestic law. They also allow the parties to tailor their rights and obligations to the specific circumstances of the project. When it comes to taxation, however, applying domestic law – rather than negotiating tailored fiscal regimes – creates a level-playing field, increases transparency, and reduces room for corruption. And while many contracts do provide exceptions from generally applicable tax law (for instance in the form of various tax concessions offered to foreign investors by States seeking to

incentivise foreign investment),<sup>183</sup> it is widely recognised that the contract should not grant exemptions that are not contemplated by domestic law.<sup>184</sup>

4.60. *Various solutions.* There is no one-size-fits-all solution when it comes to designing monetary obligations. Commodity sectors and domestic jurisdictions differ, and the contracting parties may have different preferences. Where the grantor is a public authority, wide-ranging policy issues may be at stake beyond revenues alone. For example, water fees could introduce incentives for the investor to use water efficiently. This circumstance calls for a careful and holistic consideration of both monetary and non-monetary dimensions.

4.61. *Trade-offs and need for expertise.* Different combinations of revenue streams may lead to different results in terms of distribution of revenues over time, sharing of risk between the parties, and ease of revenue collection. The resulting trade-offs need to be addressed through informed choices that reflect the specific context and the parties' preferences. As lawyers may not have the training or expertise to handle these difficult issues, financial modelling and economic expertise are necessary to inform contract negotiations.

4.62. *Fixed-income methods.* Compared to revenue- or profit-sharing models, for example, fixed-income arrangements tend to be easier to administer and are often more transparent. They also provide the grantor with an income irrespective of investment performance. On the other hand, revenue or profit sharing depends on successful production and sale, though the implications of this vary depending on whether sharing arrangements are based on profits or gross revenues.

4.63. *Profit and revenue sharing.* Profit sharing tends to be particularly complex – because the venture may take a while to become profitable (e.g. due to the need to recoup the investment costs first), and because of the risk of profit shifting. On the other hand, where the sharing is based on gross revenues rather than profits, payments would be linked to turnover irrespective of profitability. In successful projects, forms of revenue sharing could enable the grantor to receive greater income over the project duration, though – compared to fixed-income approaches – sharing models are also associated with greater uncertainty. Some contracts combine use of both fixed-income and revenue-sharing streams.

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<sup>183</sup> OECD. 2009. [Foreign investment in developing country agriculture - issues, policy implications and international response](#), p. 5 "For them, foreign direct investment is seen as a potentially important contributor to filling the investment gap, although how far these investments go towards meeting their real investments needs is uncertain. The financial benefits to host countries of asset transfers appear to be small. Land rents demanded are typically low or even zero, for example, while the various tax concessions offered to foreign investors mean tax revenues foregone".

<sup>184</sup> OECD. 2011. [Guidelines for Multinational Enterprises](#), para. II (5).

4.64. *Joint ventures.* A stake in a joint venture company could enable the grantor not only to receive dividends, but also to have representation in the company's board of directors – and with that, access to information and possibly influence over management. However, dividends depend on the company's profitability, and empirical studies on agriculture-related community-investor joint ventures have pointed to limited effectiveness of board representation or lack of dividend payments in some cases. Further, joint-venture arrangements are inherently complex. As such, they require careful consideration and targeted measures to address imbalances in the respective information, resources, and capacity of the parties.

4.65. *Time and form.* In addition to the amounts due, the contract usually determines the time and form of monetary contributions, including provisions on non-performance and interest accrual on late payments. Where the grantor is a State, and the contract covers tax matters, the parties should consider establishing contractual safeguards against abuse of transfer pricing, to ensure that taxes due are indeed paid, if domestic legislation does not adequately deal with these issues.<sup>185</sup> This may include requiring transactions between the investor and affiliated companies to be on an arm's length basis, and the investor to keep and disclose accurate contemporaneous data and records.

4.66. *Capitalisation.* To ensure that the investor has adequate resources to operate the investment and shoulder any associated liabilities, some ALICs also require minimum levels of capitalisation – that is, the amount of its own capital that a company has available for its operations. For example, the contract may provide that the investor's debt to equity ratio must not at any time exceed a specified value.

4.67. *Link with periodic review.* Contractual clauses should provide for periodic revisions of the parties' monetary obligations. These are particularly important in long-term projects to adjust payments to changing economic circumstances and ensure the continued relevance of the financial package (see Section V.A.5 below regarding notice and periodic review). The more effective clauses specify the

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<sup>185</sup> Transfer pricing refers to pricing in transactions that occur between companies belonging to the same business group ("affiliates"). Transactions may include the sale of goods such as inputs or produce; the supply of services such as construction, management or marketing; the licensing of intellectual property rights such as patented technology; or loans between the local subsidiary and other companies belonging to the same business group. In large groups with many subsidiaries, these intra-corporate transactions are part of ordinary business life. But transfer pricing offers opportunities for tax avoidance. Every cost that the firm allocates to operations outside of the host country has the effect of reducing the tax base in that country. And by manipulating prices for goods, fees for services, royalties on patents, or interests on loans, the investor can shift profits away from the locally incorporated company to affiliates located in jurisdictions where taxation is lower.



timing of the periodic reviews, require the parties to negotiate revised payments in good faith, and identify arrangements to determine revisions if the parties cannot agree – for example, through determination by an independent expert jointly appointed by the parties.

**B. Employment creation, access to jobs and labour rights**

4.68. *In general.* Jobs are often one of the most prominent benefits touted by investors. However, there is a risk that a given agricultural land investment fails to live up to the expectations created, and jobs cannot offset loss of land. Indeed, depending on the context, land and natural resources may confer collective benefits to rural people, while jobs typically involve opportunities for individuals. It is often impossible for investments to provide jobs to all those who lose land.

4.69. *Importance of quality jobs.* Further, while land transfers typically involve the loss of a permanent asset, jobs are often seasonal, limited to a specified period of time (e.g. in the construction phase), or subject to changes in economic conditions. And while emphasis is often placed on the number of jobs the project would create, it is also important to look at the quality of the jobs created and ensure decent employment conditions and see that labour rights are upheld.

4.70. *Purpose of employment provisions.* Contractual provisions governing employment aim to ensure that promised benefits materialise. They are more commonly used in contracts where the grantor is the government or a public authority, but they are also often found in contracts concluded directly with local communities. These often cover three interrelated issues: employment creation; access to jobs; and labour rights and employment conditions.

4.71. *Employment creation.* It is often difficult to predict the precise number of the different types of jobs that the project will generate over its duration – not least because external and frequently unforeseeable economic factors can have significant impacts on the project. Contracts alone cannot ensure the creation of jobs that are difficult to sustain in economic terms. As a result, job creation commitments are often hard to translate into specific contractual clauses. That said, contractual practice has emerged that seeks to address these issues.

4.72. *Job targets.* In some contracts, the investor “declares” that it “envisages” creating a given number of jobs. While such a formulation might not create enforceable obligations in many jurisdictions, inserting more specific commitments on the part of the investor to employ determined numbers of people by listing figures in the contract and foreseeing opportunities for periodic revisions in the light of evolving economic circumstances can help clarify the shared

expectations of the parties. It can also provide a useful reference for project monitoring.

4.73. *Safeguard regarding job targets.* The parties can craft clauses to compensate for situations where employment creation falls significantly below expectations. This could be the case, for example, if technological innovation enables increased mechanisation, thereby reducing the number of staff employed by the project. In such situations, the contract could require the parties to negotiate alternative benefits such as increased monetary payments or investments in social infrastructure.

4.74. *Access to jobs: unskilled positions.* Besides employment creation, access to jobs is another recurring challenge in agricultural investments. People who lose land to project implementation often struggle to access the employment opportunities the project creates. Some contracts require unskilled positions to be filled by local nationals – or even people from within the project area or in its vicinity – whenever possible. Such provisions presuppose that a local workforce is available to take up the jobs.

4.75. *Skilled positions.* Some contracts provide that local nationals – or possibly people from within the project area or in its vicinity – should be prioritised in recruitment, training opportunities, and promotions for skilled positions (for example, managerial and technical). These clauses aim to ensure the investment brings value in the host country. To ensure these clauses are effective, some contracts set percentage-based skilled labour targets for local nationals, and establish sliding scales, whereby the local employment percentage targets for skilled positions increase throughout the duration of the project.

4.76. *Improving jobs.* In these contractual set-ups, in the early stages of project implementation local workers may be predominantly in unskilled positions, but ambitious sliding scales coupled with capacity-building requirements aim to increase the numbers of local employees in technical and managerial positions. For these sliding scales to work, contracts need to establish realistic targets in the light of prevailing socio-economic conditions; specific requirements for both educational and on-the-job training, including timelines and, where relevant, minimum annual financial commitments; and effective reporting and monitoring arrangements.

4.77. *Gender and social differentiation.* Gender and other social differentiation are important issues in agricultural labour relations, partly due to occupational segregation. In agricultural plantations, for example, women are often recruited as temporary workers, without contract and on a piecework basis. This means that labour law protections may not apply, and women may be paid lower wages

and exposed to discriminatory practices. In many States, the constitution and labour legislation prohibit discrimination on the basis of sex, pregnancy and marital status in recruitment, training, remuneration, employment conditions, promotion and dismissal. But these provisions are often ineffective in dealing with entrenched gender-discriminatory socio-economic practices.

4.78. *Reducing occupational segregation.* Contracts can reinforce these general requirements through measures to reduce occupational segregation – for example, ensuring that any targets for access to employment (including, but not only, skilled positions) and training opportunities are disaggregated by gender. A similar approach can be taken in relation to other locally significant sources of social differentiation, for example ethnicity (ensuring that a particularly impacted group has access to a fair share of employment and training opportunities) or age (facilitating access to opportunities for youths who may have limited land of their own).<sup>186</sup>

4.79. *Employment conditions and labour relations.* A third set of issues concerns ensuring respect for internationally recognised labour rights, and health, safety and other workplace standards.<sup>187</sup> Most States are legally required to do so by virtue of their membership of the International Labour Organisation (ILO) or their ratification of relevant ILO conventions. In addition to international instruments, domestic labour law plays a key role in addressing labour rights issues. This includes, for example, legislation governing freedom of association and collective bargaining, minimum or living wage legislation, regulations on strikes, employment conditions, health and safety, and protection against unfair dismissal.

4.80. *Addressing labour law in the contract.* The contract can specify that the project must comply with domestic law, and it can address specific labour rights issues that arise in the investment project. For example, it can determine the nature and modalities of any service provision to employees and their dependants (e.g. medical care, housing, or education). It can also regulate or restrict the use of specific toxic chemicals or require the investor to train workers on how to use protective equipment.

4.81. *Adherence with international instruments.* One approach is for the contract to require adherence to ILO instruments, though these are primarily directed at States rather than investors. The contract could also refer to soft-law instruments such as the OECD Guidelines on Multinational Enterprises where relevant, or Performance Standard 2 of the IFC. The latter sets basic requirements like compliance with domestic law, fair treatment, and non-discrimination in

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<sup>186</sup> CFS. 2014. [CFS-RAI Principles](#), principle 4

<sup>187</sup> *Id.*, principle 2; FAO. 2012. [VGGT](#), para. 12.4.

labour relations, health and safety, and prohibition of use of forced labour. Whenever contracts refer to international standards it is essential that the parties have the institutional and human capacity to monitor compliance with those standards.

4.82. *Link to monitoring.* To assist with monitoring, the contract should require the investor to keep accurate data and records on employment creation, access to jobs and respect for labour rights, and to report progress on a regular basis. It should also provide the grantor with commensurate powers to monitor compliance, including the right to inspect the premises.

### **C. Local content and processing**

4.83. *In general.* Ensuring that the project promotes inclusive economic development in the project area or in the country at large is often a key consideration for the grantor – especially where this is a government or other public authority.<sup>188</sup> Yet a recurring challenge in resource-based investments is that they may create inadequate linkages with the local economy. As a result, investments may contribute to the domestic economy at the macro level, for example in terms of GDP or balance of payments, but nevertheless have limited poverty reduction impacts. Several States have adopted laws that seek to maximise positive linkages with the local economy. Depending on the circumstances, contractual clauses have also been used for similar ends.

4.84. *Considerations.* This issue presents several dimensions. One relates to processing: to reduce or avoid dependence on exports of raw materials, many States have adopted policies to promote domestic value addition – requiring or encouraging firms to conduct at least part of the processing within the country. The ways in which these policies are translated into contractual practice depends on the circumstances of the relevant agricultural investment.

4.85. *Local processing.* In some cases, agro-industrial processing forms part of project design from the start. This may be the case for perishable commodities that require processing soon after harvest, and for ventures that target the domestic market. For example, many sugarcane projects involve the development of a processing facility for the production of sugar or ethanol. In such situations, effective contracts can set clear parameters, based on the project's feasibility study, for the construction and operation of the processing plant – including development plans, specific targets based on sale value, related timelines, and monitoring arrangements.

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<sup>188</sup> CFS. 2014. [CFS-RAI Principles](#), principle 2.

4.86. *Encouraging local processing.* In other situations, project design as originally proposed by the investor involves agricultural production to the exclusion of any significant local processing. This may be particularly relevant to non-perishable commodities that can be transported over medium to long distances. Even in such cases, however, the grantor may negotiate for the contract to require that at least a certain portion of the production be processed locally. Contractual clauses then define the parameters of such local processing requirements. National legislation has also been deployed to encourage or require local processing.

4.87. *Incentives for processing.* In other situations, the contract creates incentives for the investor to include local processing at a later stage, for example through detailed provisions that require the investor to assess the viability of processing locally, condition contract extension to a specified share of produce being processed in the country within a specified period of time, or require the investor to sell a percentage of its production to processing facilities that may be established in the country by third parties in future. While there is space for legal ingenuity in these areas, ultimately economic viability is bound to be an important consideration.

4.88. *Local content.* Another issue concerns the sourcing of goods and services necessary for the implementation of the project, ranging from equipment to catering services. Some laws or contracts contain “local content” clauses that require the investor to source or accord preference to goods and services sold by local businesses. This may, for example, require the investor to give priority to local goods and services if the cost, quality, or time of delivery are comparable internationally. Some contracts require that priority be given to local suppliers even if this increases project costs within a specified percentage of alternative suppliers available internationally.

4.89. *Performance requirements.* The empirical evidence on the effectiveness of such “performance requirements” is mixed, and, generally speaking, legal provisions are unlikely to have significant effect if there is no local capacity to take up the business opportunities created. Therefore, making businesses more competitive is essential in promoting positive economic linkages, whether local content clauses are used or not. However, many States have historically used performance requirements extensively in their efforts to industrialise, including many States that are currently classified as high-income. Performance requirements form part of the policy arsenal available to public authorities governing agricultural land investments.

4.90. *Considerations for performance requirements.* Where performance requirements are used, they should be well thought out if they are to have the desired effect. For example, some contracts require the investor to contribute to strengthening local business capacities in critical service and supply areas, and to restructure procurement over time in order to make local provision of goods and services more feasible. As investments often involve long chains of contractors and sub-contractors, best contractual practice also clarifies that performance requirements apply to economic activities run by contractors and sub-contractors and extends reporting requirements to these operators. Some contracts require the investor to take specified proactive steps to disseminate information to potential suppliers and contractors.

4.91. *Local content targets.* Local content provisions can also specify targets for the investor to source from particular types of businesses, such as small and medium scale enterprises, or from businesses that are owned or managed by particular groups, such as women or youths. Local content and processing requirements should be accompanied by commensurate reporting and monitoring arrangements. For example, the contract may require the investor to submit annual plans on the performance of any processing facility or progress towards local content targets. In using performance requirements, States need to be mindful of the obligations arising from their membership of the World Trade Organisation (WTO), where relevant, and from any performance requirements clauses contained in any international investment treaties they may have ratified.

#### **D. Contract farming, outgrower schemes and supply-chain relations**

4.92. *In general.* The VGGT call on States to “support investments by smallholders as well as public and private smallholder-sensitive investments”.<sup>189</sup> They also state that responsible investments “should be made working in partnership with [...] local holders of tenure rights”, and that “states should consider promoting a range of production and investment models that do not result in the large-scale transfer of tenure rights to investors, and should encourage partnerships with local tenure right holders”.<sup>190</sup> Comparable provisions encouraging collaboration with small-scale rural producers are also contained in the CFS-RAI Principles.<sup>191</sup>

4.93. *Sourcing of produce.* In practice, many agribusiness companies opt to source farm produce from independent growers, including small-scale farmers. In

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<sup>189</sup> FAO. 2012. [VGGT](#), para. 12.2.

<sup>190</sup> *Id.*, paras. 12.4 and 12.6.

<sup>191</sup> CFS. 2014. [CFS-RAI Principles](#), para. 4.

some cases, the company buys most or even all of the produce from the growers, and focuses its own operations on aggregation, processing, or distribution. In others, the company runs its own plantation, and sources additional produce from independent growers as a more flexible arrangement to increase its capacity.

4.94. *Variety of contract farming arrangements.* Relations between the company and the growers are extremely diverse – from spot transactions, possibly mediated by a chain of traders and intermediaries, to tightly coordinated contract farming arrangements.<sup>192</sup> Contract farming is itself extremely diverse, including in its degree of formalisation and the nature of the parties involved. Some contract farming schemes rest on a bilateral arrangement between the company and the farmers, who may choose to trade individually or via cooperatives; while other schemes are multilateral arrangements that also involve lenders, insurers or other service providers. And while in many cases the farmers cultivate land they own or access independently, in others, the company sublets concession land to the growers.<sup>193</sup>

4.95. *Supply chain relationships.* Supply chain relationships go beyond purely contractual matters to encompass structural features of the relevant value chain, business considerations and policy choices. Further, collaborative arrangements linking agribusiness and small-scale agricultural producers can provide livelihood opportunities; but they can also expose farmers to exploitative arrangements and significant risks, as in the case of indebtedness and unfair pricing arrangements.

4.96. *Domestic law and the contract.* In several States, domestic legislation regulates supply chain relations and protects farmers' rights. International guidance is also available on addressing land, labour, and other issues in agricultural supply chains.<sup>194</sup> Contracts also influence the terms of any supply chain relations. Multiple contracts will be at stake beyond the ALIC itself. In many cases, this will include direct contracts between the investor and individual farmers or farmer cooperatives – though more informal arrangements are also common. The different contracts are interrelated and need to be considered in

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<sup>192</sup> For advice and guidance on contract farming contracts, including description of most common contractual terms, discussion of legal issues and critical problems in order to promote best practices see the UNIDROIT/FAO/IFAD. 2015. [Legal Guide on Contract Farming](#).

<sup>193</sup> For responsible contract farming templates see FAO, International Institute for Sustainable Development (IISD). 2018. [Model Agreement for Responsible Contract Farming](#).

<sup>194</sup> See e.g., OECD, FAO. 2016. [Guidance on Responsible Agricultural Supply Chains](#).

holistic terms. However, the present guide focuses on the provisions of the investor-grantor agreement.<sup>195</sup>

4.97. *Encouraging an outgrower scheme.* Depending on the situation, the contract between the investor and the grantor can encourage or even require the investor to develop contractual arrangements with small-scale rural producers. The parties must however be careful to avoid imposing outgrower schemes on unwilling producers. Any mandatory contractual provisions must be grounded not only in the project's feasibility study but also in deep, effective engagement with local producers to ensure that the outgrower scheme responds to their development aspirations, and that their participation in the scheme is fully consensual.

4.98. *Assessing investment models.* Depending on the context and applicable legal framework, a Memorandum of Understanding authorising the investor to carry out a feasibility study could require the study to assess investment models that involve collaboration with small-scale rural producers, based on consultation and, where relevant, the consent of legitimate tenure rights holders and small-scale agricultural producers; data from the study may then be used to inform the negotiation of the investor-grantor contract.

4.99. *Contractual requirements regarding outgrowers.* Where an outgrower scheme responds to local demand, the ALIC may mandatorily require that the investor develops such a scheme according to certain specifications and timelines, specifying that the implementation of these provisions must also be based on consultation with affected communities. The investor-grantor contract can also facilitate access to opportunities in the outgrower scheme for specific groups, such as women and youths. Where the contract requires the investor to set up an outgrower scheme, it should also identify monitoring arrangements and sanctions for non-compliance – for example, by clarifying that failure to develop the outgrower scheme according to specification would constitute a material breach of the contract and a ground for contract termination.

4.100. *Minimum parameters.* Acknowledging the asymmetries in bargaining power that may exist between the investor and small-scale rural producers, and to mitigate the risk of unfair arrangements, the investor-grantor contract can also set minimum parameters with which any subsequent investor-farmer agreements should comply. Besides establishing a floor for the content of farming agreements, this approach provides the grantor with a contractually defined role in monitoring

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<sup>195</sup> For guidance on investor-farmer contracts, see UNIDROIT/FAO/IFAD. 2015. [Legal Guide on Contract Farming](#).



and enforcing compliance – an important consideration given that it is often difficult for farmers to legally enforce their farming agreements.

4.101. *Key aspects to be addressed.* Key parameters for the investor-grantor contract to establish include the obligation to purchase produce from farmers up to specified production levels, subject to quality standards generally considered to be reasonable within the industry;<sup>196</sup> investor obligations to provide training and capacity support for the farmers, and related modalities and timelines; standards of quality applicable to the inputs (e.g. seeds, agro-chemicals) supplied by the investor; and the price of produce purchased from local farmers, based on minimum internationally pegged reference prices, and of inputs the farmers purchase from the investor.

4.102. *Outgrowers and side-selling.* Where relevant, the grantor-investor contract should also deal with side-selling, a recurring challenge in many contract farming arrangements, by creating effective incentives for the parties to remain committed to the relationship while also protecting farmers against disproportionate sanctions.

4.103. *Outgrowers' protections.* If the outgrowers cultivate the land granted to the investor, the contract should also establish safeguards to secure their tenure rights, so they cannot be arbitrarily evicted in case of default. If the company is to provide credit to farmers, the investor-state contract should regulate credit conditions, for example with regard to interest rates or payment deductions and rescheduling, so as to mitigate the risk of farmer indebtedness. The investor-grantor contract should require the investor to establish a grievance mechanism to hear complaints from outgrowers.

## **E. Community development funds and social infrastructure**

4.104. *In general.* Many contracts require the investor to provide monetary or in-kind contributions for social infrastructure and community projects in the investment area or its vicinity. Where the grantor is the local community or a local authority representing it, this element may constitute a particularly important part of the investor's overall economic obligations. Where the grantor is the State, obligations concerning community development funds and social infrastructure constitute one vehicle to ensure that the project benefits local groups according to their development priorities.

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<sup>196</sup> See [UPICC](#), Art. 5.1.6, according to which performance should be of a quality which is reasonable and not less than the average in the circumstances.

4.105. *Revenue sharing.* Depending on constitutional and administrative set-ups, the investor's contractual obligations may be tied to the arrangements that govern the distribution of economic benefits between central and local government bodies. There is also growing experience with community-investor agreements that complement the grantor-investor contract and specify the nature of the investor's obligations. Such community-investor agreements may cover several issues discussed in the previous sections – for example, in relation to employment or outgrowers. Depending on the parties' preferences, they also commonly include investor obligations in relation to establishing and financing a community development fund or providing and ensuring the continued operation of social infrastructure such as schools or clinics.

4.106. *Variety of contractual practice.* Contractual practice in this area is extremely varied, reflecting the diversity of situations and contractual configurations. If community development funds or social infrastructure commitments are included in the contract between the grantor and the investor, or in separate community-investor agreements, any contractual provisions should be based on community consultation and, where relevant, FPIC.<sup>197</sup> The provisions should also establish clear, specific, enforceable and time-bound obligations, as well as related reporting and monitoring requirements, and provide effective sanctions for non-compliance – including termination of the main contract in case of material breach if not cured within a specified period of time.

4.107. *Matters to be addressed.* Where the contract provides for a community development fund, depending on the situation, it should also clarify how those funds are to be managed – for example, through establishing a committee and clarifying its membership and functioning, including effective representation of different local stakeholder groups. Particular attention should be given to issues of gender and social differentiation – for example, ensuring proper representation of women and disadvantaged groups in any committee established to manage the community development fund.

### III. ENVIRONMENT

4.108. *Introduction.* Agricultural land investment relies significantly on the availability and quality of natural resources. These investments, however, are often associated with environmental risks and impacts related to the pollution of

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<sup>197</sup> FAO. 2012. [VGGT](#) which references to consultation/participation and to FPIC, also references to the UN [Declaration on the Rights of Indigenous Peoples](#) (UNDRIP). 2007 and the ILO. 1989. [Convention concerning Indigenous and Tribal Peoples in Independent Countries](#).

those same natural resources (e.g. water, soil, air), the degradation of forests and loss of biodiversity. Environmental risks and impacts vary according to the type of local ecology, the type of agricultural crops and the environmental management system in place. In addition to creating environmental challenges, these issues also present social dimensions as environmental resources provide the basis for the livelihoods and cultural identity of millions of people worldwide. The investment project may have consequences not only for the environment per se but also for the exercise of the human right to a safe, clean and healthy environment. Despite the foregoing, agricultural land investments can also produce positive impacts if conducted in a responsible and sustainable manner. The use of natural resources should be optimised, and environment protection should be included as a part of the ALIC and related agreements and not considered in isolation from them.<sup>198</sup>

#### **A. General considerations**

4.109. *Applicable law.* As briefly noted in Chapter 1, domestic law and international law play a key role in establishing the rules, institutions, and processes involved in the protection of the environment. As discussed in Chapter 3.IV.A, for example, environmental laws typically require an environmental impact assessment for investment projects that may have significant effects on the environment, and they define key substantive and procedural parameters.

4.110. *Role of contracts in environmental protection.* The ALIC, as one of the sources of the regulation applicable to the operation, can play an important role in environmental protection by filling in regulatory gaps where the domestic legal framework may present shortcomings or omissions. Whereas some contracts may require the project to comply with applicable domestic laws, both present and future, others may “top up” or complement applicable domestic environmental safeguards by mandating compliance with international or regional standards. In other words, contracts can strengthen environmental obligations which are already required by domestic and international laws as well as establish new obligations that draw on the multiplicity of environmental issues related to agricultural land leasing. The exercise of due diligence and consideration of environmental sustainability should therefore constitute an inviolable and shared objective of the contracting parties.

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<sup>198</sup> UN. General Assembly. 1992. [Rio Declaration on Environment and Development](#), principle 4.

## B. Issues and obligations

4.111. *Introduction.* Domestic, regional, and international environmental law adopted and applied in each jurisdiction differs, and the parties to the contract may have different preferences in relation to environmental obligations. However, based on general principles of environmental law (e.g. the requirement to conduct an environment impact assessment, prevention, the precautionary principle, polluter-pays principle, access to information and non-regression), this section examines a non-exhaustive set of environmental issues and good environmental practices that should be adopted on an ongoing basis, before, during and after the implementation of ALICs.

4.112. *Environmental impact assessments and contractual obligations.* As previously mentioned in the Guide, an EIA should be considered as a precondition to the contract and as part of the due diligence obligation (see respectively Chapter 3.IV.A and 3.I) to be undertaken ideally before the agricultural land investment begins, as a *sine qua non* practice. The findings of the EIA can be included as binding contractual obligations to clarify, qualify and quantify the environmental issues that need to be monitored during the lifetime of the investment project. In other cases, the EIA is conducted after the contract is signed, and the contract only takes effect once the investor is issued with environmental permits based on EIA findings (see Chapter 3.V.B). In these cases, the contract should clarify the timelines for conducting the EIA, and its modalities (e.g. contracting of independent environmental experts). The clause can also set out other conditions and requirements such as: the disclosure of information and public participation in the EIA process; the development of environmental management plans to implement the measures identified by the EIA; and the elaboration of periodic environmental reporting, scrutinised by competent institutions and accessible to all interested public and concerned stakeholders. Contractual provisions should require the investor to comply with the environmental management plan and clarify the consequences of non-compliance.

