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

**(b) Legal Structure of Agricultural Enterprises**

(prepared by the Secretariat)

<i>Summary</i>	<i>In the context of UNIDROIT's ongoing collaboration with FAO and IFAD in the area of private law and agricultural development, this document outlines topics and legal issues that may be considered in the Legal Structure of Agricultural Enterprises project.</i>
<i>Action to be taken</i>	<i>The Governing Council is invited to approve the proposed preliminary scope of the project and to reassess upward the priority status given to the project, allowing the Secretariat to establish a Working Group.</i>
<i>Priority level</i>	<i>Original priority – medium – to be reassessed and high priority given</i>
<i>Related documents</i>	<a href="#"><u>UNIDROIT 2019 – C.D. (98) 14 rev.2</u></a> ; <a href="#"><u>UNIDROIT 2019 – C.D. (98) 17</u></a> ; <a href="#"><u>UNIDROIT 2020 – C.D. (99) B.5</u></a>

**I. BACKGROUND OF THE PROJECT**

1. Supported by both the Food and Agriculture Organization of the United Nations (FAO) and the International Fund for Agricultural Development (IFAD), the project regarding the Legal Structure of Agricultural Enterprises (hereinafter the "LSAE project") was proposed for inclusion in the 2020-2022 Work Programme<sup>1</sup> by the Governing Council, at its 98<sup>th</sup> session,<sup>2</sup> and was approved by the General Assembly at its 78<sup>th</sup> session, with a medium priority level.<sup>3</sup>

2. As a first step, the Governing Council recommended that the Secretariat conduct a stocktaking exercise and feasibility analysis with respect to the legal structure for investment in agriculture activities, in order to ascertain whether UNIDROIT could make a useful contribution. At the 99<sup>th</sup> session of the Governing Council (Rome and hybrid, 23-25 September 2020), the Secretariat prepared and submitted the requested feasibility study ([C.D. \(99\) B.5](#)), which was divided into three

<sup>1</sup> [UNIDROIT 2019 – C.D. \(98\) 17](#), para. 288.

<sup>2</sup> [UNIDROIT 2019 – C.D. \(98\) 14 rev.2](#), paras. 78-82.

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

parts. Part I provided background on UNIDROIT's work in the field of private law and agricultural development. Part II provided a summary of recent international initiatives which may directly and/or indirectly influence the scope of UNIDROIT's future work. Lastly, Part III evaluated whether a new UNIDROIT/FAO/IFAD instrument would be of additional benefit and provided preliminary observations on legal issues to be considered.

3. The feasibility study suggested that the LSAE project could pursue four main objectives:

- (i) *improve market access* by identifying the current legal structures that limit entry to agricultural markets and by making recommendations as to which legal structure facilitates access to adequate domestic and global agricultural markets, with special attention to both smallholders and agriculture Micro-, Small-, and Medium-sized Enterprises (agri-MSMEs);
- (ii) *improve forms of coordination of agricultural enterprises* by analysing how contractual networks, corporate governance rules and ownership may help smallholders and agri-MSMEs achieve market scale through diverse forms of aggregation;
- (iii) *ease access to critical resources and insurance* by analysing which investment vehicles are best suited to promote access to capital, know-how, and technology; and
- (iv) *address unfair commercial practices* by analysing the remedies, as well as dispute settlement mechanisms, that may be used to address compliance issues and unfair commercial practices in agri-food chains, so as to obtain more responsible business conduct.<sup>4</sup>

4. The Governing Council authorised the Secretariat to continue its consultations with a view to identifying the main legal issues in which UNIDROIT, in cooperation with FAO and IFAD, could make a meaningful contribution. Accordingly, on 15 and 16 April 2021, UNIDROIT, FAO and IFAD co-organised a Consultation Webinar (hereinafter the "Consultation Webinar") to discuss the new LSAE project and, notably, to outline the possible topics the prospective future instrument would address. The complete report, as well as the agenda of the Webinar and the list of participants, can be found at Annex I. A [video](#) recording of both days is available on UNIDROIT's YouTube channel.

5. In light of (i) the inclusion of the project in the 2020-2022 Work Programme, (ii) the conclusions of the feasibility study, (iii) the feedback received during the Consultation Webinar, and (iv) the insights gathered throughout the consultations with experts from FAO, IFAD and other organisations, the three Rome-based organisations agreed to jointly develop a third legal guide.<sup>5</sup> The following topics and legal issues have been identified thus far and may be considered in a future international guidance document (Part II). Further refinements, however, should be entrusted to the future Working Group (Part III).

## **II. POSSIBLE TOPICS AND LEGAL ISSUES TO BE CONSIDERED IN THE LSAE PROJECT**

6. Many countries have been facing a number of socio-economic challenges (*e.g.*, food insecurity, competitiveness issues within the agri-food sector, climate change impacts on productivity

<sup>4</sup> Business Enterprises involved in agriculture and food systems should apply the Committee on World Food Security (CFS) [Principles for Responsible Investment in Agriculture and Food Systems](#) (2014), paras. 50-52.

<sup>5</sup> The [Legal Guide on Contract Farming](#) was the first guide jointly developed by UNIDROIT, FAO, IFAD. It was approved by the Committee on Food Security in 2014 and adopted by UNIDROIT, IFAD and FAO in 2015. Between 2017 and 2020 the second legal guide on [Agricultural Land Investment Contracts](#) was prepared and will be launched during this session of the Governing Council, see document C.D. (100) B.14.

and farmers' livelihoods). Sustainable Development Goals (SDGs),<sup>6</sup> technology and new financing options are transforming the features of agricultural enterprises and the forms they collaborate along the supply chain. Under the aegis of the United Nations "food systems approach" and its objective to "leave no one behind",<sup>7</sup> international development discourse has increasingly emphasised the importance of the "middle segment" of agri-food value chains for pro-poor and sustainable growth in developing countries. More specifically, due to their embeddedness in the local community fabric, agri-MSMEs can better adapt to local circumstances and provide a range of essential services such as transportation, food processing, and distribution. In doing so, these small firms make important investments in rural areas in addition to connecting farmers to markets, adding value to agricultural produce, and creating employment opportunities that are inclusive for women and youth.

7. The ways in which small producers and agri-MSMEs (which would arguably be the potential main target audience of the LSAE project) organise themselves, and the legal structure they set up for the development of their agricultural activity, may depend on a number of factors, such as the landholding size, the ability to carry out commercial activities, the position within the value chain, the participation into business networks and strategic alliances, and the functional purpose of the enterprise (e.g., to achieve socio-economic, environmental and/or cultural objectives). Their agricultural enterprises may have different legal structures, objectives, and functions, and may link producers to markets, suppliers of inputs and financial services in various ways.

8. The differences between domestic laws and particular socio-economic contexts create challenges to comparative analysis and international harmonisation. However, considering the objectives identified above (e.g., access to markets, access to credit, access to technology and, international commercialisation), it may be possible to identify common principles and rules governing creation, operation and dissolution of agri-enterprises as well as offer guidance to determine international best practices for the legal structure of agricultural enterprises. In line with this perspective, the United Nations call for a "food systems approach" highlights the importance of establishing partnerships for more coordinated actions among agri-food actors.<sup>8</sup>

9. Producers' development and integration into markets and value chains may depend on their level and type of formalisation. Producers may decide to conduct their activities and improve their access to markets individually or collectively through some form of organisation, and their integration into value chains may be based on or regulated through contracts, corporate arrangements, or both. The agricultural producer may be a member, shareholder, or part of multiple legal entities simultaneously. The type of formalisation of the organisation may vary depending on the needs of producers and agri-MSMEs. A formal legal entity may be established or punctual contractual arrangements may be adopted accordingly (e.g., individual or group contract farming).

10. As the third legal guide developed within the UNIDROIT/FAO/IFAD partnership, the LSAE Guide could supplement certain parts of the previously developed [Legal Guide on Contract Farming \(LGCF\)](#) and [Legal Guide on Agricultural Land Investment Contracts \(ALIC\)](#). In particular, as a starting

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<sup>6</sup> Sustainability standards may affect the legal features of agricultural enterprises. In this regard, the LSAE project could analyse how the legal structure of agricultural enterprises may increase smallholder food security and income to achieve a number of SDGs, such as SDG1 "No Poverty" and SDG2 "Zero Hunger". Moreover, the LSAE project could address the interlinkages between the process of establishing a legal structure and the operationalisation of some other SDGs, such as equal access to financial resources (SDG 2.3) and the promotion of development-oriented policies that encourage growth of agri-MSMEs, including through access to financial services (SDG 8.3).

<sup>7</sup> For more information see the [UN Food Systems Summit website](#), in particular Action Track 4 – Advance Equitable Livelihoods.

<sup>8</sup> "An agri-food systems approach considers the food system holistically, taking into account all drivers and their final outcomes, as well as all elements, sectors and stakeholders and their interactions and impacts on each other. This approach also recognises the fact that agri-food systems are numerous and diverse. They have different sizes, scopes and functions, from very local to global." FAO (2021). [Transforming agri-food systems: Legislative interventions for improved nutrition and sustainability](#), p.7.

point, the LSAE project could further develop a topic briefly addressed in the LGCF regarding the “forms for conducting an agricultural production activity”.<sup>9</sup> With the objective of promoting more inclusive agri-businesses, which consider the interests and voices of smallholder producers and agri-MSMEs, the future legal guide could provide guidance on the establishment (A), operation (B), and challenges that may appear throughout the life-cycle of agricultural enterprises (C). Some cross-cutting issues regarding, among others, sustainable development and technological innovations may also be considered throughout the developed guidance.

## **A. Issues related to the establishment of the legal structure of agricultural enterprises**

### *Enabling legal environment*

11. Agricultural supply chains rely upon and are directly influenced by national legal frameworks, which have become increasingly multi-sectoral, in line with the Sustainable Development Goals and agri-food system’s approach (e.g., food safety laws, human rights legislation, commodity specific legislation, environmental and consumer protection regulations). The LSAE project could further discuss the role governments and legislations play in creating an enabling legal environment that facilitates sustainable trade practices and ensures: (i) fair competition, by addressing power imbalance and unfair practices (such as delayed payments, unfair changes or cancelation of orders); (ii) legal security and certainty, by defining clear rights and responsibilities (also in relation to land tenure), as well as access to dispute resolution mechanisms; and (iii) transparency through clear rules applicable to all and increased trust. Therefore, the LSAE project could identify good legislative practices and offer guidance that may serve as a reference for the formulation or adaptation of domestic laws and public governance instruments which seek to promote sustainable agricultural development and foster the establishment and facilitate the expansion of agri-MSME businesses.