4.113. *Preventing pollution.* Based on the polluter-pays principle,<sup>199</sup> investors in agricultural land should be responsible for environmental damage caused by the use of chemicals and release of pollutants, such as ozone depleting substances,<sup>200</sup> and should bear the costs of preventing, controlling, and cleaning up pollution, as well as be prepared to cover the costs for repair and compensation. National

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<sup>199</sup> UN. General Assembly. 1992. [Rio Declaration on Environment and Development](#), principle 16.

<sup>200</sup> For the list of substances, see the United Nations Environment Programme (UNEP). 1987. [Montreal Protocol on Substances that Deplete the Ozone Layer](#).

legislation will typically regulate these matters, and contracts can fill gaps where needed. Contractual best practices are highlighted in the following paragraphs.

4.114. *Ecosystem Approach*. Good practice involves adopting an ecosystem approach which may be defined as “a strategy for the integrated management of land, water and living resources that promotes conservation and sustainable use in an equitable way”.<sup>201</sup> The ecosystem approach is based on the application of appropriate scientific methodologies focused on levels of biological organisation which encompass the essential processes, functions and interactions among organisms and their environment. The ecosystem approach recognizes that humans, with their cultural diversity, are an integral component of ecosystems.

4.115. *Protecting water*. Parties should carefully consider water issues, including by negotiating contractual provisions that specify and limit the water rights granted to the investor, where relevant. For example, water access and abstraction in irrigated agricultural projects can be addressed as a related right of the investor (see Section I.B.2 above), to be reviewed during the lifetime of the contract according to present and future environmental conditions and to the needs of legitimate tenure right holders and affected communities. Contractual clauses should calibrate the investor’s water rights to ensure they do not interfere with the water supply of other groups or individuals, other farming activities and watering places for animals. National law, or in default the contract, should also clarify how any water fees are determined. Further, contractual provisions can also provide for re-allocation of water rights when circumstances so require during project implementation; specify the type of water that can be used (e.g., surface or groundwater, from river or sea, etc.); and govern pollution and discharge management to ensure that, throughout the duration of the activities, all employees and residential communities are supplied with clean and safe drinking water.

4.116. *Preventing soil degradation*. The parties should also consider issues relating to control of soil quality. For example, crop rotation, intercropping practices,<sup>202</sup> and agro-ecological farming options can conserve and improve soil biodiversity and prevent soil erosion. Desertification issues should also be considered where applicable.<sup>203</sup>

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<sup>201</sup> For more information on the ecosystem approach, see: UN. 1992. [Convention on Biological Diversity](#).

<sup>202</sup> For further guidance see: FAO. 2017. [Voluntary Guidelines for Sustainable Soil Management](#).

<sup>203</sup> See e.g., the work done by the [UN Convention to Combat Desertification \(UNCCCD\)](#)

4.117. *Conserving biodiversity, preventing deforestation and safeguarding ecosystem services.* Environmental safeguards should be established to prevent and minimise degradation, deforestation and loss of biodiversity.<sup>204</sup> Whereas some lands are identified as being suitable for agriculture, others need to be protected due to their high conservation value (HCV) or high carbon stock (HCS). Domestic and international environmental law specify protected areas where agricultural land investment should be avoided.<sup>205</sup> Contractual provisions can elaborate on these aspects, for example through explicit, measurable commitments on deforestation, and effective systems for monitoring and follow up. ALICs can also clarify prohibitions on the introduction of invasive alien species, or measures to protect endangered species,<sup>206</sup> as may be relevant.

4.118. *Prohibition of certain chemicals in agriculture.* Contracts can also regulate use of chemicals in agriculture.<sup>207</sup> Further, biosafety and access to genetic resources can raise complex issues that may have a direct bearing on agricultural land investments.<sup>208</sup> Some States have banned the use of genetically modified seeds and organisms, as well as the use of certain chemicals and pesticides, to protect their biodiversity and avoid risks to human health. The parties should adopt the precautionary approach to protect the environment whenever there is reasonable suspicion of harm and scientific uncertainty.<sup>209</sup>

4.119. *Traditional knowledge.* The parties should consider contractual arrangements that reiterate the imperative to respect and protect traditional knowledge and the cultural heritage of legitimate tenure right holders, local communities and Indigenous Peoples. The connections between cultural diversity, biological diversity and environmental sustainability should be properly considered

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<sup>204</sup> FAO. 2012. [VGGT](#), para 13.6.

<sup>205</sup> See, e.g., [Convention on Wetlands of International Importance](#) (1971); the protected areas identified by the International Union for Conservation of Nature (IUCN); and the [UNESCO Biosphere Reserves](#).

<sup>206</sup> For more information see: UN. 1973. [Convention on International Trade in Endangered Species of Wild Fauna and Flora](#) and the IUCN Red List of Threatened Species.

<sup>207</sup> FAO. 2014. [International Code of Conduct on the Distribution and Use of Pesticides](#) can be used as reference, as well as the UN. 2001. [Stockholm Convention on Persistent Organic Pollutants](#) and the UN. 1998. [Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade](#).

<sup>208</sup> Beyond respecting the requirements of domestic law, contractors can consider the requirements of the UN. 1992. [Convention on Biological Diversity](#) and its related [Cartagena Protocol on Biosafety](#) (2000) and [Nagoya Protocol on Access and Benefit-Sharing](#) (2010); as well as the relevant provisions of the FAO. 2009. [International Treaty on Plant Genetic Resources for Food and Agriculture](#).

<sup>209</sup> The importance of the precautionary approach is recognised under Principle 15 of the UN. 1992. [Rio Declaration on Environment and Development](#), and under many environmental treaties.

in the process to develop an ALIC. Best practice builds on local approaches that are tailored to the specific context; it is therefore important for the parties to understand the customary systems to protect the environment that are used by legitimate tenure right holders and affected communities, and any specific local concerns or priorities related to biodiversity that may require the parties to develop tailored conservation obligations.

4.120. *Mitigating and adapting to climate change.* The intersections between climate change, human rights, and agriculture should be considered when negotiating and implementing ALICs. Higher temperatures and extreme weather events (e.g. storms and droughts) caused by climate change affect crops and livestock production.<sup>210</sup> The Paris Agreement on Climate Change recognises the important role of agriculture especially for the management of direct and indirect “land use, land use change and forestry (LULUCF)”.<sup>211</sup> The VGGT call for fully considering climate change in the governance of tenure.<sup>212</sup> This would require the parties to pursue climate-sensitive models of agricultural land investment. When drafting climate related obligations, the contracting parties should be mindful of the State’s nationally determined contributions (NDCs) adopted under the Paris Agreement, particularly if the government is the grantor. Contractual clauses may involve, for example, the adoption of climate-sensitive agro-ecological approaches and livestock farming practices catering both to net zero emissions and/or the sequestration of Greenhouse Gas (GHG) emissions, such as the cultivation of agricultural areas with high and long-term carbon sequestration potentials like peatlands and forests, low to zero tillage, multi-cropping to reduce evapotranspiration and soil erosion, and the improvement of soil health and fertility, as well as improved nutrient use. Contractual clauses can also address the provision of technical support and capacity development related to climate-sensitive technologies and the obligation to reduce, monitor and report on GHG emissions.

4.121. *Adopting sound management of waste.* Waste management is essential to minimise the potential contamination of natural resources such as water, soil, and air. To address this issue, the parties should regulate waste management over the

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<sup>210</sup> For more information see Intergovernmental Panel on Climate Change (IPCC). 2020. [Climate Change and Land: An IPCC Special Report on climate change, desertification, land degradation, sustainable land management, food security, and greenhouse gas fluxes in terrestrial ecosystems](#).

<sup>211</sup> UN. 1992. United Nations [Framework Convention on Climate Change](#).

<sup>212</sup> FAO. 2012. [VGGT](#), Chap. 6.

duration of the project,<sup>213</sup> and develop approaches to reduce consumption and recycle production materials.

4.122. *Monitoring and reporting environmental protection.* Transparency and access to information are crucial for effective environment protection. Parties have the duty to cooperate during the monitoring of contractual obligations, including with respect to environmental obligations. The monitoring and disclosure of environmental information can be implemented by contracting parties as well as by others, such as through private certification schemes. It is a duty and a right of the grantor to monitor environmental impacts.<sup>214</sup> Parties may previously agree which authorities will have these rights as well as decide if prior notification is required.<sup>215</sup> The adoption of environmental audits is considered common practice and should, therefore, be incorporated into ALICs to ensure effective environmental monitoring.

4.123. *Project closure and restoration of the environment.* Best practice involves the adoption of a decommissioning clause, transfer of environmental obligations to new investors and the stipulation of conditions in which the land is to be returned to the grantor (see Chapter 6). Environmental bonds and insurance, as well as clean-up and replanting obligations may be applied. According to the polluter-pays principle, investors shall bear the cost of environment reparation and if restoring to previous conditions is not possible, a duty to compensate the grantor may apply.

4.124. *Failure to comply with environmental obligations.* Non-compliance may amount to a material breach of the contract. The type of environmental legal liability applied to prevent and remedy environmental harm will depend on applicable law. The contractual relationship may be suspended until compliance is restored, or the parties may decide to terminate the contract when, for instance, non-performance of an essential environmental obligation substantially affects the legitimate expectations of one of the parties. Non-compliance with contractual environmental obligations can shift the burden of proof to the investor based on the precautionary principle. Non-judicial mechanisms, such as environmental

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<sup>213</sup> The UN. 1989. [Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal](#) lists certain types of wastes that should receive special disposal attention.

<sup>214</sup> CFS. 2014. [CFS-RAI Principles](#), para 50; FAO. 2012. [VGGT](#), para 12.12.

<sup>215</sup> This is a common practice in contract farming. See UNIDROIT/FAO/IFAD. 2015. [Legal Guide on Contract Farming](#), p. 109.



grievance mechanisms,<sup>216</sup> may provide tools for the identification and resolution of environmental non-performance issues (see Chapter 7).

#### **IV. PROTECTION OF INVESTMENT AND REGULATORY AUTONOMY**

4.125. *Introduction.* States have a duty to protect human rights and to enact regulations which are in the public's interest.<sup>217</sup> However, investors may be concerned about public action that could adversely affect their operations, and demand legal safeguards to protect their assets. Depending on the circumstances, tensions can arise between investment protection and the state's duty to regulate in the public interest. These issues require careful thinking through, including in the context of ALIC development and implementation. Given the role of governments in determining investment policy generally and protections specifically, the guidance in this Part is oriented towards ALICs between investors and governments.<sup>218</sup>

4.126. *Context.* Governments can offer investment protections in three main ways. First, they may legislate domestic investment codes, which set out incentives and protections to promote or facilitate such investment. Second, they may enter into international investment agreements (IIAs), which offer protections to investors from another State Party to that agreement making investments in their territory in exchange for reciprocal protections for their investors making investments in that State's territory. Third, they can agree to provide certain protections in the ALIC they conclude with the investor. In each of these settings, governments, or the contracting parties in the case of ALICs, may

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<sup>216</sup> Grievance mechanisms that can be used to deal with environmental complaints include, for example, at the international level: the World Bank [Inspection Panel](#), the International Finance Corporation ([Compliance Advisor Ombudsman](#)) and the OECD [National Contact Point](#).

<sup>217</sup> See Principle 1 of the [UN Guiding Principles on Business and Human Rights](#) ("States must protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises. This requires taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication"). See also [CFS-RAI Principles](#), para. 33 ("States should ensure, to the extent possible, that actions related to responsible investment in agriculture and food systems both at home and abroad, are consistent with their existing obligations under national and international law, and international agreements related to trade and investment, with due regard to voluntary commitments under applicable regional and international instruments. States should maintain adequate domestic policy space to meet their human rights obligations when pursuing business-related policy objectives with other States and business enterprises, for instance through investment treaties or contracts, in line with the UN Guiding Principles".)

<sup>218</sup> For comprehensive guidance on investment policy, see UNCTAD. 2015. [Investment Policy Framework for Sustainable Development](#).

establish substantive standards of protection. Further, governments may include a consent to arbitrate, thereby providing investors with the right to bring claims directly against them. Absent such consent, investors would be reliant on other forms of dispute settlement (see Chapter 7).

4.127. *Supplementing applicable law and the importance of balance.* While investment codes and IIAs apply to all covered investments, the parties to an ALIC can determine to supplement these rules with contractual clauses providing substantive protections (e.g. protection against expropriation and physical and legal security and consent to arbitrate). The use of such clauses, however, should be carefully considered to ensure the right balance between the desire of the investor for a predictable legal environment that makes their investment more secure and the need of the grantor government to act in the interest of the public, including to protect human rights and food security.<sup>219</sup>

4.128. *Roadmap.* In seeking to achieve the right balance between investment protection and regulatory autonomy, three issues to be considered are briefly discussed below: (A) expropriation; (B) physical security; and (C) stabilisation and legal security.

## **A. Expropriation**

4.129. *In general.* Governments have the right, in certain circumstances, to expropriate (i.e. take ownership of) property. As noted in Chapter 3, governments may expropriate rights to land in order to be able to grant them to investors for an investment project. However, this section deals with the protections investors have against expropriation of their investment. It addresses what may be covered by those protections, how expropriation is defined in this regard, as well as the conditions for lawful expropriation and compensation.

4.130. *Definition.* The definition of an expropriation and the investments covered by an expropriation protection vary among investment codes, IIAs and ALICs. The definition is particularly important because disputes arise not only in situations in which the government formally takes title to the investment (i.e. direct expropriation), but also in situations in which the government is alleged to have interfered with an investor's rights without formally taking title to the investment (i.e. indirect expropriation or regulatory taking). Most IIAs refer to indirect expropriation (e.g. by covering what are frequently referred to as measures tantamount to expropriation or similar) but, even when expressly included,

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<sup>219</sup> UN [Guiding Principles on Business and Human Rights](#), principle 9 (calling on States to "maintain adequate domestic policy space to meet their human rights obligations" when negotiating investor-State contracts).

determining whether an indirect expropriation has occurred may be difficult, and the consequences can be significant. Many IIAs also clarify that contracts, or rights arising thereunder, such as an ALIC, as covered investments, and can thus form the object of an expropriation. A determination that the enactment of a law or regulation for legitimate public policy objectives (e.g. environment or public health) constitutes a taking of an investment, and thus require authorities to compensate affected investors, can have far-reaching implications for the ability of States to regulate in the public interest. For investors, a determination that the enactment does not constitute a taking means there generally is no entitlement to compensation.

4.131. *Circumstances.* Not every failure by a grantor government to meet certain obligations under an ALIC will amount to an expropriation. Nor will every government action which affects an investment contract between a foreign investor and local community amount to an expropriation. Indeed, governments can exercise their expropriation right lawfully when meeting certain criteria. In general, the expropriation must be done for a public purpose, on a non-discriminatory basis, and with payment of prompt, adequate and effective compensation.<sup>220</sup>

4.132. *Compensation standard.* Compensation standards may vary depending on the applicable treaty or law, but a common measure in IIAs is that of “prompt, adequate and effective” compensation. The requirements of “prompt” and “effective” compensation – to be paid without undue delay and in a convertible currency respectively – are generally without controversy. Determining “adequate” compensation, however, is more difficult. International investment treaties generally require fair market value of the expropriated investment, but there are different methods to determine this value (e.g. discounted cash flow method, book value, replacement value). Deciding which method is most appropriate depends on the particular circumstances.

4.133. *Contractual clauses.* Some ALICs include clauses that deal with expropriation. Investors may particularly value these clauses in the absence of an applicable IIA with expropriation protections, or where the provisions are deemed in some way insufficient. Where the contract features an expropriation provision, it should specify, as needed, coverage, definition, circumstances and compensation standard, while aiming at balancing protection for the investor and regulatory space for the government grantor.

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<sup>220</sup> UNCTAD. 2012. [Expropriation – a Sequel](#). Series on issues in International Investment Agreements II.

## **B. Physical security**

4.134. *In general.* Physical security for agricultural land investments generally refers to protecting the investment's operations from theft, destruction of property, occupations, violence directed at personnel, or other threats. It may involve commitments by the government to provide adequate security for the investment, or else it may allow the investor to hire security to monitor the premises.

4.135. *Security clauses.* Contractual clauses on physical security may define a range of security activities, including hiring and training requirements for any security hired by the investor, reporting and monitoring requirements, and coordination requirements with local law enforcement. They should include an affirmative requirement to adhere to the Voluntary Principles on Security and Human Rights, which were developed among certain governments, private sector companies, and civil society groups to help companies ensure the safety and security of their operations while maintaining respect for human rights.<sup>221</sup>

4.136. *Considerations.* These issues should be carefully considered, and the clauses carefully drafted in order to avoid and mitigate any related human rights risks and remedy any abuses and misappropriation that may occur, including through a credible grievance mechanism (see Chapter 7). As a general principle, a responsible agricultural investment should not be expected to need security arrangements beyond those ordinarily provided by the government: a need for 'militarisation' through extensive security arrangements may be a red flag indicating that the local context is not conducive for, or supportive of, the proposed investment.

## **C. Stabilisation and security of rights**

4.137. *In general.* To mitigate the risk of arbitrary unilateral action, investors have sometimes sought to negotiate contractual clauses that provide for the long-term stability of applicable law and the security of their rights. The formulation of these "stabilisation clauses" vary widely. Some clauses purport to "freeze" applicable law to the norms in force at a specified time, excluding the application of subsequent legislation. On the other hand, economic equilibrium clauses link adverse changes in law to requirements that the grantor restore the contract's economic equilibrium – for example, via contract renegotiation or possibly payment of compensation. Hybrid clauses combine both freezing and economic equilibrium elements.

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<sup>221</sup> See the UN. 1999. [Declaration on Human Rights Defenders](#).

4.138. *Concerns about stabilisation clauses.* Concerns have been raised that stabilisation clauses could constrain the implementation by a government of deserving social, environmental, or economic measures. More stringent rules on community consultation, human rights, labour relations, health and safety, and environmental protection – to name but a few potentially relevant examples – could adversely affect investments and trigger the application of stabilisation clauses. The concern is that States may have to exempt projects from the new measures; otherwise, if States must bear the costs incurred by said measures, they may be discouraged from acting in the first place, particularly where public finances are under strain.

4.139. *Stabilisation clauses not required.* Given that they raise a host of sensitive issues, stabilisation clauses should not be automatically included in an ALIC. If an investor wishes to seek a stabilisation commitment, it should be asked to demonstrate its need, and the government should seriously consider whether it can assuage investor concerns in other ways. The parties can explore alternative ways to mitigate regulatory risk, such as insurance and involvement of multilateral lenders. If a grantor agrees to enter into a stabilisation commitment, it may seek to compensate the reduced regulatory risk for the investor with higher economic benefits, for instance in the form of greater public revenues.

4.140. *Flexible economic equilibrium clause.* Diverse forms of stabilisation clauses have different implications. Freezing clauses are particularly inflexible, and their enforceability may be doubtful in some domestic legal systems. For these reasons, contractual practice has tended to shift towards the more flexible economic equilibrium clauses. The wording of any stabilisation commitments should be properly circumscribed, and public-interest action in social and environmental matters should not be covered. An annex to the UN Guiding Principles on Business and Human Rights contains a set of Principles for Responsible Contracts, which provide more detailed guidance on regulatory space and stabilisation clauses. They state that: “[c]ontractual stabilisation clauses, if used, should be carefully drafted so that any protections for investors against future changes in law do not interfere with the State’s bona fide efforts to implement laws, regulations or policies, in a non-discriminatory manner, in order to meet its human rights obligations”.<sup>222</sup> In addition, the duration of the stabilisation clauses should also be limited to what is actually needed – e.g. to enable the investor to recover costs and generate a minimum level of returns, or to reassure lenders for the duration of their loans – rather than left open-ended.

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<sup>222</sup>

UN. 2015. [Principles for Responsible Contracts](#), principle 4.

## V. IMPLEMENTATION AND MONITORING

4.141. *Introduction.* Well-balanced ALICs and responsible and sustainable investment projects involve long-term relationships between the parties themselves and with stakeholders. This is because, depending on the circumstances, it may take time for the investor to develop the project, recover costs and generate returns. Contractual provisions need to be implemented and monitored throughout the duration of the project, and information about the project needs to be shared between the parties and with stakeholders. In addition, external circumstances such as commodity prices could change significantly over the project's duration, and the venture itself may experience different phases in the opportunities and challenges it faces.

4.142. *Making arrangements and cooperation.* The parties should therefore consider and set out in contractual provisions arrangements for administering their relationship throughout the duration of the project. Relevant issues include ensuring proper implementation through monitoring of the parties' obligations and of the project's ongoing impacts (e.g. through updated impact assessments), reporting requirements and periodically revisiting the parties' obligations in the light of changing circumstances. To this end, it is essential that each contracting party cooperate with others throughout the contract's duration.<sup>223</sup>

4.143. *Importance of open communications.* The contract should identify arrangements to facilitate communication between the parties, as well as between the parties and local communities, ranging from simple clauses that provide the parties' respective contact points to more structured arrangements such as joint committees. Given that a failure in communication between the parties can lead to a breakdown in relations, the parties should ensure that clear channels of communication exist between those involved, including for the sharing of reports and other information and for discussing concerns and grievances (see Chapter 7). Options include contractual provisions defining: points of contact, communications plans which specify processes for sharing information, and community committees, which serve various functions related to information sharing and consideration of concerns and grievances. In establishing communication plans and community committees, the parties should take steps to ensure that women, youth, and other members of the community who might

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<sup>223</sup> See, e.g., [UPICC](#), Art. 5.1.3 (stating that "[e]ach party shall cooperate with the other party when such co-operation may reasonably be expected for the performance of that party's obligations" and providing commentary between parties in the context of long-term contracts).

not normally be involved in such discussions are able to access the information and participate.

4.144. *Roadmap.* To assist parties in considering and addressing these issues, this Part shall (A) cover key implementation issues, including insurance, performance guarantees, environmental performance bonds, and notice and periodic review, as well as (B) provide an overview on monitoring, including monitoring arrangements and the importance of transparency and reporting.

## **A. Implementation**

4.145. *Introduction.* Compliance, notice and review of the contract's implementation are, like transparency and reporting, important to an investment project's success. This section briefly discusses some key compliance issues – including (1) permits and licenses, (2) insurance, (3) performance guarantees, (4) environmental performance bonds – and addresses important aspects related to (5) the parties ongoing relationship, specifically notice and periodic review of the contract and its implementation.

### **1. Permits and licenses**

4.146. *In general.* Permits or licenses, which authorise a particular investment project, are generally required by domestic law, prior to the formation or implementation of the contract, and may be readdressed as a contractual obligation that parties are called to comply with throughout the duration of the operation of the investment (see Chapter 3.V.B regarding precedent conditions). As previously described in this Guide, these are generally granted by public authorities (e.g. ministries of agriculture or environment) and may be required for various reasons including, for example, certain agricultural activities, use of natural resources, construction of facilities or infrastructure and for environmental impacts (see Chapter 3.IV.A).

4.147. *Contractual clauses, coordination, and issuance.* In assessing the legal framework (see Chapter 1), the parties should contemplate and identify which permits are necessary for the investment project's establishment or operation. For clarity, such identification should be done expressly in the contract, including listing those that might be a condition for the project's establishment (see Chapter 3.V.B regarding conditions). Where the government is the grantor, the contract may state the instances in which the government may suspend relevant permits or licenses, such as when there is a significant risk of damage to the environment. If the government is not the grantor, the parties should coordinate with government officials in order to ensure that any contractual provisions in this

regard are consistent with domestic law and to understand and ultimately satisfy any requirements. Governments should ensure that, where the necessary conditions are met, permits or licenses are issued and renewed in a timely manner and are not unjustifiably withheld.

## **2. Insurance**

4.148. *In general.* Insurance can play an important role mitigating many of the project's risks, covering hazards such as fire, theft, disease or natural calamities, damage to property or injury to individuals, and the life or health of the investment's employees. Certain States may make mandatory a particular insurance coverage for the parties, and ALICs and related agreements may contain specific obligations in this regard.

4.149. *Provision.* Insurance products are typically provided by private entities but may also be offered by large cooperative or mutual entities, which can make insurance more affordable. Public policy schemes also exist in certain States, providing guarantee mechanisms to private insurance services or subsidising minimum insurance coverage, generally linking it to credit granted under public schemes. Beyond insurance schemes, large-scale natural calamities may be covered by special State interventions offering some level of compensation for agricultural losses.

4.150. *Contractual clause.* Some contracts may provide for insurance obligations. In such cases, the contract should specify which party has the obligation to obtain insurance and indicate which type of insurance should be purchased. Merely obliging a party to take insurance, with no further clarification (such as simply requiring the purchase of "adequate insurance"), may not guarantee the necessary coverage. Insurance clauses should at least state the main minimum coverage requirements, such as the risks to be insured (e.g. fire, theft, disease, or hail) and the amounts to be covered. For liability insurance, the contract should specify the minimum limits of guarantee and, for life insurance, the amount to be covered. Special care should be taken to verify that the insurance clause conforms to the requirements of the applicable law.

## **3. Performance guarantees**

4.151. *In general.* In any major project, including agricultural land investments, parties seek assurances that the counterpart will perform its contractual obligations, and if not, that they will not be at a loss. Performance guarantees are commonly used to address these issues in construction and infrastructure projects.



4.152. *Types.* There are two main types of performance guarantees – (1) monetary performance guarantees and (2) performance bonds – though they vary from investment to investment. First, with monetary performance guarantees, the guarantor (e.g. a financial institution) undertakes to pay the government or relevant authority a stated, limited amount of money to satisfy the liabilities incurred by the contracting authority as a result of the investor's failure to perform. A monetary performance bond can be a contract form, a standby-letter of credit, or an on-demand guarantee. Second, for performance bonds, the guarantor can either (a) rectify or complete the performance itself (e.g. fix or finish a road that was built poorly or not at all); or (b) organise for another contractor to do so and then compensate for the losses caused by the original contractor's non-performance. The guarantor, however, reserves the right to comply with its obligations through payment of money alone.<sup>224</sup>

4.153. *Potential applicability.* Performance guarantees are typically used in large-scale construction and infrastructure projects, not ALICs. Agricultural investments are long-term, often taking at least ten years to yield any profit, whereas many infrastructure projects can be completed in that time. Performance guarantees can nevertheless be useful in promoting investors' compliance with an ALIC, as the requirement to repay the guarantee to the financial institution provides a strong incentive for the investor to comply with its obligations. Accordingly, if the parties have a transparent and cooperative relationship, a performance guarantee may be an appropriate mechanism for promoting compliance and could be considered for the project's implementation.

#### **4. Environmental performance bonds**

4.154. *In general.* Environmental performance bonds, or environmental impact bonds, are an arrangement by which investors finance environmental projects, and governments or other financiers (e.g. development agency) repay this financing on the condition that the proposed benefit is achieved. Such bonds are thus similar to a pay-for-performance contract, with the investor assuming the risk. Theoretically, this mechanism creates a strong incentive to monitor the progress of the project and ensure that obligations are being met. It also encourages transparency on the part of the investor, who seeks to ensure that there is no doubt they have achieved the project outcomes and will have the bond repaid.

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<sup>224</sup> In addition, the maintenance bond is a subset of performance bonds. This protects against future failures to perform during the start-up or maintenance phases of a project and guarantee that the contractor will carry out any necessary repair or maintenance work during the post-completion period.

4.155. *Potential applicability.* Environmental performance bonds may merit consideration by parties involved in ALICs as they can establish objectives, a timeline, and clear financial rewards for complying with specified environmental objectives, in both the development of a project and for conservation or project closure purposes. Given the short-term focus, and quantifiable and technical measures of success, such bonds may be inappropriate for dealing with longer term environmental problems (e.g. water pollution from various sources).

4.156. *Tailoring to ALICs.* The environmental performance bond model can be tailored to ALICs, thereby promoting monitoring and implementation. Investors and governments could agree, for instance, that certain benefits can be accrued by the investor (e.g. extra parcels of land, a tax benefit) for every specific environmental objective satisfied (e.g. rehabilitation of wildlife habitats; reduction in the fertiliser and pesticide run-off in water sources). If the investor does not meet the goal within the specified time period, they may have to return certain land tracts or start paying a tax for which they had previously been exempt. Specific goals and rewards that are delivered over discrete time periods are more likely to incentivise investors to be transparent with their efforts, and for all parties to monitor and comply with their contractual obligations.