12. The applicable legal framework is crucial to understand (i) the possible legal structure of agricultural enterprises (e.g., non for profit, for profit and cooperatives), (ii) the extent to which the agricultural producer is deemed an “entrepreneur”, and (iii) how different actors may collaborate throughout the different stages of the agri-food chain. The investigation of both domestic and transborder collaboration requires the examination of specific rules applicable to agricultural enterprises, as well as general laws applicable to both contractual and corporate arrangements. As noted in the LGCF, some civil law States regulate the status and activity of producers and other operators across the value chain under the general rules of the “civil law”. However, when they act under certain corporate structures, “commercial” rules may apply.<sup>10</sup> This distinction between “civil” and “commercial” law, which originates from the times of the European codification, does not operate in all legal systems and especially those of common law traditions, but it constitutes a good example of the need to achieve consistency in domestic legal frameworks. Similar analysis may be undertaken in the LSAE project taking into account that the “commercial” rules may not provide the same level of protection for the producers as “civil law” rules tend to do, potentially disincentivising further formalisation.

13. Domestic rules include several mandatory provisions from which agricultural producers and other operators across the value chain cannot deviate, and which may be different when producers (and potentially, in some more limited cases, the smaller agri-MSMEs) are operating under civil rules rather than commercial rules. Understanding how a particular legal structure is formulated and the potential applicable mandatory provisions and default rules is necessary to establish the terms of collaboration within the agri-food value chain. The mandatory features concern both the infrastructure of the legal enterprise and the modes of collaboration among enterprises. Rules can

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<sup>9</sup> [LGCF](#), p. 43-48.

<sup>10</sup> [LGCF](#), p. 42.

also be mandatory by private arrangements, such as when the chain leader obliges producers to comply with general terms and conditions. Therefore, a study of the applicable legal regimes also allows producers to know how and which rules may be applicable to resolve disputes among supply chain actors in advance.

14. The LSAE project could consider the laws applicable to the organisational forms established to conduct agricultural enterprises, to govern the internal relations between their members or shareholders, and their external relationships with other enterprises operating along the supply chains. A comparative review could be conducted to analyse the main formalities required to establish and operate an agricultural enterprise (e.g. legal definition of agricultural activities, capital size, number and capacity of members, management bodies, accountability, and special authorisations). Aspects related to the internal governance of the “enterprise” could also be analysed (e.g. rights and obligations of the members, distribution of powers, decision making process, shareholdings, profits and losses, liabilities, transfer of shares, termination, and dispute resolution mechanisms).

15. Besides domestic law, analysis of other sources, such as international law, general principles, traditional and customary rules, usages and practices, and soft law may also be relevant. Furthermore, the interpretation given by courts to relevant legal principles and relevant legal doctrines may also be an important source and could be used to address some of the issues in the LSAE project

#### *Focus on “commercial agricultural producers”*

16. The LSAE project should focus on the agricultural producers, whether individually or as part of a family or group, that carry out commercial production. It may be useful to analyse where the boundaries between production and processing or transformation are drawn and whether producers and agri-MSMEs have the freedom to redefine those boundaries. In this sense, the legal structures analysed in the LSAE project would mostly focus on the businesses developed by smallholders and agri-MSMEs, and would not cover agricultural production intended exclusively for household or family consumption since these do not have a commercial objective.

#### *Identification of “inclusive legal structures”*

17. Particular attention could be paid to the analysis of legal structures that support more inclusive farming business models, which empower specific categories of persons, such as women or young entrepreneurs. The inclusive perspective could be understood as a process in which the aspirations and priorities of the micro-, small and medium-sized entrepreneurs are considered, and the power relations within a legal structure are balanced. The LSAE project could focus on the analysis of business models that combine a social objective and an entrepreneurial dimension, which may be carried out in a wide range of traditional and innovative legal forms. In the context of cooperatives, the entrepreneurial dimension is often misunderstood, as cooperatives may not be established as for profit enterprises. This could also include the tasks of social agriculture (whether related with producers’ interests or third parties’ interests, such as those of local communities, producers’ families) as part of a multifunctional agriculture. Different legal structures may enable a different recognition of the role of different stakeholders such as farmers, service providers (including technology service providers and financiers).

18. Therefore, the project could envisage the identification of best practices to set up and operate agricultural enterprises, which encourage producers to acquire formal status to act as commercial actors, either as individual entrepreneurs (e.g. single-owner company) or as part of an organisation legally in charge of the production, processing, distribution, and commercialisation of the agricultural produce (e.g. cooperatives, community-owned companies, partnerships regulated under civil codes,

etc.). Moreover, the project could highlight the importance of choosing the legal entity in a “continuum perspective”, so as to permit the agricultural enterprise to evolve according to the specific needs of the producers.

19. Some of the corporate governance issues that could be analysed include (i) legal capacity, ownership or membership requirements; (ii) the necessity of a minimum capital; (iii) rights and obligations of members and managers/directors (including specific preferential rights of members of a family agricultural holding in case of transfer or inheritance of the holding), (iv) forms of decision making and power-sharing; (v) board composition; (vi) member/shareholder rights and obligations; (vii) appropriate control mechanisms (e.g., establishment of an independent audit committee, internal control procedures); (viii) disclosure and transparency; (ix) corporate social responsibility (x) risk management, (xi) liabilities, (xii) dispute resolution mechanisms, and (xiii) dissolution of the legal entity. Accordingly, the LSAE project could investigate how some of these different corporate governance issues may be addressed in the various identified forms of legal structures in order to recommend best practices for producers and agri-MSMEs.