## **5. Notice and periodic review**

4.157. *Notice.* Open and continuous communication is essential to the investment project's success. A notice provision identifies how parties are to communicate formally, typically in written form. This provision is linked to particular obligations in the contract for which notice, under certain circumstances, might be required. Notice may be required, for example, in connection with option clauses regarding additional land (see Chapter 4.I.A), renewal clauses regarding the extension of the contract (see Chapter 4.I.D), excuses for non-performance (see Chapter 5.II), the right to cure non-performance (see Chapter 5.III.B), termination (see Chapter 5.III.B.4) and disputes (see Chapter 7).

4.158. *Periodic review.* To ensure that the contract's terms remain relevant and appropriate in the light of changing economic fundamentals, the parties should consider scheduled revisions or periodic renegotiations of terms and establish the procedure for such revisions and renegotiations in the contract. Periodic review clauses should clarify: the timing (e.g. every five years); the scope, which may be general or restricted to specific clauses (e.g. rental fees); and the practical modalities for the parties to jointly review contract terms. One example would be clauses providing for the periodic adjustment of land rental fees in the light of evolving circumstances. The more effective clauses provide arrangements for situations where the parties cannot agree on the revisions.

4.159. *Amendments and renegotiations.* In connection with periodic reviews, the parties should consider specifying a procedure in the contract to allow for the contract to be amended based on the outcome of those reviews and the agreement of the parties. Such a procedure could expedite renegotiations (see Chapter 5.III.B.3) and enhance stability and sustainability.

## **B. Monitoring**

4.160. *In general.* Problems can arise even under a perfectly drafted contract if the parties fail to monitor its implementation, which entails evaluating the parties' compliance with the contractual obligations and any other applicable law, as well as the project's impacts. Monitoring is essential to ensuring that an ALIC and any related agreements lead to a successful project both for the investor and the grantor and that the anticipated benefits of the investment are realised, including for any legitimate tenure right holders and local communities. Monitoring, however, is a complex and difficult exercise, because it can be time-consuming and may occur over a significant duration. This section describes (1) general monitoring arrangements (e.g. matters, methods and those involved) in order to enhance contract monitoring and (2) the importance of transparency and reporting in those arrangements.

### **1. Arrangements**

4.161. *Matters to be monitored.* In general, a broad range of matters may be monitored. Monitoring is linked to the various obligations and key performance indicators set forth in the contract, as well as to possible social and environmental impacts, which may be linked with impact assessments and any mitigation plans that were initially performed and established, respectively (see Chapter 3). Matters covered include compliance with not only the broader regulatory framework but also the specific obligations in the contract, as well as any related agreement, such as:

- the grantor's obligation to grant the tenure and related rights to investors, as well as the investor's obligation to respect any rights withheld or reserved to ensure continued access to local communities, to protect natural resources and, as applicable, to maintain or pay fees for existing infrastructure or to construct new infrastructure;
- land and project development obligations, which may involve particular targets and timeframes;
- monetary obligations, such as payments, profit sharing and capitalisation;

- social obligations, including with respect to employment creation and labour rights; local content and processing; contract farming, outgrowers and supply chain relations; and community development funds and social infrastructure, including gender and differentiation aspects;
- environmental obligations, including to protect water, prevent soil degradation, conserve biodiversity, to mitigate and adapt to climate change and to manage waste; and
- physical security obligations, both to protect the investment and to ensure that any arrangements do not result in negative impacts on legitimate tenure right holders and local communities.

4.162. *Methods and standards.* There are various methods for monitoring compliance and for collecting the requisite data: it can be done by the investor, the government, an independent auditor or a local organisation. To facilitate monitoring and enforcement under the contract, the parties should ensure that the contract clearly defines which methods are to be used for which obligations, as well as the indicators or other aspects to be monitored.<sup>225</sup> For certain indicators, the parties should consider adopting certification standards overseen by certification bodies – either public or private entities – which could be involved in the monitoring.

4.163. *Investor self-monitoring.* Whether under domestic law or the ALIC, investors should be required to self-monitor and self-report on certain issues within an agreed timeframe. The self-monitoring tools put in place may include inviting independent third parties to assess the level of compliance, and possible risk and compliance exposures.

4.164. *Grantor monitoring.* When acting as grantor, the government can subject the contract or its renewal to the investor's compliance with its obligations. This means that if an investor does not fulfil an obligation, the government may be entitled to seek remedies (see Chapter 5). Even where the government is not the grantor, it may have a responsibility to monitor the project in accordance with the applicable legal framework through legislation and implementing regulations. Monitoring, however, is not an easy task for many governments or local communities as the time and resources needed to monitor properly can be significant. Yet another challenge can arise due to the fragmented, sector-specific approach to monitoring that may involve various government ministries and

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<sup>225</sup> FAO. 2015. [Governance of Tenure Technical Guide No. 4](#), p. 72 (identifying possible documentation for monitoring and reporting) and p. 73, Table 7 (showing documentation for monitoring and reporting).

agencies (e.g. land, environment, agriculture), each of which has its own area of interest and responsibilities. In these cases, while consolidated monitoring for all aspects of the project may be difficult, it is crucial that monitoring be done in a coordinated manner which allows the project to proceed with minimal interference.

4.165. *Independent monitoring.* Both investor and grantor monitoring carry risks, including non-reporting or over-reporting and a lack of resources respectively. Independent (i.e. third-party) monitoring is therefore considered to be best practice. Accordingly, the parties should consider, depending on the size of the project, stipulating the monitoring of key obligations by an independent auditor or a neutral local organisation, such as a civil society organisation. The costs for this could be contemplated by the parties in negotiating the contract, and one possibility could be setting aside a specified percentage of the project's revenues.

## **2. Reporting and transparency**

4.166. *Introduction.* Effective monitoring is impossible without sufficient transparency and reporting. These are key tools in the area of investment for fighting corruption and protecting human rights and are part of a growing trend towards greater transparency in business generally and these types of investments specifically. Given the confluence of issues and impacts that may arise from an agricultural investment project, the preparation and sharing of reports may be critical to the success of a responsible and sustainable project.

4.167. *Context.* ALICs can have a significant impact upon the public, in particular legitimate tenure right holders and local communities. They can result in benefits for local communities but may also have negative impacts, depriving people of their tenure rights or resulting in environmental harm (e.g. soil degradation due to excessive farming). Monitoring compliance and impacts is essential if relevant actors are to be able to take remedial measures. It is also important for the wider public to be aware of how commercial enterprises are being undertaken and implemented, so as to hold the parties accountable.

4.168. *Roadmap.* In addressing issues related to transparency and reporting, this section divides such issues between (a) investors and (b) grantors. It then concludes with a brief discussion of (c) confidential information, which may be protected from disclosure (e.g. through redactions of such information in documents).

(a) *Investors*

4.169. *In general.* Reporting obligations for investors may be found under domestic law and, in the case of foreign investment, under the law of the investor's home State. The parties should be aware of, and possibly cross-reference in the contract, the investor's reporting obligations under the applicable law, along with any further specifications. The grantor should be clear regarding what is precisely required and expected, including the types of reporting and applicable standards.

4.170. *Reports in general.* Reports should be accessible, understandable, and presented without undue delay as per the applicable law and contract. While information provided must be complete, parties should avoid issuing unnecessarily lengthy reports that end up obfuscating pertinent information and could constitute a deliberate frustration of transparency and reporting obligations.

4.171. *Reporting on financial and non-financial obligations.* The investor should be responsible for maintaining accurate accounting records in accordance with international financial reporting standards (e.g. the International Financial Reporting Standards (IFRS), where applicable), at an office near the investment area or otherwise in the State in which that area is located. Investors are typically responsible for providing the grantor with audited financial statements, generally at the expense of the investor. Investors should also comply with non-financial reporting standards consistent with domestic law and international standards – such as ISO 26000, which provides guidance on social responsibility.

4.172. *Periodic reporting.* The investor should also be responsible for preparing and providing activity reports at specified intervals (e.g. annually; biannually) that lay out summaries of key information regarding the project. The activity reports could address, *inter alia*: project operations (e.g. production amounts, acreage planted, development updates and timelines); compensation paid to the grantor and, if applicable, to legitimate tenure right holders and local communities; and any social or environmental impacts, as well as any mitigating steps taken (e.g. water usage). The parties may agree in the contract to reporting standards for particular issues, such as for social responsibility or sustainability, along with the need to obtain agreed certifications.

4.173. *Availability of reports and related information.* Whereas reports are to be shared between the parties, the parties should also consider what reports and related information should be made available more broadly. In addition to disclosure of the ALIC and any related agreements as part of contract negotiation and formation (see Chapter 3.V), the parties should include a contractual clause making certain documents (e.g. impact assessments and management plans;

activity reports) available to the public and open to inspection (e.g. at an accessible office or online),<sup>226</sup> subject to the protection of confidential information. Further to this disclosure, the parties could ensure that those documents (or summaries of them) are also made available in local languages and that regular meetings continue to be held with local communities and other stakeholders to facilitate ongoing engagement and sharing of information.

*(b) Grantors*

4.174. *In general.* Grantors play a key role in ensuring transparency with respect to ALICs and the related projects. They must ensure that information relevant to the investment's establishment and operations is available to investors, legitimate tenure right holders and any local communities which may be impacted.

4.175. *Investors.* To ensure grantors are transparent with investors, they should accurately report relevant information in an accessible format. For governments and local communities, this includes changes regarding the investment area (e.g. change of title, environmental findings, conflict, infrastructure projects that may affect the land). For governments in particular, this information also includes:

- relevant laws (e.g. laws on real property, commercial laws, tendering and procurement procedures, contract law, indigenous title, international treaties that are in force), which can be made available on the government's website;<sup>227</sup> and
- accurate fiscal information (e.g. an annual budget, disclosure of the balance of payments, national debt, credit rating, State assets), which can be compiled in accordance with relevant government accounting standards and also made available on the government's website.

4.176. *Legitimate tenure right holders, local communities, and the general public.* Grantors should seek inclusion of a contractual clause making certain reports and related information available, subject to the protection of confidential information. In addition, grantor governments in particular can ensure that local communities and the general public have access to relevant information regarding the investment project by establishing within domestic law clear requirements for the disclosure of reports and related information. Moreover, as different levels of government may be responsible for monitoring different aspects of the investment project, it is important to ensure that legitimate tenure right holders, local

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<sup>226</sup> See UNCTAD, World Bank. 2018. [Public Transparency. Responsible Agricultural Investment \(RAI\) Knowledge into Action Notes, No. RAI-KN 10](#), p. 3, Table 1 (containing a list of documents that could be categorised as private between the parties and as public).

<sup>227</sup> FAO. 2012. [VGGT](#), para. 3B.8.

communities and the general public have access to relevant information at those various levels.

4.177. *Mechanisms for sharing information.* Various mechanisms can be used by grantors to make information available to investors and the general public, such as meetings, websites, and media channels. The government, for instance, can make information available on its website and keep it updated, facilitate meetings with the investor and legitimate tenure right holders, provide press releases and other information to the media, ensure that interested stakeholders can participate in the procedures relating to permits and licenses for the project and respond to freedom of information requests regarding the project.

(c) *Confidential information*

4.178. *In general.* In considering transparency and related disclosure obligations – including making the ALIC publicly available – some investors may be concerned with the protection of commercially sensitive information, which could be used by competitors to gain an advantage. In accordance with emerging transparency and disclosure practices, confidential information may be redacted from documents that are to be made available to the public. What constitutes confidential information may be defined by domestic law and, in the absence of such guidance, could be defined by the parties in a contractual clause. Greater precision with respect to what qualifies as confidential information may reduce the likelihood of disputes over redactions, which are meant to be limited and should not be used to protect entire documents from disclosure.

4.179. *Defining confidential information.* The UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration could illustrate the ways in which the parties could tie down an operational definition of confidential information. Article 7 of those Rules provides a basic definition for confidential or protected information:

- confidential business information;
- protected against being made available to the public under the treaty;
- protected against being made available to the public by relevant laws; and
- information that would impede law enforcement if it were disclosed.

4.180. *Redactions.* Investors and grantors can redact information that qualifies as confidential information. For the procedure, the UNCITRAL Rules on Transparency might also provide a source of inspiration. They stipulate that the arbitral tribunal will consult with the parties to determine a cooperative procedure



for redactions and will ultimately decide whether particular information should be redacted if the parties are unable to reach agreement. To do this, procedures for ensuring prompt identification and redaction of confidential information are put in place. The parties could follow a similar procedure, in which a neutral third party assists them in coming to an agreement about what is confidential or protected information, setting time limits for giving notice of their proposed redactions, and ensuring that the procedure as a whole is prompt and efficient in order to make the information available to the public in a timely manner.

4.181. *Unauthorised disclosure.* Depending on the applicable law and any relevant provision in the contract, unauthorised disclosure of specific information that is confidential may breach a confidentiality obligation. The parties should also pay attention to those documents containing information that, while not defined as confidential under the ALIC, may nevertheless be subject to protection under domestic law. Provided that the party whose information was disclosed can make the requisite showing of potential harm or actual harm, that party may be entitled to damages or other remedies (see Chapter 5.III.B).

## CHAPTER 5

### **MANAGING THE CONTRACTUAL RELATIONSHIP DURING IMPLEMENTATION: DEALING WITH NON-PERFORMANCE AND REMEDIES**

5.1. *Overview.* The parties to ALICs, which are typically long-term and complex contracts, as well as other affected stakeholders may eventually encounter situations in which the rights and obligations (see Chapter 4) contemplated will not be satisfactorily performed, whether as a result of an event external to the parties' control or because of default or breach by one of the parties. The importance of proactively managing the contractual relationship and relations with other stakeholders throughout the implementation of the agricultural land investment and mitigating risks and impacts is generally acknowledged. However, many legal systems lack guidance on how to deal with cases of non-performance and the types of avenues available for contracting parties and affected third-parties to seek remedies. Access to effective remedy is a foundational principle in the UN Guiding Principles.<sup>228</sup> It is therefore imperative that the parties establish a clear contingency plan, in particular by including contractual mechanisms that can be put to effective use.

5.2. *Contingency plan and applicable law.* In designing their contingency plan, parties should consider the range of remedies an aggrieved party may exercise upon a non-performance event under the applicable law. Legal systems vary regarding the grounds for exercising each of the various remedies, their content and scope, and the sequence in which they may be exercised. The parties should also be aware of the flexibility afforded by the applicable law, within the limits of any mandatory provision found in various sources like contract law, lease law, investment law, environmental law, human rights and social regulations (see Chapter 1).

5.3. *Promoting predictability, stability, and flexibility.* For the sake of predictability and to preserve the stability of the relationship over the intended duration of the ALIC and any related agreements, parties are advised to anticipate the possible non-performance events and provide for the corresponding actions or steps, along with the necessary flexibility. Contracting parties should also be aware of potential effects of non-performance events on a broad range of stakeholders, including non-contractual parties, or third-party beneficiaries. In particular, parties must carefully consider the potential impact of a non-

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<sup>228</sup>

UN [Guiding Principles on Business and Human Rights](#), pp. 27-28.

performance event and of the applied remedies on legitimate tenure right holders, whose available remedies or recourse will depend on their position in the overall contractual arrangement (see Chapter 2.III above and Section III below).

5.4. *Roadmap.* While this Chapter focuses on contractual remedies, an aggrieved party may be entitled – depending on the legal system – to seek relief outside the particular contract or related agreement, whether based on a tort action or otherwise. Part I describes general considerations in this area. Part II examines excuses for non-performance. Part III provides an overview of remedies and addresses situations in which each of the parties to the contract is in breach, together with the remedies which may be available to other stakeholders. Part III addresses situations in which legitimate tenure right holders or local communities are parties to the contract or a related agreement, as well as the case of third-party beneficiaries.

## **I. GENERAL CONSIDERATIONS**

5.5. *Concepts of non-performance and remedy.* Non-performance is the failure by a party to perform any of its obligations under the contract, including defective performance or late performance. Non-performance events may relate to any one or several of the obligations under the contract, with more or less disruptive consequences on the overall equilibrium of the relationship. The performance of an obligation, and the relevant remedy in case of non-performance, varies depending upon the nature of the obligation incurred, whether it relates to a duty of best efforts with a degree of required diligence, or if a specific result is promised and can be assessed.<sup>229</sup> In case of non-performance, the aggrieved party should have access to a ground for remedy. The term “remedy” refers to any legal measure provided by law or by contract to protect the interest of an aggrieved party against the consequences of another party’s non-performance.

5.6. *Defining excuses and remedies to encourage performance.* It is important that the contract clearly defines the obligations (e.g. an obligation regarding timing), the performance of which could be excused or the unexcused breach of which could provide a basis for remedy. Contractual terms regarding non-performance may be placed immediately after the obligation to which they relate, or in a dedicated section on “remedies” or referring specifically to certain types of remedies (e.g. “Damages”, “Termination”, etc.). A well-designed set of excuses and remedies should enable the parties to solve problems at an early stage and avoid escalation, which may lead to far-reaching economic, environmental, and

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See [UPICC](#), Art. 5.1.4 (Duty to achieve a specific result. Duty of best efforts).

social consequences. Ideally, a well-conceived system of remedies should not only serve as a deterrent against breach (e.g. through the threat of liability, termination or other adverse consequences) and provide the aggrieved party with redress, but should also aim to encourage performance through the facilitation of proactive error detection and correction.

5.7. *Excused non-performance versus breach.* Non-performance may be excused because of an unexpected external event, such as a force majeure event, or by reason of the conduct of the other party to the contract. Non-performance may not be excused if it results either from intentional acts of the obligor or from events falling within the obligor's sphere of control, amounting to a breach of contract. While some remedies (i.e. money damages) are exclusively designed for breach, others are available both in cases of excused and unexcused non-performance, as long as the circumstances excusing non-performance do not impair their use.

5.8. *Proportionality.* In many – albeit not all – legal systems, the remedies available to the aggrieved party must be commensurate to the seriousness of the breach. Some legal systems limit the use of more severe remedies (e.g. contract termination) to instances in which the breach is intentional or reckless, substantially deprives the aggrieved party of what it was entitled to expect – within the limits of foreseeability – under the contract, or is such that the aggrieved party has no reason to believe that any performance will be forthcoming.<sup>230</sup> This ALIC Guide contemplates these situations of serious breach, which may be known domestically as a “material”, “substantial” or “fundamental” breach. As a good practice, parties should apply proportionality between the breach and the remedy; particularly in the case of termination, which should only be invoked as a measure of last resort after having exhausted all other opportunities to mitigate and cure the defect.

5.9. *Cooperation.* In dealing with non-performance situations, in addition to good faith and fair dealing, cooperation is also a key principle that is especially relevant for long-term contracts.<sup>231</sup> Examples include the exchange of relevant information, allocation of additional time for performance, mitigation of damage, granting an opportunity to cure, or adapting the contract. Upon the expiry or

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<sup>230</sup> For international commercial contracts, the [UPICC](#) reserve the remedy of termination to instances of fundamental breach (Art. 7.3.1). For international sales contracts, the UNCITRAL. 2010. Convention on Contracts for the International Sale of Goods (CISG) takes the same approach (see Art. 25).

<sup>231</sup> See [UPICC](#), Art. 5.1.3 (Co-operation between the parties).

termination of the contract, cooperation may also be required to return the land in the agreed condition (see Chapter 6.II regarding return of the land).

5.10. *Monitoring non-performance and remediation.* Even where a contract explicitly deals with remedies, it is impossible for the parties to contemplate every detail of the many possible non-performance situations that may arise. Accordingly, a sound management of non-performance events would define in the contract a set of generally applicable or specific remedies, bearing in mind the available remedies under the applicable law. Parties are also advised to provide for a mechanism to monitor non-performance and remediation, as a logical continuation of monitoring contract performance (see Chapter 4.V.B). Such mechanisms should evaluate the parties' compliance with the applicable law and the contractual obligations but could also provide guidance regarding an appropriate remediation response (e.g. through mitigation and corrective action). Parties may organise in different ways cooperative mechanisms to monitor and manage non-performance events and remedies (e.g. by establishing procedures and monitoring boards) and envisage mechanisms leading, if necessary, to a renegotiation or revision of the contract.

5.11. *Connection to dispute resolution.* Parties' inability to manage non-performance in an orderly manner, or a failure of such attempts, is likely to escalate into a "dispute" (see Chapter 7). Before resorting to adjudicatory forms of resolution (either in arbitration or before a State court), parties should, insofar as possible, prioritise starting with amicable forms of resolution (e.g. negotiations and mediation) as these can be seen as a continuation of the cooperative remedies for non-performance and could conceivably be organised by the parties under the same mechanisms. Grievance mechanisms, moreover, may likewise serve to address non-performance situations at an early stage and seek an appropriate solution.

## **II. EXCUSES FOR NON-PERFORMANCE**

5.12. *Supervening events.* Over the duration of an ALIC, certain events external to the parties' control may occur that totally impede or drastically hamper the performance of the contract. These supervening events draw particular attention because they may provide legal excuses for non-performance or trigger other legal consequences. While all legal systems provide for situations of excused non-performance, they differ widely as to which events provide a valid ground for excuse (i.e. "qualifying events"), their particular definition and scope, and their legal consequences on the parties' obligations and on the contract or related

agreement as a whole. Interpretation by courts also plays an important role due to the importance of the particular circumstances in each case.

5.13. *Flexibility under applicable law.* As a general rule, domestic laws allow parties to regulate possible excuses for supervening events in their contract. Such clauses are common in international commercial practice and may serve multiple purposes, either restricting or enlarging the applicable law's default rules that qualify supervening events and their characteristics and may modify their effects or providing for specific situations.

5.14. *Lack of or invalid contractual clauses.* In the absence of any specific contractual clause to this effect, or if such a clause is not valid, the applicable law determines whether, and to what extent, certain events or circumstances qualify as excuses and what consequences they would entail for the parties' obligations and their contract as a whole. It does not depend on the forum from which recognition of the event or circumstances is sought. The law of the forum may, however, come into play, either as an international mandatory rule or through the public order exception (see Chapter 1).

5.15. *Considerations for legitimate tenure right holders.* The consequences of an excused non-performance event on any legitimate tenure right holders warrants special consideration, especially considering that they may have given up certain rights to land or other resources in order for the investment project to be undertaken. In situations in which such holders are parties to the ALIC or related agreements and undertake certain obligations (see Chapter 2.III), they may avail themselves of an excused non-performance of their obligations. As aggrieved parties, they may not be entitled to claim compensation for the investor's excused non-performance. The same would apply if legitimate tenure right holders stand as third-party beneficiaries.

5.16. *Roadmap.* This Part deals with two possible excuses, specifically (a) force majeure and (b) change of circumstances, and also provides (c) some additional considerations regarding investor-government contracts.

#### **A. Force majeure**

5.17. *General notion.* The impossibility to perform a contract referred to as force majeure generally relates to events arising after the conclusion of a contract which are unpredictable, inevitable and beyond the parties' reasonable control, and objectively prevent one or both of them from performing. When a force majeure event occurs, the defaulting party is excused for the non-performance.

5.18. *Applicable law.* In considering a force majeure clause, parties should be aware that it does not necessarily make the applicable law irrelevant. General clauses referring to force majeure without further specifications will be interpreted in accordance with the applicable law and may also depend on the law of the forum. Moreover, contractual lists of relevant supervening events may need to be designed in different ways depending on the adjudicating body and the legal system.

5.19. *Force majeure clauses.* It is advisable for parties to include in the ALIC and related agreements a force majeure clause tailored to their specific needs. In addition to defining any notice and procedural requirements consistent with the applicable law, the clause generally: (1) defines qualifying events; and (2) spells out the consequences of recognition.

### **1. Events qualifying as force majeure**

5.20. *Definitional elements.* Contract clauses most often contain a general reference to “force majeure” coupled with another term such as “fortuitous case”. Some clauses may also use the terms “adverse factors” or “adverse events”, with or without additional language, such as “alien to the will of the parties” or “beyond the control of the parties”. Sometimes the clauses expressly require that the obligation becomes impossible to perform or leads to that same result. The uncontrollable or inevitable nature of the event is sometimes mitigated when the parties refer to a reasonability test. The clause may also include specifications regarding the causal link between the event and the failure to perform and address whether the impediment is permanent or temporary in nature, a distinction which also shapes the consequences of the impediment’s occurrence.

5.21. *List of qualifying events.* Force majeure clauses often contain a list of qualifying events, which may be useful in interpreting the clause. The parties can highlight that the list is not exhaustive by using expressions like “such as”, “highlighting, among other”, “including, but not limited to”, by inserting suspension points or “etc.”, or by adding a cover-all final description. For certainty, the parties may prefer to make the list exhaustive.

5.22. *Natural and non-natural events.* Contracts with a force majeure clause containing a list of examples of natural events almost invariably include extreme weather events and calamities (e.g. floods, frosts, droughts, storms, fires, earthquakes, and pandemics<sup>232</sup>), often referred to as acts of God. Epidemics and

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<sup>232</sup> For specific guidance on the impact of a pandemic on contractual relations, see UNIDROIT. 2020. Note of the Secretariat on the [UNIDROIT Principles of International Commercial Contracts and the COVID-19 Health Crisis](#).

pests are also often named as qualifying events. Among non-natural events, strikes or other labour conflicts are often expressly mentioned, sometimes including illegal or non-authorised actions. Upheavals ranging from riots to revolutions or armed conflicts, mobs and other social disturbances are additional events that often appear in force majeure clauses, as well as wars, acts of terrorism, insurrections, and civil disturbances.

5.23. *Conflicts with local communities.* Conflicts with local communities which hamper the performance of the contract (e.g. if local communities block access to necessary infrastructure) may qualify as force majeure depending on the contract and the particular circumstances. When such events could have been avoided or were reasonably foreseeable, as may be the case under most contracts in which local communities have indeed been identified as potentially affected by the contract and consulted (see Chapter 2), it is questionable whether unrests or conflicts would in fact amount to qualifying events because these are core issues to be addressed within the investment relationship. Including such events within the scope of force majeure could amount to an exclusion or limitation of liability hidden in the force majeure provision. Parties should be aware that many legal systems impose restrictions on exclusions of liability (e.g. striking them down if they extend to wilful or grossly negligent behaviour of the obligor or limiting the possibility to insert them in standard contracts).

5.24. *Governmental acts.* Acts of governmental authorities, covering changes in legislation or governmental policy, are commonly referred to as qualifying events in force majeure clauses in contracts between private parties. However, this is generally not the case when the government is a party to the contract as the act cannot be considered as being beyond the party's control (Section C below).

## **2. Consequences of the recognition of force majeure**

5.25. *In general.* The occurrence of a qualifying event entails an exemption of liability for the non-performing party to the extent of its impossibility to perform. In many situations, the impossibility will be partial, affecting only some of the obligations due, or will apply for a limited period, involving a suspension of the contract, before leading – if at all – to the termination of the contract.

5.26. *Burden of proof.* Force majeure operates as an excuse (or a defence) for the non-performing party, exonerating the party from performing the obligation affected by the event or precluding the non-affected party from raising a claim for damages.<sup>233</sup> Generally, the party whose performance is allegedly affected by the

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<sup>233</sup> For international commercial contracts, a similar rule is stated in the [UPICC Art. 7.1.7\(4\)](#); and, for international sales contracts, in UNCITRAL. 2010. [CISG](#), Art. 79(5).



force majeure event bears the burden of proving the occurrence of the event, its required characteristics under the contract or applicable law, and the causal link between the event and the non-performance.

5.27. *Suspension of performance.* In some extreme cases, the impediment will prevent any further performance and lead to termination of the contract. Generally, however, the impediment will simply have a suspensive effect as this is – at least initially – a less disruptive approach than outright termination and is often expressly provided for in ALICs. A suspension, however, cannot be expected to have an indefinite duration. Usually the contract's duration is extended for a temporary period of time equal to the duration of the impediment. Alternatively, the contract may foresee that performance is excused after a specified period of time has elapsed or may give a right to the other party to terminate the contract after a period of time. Another possibility is to oblige the parties to renegotiate the terms of their agreement. Further, it may be advisable to indicate the time from which the period starts running: when the impediment arose, when the party became aware of it, or – if an obligation to provide notice exists – when notice was served on the other party.