20. Contracts may play an important role in the coordination and integration of actors in Global Value Chains (GVCs) as well as in corporate governance. Contracts, broadly understood (e.g. articles of association, bylaws, shareholder’s agreements, etc.), may be used to specify the internal organisation and management of the agricultural enterprise in detail (e.g. membership, representation, decision-making process, form of management, share of profits and losses, exclusion and withdrawal of a party, transfer, termination, etc.). From an external point of view, associative contracts may also be important instruments to facilitate commercial cooperation and cross-border trade relationships (e.g. multilateral contracts, joint-venture contracts between individuals or companies from different countries, and partnerships). The LSAE Guide could cover the basic terms, general principles, and guidelines that might be addressed in these contracts and how they can be elaborated to assist producers and agri-MSMEs in becoming contract-makers rather than just contract-takers and overcoming their main difficulties.

21. In the light of the specificities of agri-businesses, the guidance to be developed would consider other international instruments which provide guidance for simplified legal structures, such as the ones developed by the United Nations Commission on International Trade Law (UNCITRAL), the Organization of American States (OAS), as well as by the Organization for the Harmonization of Business Law in Africa (OHADA). In this regard, and by way of example, the LSAE project could verify if some of the recommendations included in the OAS Model Law on the Simplified Corporation<sup>11</sup> and the recently adopted UNCITRAL Legislative Guide on Limited Liability Enterprises could contribute to the establishment and development of more inclusive agri-businesses.<sup>12</sup> The UNCITRAL Guide envisions to reduce legal obstacles encountered by MSMEs and is adaptable to “any lawful business or commercial activity”,<sup>13</sup> including agricultural activities.<sup>14</sup>

## **B. Issues related to the operation of agricultural enterprises**

22. As noted in the Consultation Webinar, the LSAE project could aim to facilitate the development of inclusive value chains and the shift from subsistence and informal production patterns to more formal market linkages, which would contribute to the development of participative value chains that enable economic activity, and seize livelihood opportunities, for small-scale producers in particular. The choice of legal structure of agricultural enterprises may affect the ability

<sup>11</sup> OAS (2012). [Model Act on the Simplified Stock Corporation](#).

<sup>12</sup> The Legislative Guide was adopted during UNCITRAL’s fifty-fourth session. The Guide will be available on the UNCITRAL website at <https://uncitral.un.org/en/texts/msmes>.

<sup>13</sup> Recommendation n°2, UNCITRAL (2021), [Draft Legislative Guide on an UNCITRAL Limited Liability Organization](#).

<sup>14</sup> UNCITRAL (2021), [Draft Legislative Guide on an UNCITRAL Limited Liability Organization](#), para 27.

to pursue different objectives, such as access to innovation, technology, finance, markets, and contracting options.

#### *Access to innovation, technology and the digitalisation of agricultural enterprises*

23. In the agricultural field, emerging digital technologies and digitally delivered services may lead to an increasing number of electronic platforms, e-commerce services and fintech companies, which may address some of the inefficiencies of agricultural value chains, especially in terms of coordination and governance. Electronic platforms can help streamline access for producers and agri-MSMEs to clients, retailers, and consumers and may provide financial services or establish partnerships with financial institutions to ensure client access to finance. Online sales, mobile devices, artificial intelligence, blockchain technology, farmer digital identity are modifying supply chains and reducing trade costs.<sup>15</sup> In this context, access to innovation and technology are key to the development of producers and agri-MSMEs.

24. The possible digitalisation of agricultural enterprises may increase market access by replacing intermediaries and favouring direct access for producers and agri-MSMEs to final destination markets. Digitalisation may also have impacts on the determinants of organisational integration and legal structures of agricultural enterprises.<sup>16</sup> The LSAE project should consider the role of technology in the definition of the enterprises and collaborations established among producers along the chain. Technology may offer a unique opportunity for greater efficiency, transparency, and traceability of information in the agriculture sector, but may also constitute an obstacle for producers and agri-MSMEs, and these risks should also be covered in the future legal guide.

25. The capacity to create value in food systems using digital technologies depends on the regulatory environment (*i.e.*, norms or regulations on data quality standards, data ownership, and data privacy). In a world of GVCs, the regulatory environment cannot be limited to national frameworks, but requires international and regional architectures regulating the definition of general principles which enable agricultural enterprises to access and use technologies. In this regard, the LSAE project could address how the requirements or the choice of the legal structure is inherently linked to opportunities that arise from technology and constrained by regulatory demands (*e.g.*, smart farming, precision agriculture, blockchains, etc.). Moreover, the digital dimension of coordination could be considered to analyse how emerging digital technologies may offer a unique opportunity for the exchange of information among agriculture enterprises and, therefore, provide greater efficiency, transparency, and traceability.