5.28. *Termination.* Contracts, or less frequently domestic laws, may grant to either one or both parties a right to terminate the contract based on the occurrence of a force majeure event. This right may be immediately available, by limiting it to future performances (see Part III.B.4 below).

5.29. *Right or duty to renegotiate.* Parties may wish to continue their relationship even when unforeseen circumstances impede or severely restrict performance. To this end, a clause of the initial agreement may provide a right or a duty to renegotiate its terms upon occurrence of a specified event. Absent such a provision, the parties may decide at any time to modify their original agreement or conclude another one by mutual consent. While domestic contract laws do not generally provide a right or a duty to enter into a renegotiation process following the occurrence of a force majeure event, some legal systems do recognise that changes in the original circumstances existing at the time of the contract's conclusion may exceptionally give rise to such a right or duty.<sup>234</sup> This may derive from an express legislative provision or from the general principles of good faith, solidarity or cooperation.

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See [UPICC](#), Arts. 7.1.7 (Force majeure) and Art. 6.2.3 (Effects of hardship).

## **B. Changes of circumstances**

5.30. *General notion.* Changing circumstances occurring over the life of the contract may go beyond the risks contemplated at the time of entering into the contract.<sup>235</sup> Situations which fundamentally alter the balance of the relationship – without necessarily impeding performance (e.g. amounting to force majeure) – constitute a frequent ground for non-performance. “Hardship” is a common term used to describe exceptional changes of circumstances that may give rise to a contractual or judicial remedy, or clauses regulating such situations.

5.31. *Diversity of hardship situations under domestic law.* A clause dealing with changing circumstances is necessary due to the great diversity regarding the recognition and treatment of hardship situations in domestic laws. On the basis of a strict adherence to the principle of the stability of the contract as stipulated by the parties, generally, domestic contract laws have neither adopted specific provisions nor developed ad hoc judicial solutions for such situations, and may not favour termination or judicial adaptation. In some situations, the court may either direct the parties to enter into negotiations with a view to reaching agreement on the adaptation of the contract or confirm the terms of the contract as they stand. Few domestic laws require a preliminary renegotiation before they grant the right to go to court in order to claim for judicial adaptation or termination due to a change of circumstances.

5.32. *Fundamental alteration.* In those legal systems where hardship situations give rise to a legal remedy, strict considerations apply in assessing the circumstances and the effective fundamental alteration of the contract. In practice, a fundamental alteration may manifest in a substantial increase in the cost of performance, or a substantial decrease in the value of the performance received. Market disruptions which adversely alter a party’s financial standing or lead to global price fluctuations are a common cause of a change of circumstances that may excuse contractual non-performance. In ALICs, a substantial increase in costs may, for instance, fall on the investor as a result of the introduction of new safety regulations requiring far more expensive production procedures. The same may affect the grantor, for instance, where it has agreed to provide the investor with certain facilities (e.g. water supply) and drastic changes in market conditions greatly increase the cost of doing so.

5.33. *Timing and assumption of the risk.* In order to invoke hardship, the events in question must be beyond the control of the disadvantaged party. They must

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<sup>235</sup> See also UNCITRAL. 2001. [Legislative Guide on Privately Financed Infrastructure Projects](#), p. 142, paras. 121-130; p. 199, para. 35; FAO. 2016. [Governance of Tenure Technical Guide No. 7](#), p. VIII-X.

*Managing the contractual relationship during implementation:  
dealing with non-performance and remedies*

also take place or become known to the disadvantaged party after the conclusion of the contract, otherwise, it would have been able to take them into account when entering into the contract. Further, hardship cannot be invoked if the disadvantaged party had assumed the risk of the change in circumstances, either expressly or as a result of the very nature of the contract.

5.34. *Performance still to be rendered.* Where the fundamental alteration in the equilibrium of the contract occurs when performance has been only partially rendered (e.g. the investor has paid the necessary fees for the land but has not yet fulfilled its obligation to build certain infrastructure, such as an access road), hardship can only apply to the parts of performance still to be rendered, and for the remaining duration of the contract.

5.35. *Lack of hardship clause in the contract.* In the case of a qualifying “change of circumstances” and absent a specific hardship clause in the contract, the disadvantaged party should first request renegotiations to adapt the original terms of the contract. Only upon failure to reach agreement within a reasonable time can either party resort to the court with a view to adapting the contract to the changed circumstances. The request must be made as quickly as possible after the time at which the hardship is alleged to have occurred. It does not by itself entitle the disadvantaged party to withhold performance, nor the counterparty to stop fulfilling its own obligations.

5.36. *Dealing with changes of circumstances in the contract.* To achieve clarity and flexibility, parties are advised to consider the changes of circumstances that may occur during the contract’s duration and deal with this issue in the contract. A “hardship clause” will define what circumstances constitute hardship and what consequences will ensue. Hardship situations are often addressed under “adaptation clauses” which require periodical review and negotiations to possibly restructure the contract.

### **C. Considerations in investor-government contracts**

5.37. *In general.* In investor-government contracts, a government grantor may seek to excuse its non-performance due to a supervening event or change in circumstances. Whether the claimed event is serious enough to wholly or partially excuse the non-performance, and for how long, normally depends on the applicable law. If the government seeks recognition of the change within its own jurisdiction, and the applicable law is not its own, the governing law the parties chose in the contract may come into play.

5.38. *Civil disturbances.* Governments may seek to suspend contractual performance in view of internal unrest, or in response to public sentiment

accompanied by acts of violence directed at the investor. Civil disturbance on its own, however, which can range from rioting to looting to armed conflict, does not excuse a government from contractual non-performance. Governments that sign investment treaties are obliged to accord full protection and security to qualifying investors. To meet this obligation, they are required to exercise due diligence in minimising the damage caused to the investor by the civil disturbance. Government inaction in the face of civil disturbance will expose the government to a potential claim for the violation of the applicable investment treaty. Moreover, particularly serious acts of civil disturbance amounting to armed conflict, such as murder, may be attributed to the government, exposing it to further liability.<sup>236</sup>

5.39. *Necessity situations.* Given that a situation of necessity, created by a “grave and imminent peril”,<sup>237</sup> may be brought about by force majeure, a change of circumstances, qualifying event, or even civil disturbance, there may be some overlap between necessity and other excuses for contractual non-performance. That said, additional conditions must be met before contractual non-performance due to necessity will not engage a government’s responsibility for internationally wrongful conduct. First, there must exist a “grave and imminent peril”. Second, contractual non-performance must be the only way for the government to address this “grave and imminent peril”. Third, contractual non-performance must not seriously impair an essential interest of the international community. And fourth, the government must not have contributed to the situation of necessity. Given the stringency of conditions attached to the defence of necessity, contractual non-performance is only excused on the ground of necessity in exceptional circumstances, such as the collapse of the national economy.

5.40. *Relation with stabilisation clauses.* Government performance of a contract may be subject to a stabilisation clause (see Chapter 4.IV.C). Whether and how a stabilisation clause affects liability for contractual non-performance by the government depends on its wording.

### III. REMEDIES FOR BREACH

5.41. *Unexcused non-performance.* When non-performance is not excused, the aggrieved party or parties and other stakeholders may be entitled to seek relief against the party or parties in breach of the contract.

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<sup>236</sup> International Law Commission (ILC). 2001. [Responsibility of States for Internationally Wrongful Acts](#), Arts. 4-8.

<sup>237</sup> *Id.*, Art. 25.

5.42. *Roadmap.* This Part: (a) covers the role of the aggrieved party's conduct; (b) provides an overview of remedies; and (c) considers the situations arising from each party's breach (*i.e.* by the investor, the grantor, and, where applicable, the legitimate tenure right holders or other local communities) and the corresponding remedies available for the aggrieved party or parties. For the latter, breaches will be reviewed with reference to the main obligations identified for each party under Chapter 4 on Rights and Obligations of the Parties, with an analysis of common defaults and concerns (including the occurrence of interference by another party) and guidance regarding possible appropriate remedies.

#### **A. The role of the aggrieved party's conduct**

5.43. *Behaviour of the aggrieved party.* The behaviour of the aggrieved party, depending on the applicable law, may have an impact on access to specific remedies. These may be denied or their scope reduced if the aggrieved party has interfered with the other party's performance, has contributed to the breach or has failed to mitigate the negative consequences of the breach. For instance, if the aggrieved party contributed to the breach, it might not be able to seek termination or specific performance, or might be required to bear part of the additional costs that the breaching party must incur when performing, which can lead to a price reduction.

5.44. *Interference.* Interference generally contemplates two distinct situations.<sup>238</sup> In the first, one party is unable to perform because the other party's interference makes performance in whole or in part impossible. For instance, the investor is responsible for building a learning centre but the government (*i.e.* the grantor) does not deliver the necessary authorisation to build the centre. In the second situation, non-performance results from an event the risk of which is expressly or implicitly allocated by the contract to the party alleging non-performance. Such an event may, for instance, result from communities which obstruct access to facilities, or from a city council which fails to deliver the necessary authorisations to build the infrastructure, and the contract allocates the risk of such events to the government.

5.45. *Contribution to breach.* The behaviour of the aggrieved party may contribute to the obligor's breach. Such as when the aggrieved party fails to comply with obligations which are necessary to the expected output. When the aggrieved party subsequently seeks damages, its own contribution to the breach may reduce recoverable damages according to the degree of fault of each party

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<sup>238</sup> [UPICC](#), Art. 7.1.2 (Interference by the other party).

and the causal link between acts or omission and defective performance.<sup>239</sup> To promote cooperation and to avoid opportunistic behaviour, some legal systems may make only certain remedies available to the aggrieved party that contributed to the breach.

5.46. *Duty to mitigate.* When facing a non-performance situation, the aggrieved party should not remain inactive when action could avoid or mitigate the damage. Indeed, many legal systems recognise a duty to do so, often known as the duty to mitigate.<sup>240</sup> Depending on the applicable law, the failure to mitigate may lead to the exclusion of some remedies or a reduction in the amount of damages available. When a duty to mitigate is not recognised, some forms of cooperation by the aggrieved party may be based on general principles of contract law, like a duty to cooperate or good faith. When recognised, mitigation can result in the adoption of corrective measures by the aggrieved party or by a third party at the breaching party's expense. For instance, if the contract provides for the investor's cooperation and approval of the infrastructures, the investor's failure to inspect the infrastructure and give notice in a timely manner of any non-conformity may deprive it of any remedy, including remedies in kind, price reduction and damages.

5.47. *Compliance with the duty to mitigate.* An aggrieved party's duty to mitigate the consequences of the breach is accepted by many domestic systems and international codifications, although divergences exist. Compliance with this duty normally implies the right to recover expenses reasonably incurred to mitigate the harm caused by the breach. When a duty to mitigate is recognised by law, failure to mitigate prevents the aggrieved party from receiving full compensation of damages or from claiming those damages due to such failure. Special attention is paid to timely substitute transactions as a means to reduce the extent of increasing losses due to price fluctuations. The duty to mitigate operates in bilateral as well as in multiparty and related contracts (see Chapter 2.III). Clearly, multiparty and related contracts may require some adjustments when defining the scope and objectives of the duty to mitigate, as more parties may be in a position to take mitigation measures against the occurrence of loss.

## **B. Overview of remedies**

5.48. *Roadmap.* Remedies can be classified into four broad categories according to their content and to the extent to which they are apt to ensure compliance with contractual commitments. This section will consider, in turn, the following

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<sup>239</sup> *Id.*, Art. 7.4.7 (Harm due in part to aggrieved party).

<sup>240</sup> [UPICC](#), Art. 7.4.8 (Mitigation of harm).

remedies: (a) in-kind remedies; (b) monetary remedies; (c) renegotiation; and (d) termination and restitution.

## **1. Remedies in-kind**

5.49. *Same or equivalent benefit expected.* Remedies in-kind aim to provide the aggrieved party with the same or equivalent benefit expected from contract performance. These may include enforcing a right to performance applying corrective measures or granting additional time for performance. Their use maintains the contractual relationship and represents a cooperative second-best solution when the initial terms of the exchange cannot materialise. They are particularly relevant for long-term relationships with impact on local communities, involving high value investments in land and infrastructure. Any other loss arising from the breach despite the application of the remedy in-kind (e.g. loss for delay in performance) is covered by awarding damages to the aggrieved party.

5.50. *Withholding performance.* Depending on the applicable law, the remedy of withholding performance may be used when one party breaches the contract before the aggrieved party has to perform pursuant to the contract schedule. In general, this remedy serves to exert pressure to encourage the other party's performance. Its impact on the development of the contractual relationship depends on the type of performance withheld, in particular whether it relates to obligations instrumental to the other party's performance. The investor may, for instance, withhold payments to the grantor if access to certain facilities is not granted. In the case of non-conforming acts of performance by the investor, withholding performance may be more difficult because the grantor's performance has usually already occurred (i.e. delivery of the land). In some situations, however, the grantor may withhold other types of performance, such as delivery of physical or other inputs (e.g. technical assistance, access to the water). It may also be used as a prelude to future termination especially when circumstances make it apparent that there will be a fundamental breach.

5.51. *Right to specific performance.* There is a generally accepted principle that payment of money which is due under a contractual obligation can always be demanded and, if the demand is not met, enforced by legal action before a court. Due to the binding character of the contract, each party should as a rule also be entitled to require performance of non-monetary obligations, the so-called "specific performance" (e.g. an order to take immediate action to deliver the land or to build a road within a specific time frame as per the contract). In civil law States, this is indeed possible. For instance, if the investor had promised to build certain facilities and then decides not to build them, the other party may ask for specific performance, unless it is excessively costly or otherwise an inappropriate

remedy, in which case damages can be sought or a replacement solution contemplated. By contrast, common law systems allow enforcement of non-monetary obligations only in special circumstances and prefer to grant damages to the party suffering from the non-performance.

5.52. *Limitations on right to specific performance.* Applicable law may restrict the use of the remedy of specific performance where it is (a) not physically possible (e.g. goods to be delivered have been destroyed); (b) unreasonably burdensome (e.g. tons of specialty seeds, due to be segregated from ordinary seeds, have in fact been commingled); (c) legally unenforceable for its exclusively personal character (e.g. technical assistance concerning a new agricultural methodology only known by a specific provider); or (d) because the aggrieved party's request has not been timely.<sup>241</sup> The occurrence of harm is not a prerequisite to obtain specific performance, nor does the breach need to be fundamental. However, depending on applicable law, the possibility to claim replacement of goods may be restricted to cases where a fundamental breach has occurred.<sup>242</sup>

5.53. *Additional time for performance.* In a wide range of situations, one party fails to perform an obligation within the period agreed in the contract and the other party is willing to give extra time for performance, preferring a late performance to no performance at all (e.g. a delayed payment of rental fees by the investor to the grantor). The possibility to accept a late performance generally depends on the type of obligation, whether fundamental or not, and the interests involved. Parties should consider how to deal with late performance in the contract.<sup>243</sup> Granting an extension of time may occur after a request for performance made on a private basis between the parties. It may also occur through the court or an alternative dispute resolution mechanism (e.g. arbitration). Some legal systems, moreover, provide for a procedure through which the party entitled to performance could give the performing party a second chance, without prejudicing other remedies, such as the right to recover damages. The procedure generally involves a notice by the aggrieved party to allow an additional period of time for performance, during which resorting to other remedies will not be possible.

5.54. *Corrective measures and the right to cure.* Corrective measures include repair, replacement or other cure of defective performance by the non-performing

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<sup>241</sup> [UPICC](#), Art. 7.2.2 (Performance of non-monetary obligation).

<sup>242</sup> For international sales contracts, a similar rule is stated in UNCITRAL. 2010. [CISG](#). Art. 46(2).

<sup>243</sup> See [UPICC](#), Art. 7.1.5 (Addition period for performance).



party at its own expense, and give the aggrieved party what it is entitled to expect under the contract. Corrective measures are strongly advisable insofar as they favour the preservation of the contract. They may be required by the aggrieved party as part of its right to performance.<sup>244</sup> In some legal systems,<sup>245</sup> the breaching party, under certain circumstances, has a right to cure even after the time for performance has passed. In order to do so, it must give notice of cure, and that notice must be reasonable with regard to its timing and content as well as to the manner in which it is communicated. This may result in additional time for performance, at least for a brief period, beyond that stipulated in the contract.

5.55. *Limitations on the right to cure.* Under certain circumstances, however, cure may not be allowed. For instance, when it would not be reasonable to permit the non-performing party to make another attempt at performance. This would be the case when the failure amounts to a fundamental non-performance, as well as if the aggrieved party can demonstrate a legitimate interest in refusing cure. For example, this legitimate interest may arise if it is likely that, when attempting cure, the non-performing party will cause damage to a person or property. On the other hand, a legitimate interest is not present if, due to the non-performance, the aggrieved party has simply decided that it does not wish to continue contractual relations. Most legal systems have a principle of full compensation for damage suffered.<sup>246</sup> An investor who successfully cures remains liable for any harm that, before cure, was occasioned by the non-performance, as well as for any additional harm.

5.56. *Contractual clause on the right to cure.* Parties are advised to provide in the contract for an opportunity to cure in case of alleged defaults and set up the corresponding procedure, in particular when the contemplated breach is a ground for termination. The procedure may be agreed by consultations between the parties, or set by the aggrieved party, through a notice indicating a specific time within which to complete the cure.

## **2. Monetary remedies**

5.57. *Introduction.* There are some remedies that do not provide the aggrieved party with the same kind of expected benefit but instead a monetary value in lieu of that benefit. This is the logic, for example, behind damages as a stand-alone remedy or a price reduction in the case of defective or partial performance.

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<sup>244</sup> *Id.*, Art. 7.2.3 (Repair and replacement of defection performance).

<sup>245</sup> *Id.*, Art. 7.1.4 (Cure by non-performing party).

<sup>246</sup> *Id.*, Art. 7.4.2 (Full compensation).

(a) *Price reduction*

5.58. *In general.* In contractual practice, a price reduction may be sought in case of breach for non-conformity or for partial delivery. In general, the remedy functions to preserve the exchange and restore the balance between the values of the exchanged performances. It is used when one of the performances is defective or incomplete and the aggrieved party is uninterested in or unable to obtain specific performance, nor contract termination. A fundamental breach is usually not required to seek a price reduction.

5.59. *Application.* The contract may define criteria for price reduction and often include a penalty dimension with an escalating adjustment of the price depending on the seriousness of the breach. A price reduction may be barred, however, by the obligor's right to cure defects, when recognised under the applicable law.

5.60. *Examples.* Price reduction may be applied in ALICs when the grantor fails to fulfil its obligations; for instance, if it fails to build the promised facilities. In which case, the amount of the instalments to be paid by the investor may be reduced. It may also apply when the investor must bear increased costs due to the counterparty's actions or inactions (e.g. government fails to repair the broken irrigation system which it owns).

(b) *Damages*

5.61. *In general.* Money damages are exclusively designed for breach and could not apply as a remedy for an excused non-performance. They may be sought in combination with other remedies or as a stand-alone remedy, in which case the objective is normally to put the aggrieved party in the position it would have occupied had the contract been performed as specified. Damages would typically include costs incurred and lost profits.

5.62. *Proof of loss or harm.* Unlike other remedies where breach of contract may suffice, for damages to be awarded the aggrieved party must prove that it has suffered a loss or harm. However, some legal systems reverse the burden of proof: the aggrieved party must simply prove the breach and the breaching party must prove that no harm has been caused or that it was not caused by the breach. In assessing whether a breach has caused loss or harm, legal systems may use several criteria: full compensation, certainty, and foreseeability are the most common.

5.63. *Full compensation.* Full compensation is a generally admitted principle and may relate to loss incurred and any gain of which the aggrieved party was deprived where there is found to be adequate causation. Such harm may be

understood in a wide sense beyond pecuniary effects, including, for instance, physical suffering or emotional distress.

5.64. *Certainty.* Compensation is due only for harm established with a reasonable degree of certainty.<sup>247</sup> For example, the mere chance of profits the investor alleges it has lost due to the delayed compliance by the grantor might fail the certainty test unless there was a concrete negotiation or a binding contract for the purchase of the production with a third party. Many legal systems recognise the loss of a chance but only in proportion to the probability of its occurrence.

5.65. *Foreseeability.* The non-performing party is normally liable only for harm that was either foreseeable or which could have been reasonably foreseen at the time of conclusion of the contract.<sup>248</sup> Parties can define in detail what constitutes foreseeable losses. Grantors are advised to note the possibility of contractual provisions allowing for the investor's recovery of unforeseeable damages caused by the grantor's breach.

5.66. *Amount of damages.* If damages are owed, then all damages should generally be recovered, including both actual losses and lost profits. As a general rule, damages normally include the loss in value of the expected performance (though discounted for costs avoided by not having to counter-perform). However, this loss may not be recovered if a price reduction has already been obtained for the same loss in value. When the aggrieved party engages in a substitute transaction, depending on applicable law, damages normally amount to the difference between contract price and cover price (the price obtained in the substitute transaction).

5.67. *Reliance.* Some legal systems also contemplate another method of damages assessment whereby the aggrieved party has a right to damages based on that party's "reliance interest", which consists of expenditures made in preparation for performance or in performance, less any loss that the party in breach can prove with reasonable certainty that the aggrieved party would have incurred had the contract been performed.

5.68. *Contractual clauses on types of damages.* Parties are normally entitled by the applicable law to determine the type and amount of recoverable damages through contractual clauses. Disclaimers can define liability standards or concern damages. Parties can limit recoverable damages and modify the full compensation principle by, for example, excluding or limiting consequential damages.

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<sup>247</sup> [UPICC](#), Art. 7.4.3 (Certainty of harm).

<sup>248</sup> [UPICC](#), Art. 7.4.4 (Foreseeability of harm).

5.69. *Contractual clauses on the amount of damages.* Parties can draft clauses to predefine the amount of damages in case of breach. These may help lower litigation costs (e.g. producing evidence of and quantifying damages) and also tend to induce compliance, especially in listing values and costs that courts would be unable to assess (e.g. immaterial damages, costs of investments done in reliance of execution of the contract, etc.).

5.70. *Penalty clauses.* Penalty clauses provide for the payment of a predetermined amount of money in case of non-performance irrespective of the actual harm suffered. Depending on the clause, it may have the effect either of increasing or limiting – though in practice, this is very rare – the compensation due to the aggrieved party. While clauses intended to facilitate the recovery of damages are common practice and generally accepted under domestic laws, some legal systems forbid clauses that intend specifically to operate as a deterrent against non-performance by way of a penalty. Other legal systems allow such clauses but entitle the court to reduce the amount due when it is deemed to be grossly excessive under the circumstances.<sup>249</sup>

5.71. *Interplay between damages and penalty clauses.* Depending on the legal system, the freedom to set monetary penalties resulting from a breach may face various bans, limits, or review. Freedom of contract may also be limited with respect to the scope of disclaimers made in relation to the nature of the breach (fundamental or not) or the conduct of the breaching party (intentional or reckless).

(c) *Interest and late payments*

5.72. *In general.* In some legal systems, pecuniary obligations, including rental fees for the land or price for products or damages, are combined with the obligation to pay interest. Interest is often provided by contract law both at the domestic and international level for delay of payment of monetary obligations, including those consisting of prices.<sup>250</sup> Thus, where available, the right to interest arises whenever the party exercises the right to demand a delayed payment. If the party opts for termination, the accrual of interest may be liquidated having regard to the delay occurred in obtaining the price payment, due to time needed for the substitute transaction. On the one hand, the payment of interest does not generally require specific evidence of loss suffered by the aggrieved party. On the other hand, it does not reduce any concurrent right to claim additional damages suffered by the aggrieved party. In the latter case, the claimant is requested to

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<sup>249</sup> [UPICC](#), Art. 7.4.13 (Agreed payment for non-performance).

<sup>250</sup> *Id.*, Art. 7.4.9 (Interest for failure to pay money).

provide specific evidence and the damages need to comply with the usual standards of foreseeability and certainty.<sup>251</sup>

### **3. Renegotiation and adaptation of the agreement**

5.73. *Introduction.* While certainty in contractual obligations is important for meeting parties' expectations, thereby supporting the principle of the stability of the contract, certain circumstances may be agreed by the parties, or provided in the applicable law, which may lead to a renegotiation or an adaptation of the agreement.

5.74. *Risk mitigation mechanisms.* To address evolving circumstances without having to engage in an overall renegotiation of the contract, parties should adopt risk mitigation mechanisms by inserting a periodic adaptation or revision clause into their contract. For example, a price revision clause may be used to limit risks (e.g. of currency fluctuations or inflation). These clauses often provide for an automatic price adjustment according to a pre-established schedule which is triggered by a depreciation or appreciation of the currency in which the price is denominated above an agreed threshold, usually expressed as a percentage of the unit price. Other price adjustment mechanisms may be used to limit the risks associated with market fluctuations.

5.75. *Renegotiations and periodic review.* Renegotiations and periodic reviews by the parties are possible during performance of the contract provided each of them agrees at that time or it is provided for in the contract. Parties may agree in the contract that renegotiation will take place or may be considered upon the occurrence of certain events, and according to a pre-established procedure. Parties may also include a provision on periodic review, which can be meant to occur at periodic intervals or on the occurrence of certain events (see Chapter 4.V.A on periodic review).

### **4. Termination**

5.76. *Termination as a remedy for non-performance.* The term "termination" (or equivalent terms found in contract practice) may cover a range of situations, from the termination of the contract at the expiration date or earlier by the mutual agreement of the parties, or by either of the parties in the exercise of a right provided by agreement or by the law. Chapter 6 deals with termination upon the contract's expiration and by mutual agreement. This section covers termination as a remedy for non-performance, whether excused or for breach.

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<sup>251</sup> *Id.*, Arts. 7.4.3 (Certainty of harm) and Art. 7.4.4 (Foreseeability of harm).

5.77. *In general.* Termination is a drastic remedy for a breach of contract. Indeed, it may have effects far beyond the specific contractual relationship and impact other stakeholders. In long-term relationships, especially those with several contracting parties or involving related contracts, parties may be well advised to agree in advance that termination may not be sought before a certain lapse of time, during which the parties will resort to cooperative remedies, including an opportunity to cure the breach by the defaulting party.

5.78. *Fundamental breach.* Termination would normally only operate in case of “material” breach (also referred to as “substantial” or “fundamental” breach). Some legal systems limit the use of contract termination to instances in which the breach meets certain criteria: it substantially deprives the aggrieved party of what it was entitled to expect under the contract (within the limits of foreseeability); is intentional or reckless; or is such that the aggrieved party has no reason to believe that any performance will be forthcoming.<sup>252</sup>

5.79. *Termination and penalty clauses.* Depending on the circumstances, penalty clauses may be more appropriate than termination. There are a myriad of grounds for termination in ALICs (e.g. disputes regarding rights over the investment area, such as with the local community; disrespect for the prescribed harvest conditions; failure to comply with contractual obligations within a given period of time; failure to initiate the operation of the land within a given period of time, etc.).

5.80. *Procedure.* The procedure to terminate a contract depends on the applicable law: the party seeking termination may need to file a claim in court or a written notice directed to the other party may suffice. Applicable law may allow the parties to follow an extra-judicial procedure if termination clauses are included in the contract (enabling termination by notice) or, if a notice is formally addressed to the party in breach, assigning a period of time for performance. Legal systems also differ about the time within which the notice of termination should be given to the party in breach. At the international level, the aggrieved party is required to provide notice within a reasonable time after becoming aware of the breach.<sup>253</sup> The use of notice is important when it is coupled with a grace period in which the party in breach may perform, thereby preventing termination from occurring, at least for that period. This last resort remedy may play an important function in long-term contracts with important investments by either party.

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<sup>252</sup> [UPICC](#), Art. 7.3.1 (Right to terminate the contract).