#### *Access to financial resources and markets*

26. During the Consultation Webinar, it was widely recognised that access to capital and to the relevant markets are among the major challenges for the development of producers and agri-MSMEs. Participants noted that alternative financing vehicles which adopt, for example, a flexible and a gender-sensitive approach, may contribute to the achievement of the SDGs and increase the use of technology and innovation in agricultural enterprises. Digital technologies may be used to address the main challenges in accessing finance for agri-MSMEs, especially regarding the so-called “missing middle”, which include producers and agri-MSMEs that are not small enough to benefit from microfinance instruments, but not large enough to become traditional bank clients. For example, electronic and e-commerce platforms are increasing lender access to data and reducing traditional transaction costs, thereby facilitating the investor’s due diligence process. However, a transparency

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<sup>15</sup> OECD (2019), *Digital Opportunities for Better Agricultural Policies*, OECD Publishing, Paris, <https://doi.org/10.1787/571a0812-en>, p. 31.

<sup>16</sup> See: <https://www.oecd.org/agriculture/topics/technology-and-digital-agriculture/>

gap caused by unfair access to technology may emerge in the relationship between big data firms, financing institutions and producers.

27. Therefore, the LSAE project could consider analysing fair access to financial resources as one of the main considerations when providing guidance regarding the choice of the legal structure of agricultural enterprises, and how this choice may impact the access to credit and markets. The choice of legal structure (in combination with secure tenure rights) could be relevant to evaluate creditworthiness, for example, for bank lending, insurance schemes, as well as for private investments in equity. Different legal structures (e.g., stock companies, joint-ventures) or contractual arrangements may be used as alternative vehicles for funds interested in equity investments, for example. The project could also explore the issue of cooperatives acting as borrowers, pointing out some of the benefits and challenges they may face, mainly in terms of management, governance, and difficulty in obtaining guarantees.

28. The guidance to be provided would be coordinated with other initiatives developed by other international and regional organisations to avoid overlap, such as the work initiated by the World Bank Group – Enabling the business of agriculture and UNCITRAL’s Working Group I on access to credit for MSMEs. It would also be important to explore the role of contracts (also in connection with credit protection rights) to shape the relationship with financing entities and between other actors within the value chain. In this scenario, contractual arrangements may be either obstructive or conducive to investment and financial sustainability.

#### *Collaborative contracts in agricultural supply chains (multi-party and associative contracts)*

29. During the Consultation Webinar, it was recognised that there is an increasing need for coordination and cooperation in GVCs to overcome the main obstacles that agri-MSMEs usually face. It was also noted that such a collaborative approach already exists in practice, but legal obstacles in conventional contract doctrines and transnational commercial contracts, statutory provisions, and parties’ failure to explicitly design a collaborative setting within their contracts, could be further addressed.

30. The LSAE project could become a good opportunity to take into consideration, as part of the broader project, the analysis of long term/relational contracts specifically adopted in the agricultural field. This topic was previously included under the 2014-2016 Work Programme, under the label of “multilateral contracts, in particular corporate contracts” ([C.D. \(92\) 13](#)), and concerned contracts that are established when two or more parties associate for a common purpose – “associative contracts”, “joint-venture contracts”.<sup>17</sup> The LSAE project would, therefore, allow the Institute to link the new analysis with the area of best practices in the field of international contracts, and, ultimately, with the UNIDROIT [Principles of International Commercial Contracts](#).

31. Unlike the bilateral contractual relationships addressed in the LGCF (agricultural production contracts),<sup>18</sup> this project would cover different contractual arrangements established in the case of integrated relations, where a legal dependency among contracting parties is created and they form one single legal entity. In contract farming arrangements, “the agricultural producer should keep autonomy in terms of assets and management of the undertaking.”<sup>19</sup> Therefore, in order to bring a new perspective of analysis in the field of private law and agricultural development, the new LSAE guide could focus on contracts that regulate a different situation: a “partnership” scenario under

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<sup>17</sup> UNIDROIT (2013), [C.D. \(92\) 13](#), p. 5

<sup>18</sup> As understood in the [LGCF](#) (p.14), “an agricultural production contract assumes legally independent parties. In the case of integrated relations, the degree and form of control exerted by the contractor should not modify the legal nature of the relationship into one of legal dependency, which would fall outside the Guide’s scope.”

<sup>19</sup> [LGCF](#), p.15.



which a common venture is actually created. In this context, it is extremely important to pay attention to how the balance between the different contracting parties is maintained. The major risk may be that producers or agri-MSMEs lose any real power they may have if a joint or common venture is created with a more powerful party, which may essentially dictate the course of action. Issues related to ownership and proprietary rights may be addressed in the Guide so as to point out best contractual practices to regulate the operation of the business (e.g., proprietary rights over assets of the business), as well as to analyse the question of ownership of assets within a corporate structure, including questions regarding land tenure

#### *Liabilities within agricultural enterprises*

32. When a legal entity or cooperation through contracts is established, the contractor may be exposed to liabilities that are normally attached to the producer. When cooperation takes place within multi-party contracts or linked bilateral contracts, liabilities may be allocated in different ways depending on the applicable law and possible agreements among the parties. Therefore, the LSAE project could analyse the best practices to address risk-sharing issues (e.g., debts and losses) and differentiate any liabilities (e.g. non-compliance of the producer with social and environmental standards, and how personal assets should be protected from farm business liabilities). Practices could be distinguished depending on whether cooperation occurs within multilateral or linked bilateral contracts.

33. As noted in the Consultation Webinar, with special regard to cooperation within cooperatives, the analysis of the role played by indivisible reserve funds could be useful in this context. For example, indivisible reserves, which are an essential part of the financial structure of cooperatives, may be used not only to promote the interests of cooperative members and satisfy their economic, social, and cultural needs, but also to reduce the risks related to any liabilities and failures. Both breaches and supervening circumstances lead parties to accommodate their respective interests and take appropriate measures. In the future guide, it would be important to highlight the benefits of confirming a “collaborative approach to remedies” to enable the preservation of the enterprise and related contractual relationship, and to focus on corrective remedies rather than on compensation and termination. The analysis may be articulated taking the value chain structure into account and the modes of contractual cooperation, including multi-party and linked bilateral contracts.

### **C. Issues related to remedies, dispute resolution, dissolution and, termination of agricultural enterprises**

#### *Remedies and dispute resolution mechanisms*

34. During the Consultation Webinar, it was highlighted that private law and contracts may be used to analyse the different remedies available for breach of product or process requirements, such as socio-environmental certification requirements. In the LSAE Guide, it may be useful to distinguish the set of remedies available in multi-party contracts and whether they should be designed differently depending on the adopted legal structure and its objectives (improve access to markets, access to credit, international commercialisation), as well as on the value chain’s structure. In addition, the connection between remedies and the different types of formal and informal dispute resolution mechanisms may also be considered. For example, the different role of corrective remedies, as opposed to contract termination, could be illustrated in terms of their different impact on the value chain both in multi-party contracts and linked bilateral contracts.

### *Transfer of "shares", dissolution and termination of agricultural enterprises*

35. The future guide may consider addressing the challenges that may appear when the original structure is associated with another agricultural enterprise, for instance through a merger. The LSAE project could also analyse issues regarding the various forms of transfer of ownership, assets, and rights. The guidance to be developed could encourage an inclusive decision-making procedure in such transfers. More specifically, with regard to cooperatives, it may be of particular interest to analyse the process of integrating second-degree cooperatives, which are generally established with at least two legal entities to strengthen the members' economic activity.

36. Another transfer-related issue that could be taken into account when deciding the legal structure of agricultural enterprises regards the duration of the business and options that may facilitate the transfer of the enterprise or its shares (*e.g.*, in case of withdrawal or death of a shareholder or a member; including specific preferential rights of members of a family agricultural holding in case of transfer or inheritance of the holding), taking into account the aim of sustainable development, preservation and, consequentially the intergenerational continuation of the business. Questions regarding the dissolution of enterprises and the applicability of bankruptcy may be relevant to understand the impact of enterprises' dissolution on other actors of the supply chain. In addition, the LSAE project may also eventually examine forms of termination.

### **III. NEXT STEPS – ESTABLISHMENT OF A WORKING GROUP**

37. Consistent with UNIDROIT'S established working methods, the Secretariat would propose the establishment of a Working Group, to be composed of international legal experts representing different legal systems and geographical regions as well as different branches of law including, among others, experts in agricultural law, corporate law, cooperative law, contract law, property law, international law, and agribusiness economists. The Working Group would also count on the participation of technical experts from IFAD and FAO, as well as from other international, regional, and non-governmental organisations. Some of the experts that participated in the Consultation Webinar could be invited as members of the future Working Group on the LSAE project. The Secretariat would be in charge of the coordination of the Working Group meetings, along with FAO and IFAD legal departments.

38. It is proposed that the LSAE Working Group be chaired by the Hon. Justice Ricardo Lorenzetti (Supreme Court of Argentina and member of the UNIDROIT Governing Council), given his unrivalled knowledge and experience in this field. Under his guidance, a first session of the Working Group would be organised before the end of 2021. In coordination with IFAD and FAO, the Secretariat could set up an exploratory working group composed of a core group of experts in October 2021 to help refine the scope of the project and start preparing an annotated issues paper for discussion during the first Working Group meeting.

### **IV. ACTION TO BE TAKEN**

39. *The UNIDROIT Secretariat would invite the Governing Council to take note of the advances made so far and to approve the proposed upgrade of the LSAE project within the current 2020-2022 Work Programme, from medium to high priority and, therefore, allowing the Secretariat to establish a Working Group.*



Food and Agriculture  
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**Consultation Webinar**  
**LEGAL STRUCTURE OF AGRICULTURAL ENTERPRISES PROJECT**

15 & 16 April 2021  
(Held remotely on Zoom)

**SUMMARY REPORT**

1. On 15 and 16 April 2021, 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) co-organised and held a Consultation Webinar to discuss the new project on Legal Structure of Agricultural Enterprises (LSAE). The Webinar attracted over one hundred and fifty (150) registered participants and featured thirty-five (35) speakers from a wide diversity of backgrounds including experts from Belgium, Brazil, Chile, India, Italy, the United Kingdom, the United States of America and the Philippines; representatives of international organisations; as well as representatives of the private sector, non-governmental organisations and think tanks (The Webinar's agenda can be found at **Annexe I** and the complete list of registered participants at **Annexe II**).

2. The purpose of the Webinar was to inform the drafting of an annotated list of contents and possible topics to be addressed in a future instrument and explore the nature of the contribution to be made by UNIDROIT, FAO and IFAD in light of their respective mandates and expertise.