<sup>253</sup> For international commercial contracts, a similar rule is stated in [UPICC](#) Art. 7.3.2(2) and, for international sales contracts, in UNCITRAL. 2010. CISG, Art. 64(2)(b).

5.81. *Total versus partial termination.* Where the contract consists of a series of obligations and one party fails to perform one of these obligations, depending on the applicable law, the aggrieved party may not have the right to terminate the whole contract. In instalment contracts, for instance, if one of the due instalments is grossly non-conforming, but all the others conform to contract specifications, termination could address the non-conforming instalment only. Depending on whether termination is total or partial, all obligations or only some will be affected by termination. Only performances affected by termination need to be returned. Indeed, in the case of total termination, because parties are released from all obligations, if some have already been performed, these must all be returned. In case of partial termination, obligations not affected by termination (e.g. past banana deliveries) remain in place and performances not affected do not need to be returned.<sup>254</sup>

5.82. *Effects.* Contract termination generally releases parties from the obligations under the contract but not from post-contractual obligations, which are provided by applicable law and may persist even after termination. For example, the parties may agree that, after the date of termination of the ALIC, the investor should remove his assets located on the land that had been granted within a given period of time. Similarly, some development obligations (e.g. to build or to maintain infrastructure) may remain in force after the termination of the contract.

5.83. *Processing obligations.* Some investment contracts or related agreements include agro-industrial processing obligations. This is notably the case for the production of perishable commodities which must be quickly processed or for ventures that target the domestic market (see Chapter 4.II.C). In such situations, the parties should clearly indicate in the contract the consequences of each type of breach on the overall investment contract. The same is true if a contract requires the investor to sell a percentage of the produce locally and the investor breaches the obligation. In such cases, termination of the contract would not be appropriate, and a penalty clause would be preferable, provided such clauses are valid under the applicable law.

5.84. *Termination and damages.* When based on breach, termination does not normally preclude any claim for damages. It does not affect any provision in the contract for dispute settlement or which governs the parties' rights and obligations following termination or breach (e.g. duty to pay penalties for contract repudiation or duty to mitigate damages resulting from the breach).

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<sup>254</sup> See [UPICC](#), Art. 3.2.13 (Partial avoidance).

## C. Breaches and related remedies in the context of agricultural land investment contracts

5.85. *Introduction.* This section presents an overview of the most common breaches which may occur in connection with the various types of rights and obligations identified in the Guide (see Chapter 4). It includes a table flagging those breaches, the respective obligations and their possible corresponding remedies, bearing in mind that the applicable remedies designated by the parties in the contract are subject to any mandatory provisions. Absent the parties' designation in the contract, mandatory and default rules of applicable law will determine the available remedies. Parties may design and use self-executing remedies or may need to resort to legal action to enforce a contractual or legal remedy. Even without a contractual link to the investor, legitimate tenure right holders and local communities (LRH & Loc.Com) may, for example, claim rights as third-party beneficiaries (see Chapter 2.III.C) and seek to enforce those rights or may resort to grievance mechanisms (see Chapter 7.I).

5.86. The table addresses the remedies for investor's breach of obligations (1) and the remedies for grantor's breach of obligations (2). However, it does not cover the following: non-performance events which qualify as force majeure or other grounds of excused non-performance; remedies for breaches of obligations under the domestic regulatory framework (e.g. tax law, labour law, human rights, environmental protection provisions, etc.), under customary law (e.g. indigenous rights or environmental protection), or under international investment agreements; and remedies arising outside the contract (e.g. tort or property right claims).

### 1. Grantor and legitimate tenure right holders and local communities' remedies for investor's breach of obligations

Investor's breach of obligations	Grantor's remedies	LRH & Loc.Com's remedies
<b>OBLIGATIONS REGARDING LAND TENURE</b>		
– non agreed use, overuse, misuse of resources (e.g. timber, below ground resources, water, etc.)	<i>Depending on the seriousness of the breach, in particular its possible impact on LRH &amp; Loc.Com. and the environment</i>	<i>Depending on their participation as parties to ALIC contract, as parties to a related agreement or as third-party beneficiary</i>



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<ul style="list-style-type: none"> <li>- non agreed land use (e.g. crops)</li> <li>- infringement of LRH &amp; Loc.Com's access rights to land, to resources or to infrastructure</li> </ul>	<ul style="list-style-type: none"> <li>- Request to cure within a period of time</li> <li>- Withholding counter performance of supply of agreed inputs or services</li> <li>- Adaptation of the contract, e.g. increased monetary payments or social infrastructure, reallocation of related rights, such as water rights</li> <li>- Recovery of damages</li> <li>- Renegotiation of the contract</li> <li>- Termination</li> </ul>	<ul style="list-style-type: none"> <li>- Request to cure within a period of time</li> <li>- Adaptation of the contract e.g. increased monetary payments or social infrastructure, reallocation of related rights</li> <li>- Recovery of damages</li> <li>- Termination</li> <li>- Remedies under community-investor agreements</li> <li>- Remedies resulting from the exercise of grantor's remedies<sup>255</sup></li> <li>- Complaints under grievance mechanisms</li> </ul>
<b>OBLIGATIONS REGARDING PROJECT DEVELOPMENT</b>		
<ul style="list-style-type: none"> <li>- Breaches in relation to delivery of agreed goods or performance of agreed services</li> </ul> <p>e.g. failure to meet quantitative production targets, to expand the cultivated land area or to build and operate a processing facility</p>	<p><i>Depending on type of breach (delayed - defective - failed performance) and the type of obligation and whether fundamental or not</i></p> <ul style="list-style-type: none"> <li>- Granting additional time for performance</li> <li>- Request to cure within a period of time</li> <li>- Withholding counter performance of supply of agreed inputs or services</li> <li>- Legal action for specific performance [depending on legal system]</li> <li>- Recovery of damages</li> <li>- Renegotiation / adaptation of the contract</li> <li>- Termination</li> </ul>	

<sup>255</sup> For example, termination of the investor/Government-grantor contract will in principle entail the termination of the related or linked contract between investor and LRH & Loc.Com.

<b>OBLIGATIONS REGARDING SOCIAL AND ECONOMIC ISSUES</b>		
<b>Monetary contributions</b>  - Breaches in relation to payment of monetary contributions (rental fees/revenues, taxes, utilities fees etc.)	<i>Depending on type of breach: delayed, partial payment or total failure to pay</i>  - Granting additional time for performance - Withholding counter performance of supply of agreed inputs or services - Legal action for payment - Recovery of damages - Termination	
<b>Employment creation, access to jobs and labour rights</b>  - Failure to meet job targets - Failure to provide agreed services to employees (e.g., medical care, housing, or education) targets - Failure to meet local content and processing requirements targets	- Adaptation of the contract: e.g. increased monetary payments or social infrastructure - Request to cure within a period of time - Renegotiation / adaptation of the contract - Termination	- Request to cure within a specified period of time - Recovery of damages - Renegotiation / adaptation of the agreement - Remedies under community-investor agreements - Remedies resulting from the exercise of grantor's remedies - Complaints under grievance mechanisms
<b>Contract farming, outgrower schemes and supply chain relations</b>  - Failure to establish an outgrower scheme according to certain specifications and timelines	- Request to cure within a period of time - Termination	- Complaints under grievance mechanisms

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<ul style="list-style-type: none"> <li>- Breach of obligations in relation to outgrower schemes (e.g. quantity, quality standards and price of produce to be purchased, inputs and capacity support to be supplied to farmers and related price, credit conditions etc.)</li> </ul>	<ul style="list-style-type: none"> <li>- Request to cure within a period of time</li> <li>- Termination</li> </ul>	<ul style="list-style-type: none"> <li>- Remedies under contract farming agreements with investor</li> <li>- Remedies resulting from the exercise of grantor's remedies</li> </ul>
<p><b>Community development funds and social infrastructure</b></p> <ul style="list-style-type: none"> <li>- Failure to provide agreed monetary or in-kind contributions for social infrastructure and community projects (e.g. schools or clinics)</li> </ul>	<ul style="list-style-type: none"> <li>- Request to cure within a specified period of time</li> <li>- Adaptation of the contract: e.g. increased monetary payments</li> <li>- Termination</li> </ul>	<ul style="list-style-type: none"> <li>- Request to cure within a period of time</li> <li>- Remedies under community-investor agreements</li> <li>- Remedies resulting from the exercise of grantor's remedies</li> <li>- Complaints under grievance mechanisms ***</li> </ul>
<b>OBLIGATIONS REGARDING THE ENVIRONMENT</b>		
<ul style="list-style-type: none"> <li>- Non agreed use, overuse, misuse of resources: water</li> <li>- Breach of obligations in relation to environmental protection – e.g. regarding cultivation / farming practices, wastes</li> <li>- Infringement of LRH &amp; Loc.Com's rights with regard to environmental sustainability, traditional knowledge and cultural heritage</li> </ul>	<p><i>Depending on seriousness of the breach</i></p> <ul style="list-style-type: none"> <li>- Request to cure within a period of time</li> <li>- Adaptation of the contract: e.g. increased monetary payments or social infrastructure, reallocation of water rights</li> <li>- Recovery of damages</li> <li>- Renegotiation of the contract</li> <li>- Termination</li> </ul>	<ul style="list-style-type: none"> <li>- Request to cure within a period of time</li> <li>- Recovery of damages</li> <li>- Renegotiation / adaptation of the agreement</li> <li>- Remedies under community-investor agreements</li> <li>- Remedies resulting from the exercise of grantor's remedies</li> <li>- Complaints under grievance mechanisms</li> </ul>

<b>OBLIGATIONS REGARDING PHYSICAL SECURITY</b>		
<ul style="list-style-type: none"> <li>- Breach of agreed security activities (e.g. human rights abuses and misappropriation)</li> </ul>	<ul style="list-style-type: none"> <li>- Mitigation of risks</li> <li>- Request to cure within a specified period of time</li> <li>- Recovery of damages</li> <li>- Renegotiation of the contract</li> <li>- Termination</li> </ul>	<ul style="list-style-type: none"> <li>- Complaints under grievance mechanisms ***</li> </ul>
<b>OBLIGATIONS REGARDING MONITORING AND IMPLEMENTATION</b>		
<ul style="list-style-type: none"> <li>- Failure to deliver agreed environmental, financial and non-financial reports to parties</li> <li>- Failure to make agreed financial and non-financial reports available to the public and LRH &amp; Loc.Com's</li> </ul>	<p><i>Depending on type of breach: delayed reporting, partial reporting, inaccurate reporting total failure to report</i></p> <ul style="list-style-type: none"> <li>- Granting additional time for performance</li> <li>- Request to cure within a period of time</li> <li>- Withholding counter performance of supply of agreed inputs or services</li> <li>- Legal action for specific performance [depending on legal system]</li> <li>- Recovery of damages</li> <li>- Termination</li> </ul>	

## 2. Investor's remedies for grantor's breach of obligations

<b>Grantor's breach of obligations</b>	<b>Investor's remedies</b>
<b>OBLIGATIONS REGARDING LAND TENURE</b>	
<ul style="list-style-type: none"> <li>- Breach of option clause or preference clause regarding grant of additional land in</li> </ul>	<p><i>Depending on whether the breach is fundamental or not</i></p> <ul style="list-style-type: none"> <li>- Recovery of damages</li> <li>- Renegotiation / adaptation of the contract</li> <li>- Termination</li> </ul>

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<p><b>Breaches in relation to land tenure and related rights</b></p> <ul style="list-style-type: none"> <li>- Regarding access / use of agreed land and agreed resources</li> <li>- Regarding the provision of agreed facilities</li> <li>- Regarding the provision of agreed utilities</li> </ul> <p><b>Breaches in relation to infrastructure</b></p> <ul style="list-style-type: none"> <li>- Regarding the provision of agreed infrastructure and maintenance - e.g. public roads and water, electricity and waste utilities - Or investment-specific infrastructure</li> </ul>	<p><i>Depending on type of breach (delayed - defective - failed performance) and type of obligation and whether fundamental or not</i></p> <ul style="list-style-type: none"> <li>- Granting additional time for performance</li> <li>- Withholding payments of rentals</li> <li>- Withholding counter performance of supply of agreed inputs or services</li> <li>- Taking action to remedy (e.g.: repair of irrigation system)</li> <li>- Reduction of rentals or other financial obligation</li> <li>- Recovery of damages</li> <li>- Renegotiation / adaptation of the contract</li> <li>- Termination</li> </ul>
<p><b>Breaches in relation to delivery of permits</b></p> <ul style="list-style-type: none"> <li>- Failure / delay to deliver the required authorisations, licenses and permits</li> </ul>	<ul style="list-style-type: none"> <li>- Granting additional time for performance</li> <li>- Withholding payments of rentals</li> <li>- Withholding counter performance of supply of agreed inputs or services</li> <li>- Recovery of damages</li> <li>- Renegotiation / adaptation of the contract</li> <li>- Termination</li> </ul>
<p style="text-align: center;"><b>OBLIGATIONS REGARDING PROTECTION OF INVESTMENT</b></p>	
<ul style="list-style-type: none"> <li>- Failure to provide adequate security to protect the investment</li> </ul>	<ul style="list-style-type: none"> <li>- Recovery of damages</li> <li>- Termination</li> </ul>
<ul style="list-style-type: none"> <li>- Breach of stabilisation clause</li> </ul>	<ul style="list-style-type: none"> <li>- Renegotiation / adaptation of the contract</li> <li>- Recovery of damages</li> <li>- Termination</li> </ul>
<p style="text-align: center;"><b>OBLIGATIONS REGARDING MONITORING AND IMPLEMENTATION</b></p>	
<p>Breach of confidentiality obligation</p>	<ul style="list-style-type: none"> <li>- Recovery of damages</li> <li>- Termination</li> </ul>

## CHAPTER 6

### TRANSFER OF RIGHTS AND OBLIGATIONS UNDER THE CONTRACT AND RETURN OF TENURE RIGHTS

6.1. *Overview.* This Chapter addresses issues relating to (I) the transfer of the investment project or rights and obligations under ALICs, particularly from one investor to another, and (II) the return of the land at the end of such contracts. These issues are important, particularly, to ensure that any transfers are handled in such a manner that a project becomes or continues to be responsible and sustainable; and to ensure that land remains productive and any rights to it are returned to those who granted them or otherwise released in favour of the investment project.

#### I. TRANSFER

6.2. *In general.* Rights and obligations related to ALICs, including the investment projects themselves, may be transferred from one (original) investor to another (new) investor. The term “transfer”, or equivalent terms that may be used in domestic laws, international instruments and contract practice (such as “assignment”,<sup>256</sup> “acquisition” or “cession”), covers the possibility for an investor to fully or partially transfer those rights and be discharged of obligations, which include, *inter alia*, rights to access or use the land, rights to transport and export agricultural products (see Chapter 4.I) as well as the duty to hire local people and the duty to provide local communities with social and economic benefits (see Chapter 4.II). The term “transfer” is to be understood in a broad sense in order to cover all of the possibilities of transferring any kind of rights and obligations after the contract has been concluded. The transfer can also refer to total transfer of the contract, transfer of specific obligations or rights and sublease, and the transfer of the investor itself (*i.e.*, the transfer of the company that has invested through the ALIC, see Section B below). Finally, while the following paragraphs mostly focus on the transfer of rights and obligations from one investor to another, there may be instances where rights are transferred by the grantor (*e.g.* transfer of the right to receive rents or other payments).

6.3. *Economic rationale.* Although transfer of rights, obligations or the entire contract from one investor to another is not central to the agricultural operation, it may be necessary for various reasons (*e.g.* to obtain financing) and in different

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<sup>256</sup> *E.g.* the [UPICC](#) refer to “assignment of a right” (Art. 9.1.1 *et seq.*), “transfer of an obligation” (Art. 9.2.1 *et seq.*) and “assignment of a contract” (Art. 9.3.1).

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situations (e.g. breach of contractual obligations by one of the contracting parties, insolvency of the investor, unprofitability of the land, etc.). The necessity of transfer could arise, for example, if an investment fails to generate expected economic benefits and causes significant negative impacts or if an investor no longer has the capability (e.g. technical expertise) to ensure a project's continued success. Accordingly, such a transfer may reduce the risk of hostile termination of the contract and may increase the chance of continuing the economic operation. It may also render the operation more efficient because specific obligations may be transferred to a new specialised investor (e.g. specialised in building water infrastructure or with expertise in monitoring). Finally, transfer may favour additional investment in the land (e.g. by transferring to an investor with more capital or other means for revitalising or improving a project).

6.4. *Transfer of rights, of obligations and of the contract.* Three types of transfer can be distinguished. First, the assignment of rights covers the cases in which a party transfers its rights for payment of a monetary sum or other performance to another person. Grantors, for example, are typically entitled to receive payments for the grant of tenure and related rights. Applicable laws will usually permit a grantor to freely assign this right to payment to a third party (e.g. a governmental body, a local community). Second, ALICs may oblige a party to pay a fixed sum of money or to provide a service. This party – usually the original investor – may wish to transfer these obligations to another party (i.e. the new investor). Domestic laws vary considerably in the mechanisms that are used to transfer obligations. In most jurisdictions, however, this transfer cannot be executed freely: either the original investor enters into an agreement with the new investor with the consent of the grantor and, if applicable, legitimate tenure right holders and local communities; or the grantor directly enters into an agreement with the new investor.<sup>257</sup> Third, the assignment of the contract means that both rights and obligations of a party, in most cases the original investor, are transferred to a new investor. In many jurisdictions, the assignment of the contract also requires the consent of the grantor and, if applicable, legitimate tenure right holders and local communities.<sup>258</sup>

6.5. *Legal framework.* As lands are sensitive assets for grantors, domestic law often includes safeguards to prevent the acquisition of land in specific situations. These vary from State to State, usually found in various sources which overlap within a State's boundaries (e.g. constitutional law, domestic legislation, customary law and international law - see Chapter 1), and often consider the

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<sup>257</sup> See e.g. for international commercial contracts [UPICC](#), Art. 9.2.1 and 9.2.3.

<sup>258</sup> See e.g. [UPICC](#), Arts 9.3.3 and also UNCITRAL. 2001. Legislative Guide on Privately Financed Infrastructure Projects, para. 62, p. 122.

nationality of the investor, the scale of the agricultural land and the zoning of the land. Safeguards may apply both before and after the conclusion of the contract; for example, when an investor intends to transfer an obligation to a new investor. In States lacking a specific, complete legal framework tailored to investments in land, the parties can use the contract to fill this gap.

6.6. *Overlap of legal sources.* A myriad of regulations may affect the transfer of rights and obligations related to ALICs, and investors should be aware that some jurisdictions have special provisions regarding agricultural lands. In most jurisdictions, the transfer of rights and obligations from such contracts is not only regulated by general contract and obligations law, but also by, *inter alia*, land, rural, natural resources, and environmental law. Certain jurisdictions may therefore require that the investor comply with several measures before the transfer takes place, if it is permitted at all. When not provided for by domestic law, ALICs may include similar provisions addressing such issues. Finally, these legal sources may overlap with others: foreign direct investment, taxation, water rights and rates, etc.

6.7. *Related agreements.* Another issue to take into consideration is the existence of agreements related to the main ALIC (see Chapter 2.III.B). Indeed, the contracting parties may conclude parallel agreements (e.g. community development agreements) with others such as legitimate tenure right holders or local communities to share benefits and hire local people. These related agreements usually refer to the main ALIC concluded by the grantor and the original investor. In order for those rights to be properly enforceable after the transfer, it is advisable that the contracting parties include a provision that entails the automatic transfer of rights and obligations in the related agreement to the new investor.

6.8. *Role of grantors.* The role and power of grantors vary from State to State. For instance, constitutions may provide for State ownership of all land or allow both State and private ownership.<sup>259</sup> In other jurisdictions, lands owned by governments may be more strongly protected than private owned lands (e.g. Crown lands, public lands, Federal lands). A government's main responsibility is for the allocation of land, including the regulation of land transfers in order to protect its citizen's rights. As a result, a government grantor usually does not transfer the whole contract but part of its rights in order to retain ownership of land. In general, it is the investor that would transfer its obligations or that would be replaced by the grantor.

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<sup>259</sup>

FAO. 2015. [Governance of Tenure Technical Guide No. 4](#), p. 33.



**A. Legality of transfer validity and effectiveness of transfer, required formalities and limitations**

6.9. *Transfer in general.* In ALICs, the contracting parties should be aware that the applicable law may impose requirements or limitations to the transfer of rights and obligations deriving from the contract. The parties should therefore make certain that any transfer is consistent with the applicable legal framework to ensure the transfer's validity and effectiveness. Subject to the applicable laws, parties may consider inserting in their original contract specific clauses on transfer of rights and obligations, of the entire contract, and on change of investor, clarifying the extent and the conditions to which such transfer is possible.

6.10. *Transfer of obligations: necessity of an agreement.* An effective transfer of obligations requires an agreement between the original investor and the new investor with consent of the grantor and, if applicable, legitimate tenure right holders and local communities, or between the grantor and the new investor with consent of such holders and communities.<sup>260</sup> Often, the new investor, the grantor and other contracting parties may conclude a new agreement. This new contract may refer to the previous contract and may expressly provide that the new investor takes over the original investor's obligations as stipulated in the previous contract. That is, the new investor takes the place of the original investor. Alternatively, the new investor and the grantor may decide to enter into a brand-new agreement that stipulates new rights and obligations. These options should be the result of the negotiation between the contracting parties in consultation with other stakeholders (see Chapter 3.V.A). In addition, entering into a new agreement may clarify the rights and obligations of the grantor and the new investor, particularly in relation to tenure and related rights to the land and, if applicable, ensure that the rights of legitimate tenure right holders and local communities are protected. It may also expressly discharge the original investor from its obligations.

6.11. *Requirements of consent, prior notice, and acceptance.* Domestic laws usually require that the grantor should give consent to the transfer of obligations. If not provided by law, the contracting parties should include a clause that sets out the requirements of prior consent of the grantor. Domestic laws or the contracts may include the obligation for the original investor to serve prior notice to the grantor before transferring any obligation, in order to obtain its consent, or when consent was given in advance.<sup>261</sup> For example, a clause may provide that any notice of a transfer of obligations should be sent by the original investor six

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<sup>260</sup> [UPICC](#), Art. 9.2.1.

<sup>261</sup> *Id.*, Art. 9.2.4.

months before the date of effectiveness and, in the event that the grantor does not answer, the response is deemed to be negative and the obligations shall not be transferred. States with decentralised governments may also require the prior approval of the transfer by a central administrative body when the transfer was decided by the local government. A mere transfer of certain rights, however, might not necessarily entail such a mechanism. For instance, the grantor's right to receive the payment for use of land may be transferred to a different governmental body or a local community without any prior consent of the investor. If the investor wants to transfer the tenure rights, on the other hand, this may affect the substance of the contract itself because it is of an essentially personal character. Therefore, such a transfer may have the same effect as transferring the whole contract, and the grantor should give prior consent. It is also advisable that the parties include a non-assignment clause in the contract that limits or prohibits the transfer of tenure rights, always considering however the effectiveness of such a clause under the applicable domestic law.<sup>262</sup>

6.12. *Legitimate tenure right holders and transfer.* The transfer of obligations should entail consultation with local communities (see Chapter 3.II).<sup>263</sup> Investors and grantors should be aware of existing obligations under domestic and international law, and that the status of various land tenure rights may differ from one jurisdiction to another. In some systems, for example, customary tenure right holders may be recognised as legal tenure right holders<sup>264</sup> or registered with the relevant land registry. In other systems, by contrast, customary tenure may not be legally recognised, and legitimate tenure right holders are not granted legal protection. Also, there may exist multiple rights to the same land.

6.13. *Legitimate tenure right holders and consent.* Recognition of these rights should entail consultation with the local communities affected by the transfer of obligations to a new investor. Their consent should be obtained, as a pre-contractual condition and as part of the due diligence procedure, because they hold rights to the land. When customary tenure is not legally recognised, the parties should comply with their international obligations. For example, the United Nations Declaration on the Rights of Indigenous Peoples and the ILO Indigenous and Tribal Peoples Convention requires compliance with FPIC with respect to Indigenous Peoples for the execution of the transfer.<sup>265</sup> Even if information is not

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<sup>262</sup> [UPICC](#), Art. 9.1.9(2).

<sup>263</sup> FAO. 2012. [VGGT](#), paras. 9.9 and 12.7.

<sup>264</sup> FAO. 2015. [Governance of Tenure Technical Guide No. 4](#), p. 33.

<sup>265</sup> UN. 2007. [Declaration on the Rights of Indigenous Peoples](#), Art. 10 and the ILO. 1989. Convention concerning Indigenous and Tribal Peoples in Independent Countries, Art. 16.

## *Transfer of rights and obligations under the contract and return of tenure rights*

readily available, parties should consult with legitimate tenure right holders and local communities with a view to confirming, for example, that the area is free and has no occupants. In addition, parties should note that individual and public property are not the only forms of tenure rights. Some States also recognise community titles or rights that overlap with others.

6.14. *Related agreements.* The parties may include provisions in their contract or in related agreements with legitimate tenure right holders and the local community to share the benefits of the investment project by the hiring of local workers or through the contribution to a development fund. For instance, local workers may directly be affected if the original investor decides to transfer the contract to a new investor who might not necessarily offer the same facilities to local populations. The consent of such holders and communities is thus important as it may impact the basic obligations of their contractual relationship.<sup>266</sup> Consent should be obtained by both the grantor and the original investor before the execution of the transfer.

6.15. *Informed consent.* If the original investor desires to transfer all or part of its rights and obligations under the ALIC to a new investor, the former should explain to the contracting parties the reasons for the transfer. The new investor should provide full information about its project in the same manner as the original investor did when it acquired the land (see Chapter 3). Further, while a grantor's answer to the notice of transfer may be readily obtainable, the consent of legitimate tenure right holders or local communities may require supplementary involvement of the original and new investors. The contract should outline the terms by which a new investor should advertise its project to such holders and communities (e.g. media, language, participants, and minimum participation), and the final result should be made known in line with those terms.

6.16. *Limitations on transfer.* In many jurisdictions there may be limitations on transfer in specific situations, such as when the grantor holds the land itself, when the land has specific characteristics, when the investor is not a national of the State in which the land is located or when there is a change of control of the investor.

6.17. *States' lands.* As previously mentioned, in some States, title to land is retained by the government. Consequently, ALICs can only take the form of grants of tenure and related rights for a specified period. In other States, the government may hold large tracts of land, and these lands may have supplementary protection (e.g. Crown lands, public lands and Federal lands). When an investor seeks to transfer its obligations relating to the lease of such lands, similarly to when it

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<sup>266</sup>

FAO. 2015. [Governance of Tenure Technical Guide No. 4](#), p. 51.

concluded the contract with the grantor, numerous authorisations may be needed. For instance, if the land must be held by the grantor by virtue of law, a parliamentary derogation may be needed. In decentralised States, both federal and local approvals may be required.

6.18. *Large-scale land safeguards.* It must be recalled that the Guide does not endorse large-scale land transfers. If they do occur, however, certain systems require specific authorisations, because such investments may be of great importance for the States' interests (e.g. environmental, social, economic interests, amongst others).<sup>267</sup> Domestic laws often determine safeguards based on the size or the value of the land. That is, a transfer may require such an authorisation if the size of the land exceeds a given threshold or value ceiling.<sup>268</sup> The authorisation may be of an administrative or legislative nature. Other legal mechanisms exist in some systems, such as the organisation of a local referendum, the first option to purchase by the grantor or even the obligation to initiate a tender. Such safeguards may also be applicable when the land has been zoned as an environmental protection area<sup>269</sup> or when it contains specific natural resources (e.g. water, oil, gas, wood). When the investor wishes to transfer the land, these characteristics may prevent a mere transfer of the land and may require approvals from diverse governmental bodies. For example, a given tract of land may require a specific mode of agricultural operation with which the new investor might not be familiar, and which requires an assessment by the grantor's administration. In other States, domestic laws might have very low standards with respect to the environment, local development, human rights, respect of legitimate tenure right holders, etc. Grantors may therefore wish to include an ad hoc provision that expressly prohibits the transfer of the land due to its characteristics.

6.19. *Nationality of the investor.* As agricultural land is an economically and politically sensitive asset, some systems prohibit transfer to a person or corporate entity that is not a national of the State in which the land is located. These limitations on transfer are usually applicable to natural persons as well as legal entities. As for companies, domestic legislation may allow foreign investment through domestic majority-owned firms<sup>270</sup> or may set a quota on the percentage of domestic agricultural land that can be foreign owned. In such situations, foreign investors may wish to consider entering into joint ventures with local companies.

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<sup>267</sup> FAO. 2012. [VGGT](#), paras. 12.6, 12.10.

<sup>268</sup> FAO. 2015. [Governance of Tenure Technical Guide No. 4](#), p. 33.

<sup>269</sup> *Id.*, p. 36.

<sup>270</sup> See national legislation quoted in *Id.*, p. 49.

## **B. Transfer of the investor itself**

6.20. *In general.* In most cases, the investor is a corporate entity registered with the State in which the land is located. This is due to the limitations on transfer for foreigners found in several States. Grantors should take into consideration that the investor can nevertheless be transferred from a mother company to another, or can merge with another corporate entity, or can change its control.

6.21. *Change of control.* When not provided by law, it is advisable that the parties include a change of control clause in the contract. This clause requires the investor to inform the grantor when its shareholding participation changes (including acquisition) or when its executive team changes. If the grantor does not accept the change, it may have the capacity to seek changes or terminate the contract. This clause can also be effective, for example, when there are changes in beneficiary ownership structures, when the investor intends to transfer the land to its heirs or its affiliates, or when the investor intends to pursue a merger. An investor, for example, may seek to transfer the ALIC to benefit from the tax incentives that are granted by a government grantor to new investors or even to avoid jurisdiction. By requiring the prior consent of the grantor, this kind of clause may reduce the risk of abuse of law by the investor.

6.22. *Heirs and affiliates.* Some systems or contracts do not necessarily require prior consent of the grantor when rights and obligations are transferred to the investor's heirs or to the investor's affiliates. The contract may define these terms and should ensure that such a clause does not breach another contractual provision and would not constitute an abuse of law (e.g. by circumventing the competence of the domestic jurisdictions). In contract practice, parties often refer to the applicable law to define who are the investor's heirs and affiliates.

6.23. *Mergers.* Contracts may contain specific provisions in cases where the investor engages in a merger. However, the applicable law often provides for mechanisms that cause all rights and obligations, under certain conditions, to be transferred in their entirety by operation of law.<sup>271</sup>

6.24. *Partnership.* If the investor seeks to collaborate with another investor to operate the project, it may decide not to transfer all or part of its rights and obligations set forth in an ALIC. If the investor and the collaborator enter into an agreement, the principle of privacy of the contract protects the grantor. However, the grantor should ascertain whether such a partnership would negatively affect

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<sup>271</sup> See [UPICC](#), Art. 9.1.2.

its contractual relationship with the investor. If not, there is no reason for the grantor to terminate the contract.

### **C. Importance of disclosure**

6.25. *In general.* The transfer of all or part of an ALIC may affect tenure rights. As mentioned in the VGGT, “tenure security is improved when information on tenure rights is easily available to all, because people who do not know that a tenure right exists may inadvertently do something that infringes that tenure right”.<sup>272</sup> To implement this provision, each transfer should be communicated to the relevant authority to update information on the holder of rights to the transferred land. Grantors are also advised to make this information public and communicate any effectiveness of transfer to the affected legitimate tenure right holders or local communities after they have been consulted by appropriate means (e.g. local language, appropriate media).

## **II. RETURN OF ASSETS UPON END AND TERMINATION OF THE CONTRACT**

6.26. *Scope.* The term “return” addresses situations in which assets are to revert from the original investor to the original grantor upon the end or termination of an ALIC.<sup>273</sup> While grantors are often the principal beneficiaries of the return of the land, return can also involve legitimate tenure right holders and local communities who hold or held rights to the land. Moreover, it is not limited to land as all project-related assets may revert upon expiry of the ALIC.

6.27. *End of the contract and termination.* The contracting parties should be aware that agricultural investment projects entail a high risk of failure and may not generate the expected revenues. For these reasons, the contract may come to an end before its natural expiry date, and the contract should include a termination clause to address the specific circumstances of the return of assets, including return of rights to land. Return may apply, for example, in case of end of the contract, failure to remedy a breach of the contract by one of the contracting parties, unexpected impediments or transfer of the contract. In many jurisdictions, the legal framework may include special provisions for the automatic transfer of assets when the contract is terminated (see Chapter 5.III). Grantors may also include supplementary provisions in the contract to ensure the return of land and related assets in certain cases; for instance, when the investor dissolves

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<sup>272</sup> FAO. 2012. [VGGT](#), p. 35.

<sup>273</sup> See e.g. UNCITRAL. 2001. [Legislative Guide on Privately Financed Infrastructure Projects](#), pp. 161 *et seq.*, paras. 36 *et seq.*

or is liquidated. Finally, the grantor may ask for the return of lands which are unused by the investor.

#### **A. Requirements and conditions for return**

6.28. *Legal framework.* Most domestic laws include provisions on the return of specific assets following the end or termination of a contract. Parties should be aware that several legal sources may apply: from general rules on restitution upon termination to specific provisions contained in lease law and land law. Moreover, legal systems may distinguish movable and immovable assets or define real estate, with the latter categories often encompassing land as well as buildings. It should be noted that there are many classes of assets (e.g., monetary and non-monetary assets, etc.)<sup>274</sup> and that these definitions may have consequences on the conditions of restitution and return.

6.29. *Contractual clauses on return.* Preferably, assets are to revert automatically to the grantor upon the expiry of the contract. To avoid lack of clarity and disputes, the parties should negotiate specific clauses regulating this process in advance. One solution for managing the return of assets is the establishment of a common committee composed of representatives of all the contracting parties, including legitimate tenure right holders and local communities, which is to be entrusted with the task of verifying “whether the facilities are in the prescribed condition and conform to the relevant requirements set forth in [the ALIC]”.<sup>275</sup> This can be the same committee in charge of the supervision and monitoring of the project (see Chapter 4.V.B).

6.30. *Assets to be returned.* Agricultural land investment projects may involve numerous assets. Grantors usually grant access to a piece of land, and other assets attached to that land such as trees, buildings, and infrastructure may also be included for investors to operate the land (see Chapter 4.I.A). Moreover, the investor may be obliged to build infrastructure on the land as part of the economic operation of that land (see Chapter 4.I.B.2). Consequently, parties should value the land and inventory the related assets during the negotiation phase to ensure that the return phase will not adversely affect a contracting party. The investor may also conclude agreements with legitimate tenure right holders and local communities to share the benefits of the economic operation through a local development fund or the construction of facilities (see Chapter 4.II.E). Upon the end of the contract, these assets may be returned. In brief, it is advisable that the

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<sup>274</sup> See e.g., [UPICC](#), Arts. 7.2.1 and 7.2.2.

<sup>275</sup> UNCITRAL. 2001. [Legislative Guide on Privately Financed Infrastructure Projects](#), para. 42.

contracting parties include contractual provisions for each category of assets to ensure their return to the grantor in accordance with the applicable legal framework.

6.31. *Public and private property.* The distinction between public and private ownership is one classification the parties can easily implement within the ALIC. In this regard, some jurisdictions place “particular emphasis on the [grantor’s] interest in the physical assets related to the project and generally require the handover to the [grantor] of all of them, whereas in other States privately financed infrastructure projects are regarded primarily as a means of procuring services over a specified period, rather than of constructing assets”.<sup>276</sup> The contract could first recall which assets are defined by the domestic legal framework as public property. This category of assets generally serves to provide the characteristic performance of the contract (*i.e.* the economic operation of the land), and these will return to the grantor at no cost and free from any liens and encumbrances. The second category covers those assets that were acquired by the investor and which are not indispensable for the economic operation of land but that can enhance productivity; these can be purchased by the grantor at its option. Finally, some assets can remain the private property of the investor and may be freely removed or disposed of by the investor.

6.32. *Land.* Depending on the contract, grantors may remain the owners of the land throughout the duration of the project or may retain outstanding rights over the land for which tenure and related rights are granted. Grantors are usually the final owners of the land upon end of the contract, and efforts should be made so that legitimate tenure right holders regain their rights.<sup>277</sup> Unless otherwise provided, the investor may be required to return the land “free of any liens and encumbrances and at no cost to the [grantor], except for compensation for improvements made to, or modernisation of, the property”.<sup>278</sup> This necessity stems from “the purpose of ensuring the continuity of the [operation of the land]”.<sup>279</sup> It is also due to the special status of land, which is of great importance for grantors, legitimate tenure right holders and local communities. Indeed, some systems prohibit private ownership of land. The term “improvement” covers works

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<sup>276</sup> *Id.*, para. 23 p. 109.

<sup>277</sup> FAO. 2012. [VGGT](#), para. 14.2 (“Where possible, the original parcels or holdings should be returned to those who suffered the loss, or their heirs, by resolution of the competent national authorities. Where the original parcel or holding cannot be returned, States should provide prompt and just compensation in the form of money and/or alternative parcels or holdings, ensuring equitable treatment of all affected people”).

<sup>278</sup> UNCITRAL. 2001. [Legislative Guide on Privately Financed Infrastructure Projects](#), p. 162, para. 38.

<sup>279</sup> *Id.*



*Transfer of rights and obligations under the contract  
and return of tenure rights*

undertaken by the investor on the land to improve its environmental conditions or economic productivity (e.g. drainage works). The cost of these works should be evaluated, and the grantor may compensate the investor for the accrued benefit entailed by the drainage. Conversely, the investor may be liable for any deterioration of the land.

6.33. *Trees.* In the forestry and arboriculture industries, trees are of intrinsic importance for the economic operation of land. As some tree species require many years to be productive (e.g. three years for a palm tree, five years for a rubber tree, ten years for a eucalyptus, forty years for a birch tree), they may therefore be furnished to the investor by the grantor as a characteristic asset of the land. The investor may be obligated to replant throughout the duration of the contract to preserve the environment and to maintain the economic operation of the land (see Chapter 4.III). Such an obligation should be monitored and supervised by the grantor and legitimate tenure right holders or local communities where applicable. At the contract's end, and except where otherwise provided, the investor should return the land in the same condition as when it received it. This may translate into the investor's obligation to replant the corresponding number of trees of the same characteristics (e.g. species, age, etc.). If the investor fails to fulfil its replanting obligation, it may be liable for deterioration of the land.

6.34. *Crops.* Before the contract ends, the parties should know at which stage the crops will be ready for harvest. The parties are advised to agree in advance who will be the beneficiary of those crops, for instance through the common committee mentioned above. When the contract is in force, the crops are the investor's property because they are the outcome of the investment project. If, at the end of the contract, saplings still exist on the land, the parties may agree that the final harvest would be the investor's property at its cost. As a consequence, the investor should compensate the grantor, legitimate tenure right holders and local communities for the period that the land cannot be used (i.e. between the end of the contract and the harvest of the crops). The compensation may be calculated as a delay in returning the land.

6.35. *Buildings and infrastructure.* Buildings and infrastructure are physically and intrinsically attached to the land. However, two different categories thereof must be distinguished: (a) the existing assets on the land at the time of the contract's conclusion and (b) those built by the investor throughout the contract's duration. This distinction may determine whether compensation is required. First, as previously mentioned, grantors may provide investors with various buildings (e.g. barns, storages, housing) and infrastructure (e.g. water canals, roads) at the time of the contract's conclusion. In most cases, these assets are leased by the grantor to the investor together with the land because they serve to provide

the characteristic performance of the contract. In the same manner as for the land, these assets should be returned to the grantor because they are the State's properties. It should also be noted that the investor may have the obligation of maintaining these assets or may be liable for deterioration of them. Second, the investor may build buildings and infrastructure on the land pursuant to the contract's provisions. On the one hand, the investor may have the right to build supplementary buildings for the purposes of the project's operation. For instance, if the economic activity of the land increases, the investor may need more storage buildings for the production and more housing for the employees. It is advisable that, for the construction of such buildings, the investor obtains the consent of the grantor and is transparent in implementing a compensation plan for improvements of the land, as the case may be. On the other hand, the contract may require the investor to build infrastructure and buildings for the operation of the land or for the needs of local communities. In this case, such a contractual clause should deal with the return of these assets, in particular identifying the final holder. In most cases, the grantor and the local communities are the beneficiaries at no cost.

6.36. *Equipment.* The term "equipment" covers all the assets that can be easily removed or disposed of by the investor, and includes both heavy (e.g. machines, tractors, lorries) and light equipment (e.g. clothes, tools). Like buildings, equipment may be furnished by the grantor or purchased by the investor. When the equipment is purchased by the investor, the investor may decide to keep it even after the expiry of the contract. If the grantor wants to purchase these assets, it is advised to include a "first option to purchase clause" in the contract. Two situations should be distinguished: (a) the assets are amortised as of the end of the contract so that the grantor may purchase them at a nominal value; or (b) the assets are not amortised as of the end of the contract so that the grantor may buy them at a fair market value. If the equipment was furnished by the grantor to the investor, these assets should be returned to the grantor as machines, lorries and tools may be of great importance to continue the economic operation of the land. The parties should also supervise and monitor any change of equipment. For example, for machines found to be too old or out of service, the parties may find an equitable way to finance replacements and decide who will receive them upon the contract's end.

6.37. *Transfer of technology.* When the contract ends, grantors may wish to acquire the technology of the original investor to continue the operation of the land. Technology is the systematic knowledge for the application of a process or

for the rendering of a service.<sup>280</sup> In the case of agricultural land investments, this knowledge may be the way of operating the machines and maintaining the land. The communication of such a knowledge is called "transfer of technology". On the one hand, the grantor needs this technology to continue the economic operation of the land itself or through a new investor. On the other hand, the original investor may be reticent to give this sensitive information to another party and even more so to a new investor which might be a competitor. Because the obligation of transfer of technology cannot be imposed unilaterally upon the investor by the grantor,<sup>281</sup> the parties may negotiate the terms for transfer of technology before the contract expires. One method could be the consultation of a supervisory committee which seeks to conciliate the contracting parties' contradictory interests. It should be noted that the legal framework may impose such obligations on the investor. The transfer of technology can therefore be a continuing obligation of the investor even after the contract is no longer in force. For instance, the investor's personnel may train and accompany grantor's experts or the new investor's personnel during the first months of the new agreement.

## **B. Cost and liabilities**

6.38. *Responsibility for return.* In many jurisdictions, the investor may be responsible for the return of the assets upon the end of the contract, meaning the investor should bear the costs of removing from the land or otherwise disposing of the assets that are to revert to the grantor, legitimate tenure right holders and local communities. The investor should remove the assets it wants to keep within the time agreed by the parties so as not to impede the continued economic operation of the land. It also has responsibility for rendering the land and all the relevant project-related assets to the grantor and the local communities pursuant to the terms set forth in the contract. However, these terms should be reasonable.<sup>282</sup> Accordingly, the grantor may oblige the investor to return the project-related machines within a reasonable time but it may not impose their return to a place far from the land that was leased. To foster legal certainty, the parties should devise procedures before the expiry of the contract. For example, a common committee may be in charge of supervising the progress of the return,<sup>283</sup> and may also evaluate unexpected costs and apportion them between

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<sup>280</sup> UNCTAD. 1985. [Draft International Code of Conduct on the Transfer of Technology](#), Chapter 1, para. 1.2.

<sup>281</sup> UNCITRAL. 2001. [Legislative Guide on Privately Financed Infrastructure Projects](#), , para. 51.

<sup>282</sup> *Id.*, para. 41.

<sup>283</sup> *Id.*, para. 42.

the parties. Investors, moreover, should be aware that grantors may demand that all the project-related assets return directly to a new investor in order to continue the economic operation of the land.

6.39. *Liabilities for deterioration.* As a corollary of the responsibility to return the project-related assets in the conditions agreed by the parties, the investor may be liable for any deterioration of the land and the related assets. Deterioration may be evaluated by the common committee based on objective criteria. Prior to conclusion of the ALIC, the contracting parties may assess the biological, chemical, and environmental characteristics of the land through feasibility studies (see Chapter 3.III). When these standards are lowered after re-assessment by the parties (e.g. through the common committee) and can be attributed to the investor's misuse of the land (e.g. utilisation of unauthorised chemicals, abuse of natural resources, etc.) deterioration of the land may be considered to have occurred, for which the investor may be obliged to pay compensation. Some jurisdictions provide that the compensation must be equal to the potential suffered loss. In addition, while the land is transferred to the grantor or to a new investor, the original investor may be responsible for mitigating risks of deterioration.

6.40. *Time to return.* The end of the ALIC necessarily implies a period in which the investor should return the land. Many systems include a mechanism of default interest which entails that if the investor does not return the land and the project-related assets within this period of time, it may be charged interest that corresponds to the suffered loss.<sup>284</sup>

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See [UPICC](#), Art. 7.4.10.



## CHAPTER 7

### GRIEVANCE MECHANISMS AND DISPUTE RESOLUTION

7.1. *In general.* Even with careful negotiation and drafting, no contract caters for every eventuality. Changing circumstances may hinder the performance of the contract on its original terms, and even efforts to renegotiate different terms may not allow continued performance of the contract (see Chapter 5 on remedies). When this happens, resolving complaints and disputes between the contracting parties or with non-parties in an effective and efficient manner is critical. In particular, the investor, having committed significant capital resources, expects a measure of predictability and certainty in the manner in which disputes will be resolved. To this end, contractual clauses which stipulate that one or more contracting parties waive their right of access to effective remedy are unlikely to be enforceable.

7.2. *Impact beyond the contracting parties.* As the performance of ALICs and related agreements can have an impact beyond the contracting parties, grievance mechanisms and dispute resolution may concern those parties, as well other stakeholders, including third-party beneficiaries (“non-parties”). As previously noted in this Guide, the contracting parties typically consist of the investor on one end, with the government or local community as grantor on the other, but may also include legitimate tenure right holders (see Chapter 2.I). Non-parties to a contract are not bound by any contractual undertaking but may well be affected by contractual performance (or non-performance). For instance, legitimate tenure right holders as well as members of local communities may be displaced or be subject to pollution caused by the agricultural land investment activity.

7.3. *Conflicts arising from investor-government contracts.* Conflicts between investors and governments are likely to concern pre-contractual conditions (see Chapter 3); performance or non-performance of the contract; and the unilateral termination or abandonment of the contract by one of the contracting parties. Depending on the nature of the situation or dispute arising from an investor-government contract, contracting parties and non-parties may avail themselves of a variety of dispute resolution mechanisms. A purely factual conflict may be submitted to expert determination, negotiation, or mediation, whereas one involving both factual and legal determinations may be submitted to a grievance mechanism, negotiation, mediation, arbitration (if the parties have consented), domestic, regional or international courts.

7.4. *Conflicts arising from investor-community contracts.* Conflicts between investors and local communities are likely to concern the investor's respect for the community's interests, development, and environment. Local communities' proximity to and even dependence upon the agricultural land used by the investors means that they are especially sensitive to any deviation in investor conduct that was not contractually agreed upon. Investor responsiveness to local community concerns and complaints will allow many situations to be addressed at an early stage before they escalate into a dispute. Grievance mechanisms may offer solutions for situations that are rapidly flagged. When the situation escalates into a dispute, solutions may be achieved through negotiation, mediation, arbitration (where applicable), or domestic, regional, and international courts.

7.5. *Roadmap.* This Chapter first provides a general overview of the considerations underlying grievance mechanisms (I), then examines the different dispute settlement mechanisms (II),<sup>285</sup> and finally addresses the enforcement of settlements, awards, and judgments (III).

## **I. GRIEVANCE MECHANISMS**

7.6. *Definitions.* A grievance refers to an injustice felt usually by non-parties, such as legitimate tenure right holders and members of the local community, whose legitimate expectations, based on law or custom, have been impacted by the activities of the contracting parties.<sup>286</sup> Grievance mechanisms are any non-judicial or judicial process by which concerns linked to the perceived injustice can be raised and remedies sought.<sup>287</sup>

7.7. *Link to impact assessments and local communities.* ALICs are likely to have a significant environmental, human rights and social impact on local communities. In addition to conducting relevant impact assessments as described in Chapters 3.IV, contracting parties should enhance respect for non-party rights and interests by establishing standing grievance mechanisms to receive, investigate, and resolve complaints.

7.8. *Objective.* Standing grievance mechanisms aim to address a range of failures to comply with, *inter alia*, domestic laws, contractual stipulations, good

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<sup>285</sup> This Chapter should be read in light of one of the basic ideas underlying the UPICC, *favour contractus*, the aim of which is to preserve the contract whenever possible and to foster continuation of the contractual relationship. See, e.g., [UPICC](#), Arts. 6.2.1-6.2.3, 7.1.4, 7.3.1.

<sup>286</sup> UN [Guiding Principles on Business and Human Rights](#), p. 28.

<sup>287</sup> *Id.*

business practices, and impact assessments whether not carried out or inadequately monitored.

7.9. *Equitable, transparent, and predictable procedures.* In order to foster constant and effective engagement between contracting parties and non-parties, grievance mechanisms should be equitable, transparent and have predictable procedures. These mechanisms may involve impartial and thorough investigators and, as noted in the CFS-RAI Principle 9, should be readily accessible to all legitimate tenure right holders and members of local communities.<sup>288</sup> When non-parties are confident that a grievance mechanism will offer a cost-effective, reprisal-free and fair investigation of their complaints, along with an early remedy, this mechanism can prevent conflict escalation between contracting parties and non-parties.

7.10. *Forms.* Grievance mechanisms can take one of four principal forms: (1) an extension of a grantor government or State-linked institutions; (2) a part of the investor's corporate or operational structure; (3) a collaboration between the contracting parties, or (4) involve third-party monitoring.

7.11. *State-linked grievance mechanisms.* Grievance mechanisms that are an extension of a grantor government or State-linked institutions serve to complement existing judicial mechanisms. In situations where a judicial remedy may be excessive or culturally inappropriate, mechanisms like those administered by national human rights institutions or small claims tribunals offer to settle disputes in a more informal setting and may better meet the needs of aggrieved parties who prefer to avoid or refuse to go to court.

7.12. *Investor-linked grievance mechanisms.* The VGGT calls for "business enterprises to provide for and cooperate in non-judicial mechanisms to provide remedy, including effective operational-level grievance mechanisms".<sup>289</sup> Mechanisms that form part of the investor's corporate or operational structure provide direct access for aggrieved non-parties affected by the investor's activities. They are often administered by the investor company or enterprise, but complaints can also be redirected by the investor to an external body. Establishing an effective in-house grievance mechanism counts towards an investor's discharge of its social responsibility to respect legitimate tenure right holder and local community rights, and allows the investor to identify and address grievances

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<sup>288</sup> CFS. 2014. [CFS-RAI Principles](#), principle 9; OECD, FAO. 2016. [Guidance for Responsible Agricultural Supply Chains](#), pp. 26, 33, 53-4; OECD. 2017. OECD. [Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector](#), pp. 75-6.

<sup>289</sup> FAO. 2012. [VGGT](#), para. 3.2.



before they worsen.<sup>290</sup> Like State-linked mechanisms, investor-linked grievance mechanisms complement and supplement existing judicial mechanisms. They do not preclude access to other forms of non-judicial or judicial dispute settlement mechanisms.

7.13. *Stakeholder grievance mechanisms.* Grievance mechanisms can be managed by a single stakeholder, by representatives of key stakeholders who jointly administer the process (multi-stakeholder), or by one stakeholder who oversees the process while remaining accountable to the other stakeholders. Stakeholders may include the investor, the government, the legal and legitimate tenure right holders, the local community, as well as trade unions, guilds, inter-governmental organisations, non-governmental organisations, and local, regional and international human rights bodies. Collaborative grievance mechanisms share the aims of State-linked and investor-linked grievance mechanisms.

7.14. *Examples of grievance mechanisms.* One notable stakeholder grievance mechanism is the World Bank Inspection Panel, which is managed solely by the World Bank and designed for local communities that have been adversely affected by World Bank-funded projects. The National Contact Points (NCP) for the OECD Guidelines for Multinational Enterprises are another important stakeholder grievance mechanism. Whereas the World Bank Inspection Panel handles a wide spectrum of grievances with diverse origins, the OECD-NCP grievance mechanism is reserved for handling grievances arising from non-observance of the OECD Guidelines, requiring States adhering to the OECD Guidelines to establish an NCP for that purpose.

7.15. *Third-party monitored grievance mechanisms.* Third-party monitoring, which was already discussed in Chapter 4.V.B in the context of contract implementation, has the benefit of neutrality which State-linked, investor-linked, and stakeholder grievance mechanisms may lack. Third-party monitored grievance mechanisms can assume varying degrees of formality. Less formalised mechanisms may involve the third-party monitor writing down and collecting complaints during individual meetings, field visits, or at agreed locations. More formalised mechanisms may involve the third-party setting up a website, email or collection boxes to collate written grievances, after which the third-party administers a State-linked, investor-linked, or stakeholder grievance mechanism for submitted grievances.

7.16. *Good practice.* Contracting parties and non-parties should note existing good practices on the setting up and implementation of grievance mechanisms.

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<sup>290</sup> See e.g. IFC. 2009. [Good Practice Note. Addressing Grievances from Project-Affected Communities](#).

One example can be found in the Office of the Compliance Advisor/Ombudsman Advisory Note to the World Bank on “A Guide to Designing and Implementing Grievance Mechanisms for Development Projects”, which identifies “good practice markers”, such as the following:<sup>291</sup>

- *Refine core company value.* To improve their community relations in general and grievance resolution in particular, companies can adopt certain critical values or attitudes, including: commitment to fairness in both process and outcomes; freedom from reprisal for all involved parties—within the company and in the community; dedication to building broad internal support for the grievance mechanism across project lines; mainstreaming responsibility for addressing grievances throughout the project, rather than isolating it within a single department; and willingness by senior management to visibly and sincerely champion the grievance system.
- *Start early in the project cycle.* The most successful grievance mechanisms are put in place as early as possible – ideally, during the project feasibility phase (see Chapter 3.III) – and are modified for later project phases. Problems are often resolved more easily, cheaply, and efficiently when they are dealt with early and locally.
- *Involve the community in the design.* Stakeholders should be involved in the grievance mechanism design instead of a company-designed system being imposed. The company should engage community representatives to identify key factors, such as the kinds of disputes that could arise during the project life; how community members prefer to raise concerns and fill in complaints; the effectiveness of current company procedures for resolving complaints; and the availability of local resources to resolve conflicts. Based upon this local assessment, community representatives should help shape both the design and future improvements of the grievance mechanism.
- *Ensure accessibility and gender sensitiveness.* An effective grievance mechanism should be accessible to diverse members of the community, including more vulnerable groups such as women and youth. Multiple points of entry should be available, including face-to-face meetings, written complaints, telephone conversations, or e-

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<sup>291</sup> Compliance Advisor Ombudsman (CAO). 2008. [Advisory Note: A Guide to Designing and Implementing Grievance Mechanisms for Development Projects](#), pp. 2-4. We note that the language found in the World Bank’s Advisory Note refers to a given context which would need to be adapted and tailored for the particular circumstances present in each individual agricultural land investment project.

mail. Confidentiality and privacy for complainants should be honoured where this is seen as important.