3. The Consultation Webinar featured opening remarks by Professor Maria Chiara Malaguti (President, UNIDROIT), Ms Donata Rugarabamu (Legal Counsel, FAO), and Ms Katherine Meighan (General Counsel, IFAD) who introduced the UNIDROIT/FAO/IFAD collaboration in the field of private law and agricultural development.

Opening remarks

4. *Professor Maria Chiara Malaguti* welcomed all the participants and explained the background of UNIDROIT's work in the field of private law and agricultural development, which originated in 2009 and had been further specified after a Colloquium which was held in 2011 on "Promoting Investment in Agricultural Production: Private Law Aspects". She outlined the benefits of cooperation with FAO and IFAD, noting that the tripartite partnership had already resulted in the joint production of two international instruments: the [Legal Guide on Contract Farming](#) (finalised in 2015) and the [Legal Guide on Agricultural Land Investment Contracts](#) (finalised in 2020). She emphasised the importance of the new LSAE project and supported the thematic continuity and synergy developed over the years.

5. *Ms Donata Rugarabamu* emphasised the importance of the collaboration between UNIDROIT, FAO and IFAD in the area of private law and agricultural development. She recognised the success of the previously adopted Legal Guide on Contract Farming and drew attention to the timeliness of the new jointly developed projects, including the project on LSAE and another one analysing the impact of Covid-19 on supply chain contracts. She highlighted the ongoing [United Nations decade of family farming](#) (2019-2028) and the need to increase smallholders' food security and income to achieve a number of Sustainable Development Goals (SDGs), most importantly SDG1 "No Poverty" and SDG2 "Zero Hunger". Ms Rugarabamu recognised the inherent value of the integration of smallholders into value chains and noted that one of the main problems hindering this integration is the small-scale, informal and scattered nature of smallholder production. She highlighted the alignment of the LSAE project with FAO's new Strategic Framework and explained how it could contribute to "Better Production" by "ensuring sustainable consumption and production patterns, through sustainable and inclusive food and agriculture supply chains at local, regional and global level, ensuring resilient food systems in a changing climate and environment"<sup>1</sup>

6. *Ms Rugarabamu* further noted that the LSAE project could consider how smallholder farmers might form themselves into agricultural enterprises, what legal structure this should take and how other agricultural enterprises in the food supply chain interact with smallholder farmers and family farmers. She pointed out that the project could face two challenges: first, how to minimize the opportunity costs for smallholders and family farmers, who may be operating in more informal ways prior to transitioning into agricultural enterprises; second, how to ensure that the push towards LSAE is done inclusively and in a gender-sensitive manner, without leaving anyone behind.

7. *Ms Katherine Meighan* reiterated the importance of the instruments adopted under the tripartite partnership and emphasised how the Legal Guide on Contract Farming and the Legal Guide on Agricultural Land Investment Contracts are comprehensive legal tools that can be used as a reference point for a broad range of users involved in policy design, legal research, and capacity building. She supported the UNIDROIT/FAO/IFAD initiatives for enhancing knowledge and raising awareness of the importance of uniform legal regimes applicable in the field of agricultural investments and production. She finally, pointed out that almost 80% of world's food is produced by small farmers and cooperatives, and also 80% of extreme poor live in rural areas and underlined the need to ensure that the people who feed us, themselves should be fed.

8. Ms Meighan explained that the development of a new guidance instrument on LSAE was a great opportunity for IFAD to reflect beyond its traditional project-based financing and provide insight relating to its innovative investment structure consisting of equity direct investment into private sector entities. She explained that an independent private investment fund, the Agri-Business Capital (ABC) Fund, was incorporated under the laws of Luxembourg and that it had been anchored by the European Union (EU), the Government of the Grand Duchy of Luxembourg and the Alliance for a Green Revolution in Africa (AGRA), with IFAD's sponsorship and efforts to bring like-minded partners together. She noted that following the amendments to its Articles, which initially did not permit IFAD to be an anchor investor, IFAD also made its first ever equity direct investment into ABC Fund, which is a blended capital impact fund catalysing public and private investment into an underserved space of financing small-scale agri-entrepreneurs, called "the missing middle". She stressed the importance of considering the challenges faced by small farmers or cooperatives that are too small and do not have the credit and financial track record or collateral required to receive loans and financing from local banks, but at the same time are too large to benefit from micro-credit.

9. The opening of the Consultation Webinar was followed by an introductory presentation of the LSAE project and its preparatory work.

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<sup>1</sup> One of the pillars of the "Four Betters cross-cutting aspirations: Better Production, Better Nutrition, Better Environment and a Better Life".

*Introduction to the LSAE project and preparatory work*

10. The Hon. Justice Ricardo Lorenzetti (Supreme Court of Argentina and Member of the UNIDROIT Governing Council) explained that, in light of the finalisation of the second project on Agricultural Land Investment Contracts, the UNIDROIT Governing Council had reassessed the topics that had been identified during the 2011 Colloquium and decided to recommend new work on the topic of LSAE as part of UNIDROIT's 2020-2022 Work Programme. Following that decision, in 2020, the UNIDROIT Secretariat prepared a [background paper](#) to formulate preliminary observations on legal issues to be considered.