- *Maintain a wide scope of issues.* The grievance mechanism should be open to a wide range of concerns: both those based in factual data and those arising from perceptions or misperceptions. Perceived concerns can be as critical to address as actual hazards. The mechanism should also be able to address multi-party and multi-issue complaints.
- *Develop culturally appropriate procedures.* The grievance mechanism should be responsive, respectful, and predictable – clearly laying out an expected timetable for key process milestones. It should be capable of bridging deep divides, including cultural divides. The design and operation of the grievance mechanism should consider cultural differences, such as communities' preferences for direct or indirect negotiation; attitudes toward competition, cooperation and conflict; the desire to preserve relationships among complainants; authority, social rank, and status; ways of understanding and interpreting the world; concepts of time management; attitudes toward third- parties; and the broader social and institutional environment.
- *Incorporate a variety of grievance resolution approaches.* To accommodate differences in personal and cultural preferences, the grievance mechanism should offer a variety of grievance resolution approaches – not just a single grievance procedure. The complainant should have influence over which approach to select. Some complaints may be managed in an informal way solely by those directly involved, such as a company representative and the complainant. Others may rely on more formal independent redress, such as arbitration using a neutral third-party. Some mechanisms may rely on an interest-based approach, such as responding to the stated legitimate and perceived needs of the complainant. Others may rely on a rights-based approach, based on legal, contractual, or other rights. Where possible, local and customary ways of grievance resolution should also be evaluated and incorporated into the mechanism.
- *Identify a central point for coordination.* A well-publicised and consistently staffed position, held by an individual or team, should be maintained. A central coordinator facilitates the development and implementation of the grievance mechanism, administers some of its resources, monitors internal and external good practice, ensures

coordination among access points, and ensures that the system is responsive.

- *Maintain and publicise multiple access points.* Expanding access beyond those individuals who have the primary responsibility to receive grievances can significantly reduce participation barriers and encourage community members to address problems at an early stage and in a constructive manner. Individuals serving as access points are most effective if they are trustworthy, trained, knowledgeable, and approachable regardless of the ethnicity, gender, or religion of the complainant.
- *Report back to the community.* The company should provide regular feedback to relevant stakeholders to clarify expectations about what the grievance mechanism does and does not do; to encourage people to use the mechanism; to present results; and to gather feedback to improve the grievance mechanism. Information reported back might include types of cases and how they were resolved, and the way the grievance has influenced company policies, procedures, operations, and the grievance mechanism itself.
- *Use a grievance register to monitor cases and improve the organisation.* In addition to resolving individual or community disputes, the grievance mechanism is an opportunity to promote improvements in the company. A grievance register can be used to analyse information about grievance and conflict trends, community issues, and project operations to anticipate the kinds of conflicts they might expect in the future, both to ensure that the grievance mechanism is set up to handle such issues and to propose organisational or operational changes. Sometimes, enacting policies or other types of structural change can resolve grievances around a common issue, rather than continuing to settle individual complaints on a case-by-case basis.
- *Evaluate and improve the mechanism.* The company should periodically conduct an internal assessment of the grievance mechanism to evaluate and improve its effectiveness. Important elements of evaluation include: general awareness of the mechanism; whether it is used and by whom; the types of issues addressed; the ability of the mechanism to resolve conflicts early and constructively; the actual outcomes (impacts on project operations, management systems, and benefits for communities); its efficiency; and, most

fundamentally, the ability to accomplish its stated purpose and goals. At certain times, the company should also solicit and include the views of stakeholder representatives to see how the mechanism is proving effective in practice.

7.17. *Good practices continued.* Other examples of good practices can be found in the IFC's Good Practice Note on Addressing Grievances from Project-Affected Communities, which identifies five key steps in the grievance management process:<sup>292</sup>

- *Step 1:* Publicising grievance mechanism procedures;
- *Step 2:* Receiving and keeping track of grievances;
- *Step 3:* Reviewing and investigating grievances;
- *Step 4:* Developing resolution options and preparing a response; and
- *Step 5:* Monitoring, reporting, and evaluating a grievance mechanism.

7.18. *Effectiveness criteria.* Additionally, to ensure the optimal functioning of any established grievance mechanism, contracting parties and non-parties should adopt the UN Guiding Principles' "effectiveness criteria" which highlight that the grievance mechanism should be:<sup>293</sup>

- *Legitimate:* enabling trust among the stakeholder groups for whose use they are intended, and being accountable for the fair conduct of grievance processes;
- *Accessible:* being known to all stakeholder groups for whose use they are intended, and providing adequate assistance for those who may face particular barriers to access;
- *Predictable:* providing a clear and known procedure with an indicative time frame for each stage, and clarity on the types of process and outcome available as well as means of monitoring and implementation;
- *Equitable:* seeking to ensure that aggrieved parties have reasonable access to sources of information, advice and expertise necessary to engage in a grievance process on fair, informed and respectful terms;

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<sup>292</sup> IFC. 2009. [Good Practice Note. Addressing Grievances from Project-Affected Communities](#), pp. 16-28.

<sup>293</sup> UN [Guiding Principles on Business and Human Rights](#), principle 31; see also OECD. 2017. [Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector](#), p. 76 (Table 8).

- *Transparent*: keeping parties to a grievance informed about its progress, and providing sufficient information about the mechanism's performance to build confidence in its effectiveness and meet any public interest at stake;
- *Rights-compatible*: ensuring that outcomes and remedies comply with internationally recognised human rights;
- *A source of continuous learning*: drawing on relevant measures to identify lessons for improving the mechanism and preventing future grievances and harms; and
- *Based on engagement and dialogue*: consulting the stakeholder groups for whose use they are intended by focusing on dialogue as the means to address and resolve grievances.

## **II. DISPUTE SETTLEMENT MECHANISMS**

7.19. *Introduction*. The existence of a dispute presupposes unsatisfactory, unilaterally adjusted or non-performance by one or more of the contracting parties. However, not every failure to observe the terms of the contract needs to escalate into a dispute. For potential disputes involving only contracting parties, the parties may agree to waive or revise certain terms of performance. For potential disputes involving non-parties, the party or parties whose actions or omissions will affect third-party beneficiaries and other stakeholders may consult and reach an agreement with the latter on a course of action that mitigates or avoids anticipated adverse impacts. If steps are taken to prevent a dispute from crystallising, neither the contracting parties nor the non-parties need proceed to dispute resolution.

7.20. *Roadmap*. This section examines general considerations regarding dispute settlement mechanisms (A), outlines possible forms that non-judicial (B) and judicial dispute resolution (C) can take. The most appropriate form of dispute resolution will be determined by the circumstances of each situation or dispute and the manner and extent to which non-parties are involved.

### **A. General considerations**

7.21. *Agreement on a dispute settlement mechanism*. Contracting parties may agree on a preferred dispute settlement mechanism, provided that such an agreement is valid under host State law. Parties may also agree on the formalities and rules governing the dispute settlement procedure. Certain aspects of their contractual relationship could be particularly contentious, such as competing

rights over the granted agricultural land; the standard of compliance with social, human rights, economic and environmental obligations; excuses for non-performance; and grounds for termination. Non-parties whose rights or interests regarding the land overlap with those of the contracting parties might also be particularly affected. Accordingly, contracting parties are advised to make provision for a dispute settlement mechanism allowing for one or more forms of non-party participation during negotiation and drafting of the contract.

7.22. *Applicable law.* A preliminary concern in dispute resolution is the applicable law. The legality of land ownership and tenure, and other land-related issues are governed by the law of the State in which the land is situated (*i.e.* host State law). Additionally, the substance of a dispute can be governed by a law or laws chosen by the contracting parties. As indicated in Chapter 1, the legal framework for ALICs comprises domestic and international sources of law. In the absence of express choice, the substance of the dispute may be governed by a combination of host State law and international law. For instance, disputes involving a claim over land rights which are submitted for final, binding adjudication by an impartial decision-maker, will often be determined primarily by the application of host State law.

7.23. *Unequal bargaining power.* The final choice of dispute settlement mechanism may reflect the unequal bargaining power of the contracting parties. For example, an investor may prefer dispute settlement through international arbitration, while a grantor government may prefer dispute settlement in domestic judicial or non-judicial settings. Furthermore, legitimate tenure rights holders or a local community may find themselves in a weaker position relative to the investor or the government and may have to accept an imposed dispute settlement mechanism. Regardless of the chosen dispute settlement mechanism, it should adequately protect the rights and interests of all parties involved, both contracting and non. When the choice of dispute settlement mechanism was stipulated by one contracting party, access to effective remedy (see Chapter 5) becomes all the more critical to ensuring contractual stability and predictability, and the fostering of a functional contractual relationship. It is a safeguard against unfair conduct on the part of the stronger contracting party and ensures that weaker contracting parties, as well as non-parties, have genuine and effective recourse to remedies.

7.24. *Substantive and procedural dimensions.* Access to effective remedy comprises both substantive and procedural dimensions. Substantively, the objective is that of righting wrongs that have occurred, which can be met through financial or non-financial restitution, as well as punitive or preventive sanctions. The procedural dimension concerns the provision of remedy through an

adjudicatory process that is independent, impartial, and corruption-free. Given the variety of disputes that may arise from ALICs, awareness of the different non-judicial and judicial dispute settlement options will allow contracting parties to incorporate in the contract one or any number of mechanisms that best suits their needs, as well as those of non-parties.

7.25. *Forums and non-party participation.* While some contracting parties may choose to litigate their dispute before a domestic court, others may consent to arbitrate their dispute before an international court, and yet others may agree on alternative dispute resolution mechanisms. Contracting parties should also envisage or cater for the participation of non-parties in dispute settlement proceedings. In domestic litigation, subject to the law of the forum, such participation may take the form of written or oral *amicus curiae* (or “friend of the court”) submissions. In international arbitration, subject to the law governing the arbitration, non-parties may also make written submissions to the tribunal. To this end, contracting parties may consider adopting or adapting the procedure in the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration for receiving submissions from “third person(s)”.<sup>294</sup> In less institutionalised dispute settlement proceedings, such as a hearing before indigenous community elders, the elders may wish to hear from all interested parties before making a final ruling that is binding on the contracting parties and the non-parties.

7.26. *Default forum.* When a contract does not contain a forum selection clause, a contracting party does not require the prior consent of the other contracting party or parties before submitting its dispute to the courts of the host State. This is because domestic courts can exercise compulsory personal and subject matter jurisdiction over persons and disputes located in that State’s territory. Accordingly, judicial resolution may be unilaterally invoked by a claimant, regardless of whether the claimant is a contracting party or non-party. Compulsory jurisdiction allows domestic courts to compel a defendant to stand trial, and to impose punitive sanctions, such as contempt of court, if the defendant refuses to do so.

7.27. *Consent for alternative fora.* By contrast, non-judicial dispute resolution mechanisms are those which are stipulated in the contract. Arbitration, for example, is a form of consensual, non-judicial dispute resolution, which requires the consent of contracting parties before arbitration can proceed. Consent can be expressed in an arbitration clause in the contract, or in an exchange of letters between the contracting parties. The form of the consent will normally be

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<sup>294</sup> UNCITRAL. 2014. [Rules on Transparency in Treaty-based Investor-State Arbitration](#), Art. 4.



determined by the law applicable to the ALIC, subject to the mandatory provisions of the domestic law of the land.

7.28. *Consent outside of the contract.* Contracting parties may also agree to the non-judicial resolution of disputes outside of the ALIC. The agreement may pertain to future disputes or an existing dispute and will be recorded separately from the main contract. If the contract fails to provide for a mode of dispute resolution, the separate agreement prevails. When the contract already provides for a mode of dispute resolution, whether the separate agreement takes precedence over a contractual clause depends on the wording of both the separate agreement and the contractual clause. In order to minimise uncertainty over the chosen mode of dispute resolution, or the order of priority among different modes of dispute resolution, contracting parties should be adequately advised and represented not only during the contract drafting process, but also during pre-contractual and post-contractual communications.

## **B. Non-judicial dispute resolution**

7.29. *Introduction.* Non-judicial dispute resolution proceedings can sometimes be timelier and more flexible than judicial proceedings. Contracting parties are often free to choose one or combine several options, tailoring things to their needs. For example, parties wishing to: foresee factual, environment-related disputes regarding soil quality, management and degradation may benefit most from rapid expert determination (1); preserve their contractual relationship to the greatest extent possible may prefer negotiation or mediation (2); cater for disputes raising issues of law may benefit most from submission to legally-trained arbitrators (3).

### **1. Expert determination**

7.30. *In general.* Expert determination can bring about the expeditious resolution of a dispute that raises only issues of fact. However, the nature of the factual dispute must be straightforward enough for an expert determination to suffice as the tie-breaker. An example of a factual dispute arising from an ALIC would be the contested existence of soil degradation. An expert determination may be all that is required to let the parties know if contractual provisions on compensation and reparative measures for soil degradation can be invoked against the defaulting party. A counterexample of a straightforward factual dispute is one in which the extent of an investor's compliance with its contractual obligations to maintain soil quality is contested, as this involves an issue of law as well as fact. Given that the latter example raises legal issues of contractual

interpretation and proof, which call for the involvement of legal counsel, expert determination alone is unlikely to suffice.

7.31. *Appointment procedures.* When a dispute can be resolved by expert determination, the expert or panel of experts tasked to hear the dispute is normally appointed by agreement of the disputing parties, who can be contracting parties as well as non-parties. Alternatively, each disputing party may appoint one expert, and the appointed experts may agree on another expert. Disputing parties may also request the appointment of an expert or a panel of experts from an arbitral institution or a relevant industry body. In the last scenario, the expert or experts will be appointed in accordance with institutional rules or procedure.

7.32. *Expert qualifications, availability, and independence.* When appointing experts, disputing parties should ensure that the experts' qualifications, experience, and professional standing demonstrate a high level of aptitude in the field or matter on which a determination is sought. Unless the disputing parties agree otherwise, experts must be independent of the parties (*i.e.* should not, for example, be an employee of one of the disputing parties). When appointing experts, disputing parties may also wish to consider the experts' availability, place of residence in the event that an on-site inspection is required, language skills, and costs of appointment.

7.33. *Expert written report.* An expert determination may be given in a written report. A draft report may be circulated to the disputing parties for their comments, and the final report should address those comments. While the final report is intended to resolve the dispute, recourse to expert determination generally does not bar disputing parties from subsequently accessing other forms of non-judicial or judicial dispute settlement mechanism.

## **2. Negotiation and mediation**

7.34. *In general.* Negotiation and mediation are amicable forms of non-judicial dispute settlement. Mediation encompasses conciliation and any other procedure where a neutral third person is appointed to steer, but not compel, the disputing parties to a resolution. Negotiation and mediation can be initiated by and involve both contracting parties and non-parties, so long as all parties to the negotiation and mediation agree to have the dispute resolved in the proposed manner, and pledge to uphold any settlement they may reach on a voluntary basis. Negotiation differs from mediation in that the latter is normally conducted by a third person,

the mediator, who assists the disputing parties in arriving at a compromise.<sup>295</sup> The mediator does not, however, have the power to impose a solution should the disputing parties fail to arrive at one. Neither negotiation nor mediation guarantees final resolution of the dispute. Disputing parties who fail to reach a settlement through negotiation or mediation are free to explore other means for resolving their dispute.

7.35. *Negotiation.* Negotiation is a relatively informal and confidential process in which disputing parties attempt to reach a settlement through discussions without third party intervention. Contracting parties with a long-standing relationship and who are familiar with each other's operations may view negotiation as a way to preserve a good working relationship. In contrast, some contracting parties may find it more challenging to negotiate with an entity with whom it has a disagreement, but limited familiarity. Non-parties who have a pre-existing relationship with the contracting parties may also find negotiation more appealing than non-parties lacking this pre-existing relationship. Should negotiation fail to yield a settlement between disputing parties, the next step is usually mediation.

7.36. *Mediation.* Unlike negotiation, mediation is a more formal process in which disputing parties seek to arrive at a resolution with the assistance of a mediator.<sup>296</sup> Mediation may appeal to disputing parties because it can be conducted over a short period, can have lower cost implications and, due to its confidential nature, generally keeps both small and large-scale disputes out of the public eye. Disputing parties must expressly agree to submit their dispute to mediation which can be done in a contractual clause or through an extra-contractual agreement. Mediation can be conducted *ad hoc*, or pursuant to institutional rules designed for mediations. In the former, disputing parties determine the procedure and agree on a mediator with qualities corresponding to their particular situation. In the latter, disputing parties mediate under the auspices of an institution which designates procedural rules and recommends a mediator. Contracting parties may also stipulate that recourse to mediation is a precondition to the submission of the dispute to binding dispute settlement procedures like arbitration, or litigation before courts. Unless otherwise agreed by the parties, a mediator does not act as

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<sup>295</sup> UNCITRAL. 2018. UNCITRAL [Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation](#) (amending the UNCITRAL. 2002. Model Law on International Commercial Conciliation), Art.1, note 2.

<sup>296</sup> OHADA. 2017. [Uniform Act on Mediation](#), Arts. 1, 4, 7-9.

an arbitrator of the dispute submitted to mediation, issuing a ruling that is binding on the mediating parties.<sup>297</sup>

### 3. Arbitration

7.37. *In general.* Arbitration is a consensual form of non-judicial dispute settlement. Although consent to arbitrate refers to the consent of the contracting parties, non-parties with interests at stake may wish to participate in the arbitral proceedings. Non-parties to the dispute who also happen to be contracting parties may participate by requesting to be joined to the proceedings, whereas the participation of non-parties to the contract in arbitral proceedings generally requires the consent of the contracting parties. Disputes arising from ALICs may be submitted to contract-based arbitration, or to treaty-based arbitration.

7.38. *Contract-based arbitration.* In contract-based arbitration, the consent of the contracting parties to arbitrate may be recorded in an arbitration clause in the contract, or in a separate agreement after the dispute has arisen. An arbitration agreement may be recorded in writing, orally, or by other means.<sup>298</sup> It should clearly define the matters which the contracting parties consent to submit to arbitration and, if they wish to arbitrate under the auspices of an arbitral institution, correctly identify that institution. An arbitration agreement should also stipulate the seat of the arbitration, and may indicate the language of the arbitration, and the number of arbitrators to hear and decide the dispute. Once consent to arbitrate is given by the contracting parties, it cannot be unilaterally withdrawn. A valid arbitration agreement creates a binding obligation on all parties to the agreement to submit to arbitration, and generally precludes any party to the agreement from seeking judicial resolution of the dispute.

7.39. *Principle of separability.* In contract-based arbitration, an arbitration agreement is separable from the main contract,<sup>299</sup> and empowers the arbitral tribunal to rule on its own jurisdiction without having recourse to the courts.<sup>300</sup> Pursuant to the principle of separability, a finding by an arbitral tribunal that the contract was void *ab initio* or subsequently terminated does not affect the validity of an arbitration clause.<sup>301</sup> Pursuant to the principle of *kompetenz-kompetenz*, an

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<sup>297</sup> UNCITRAL. 2018. UNCITRAL [Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation](#) (amending the UNCITRAL. 2002. Model Law on International Commercial Conciliation), Art.13.

<sup>298</sup> UNCITRAL. 2006. UNCITRAL [Model Law on International Commercial Arbitration](#), Art.7 (Option 1).

<sup>299</sup> *Id.*, Art.16(1); and accompanying Explanatory Note, para. 25.

<sup>300</sup> *Ibid.*

<sup>301</sup> See UNIDROIT/FAO/IFAD. 2015. [Legal Guide on Contract Farming](#), p. 202.

arbitral tribunal is its own judge of whether it has jurisdiction to hear a dispute. A contracting party may challenge the tribunal's jurisdictional ruling before the courts of the State in which the arbitration is seated. The procedure and outcome of the challenge is determined by the domestic laws of that State. If the court finds that there is a valid agreement to arbitrate, it will order a stay of court proceedings and refer the contracting parties to arbitration. If the court finds, however, that there is no valid agreement to arbitrate, it will not compel the contracting parties to submit to arbitration. In the latter scenario, contracting parties will have to consider forms of non-judicial dispute resolution other than arbitration, or judicial dispute resolution. To minimise jurisdictional conflicts between arbitral tribunals and other dispute settlement bodies, contracting parties should draft an arbitration clause expressing a clear intention to arbitrate.

7.40. *Non-party participation.* In contract-based arbitration, non-parties to the contract may, exceptionally, participate in the proceedings by making a submission to the arbitral tribunal or by observing a hearing. Non-parties to the dispute may participate by requesting to be joined to the proceedings. A request for joinder may be subject to time stipulations and barred after a certain date, and may be rejected by the arbitral tribunal if it prejudices any of the existing disputing parties.<sup>302</sup> When an arbitration is conducted in accordance with procedural rules designed by the contracting disputing parties, the possibility and manner of non-party (be it to the contract or to the dispute) participation is a matter for agreement between the contracting disputing parties. When an arbitration is conducted in accordance with the procedural rules of a chosen arbitral institution, the possibility and manner of non-party (be it to the contract or to the dispute) participation may be specified in the applicable institutional rules.

7.41. *Treaty-based arbitration.* In treaty-based arbitration, there has to be consent between the investor and the host State, and such consent is given separately. First, the State's consent to arbitrate may be found in a bilateral or multilateral International Investment Agreement (IIAs), which may confer protection on qualifying investments of investors who are nationals of the other or other contracting States. In most IIAs, a contracting State consents to arbitrate a given class of future disputes arising from qualifying investments with qualifying investors at large. Second, the investor's consent to arbitrate, given after a dispute with the host State has arisen, is found in a request for arbitration with the State that refers to the applicable IIA. Once consent by the host State and the

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<sup>302</sup> UNCITRAL. 2010. [UNCITRAL Arbitration Rules](#), Art.17(5).

investor to arbitrate is given, the arbitration will be conducted in accordance with the procedure set out, or the institutional rules referenced, in the applicable IIA.

7.42. *Special procedural aspects of treaty-based arbitration.* Disputes arising from ALICs can be submitted to treaty-based arbitration when the applicable IIA expressly recognises contracts or rights created by contract as protected investments. Investor-State disputes that are contractual in origin can also be submitted to treaty-based arbitration if the applicable IIA does not expressly list contracts or rights created by contract as protected investments, but confers protection on rights and interests of economic value, regardless of provenance. By contrast, investor-State disputes that are contractual in origin cannot be submitted to treaty-based arbitration if the applicable IIA expressly excludes contracts and rights created by contract from protection. Although the preponderance of claims brought by investors against States in treaty-based arbitration allege the violation of the applicable IIA (*i.e.* treaty claims), some investors may also allege the breach of the underlying contract (*i.e.* contract claims). Whether a treaty-based arbitral tribunal is empowered to hear contract claims as well as treaty claims depends on the scope of the Contracting States' consent to arbitrate in the applicable IIA.

7.43. *Special substantive aspects of treaty-based arbitration.* In treaty-based arbitration, the investor is the claimant, while the State is the respondent. This is unlike contract-based arbitration where any of the contracting parties can be the claimant or the respondent. This is because most IIAs, which only set out the obligations of Contracting States with respect to investment protection, can only be invoked by investors against those States but not vice versa. Depending on the IIA, the State may be able to bring a counterclaim against the investor. Some newer IIAs impose obligations on investors to respect human rights and maintain high standards of corporate social responsibility when operating in the host State. However, these newer IIAs do not expressly allow States to initiate claims against investors who do not meet these obligations. When invoking an IIA, an investor claims that the State has violated international obligations owed to itself or to its investment. Common IIA obligations include the conferral of fair and equitable treatment on protected investors and their investments,<sup>303</sup> the guarantee that protected investments will not be expropriated in the absence of a public purpose, proper compensation, and due process,<sup>304</sup> and the commitment – though becoming less common in recent and new IIAs – to observe all obligations the host State has entered into with the investor.<sup>305</sup> The claim and any counterclaim

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<sup>303</sup> The IIA clause setting out this obligation is also known as an FET clause.

<sup>304</sup> The IIA clause setting out this obligation is also known as an expropriation clause.

<sup>305</sup> The IIA clause setting out this obligation is also known as an umbrella clause.

will be heard by an arbitral tribunal constituted in accordance with the procedure set out, or the institutional rules referenced, in the applicable IIA. Like arbitral tribunals that derive their powers from contract, arbitral tribunals that derive their powers from IIAs can rule on their own jurisdictional competence and, when jurisdiction is established, rule on the merits of the claim.

7.44. *Public interest and transparency.* In treaty-based arbitration, investors challenge the legality of host State measures, and in turn the propriety of the exercise of sovereignty, affecting their investment. The significant public interest element in investor-State arbitration has led to calls for greater transparency in arbitration proceedings which are traditionally confidential. In this regard, the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration provide that key documents such as party submissions and witness statements shall be made available to members of the public on request,<sup>306</sup> and that parties other than the claimant investors and respondent States can make submissions on matters within the scope of the dispute,<sup>307</sup> so long as the publication of documents and the participation of these parties do not compromise the protection of confidential information or the integrity of the arbitral process.<sup>308</sup> The UNCITRAL Rules on Transparency cater for the participation of non-State legal tenure right holders, legitimate tenure right holders, and members of the local community in an investor-State arbitration. Outside the UNCITRAL Rules on Transparency, the publication of key documents and the participation of such holders and members in treaty-based investor-State arbitrations may be regulated by institutional arbitration rules. In other arbitrations or in the absence of applicable institutional arbitration rules, these matters are determined by arbitral tribunals, with the consent of the investor and the State, on a case-by-case basis.

7.45. *Procedural rules.* Although parties to an arbitration, whether contracting parties or non-parties, are free to design the arbitral procedure, given the availability of institutional procedural rules, as well as procedural rules for *ad hoc* arbitrations,<sup>309</sup> they may also adopt a set of ready-made rules. These rules set out the time limits for the filing of statements of claim and defences, the constitution of the tribunals, the steps to take when seeking interim relief, the conduct of oral hearings, and the possibility of recourse against an arbitral award issued by the tribunal. Parties to an arbitration have an equal right to be heard in

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<sup>306</sup> UNCITRAL. 2014. [Rules on Transparency in Treaty-based Investor-State Arbitration](#), Art. 3.

<sup>307</sup> *Id.*, Arts. 4-5.

<sup>308</sup> *Id.*, Art. 7.

<sup>309</sup> See e.g. UNCITRAL. 2010. [UNCITRAL Arbitration Rules](#).

an arbitration. The failure to observe this may affect the enforceability of an award.

7.46. *Final awards.* Arbitration is ended with the issuance of a final award by the tribunal which is binding on the disputing parties. In a contract-based arbitration initiated by one contracting party against another, and in which affected members of the local community participated, any award rendered is binding on the disputing contracting parties, but not on members of the local community. In a treaty-based arbitration between an investor and a State, and in which an affected legitimate tenure right holder made written submissions, any award rendered is binding on the disputing investor and State, but not on the legitimate tenure right holder. An arbitral award may be satisfied voluntarily by the disputing party against whom an order of damages has been made. Absent voluntary satisfaction, the prevailing disputing party may seek enforcement and execution of the award in domestic courts.

7.47. *Enforcement and execution.* The enforcement and execution of arbitration awards is regulated by international instruments such as the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention),<sup>310</sup> in conjunction with domestic legislation. The grounds for refusing the enforcement or setting aside an arbitral award are limited to those supplied in treaties and in domestic law, ensuring finality in dispute resolution through arbitration (see also Section III below regarding enforcement).

### **C. Judicial dispute resolution**

7.48. *Introduction.* Disputing parties who choose to pursue judicial proceedings will be subject to the laws of the forum, including the private international law rules of the forum which determine the applicable law, and may establish that the law applicable to a given case is foreign law. If the courts of the host State have exclusive jurisdiction over disputes concerning land located there,<sup>311</sup> then the parties must litigate their dispute before these courts. Absent that State's courts having exclusive jurisdiction, then the disputing parties may litigate their dispute in a forum of their choice.

7.49. *Forum selection.* When choosing a forum, disputing parties should consider the procedural laws on limitation periods and the regulation of litigation,

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<sup>310</sup> The [New York Convention](#) was signed 10 June 1958 and entered into force 7 July 1959.

<sup>311</sup> EU. 2012. [Regulation \(EU\) No 1215/2012](#) of the European Parliament and of the Council on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, Art. 24(1).



as well as any relevant practice, which can vary widely across jurisdictions. Disputes involving the adverse impact of land activities on children of the local community, for instance, should be litigated, to the extent that the disputing parties are free to choose their forum, in a jurisdiction with longer limitation periods for land-related claims. This is because the harmful effects may take many years to manifest. Such a claim may be time-barred from judicial resolution in a jurisdiction with shorter limitation periods for land-related claims. Other relevant considerations when choosing a forum for judicial dispute resolution, for example, include the place of incorporation or headquarters of the investor, laws that affect the justiciability or the ability of the courts of the forum to hear a claim, as well as laws setting out any special remedies. The weight given to each consideration will vary depending on the circumstances of each dispute and the identity of the disputing parties.

7.50. *Proceedings.* Judicial proceedings are distinguishable from most forms of non-judicial dispute resolution mechanisms by their high level of formality. Each litigant's fundamental right to a fair trial before independent and impartial judges requires the strict observation of procedural guarantees. Disputing parties may be required to act through lawyers who will help them navigate complex rules of procedure and present their best claim or defence. When relying on legal representation, parties should be mindful of legal costs. At the end of a judicial dispute resolution, courts may order each disputing party to bear its own legal costs, or the losing party to pay the winning party's costs.

7.51. *Fora.* Disputing parties electing judicial dispute resolution may litigate in domestic courts (1) or submit their claim to an international or regional court (2), depending on the nature of the claim and the jurisdictional competence of the court over that claim. As domestic courts have a broader competence, they will receive a greater variety of disputes arising from investor-government and investor-community contracts. International and regional courts have a narrower jurisdictional competence than domestic courts, which is usually limited to claims alleging the violation of human rights or raising questions of international law.

## **1. Domestic courts**

7.52. *In general.* Contracting parties to the ALIC or related agreements can sue and be sued before domestic courts. Litigants before domestic courts do not require the prior approval or the consent of defendant parties before they bring a claim. So long as the claim complies with all the relevant rules of procedure of the forum, it will be heard. It should be noted that depending on the law and on the specifics of the administration of justice in a given jurisdiction, the competent

domestic court itself may vary (e.g. municipal, regional, provincial, federal court, or it could be an administrative court, all of which often have different rules).

7.53. *Investors.* For ALICs that do not contain an arbitration clause, both domestic and foreign investors may litigate a dispute with other contracting parties before the courts of the host State (*i.e.* where the land is located). When the defendant is the investor's home State, the investor may be bound by domestic law to litigate its dispute before domestic courts.

7.54. *Other contracting parties.* Other contracting parties may also sue an investor before domestic courts. When the claimant is a grantor government or local community, litigation is likely to commence before the courts of the host State. Investors, both domestic and foreign, may be sued in the courts of the jurisdiction in which the investment is situated for non-performance, unsatisfactory performance, or any other breach of the contract, or for the violation of domestic laws in the course of performing the contract.

7.55. *Non-parties.* Non-parties who are adversely affected by the activities carried out by the contracting parties and may even have rights as third-party beneficiaries (such as legitimate tenure right holders and members of local communities) may also sue the latter in domestic courts. When the defendant is a domestic investor or a grantor government or local community, the dispute is domestic in nature and the proper forum is the courts of the host State.

## **2. International and regional courts**

7.56. *In general.* Contracting parties and non-parties may submit or request submission of disputes arising from a contract to international or regional courts for resolution. At present, with the exception of individual commission of international crimes,<sup>312</sup> only States can be sued before international and regional courts.

7.57. *Regional courts.* Domestic investors and non-parties from certain jurisdictions have the option of suing their State of nationality or the host State for human rights violations or environmental damage before a sub-regional or a regional court such as the Economic Community of West African States Community Court of Justice. One example of a regional court that can hear claims brought by nationals and non-nationals against signatory States is the Inter-American Court of Human Rights which enforces the American Convention on

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<sup>312</sup> International Criminal Court. 2011. [Rome Statute of the International Criminal Court](#), Art. 25.

Human Rights. Other examples of regional courts are the African Court on Human and People's Rights and the European Court of Human Rights.

7.58. *Diplomatic protection.* Foreign investors, apart from invoking applicable IIAs against host States as explained in Section II.B.3 above, may request diplomatic protection from their home State. As the conferral of diplomatic protection for contractual disputes is infrequent and discretionary, few investors seek assistance from their home State if they can bring a claim directly against the host State. Diplomatic protection entails "the invocation by a State, through diplomatic action or other means of peaceful settlement, of the responsibility of another State for an injury caused by an internationally wrongful act of that State to a natural or legal person that is a national of the former State with a view to the implementation of such responsibility".<sup>313</sup> Diplomatic action can consist of negotiations at the inter-State level, for instance.

### **III. ENFORCEMENT OF SETTLEMENTS OR DECISIONS RESOLVING A DISPUTE**

7.59. *Introduction.* When a dispute has been resolved through non-judicial or judicial means, disputing parties should comply with the terms of the agreement, settlement, decision, award, or judgment. If the disputing party directed to take or refrain from a course of action, or to compensate the other disputing party for its losses, does not voluntarily satisfy the settlement or the decision reached, the creditor party will be required to launch enforcement procedures. As enforcement regimes can vary from State to State, the creditor party should be aware of the applicable laws of the forum in which enforcement is sought.

7.60. *Enforcement via public authorities.* When enforcing a settlement or decision against private entities, the creditor party may have recourse to public authorities. Where the creditor party has an arbitral award, this entails an application to a court in a jurisdiction where the debtor party has known assets, to first recognise the award pursuant to the New York Convention or applicable domestic legislation, and then to execute the award against the debtor party's known assets. On occasion, a creditor party may need to seek an injunction from the court to stop the debtor party from disposing of its assets. Satisfaction is obtained when the court orders the seizure and sale of the debtor party's assets.

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<sup>313</sup> International Law Commission (ILC). 2006. [Draft articles on Diplomatic Protection](#), Art.1.

7.61. *Enforcement by private means.* The creditor party may also pursue enforcement by private means. Such means can be written into the contract. Additionally, the creditor party may consider “blacklisting”, by formal announcement or otherwise, the debtor party. Reputational sanction is likely to undermine a debtor party’s future contracting opportunities and profits. A debtor party will respond positively to private means of enforcement when the benefits of satisfaction outweigh the costs of non-satisfaction.

7.62. *Enforcement against a government.* When enforcing a settlement or decision against a government, the creditor party may also have recourse to public authorities. Awards rendered pursuant to investor-State arbitration may be recognised and executed against the respondent State’s assets in domestic courts in accordance with the New York Convention or applicable domestic legislation. If the investor-State arbitration was conducted pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States,<sup>314</sup> the award shall be recognised and enforced by the courts of any signatory State to the Convention in a similar fashion to a final judgment of a court in that State.<sup>315</sup> Parties seeking to use the New York Convention or the International Centre for Settlement of Investment Disputes (ICSID) Convention to enforce an arbitral award before a given State’s court’s must first ascertain whether that State is a signatory to either one or both conventions.

7.63. *Sovereign immunity.* States can claim sovereign immunity from execution against State assets. Many jurisdictions recognise qualified sovereign immunity from enforcement, while a small number of jurisdictions recognise absolute sovereign immunity from enforcement. In the former, State assets expressly earmarked or determined by the courts to serve a governmental purpose, such as military aircraft and monies held by the central bank, are immune from execution. In the latter, all State assets, regardless of whether they serve a governmental or commercial purpose, are immune from enforcement. The decision to recognise qualified or absolute sovereign immunity from execution lies within the discretion of each State.

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<sup>314</sup> International Centre for Settlement of Investment Disputes, [ICSID Convention, Regulations and Rules](#).

<sup>315</sup> Signed on 18 March 1965, entered into force 14 October 1966, Art. 54(1).

7.64. *Importance of effective enforcement.* Whether enforcement of a settlement, award or judicial decision is sought by a domestic investor, a foreign investor, by a grantor, or by non-parties against contracting parties, all States should ensure that there is an effective enforcement regime to provide genuine redress.<sup>316</sup>

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<sup>316</sup> UN [Guiding Principles on Business and Human Rights](#), pp. 3-12, 27-35. Examples of enforcement regimes include UNCITRAL. 2019. [Convention on International Settlement Agreements Resulting from Mediation](#); UNCITRAL. 1958. [Convention on the Recognition and Enforcement of Foreign Arbitral Awards](#); Hague Conference on Private International Law (HCCH.) 1971. [Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters](#).

## ANNEX I - CHECKLIST OF KEY ISSUES

(Formatting and insertion of cross-reference to be done)

### ***The Legal Framework (Chapter 1)***

Contracting parties may find the identification of the applicable legal framework challenging as it requires assessing the domestic law (*e.g.* legislation, judicial decisions, regulations and, in some instances, customary rules) of the State in which the investment is or will be made, as well as the elements of international, regional and supranational law that may influence the contractual relationship. Moreover, in order to achieve responsible agriculture investment it may be necessary to address, in the ALIC itself, certain issues or gaps identified in that law. The first chapter thus gives guidance on the various sources of law that may define the legal framework applicable to an ALIC.

#### ➤ **Checklist of key issues**

Review and assess the applicable legal framework:

- analyse the hierarchy of the legal framework in the host-State and identify mandatory and default rules with which the parties must comply, as well as any relevant customary rules (*e.g.* non-discrimination on the basis of gender);
- consider the private international law (including conflict of law) dimension (*e.g.* when one of the contracting parties is a foreign investor) to determine the applicable legal framework, and evaluate whether a choice of law clause is compatible with the applicable national legal regime;
- identify applicable public international law, both binding (*e.g.* treaties, customary obligations, general principles) and non-binding soft law instruments such as international guidance documents (*e.g.* the UN Guiding Principles, the VGGT, the CFS-RAI Principles, LGCF);
- analyse relevant judicial decisions, whether domestic, regional, or international, which may entail obligations under the ALIC;
- assess whether there are any gaps in the domestic legal regime and whether those gaps can be addressed through contractual provisions; and, if not, evaluate whether a proposed investment should ultimately proceed.

## ***Parties, Stakeholders, and Contractual Arrangements (Chapter 2)***

Chapter 2 provides legal guidance on the potential “contracting parties” (grantors, legal and legitimate tenure right holders) and “other stakeholders” (e.g. local community, indigenous peoples, government agencies, service providers) who may be interested or involved as third-parties. The Guide examines the notion of legitimate tenure right holders and explores a variety of the possible contractual arrangements (e.g. investor-grantor contracts, multi-party contracts, community development agreements) that parties may decide to adopt.

### **➤ Checklist of key issues**

- adopt appropriate measures to ascertain, respect, and protect the rights of legitimate tenure right holders – which may differ from those of legal tenure right holders;
- perform stakeholder mapping to identify the various potential contracting parties and other actors who may have rights and obligations related to the land, or may be affected by the ALIC, including local communities, indigenous peoples and government agencies who may need to be consulted to avoid bad faith occupants;
- identify trusted local advisers and engage with various stakeholders representing different concerns, including, when relevant, women, youth, elders, indigenous groups, pastoralists, or other groups who use land in non-traditional ways;
- consider the possible contractual arrangements for balancing the interests of those parties and stakeholders, including contracts between investors and grantors, multi-party contracts, related agreements and contracts with legitimate tenure right holders;
- consider the financial and organizational costs for the implementation of a participatory approach to the involvement of third-party beneficiaries.

## ***Significant Pre-Contractual Issues in Agricultural Land Investment Contracts (Chapter 3)***

A vital step in ensuring the success of an agriculture investment project is obtaining essential information related to the investment before signature of a contract. The third chapter of the Guide presents the key elements of the precontractual processes regarding due diligence, feasibility studies and business plans, as well as impact assessments. Guidance on how to conduct consultations

is also provided, examining who should be consulted, explaining the importance of the quality of consultations and outlining the relevance and main components of active, free, meaningful and informed participation. Chapter 3 further provides an overview of the stages of contract formation, including tendering and bidding processes, negotiation, providing guidance on the contractual form, content, and conditions.

➤ **Checklist of key issues**

Due Diligence:

- ensure that the process of due diligence meets international standards, in particular with regard to the protection of tenure rights in the area of agricultural investment.

Consultations:

- take steps to ensure consultations follow international guidance, are conducted as widely as possible, consider the diversity of perspectives, and create spaces for particularly marginalised groups to be heard, especially in the early phases of project;
- ensure active, free, effective, meaningful and informed participation by considering the use of FAQs to streamline the information, vernacular radio notices or local advisors (especially for remote communities);
- provide consultation documents in language the communities can access and ensure affected people have access to the necessary facilities (e.g. local advisors) for them to understand the information received;
- take steps to ensure that free, prior, and informed consent is obtained from legitimate tenure rights holders, particularly in the case of indigenous peoples.

Feasibility study:

- consider including in the feasibility study: (a) compilation of all relevant data; (b) analysis of alternatives to achieve the goals of the project; (c) detailed examination of costs and benefits of project effectiveness; (d) preliminary design; and (e) detailed risk assessments including those relating to environmental and social impacts;



## *Annex I - Checklist of key issues*

- evaluate the risk of over-accumulation of land in cases where the same investor or any of its affiliates may have already acquired tenure rights in the same country/area;
- consider whether the identified land is both suitable and available and, if so, its valuation, along with whether necessary resources (e.g. water) are also available;
- reconsider the investment project if it involves land that is to be expropriated or has already been expropriated – as a result of which or for which legitimate tenure rights holders or other local communities are evicted.

### Business plan:

- develop a business plan for the proposed project involving the land and resources in question to organise the information gathered from a feasibility study as part of the investment project's marketing, operating, management and financial strategies.

### Impact assessments:

- perform impact assessments by undertaking this exercise in a holistic manner, with a focus on sustainability and by using the integrated and participatory approach;
- conduct simultaneously assessments regarding environmental impacts, social impacts, human rights impacts, economic impacts, as well as cultural impacts, and the impacts on intellectual property rights related to plant breeders' rights, keeping in mind that not all assessments may be required in a particular context;
- to be more than a mere "box-ticking" exercise, an impact assessment should include, among others, the following essential elements: mechanisms for ensuring participation of all legitimate tenure holders likely to be affected; monitoring and evaluation plans, including those for mitigating possible negative impacts; and the identification of actors liable to receive redress;

- consider whether the inclusion of appropriate clauses in the ALIC or a related agreement could avoid or mitigate the potential impacts flagged in impact assessments;
- reconsider the project if significant negative impacts are envisioned which cannot be avoided or mitigated through the contract or a related agreement.

Contract negotiation and formation:

- comply with requirements and guidance for the submission and review of investment proposals, which should be screened in a transparent manner which considers the proposal's impacts, safeguards and overall alignment with development plans and results in the publication of the contract and any related agreements, subject to the redaction of confidential information;
- conduct the negotiations or renegotiations in an inclusive and transparent manner, which ensures both the validity of any resulting contract, agreement or any amendments thereto and that parties and stakeholders are properly represented and have the necessary legal assistance;
- ensure that the resulting contract or agreement meets requirements of form and content, the non-fulfilment of which could lead, for example, to avoidance of that contract or agreement or various penalties.

***Rights and Obligations of the Parties (Chapter 4)***

One of the biggest challenges facing the parties to an ALIC is how to draft appropriate provisions addressing not only the particular tenure and related rights that are granted, but also necessary safeguards for any gaps in the State's law and for possible impacts of the investment. Chapter 4 thus aims to assist with the negotiation of provisions in various areas, such as land tenure, human and social rights – including food security, gender and youth – the environment, finance, investment protection and regulatory autonomy of States, and monitoring, implementation and transparency. Legal guidance is provided on a number of such safeguards, including innovative 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, including community development agreements or trusts, local employment or content requirements and outgrower schemes.

➤ **Checklist of key issues**

With respect to land tenure:

- specify the location and description of the land, including possibly related clauses containing terms regarding additional land;
- specify the tenure rights to be granted, including rights of use, access to and control of land, resources, utilities and facilities, as well as any rights withheld or reserved for the grantor or to protect and respect the rights of legitimate tenure right holders;
- specify any related rights to be granted, including access to utilities, to use and build infrastructure, and others necessary for the project's activities (e.g. import, export, transport and market production);
- define parameters for project development, including targets, timeframes, indicators of performance and incentives and in coordination, for example, with any terms for duration and renewal, monitoring, periodic review, force majeure situations and transfer and return;
- define terms for the duration and renewal of the grant of those rights, in coordination with any project development parameters and periodic review provisions.

With respect to social and economic issues, consider and specify as necessary:

- the monetary contributions in exchange for the granted rights, which may vary depending on the form of the project and overall bargain established by the ALIC, and any related agreements, as well as the timing and form of those contributions and any capitalisation requirements to ensure the investor has adequate resources;
- employment creation, access to jobs and labour rights, which may offer legitimate tenure right holders quality jobs on the project, with a particular emphasis on including such holders in a way that reduces occupational segregation and adheres to international rights and standards with respect to labour and workplace conditions;
- local content and processing, which can promote inclusive development in the project area and may involve incentives or performance requirements in order to establish more linkages with the local economy;

- contract farming, outgrower schemes and supply chain relations, which offer various arrangements for the project to involve legitimate tenure right holders and local communities, and certain minimum parameters and key aspects of those arrangements should be specified in the ALIC or a related agreement;
- community development funds and social infrastructure, by which the investor makes monetary or in-kind contributions to funds or community projects in order to share the benefits of the investment and for which there is a variety of contractual practices and matters to be addressed in the ALIC or a related agreement.

With respect to the environment, consider and specify as necessary:

- applicable domestic, regional and international law in connection with the evaluation of the legal framework, as well as relevant corporate social responsibility instruments and the role that ALICs and related agreements can play in environmental protection;
- the results of environmental impact assessments and how those impacts could be addressed through contractual provisions;
- contractual provisions regarding: the prevention of pollution and soil degradation, protection of water and ecosystems, management of waste and mitigation and adaptation to climate change, monitoring and project closure.

With respect to investment protection and regulatory autonomy, consider and specify as necessary:

- the need for balance between protection of the investor's investment and the regulatory autonomy of the State in which that investment is located or to be located, under the applicable law and any applicable international investment agreements;
- in light of that balance, provisions for ALICs between investors and governments, addressing – if needed – the circumstances under which a government may expropriate an investor's investment and the investment's physical and legal security, while keeping in mind that a responsible agricultural investment project should not require extensive security arrangements.

With respect to monitoring and implementation, consider and specify as necessary:

- the arrangements for the monitoring and implementation of the project, with a particular emphasis on promoting open communications between the parties and stakeholders;
- designating who is responsible for monitoring of the various obligations in the ALIC or a related agreement, as well as the methods and standards for such monitoring;
- how investors and grantors are to report on the matters monitored and the overall project, among themselves and with stakeholders and the general public, taking into consideration reporting obligations under applicable law, international reporting standards, and redaction of confidential information;
- terms regarding permits and licenses, insurance, any performance guarantees or bonds and notice and periodic review of the contract's implementation.

***Managing the Contractual Relationship during Implementation: Dealing with Non-Performance and Remedies (Chapter 5)***

Contracting parties and affected stakeholders may eventually encounter situations in which the contemplated rights will not be respected and/or obligations will not be satisfactorily performed, whether as a result of an event external to the parties' control or due to a default or breach by one of the parties. In many legal systems, however, there is no guidance on how to deal with cases of non-performance and the types of avenues available for parties and non-contracting parties to seek remedy. Chapter 5 of the Guide provides guidance on the importance of ensuring access to effective remedy and highlights the role contracting parties may play in establishing a contingency plan, in particular by building adequate and effective contractual mechanisms. The Chapter thus focuses on contractual remedies, but, depending on the specific legal system, an aggrieved party may be entitled to seek relief outside the particular contract or related agreement as well.

➤ **Checklist of key issues**

With respect to the contingency plan, consider and specify as necessary:

- Bearing in mind the applicable law, discuss possible situations in which certain obligations might not be met and how that non-performance might

be excused or otherwise remedied in order to build, to the extent necessary, a contingency plan into the ALIC for such situations and to promote predictability, stability and flexibility in the contractual relationship;

- in designing such a plan, take steps to ensure that the excuses or remedies that it provides are proportional, promote cooperation between the parties and are otherwise consistent with any agreed monitoring obligations and grievance and dispute resolution mechanisms.

With respect to the excuses, consider and specify as necessary:

- the events qualifying as force majeure situations and the consequences of such a qualifying situation;
- for changes of circumstances, in light of the diversity of approaches under domestic law, specify the particular circumstances giving rise to a hardship situation, and the consequences of that situation;
- for contracts between investors and governments, the special circumstances that may arise from civil disturbances and other situations of necessity.

With respect to remedies, consider and specify as necessary:

- the role of the aggrieved party's conduct in the breach, including interference, contribution to the breach and the duty to mitigate;
- in-kind remedies, which include withholding performance, right to performance, and corrective measures and the right to cure;
- monetary remedies, which include price reduction, as well as the right to interest and late payments;
- renegotiations which may allow for mitigation of risk and revision of the contract or related agreement;
- termination and restitution including grounds for termination, penalty clauses, and the procedure and effects of termination, which should be used only as a last resort;

- how various breaches – by the investor, grantor and legitimate tenure right holder – would generally be remedied.

***Transfer of Rights and Obligations under the Contract and Return of Tenure Rights (Chapter 6)***

Chapter 6 provides legal guidance focusing on two key moments in the lifespan of an ALIC: first, the transfer of the investment project or rights and obligations under ALICs, particularly from one investor to another, and second, the return of the land at the end of such contracts. Regarding transfers, parties must take care to ensure that they are handled in such a way that a project becomes or continues to be responsible and sustainable. Guidance is provided on the terms by which the project may be transferred, limitations on transfer, and the importance of disclosure of transfers. For returns, the parties must ensure that the agricultural land remains productive and any rights to it are returned to those who granted them or otherwise released them. To those ends, the Guide focuses on what situations are covered by return, the particular context of the return, and the cost and liabilities of the return.

**Checklist of key issues**

Regarding transfer consider and specify as necessary:

- terms by which the project may be transferred including with respect to prior notice, acceptance and consent to that transfer, as well as how that transfer affects any related agreements;
- terms by which the investor may transfer its rights and obligations to another investor including with respect to changes in control, heirs and affiliates, mergers and partnerships;
- limitations on transfer including with respect to government land, large-scale land areas and the investor's nationality;
- the importance of disclosure of transfers.

Regarding return consider and specify as necessary:

- what situations are covered by return which generally relates to when the contract ends, whether at the expiration of the contract's duration or by mutual agreement;

- the particular context of the return including the assets to be returned, distinctions between public and private property, and how the land, trees, crops, buildings and infrastructure, equipment and other technology are to be handled;
- the cost and liabilities of the return including how (and by whom) responsibility is borne for them, deterioration, and timing.

### ***Grievance Mechanisms and Dispute Resolution (Chapter 7)***

Chapter 7 deals with the types of grievances and disputes that commonly arise under ALICs and the various mechanisms for non-judicial and judicial dispute resolution. By establishing appropriate grievance mechanisms, including for employees, legitimate tenure right holders and local communities, the contracting parties may reduce the risks associated with a particular agricultural investment and prevent conflicts. In the event that a dispute arises, however, having defined a dispute resolution procedure and related commitments in the contract – including, for instance, expert determinations, negotiation, mediation, conciliation, arbitration and litigation – can ensure that disputes are resolved expeditiously and that the leased agricultural land does not lie fallow during that dispute. The legal guidance seeks to assist with understanding various grievance and dispute resolution possibilities and setting out efficient procedures in this regard.

#### **➤ Checklist of key issues**

For grievance mechanisms consider and specify as necessary:

- how such mechanisms are linked to impact assessments, legitimate tenure right holders and local communities and how such holders and communities' concerns can be best addressed;
- the various types and forms of such mechanisms;
- good practices, which provide guidance for setting up and implementing effective grievance mechanisms.

Regarding disputes resolution mechanisms, consider and specify as necessary:

- the importance of access to effective remedy and the contractual provision of such remedy, with an understanding of what can be agreed by the parties;



## *Annex I - Checklist of key issues*

- how unequal bargaining power can influence that agreement, the various available forums and non-party participation, the default forum and consent.

For non-judicial dispute resolution, consider and specify as necessary:

- choosing one or combining several of the following options tailored to the particular circumstances – including expert determination for disputes of fact, negotiation or mediation, and arbitration, the latter of which may be contractually-based or treaty-based;
- choosing a non-judicial dispute resolution mechanism with a particular emphasis on being inclusive of any other stakeholders and third-party beneficiaries.

For judicial dispute resolution, consider and specify as necessary:

- consider whether the courts of the State in which the land is located (*i.e.* host State) has exclusive jurisdiction over disputes concerning land and the various claims and procedures in those domestic courts and whether certain claims could be submitted to international or regional courts.

With respect to enforcement of settlements or decisions resolving a dispute:

- consider the various means by which a settlement or decision could be enforced in order to ensure an effective enforcement regime is available, if needed, to provide genuine redress.

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## ANNEX III - RESOURCES

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This Annex lists resources that supported the Guide's development. Such references are categorised as (I) instruments and guidance documents from inter-governmental Organisations; and (II) additional resources from international entities, scholarly articles and related materials, where appropriate keyed to the relevant paragraph(s) of the Guide. Within those categories, the resources are organised alphabetically by the entity or individual authors. Internet links are updated at 1 June 2020. It must be noted, however, that inclusion of a resource in this list does not indicate that UNIDROIT agrees with or approves that resource.

### **I. Instruments and guidance documents from inter-governmental organisations**

#### **1. International Conventions**

[African Charter on Human and Peoples' Rights, 1981](#)

[American Convention on Human Rights, 1969](#)

[Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, 1989](#)

[Cartagena Protocol on Biosafety to the Convention on Biological Diversity, 2000](#)

[Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984](#)

[Convention concerning the Abolition of Forced Labour, 1957](#)

[Convention concerning the Application of the Principles of the Right to Organise and to Bargain Collectively, 1949](#)

[Convention concerning Discrimination in Respect of Employment and Occupation, 1958](#)

[Convention concerning Forced or Compulsory Labour, 1930](#)

[Convention concerning Freedom of Association and Protection of the Right to Organise, 1948](#)

[Convention concerning Indigenous and Tribal Peoples in Independent Countries, 1989](#)

[Convention concerning Minimum Age for Admission to Employment, 1973](#)

[Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, 1999](#)

[Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, 1998](#)

- Convention on Biological Diversity, 1992
- Convention on the Elimination of All Forms of Discrimination against Women, 1979
- Convention on Environmental Impact Assessment in Transboundary Context, 1991
- Convention on International Trade in Endangered Species of Wild Fauna and Flora, 1973
- Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, 1971
- Convention on the Rights of the Child, 1989
- Convention on Wetlands of International Importance, especially as Waterfowl Habitat, 1971
- Equal Remuneration Convention, 1951
- European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950
- International Convention on the Elimination of All Forms of Racial Discrimination, 1965
- International Covenant on Civil and Political Rights, 1966
- International Covenant on Economic, Social and Cultural Rights, 1966
- International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, 1990
- International Treaty on Plant Genetic Resources for Food and Agriculture, 2009
- Kyoto Protocol to the United Nations Framework Convention on Climate Change, 1997
- Montreal Protocol on Substances that Deplete the Ozone Layer, 1987
- Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilisation to the Convention on Biological Diversity, 2010
- Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean, 2018
- Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, 1998
- Stockholm Convention on Persistent Organic Pollutants, 2001
- United Nations Convention on Contracts for the International Sale of Goods, 2010
- UN Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa, 1994



UN Convention on International Settlement Agreements Resulting from Mediation, 2019

UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958

UN Declaration on Human Rights Defenders, 1999

UN Declaration on the Rights of Indigenous Peoples, 2007

UN Framework Convention on Climate Change, 1992

UN Rio Declaration on Environment and Development, 1992

## **2. Other instruments and guidance documents from inter-governmental Organisations**

AU (African Union), ADB (African Development Bank) and UNECA (United Nations Economic Commission for Africa). 2014. *Guiding Principles on Large Scale Land Based Investments in Africa*. Addis Ababa

CAO (Compliance Advisor/Ombudsman). 2008. *Advisory Note: A Guide to Designing and Implementing Grievance Mechanisms for Development Projects*. Washington, D.C.

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- FAO, IFAD (International Fund for Agricultural Development) and WFP (World Food Programme). 2015. *Achieving Zero Hunger: the critical role of investments in social protection and agriculture*. Rome
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- IFC. 2012. *Performance Standards on Environmental and Social Sustainability*
- ILC (International Law Commission). 2001. *Responsibility of States for Internationally Wrongful Acts*
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