11. The background paper suggested that the LSAE project could pursue four main objectives:

- (i) **improve access to market** by analysing the current legal structures that limit access to global agricultural markets and making recommendations as to which legal structure promotes better access by smallholders and agriculture Small Medium Enterprises (agri-SMEs) to adequate domestic and global agricultural markets;
- (ii) **increase the size and soundness of agricultural enterprises** by analysing how contractual and corporate networks – either directly or through collaboration within and across agricultural commodities – may favour that outcome;
- (iii) **ease access to critical resources and insurance** by analysing which investment vehicles are best suited to promote access to capital, know-how, and technology; and
- (iv) **address unfair commercial practices** by analysing, in the context of the legal structures and contractual networks considered, how unfair commercial practices in agrifood activities are covered.

12. Justice Lorenzetti emphasised that the decision regarding the possible legal structure and organisational models in agrifood chains and whether it should be through contractual arrangements and/or corporate coordination may be influenced by a number of variables such as digitalization, smart farming, precision agriculture, blockchains and digital platforms. He clarified that while the project would not aim at the unification or even harmonisation of domestic rules, UNIDROIT, FAO and IFAD could nevertheless identify relevant areas of domestic law and make an important contribution to reform and the modernisation of certain aspects of domestic legal systems regarding agricultural enterprises for smallholders and agri-SMEs. He noted that the legal form is not only a necessary precondition for the efficient internal operation of individual enterprises but also to access both domestic and global markets. In this new project, UNIDROIT could continue to provide input from the point of view of contract law, with which it is familiar and has solidly established expertise. The Institute is also well positioned to participate in private law analysis of corporate structures.

13. He further noted that the objective of the Consultation Webinar was to gather input from experts from different fields to further understand the challenges to be addressed and delineate the scope of the LSAE project. He specified that the Consultation Webinar consisted of five different sessions focusing on:

- (i) regulatory demands and new technology scenarios;
- (ii) contractual structures for collaboration;
- (iii) remedies and dispute settlement mechanisms;
- (iv) corporate structures for the organisation of farmers, and
- (v) challenges for agricultural finance.

## **Session 1. Regulatory demands and new technology scenarios**

14. The first session contextualized the environment in which agricultural enterprises operate and how some variables may influence the assessment of the possible legal structures (corporate or contractual structures) of agricultural enterprises to obtain more efficient and inclusive agrifood systems and to fulfil a number of SDGs. The session considered some of the current constraints, opportunities, and specific needs of the agricultural and related sectors to improve smallholders and SMEs access to market. The debate focused on analysing how the requirement or choice of the legal structure is inherently linked to economic features and opportunities that arise from technology and regulatory demands. Moreover, the benefits expected from organising farmers as economic actors and the difficulties smaller producers may face in transitioning to formal legal structure were also highlighted.

15. The session was chaired by Mr Teemu Viinikainen (Legal Consultant, FAO) and featured presentations by Ms Siobhan Kelly (Agribusiness Economist, FAO), Professor Jennifer Bair (University of Virginia, USA), Mr Tomislav Ivancic (Advisor, FAO), Mr Erik Van Ingen (Blockchain and data specialist, FAO), and Ms Cornelia Boesch (Food Safety Officer, FAO).

### 'Food systems overview' – Siobhan Kelly

16. *Ms Siobhan Kelly* noted that food systems can be defined and interpreted in many ways, depending on the disciplinary entry point, however, all definitions focus on social, economic and environment objectives. She further explained that there are clear and direct linkages between food systems and a number of SDGs, such as the goal to reduce poverty and improve food security and nutrition for all. She explained the importance of considering the Food Systems approach when developing the LSAE project to encompass social, economic and environmental objectives and the entire range of players, as well as their interlinked activities relating to production, aggregation, processing, distribution, consumption, and disposal of food products that originate from agriculture, forestry or fishery. She highlighted that all countries were at different stages in their food systems' transformations and were facing different challenges and opportunities.

17. Regarding the challenges and opportunities that food systems face, she noted that an estimated 2 billion people in the world did not have regular access to safe, nutritious, and sufficient food in 2019 and that the SDG1 target of ending poverty by 2030 was unlikely to be met. She also recalled that 4.5 billion people still depend on food systems for their jobs and livelihoods. Accordingly, she highlighted the importance of adopting a systemic approach and having partnerships within food systems for more coordinated actions among the actors (public, private, and civil society). She further pointed to the importance of dialogue and coordination between the actors in the value chain.

18. In relation to the role of agricultural enterprises in food systems, she noted that agri-food enterprises in the value chain may have different functions. She further noted that these actors can link producers to markets in various ways, such as by providing inputs to farmers to add value to products. She explained that these actors also provide employment to numerous people and are therefore essential for reducing poverty in rural areas.

### 'Global value chains and the challenges of hybrid governance' – Jennifer Bair

19. *Professor Jennifer Bair* introduced Global Value Chains ("GVCs") as an analytical framework to reflect upon the organisation and geography of production and highlighted the challenges of hybrid governance. Referring to a report developed in 2013 by the United Nations Conference on Trade and Development (UNCTAD), she noted the broad definition adopted to explain GVCs as "international production networks of firms investing in productive assets worldwide and trading inputs and outputs

in cross-border value chains of various degrees of complexity”.<sup>2</sup> She further noted that GVCs may be intra-firm or inter-firm and regional or global in nature and drew the participants’ attention to the importance of coordination by a lead firm.

20. With regard to coordination, Prof. Bair noted that GVCs are typically coordinated by transnational corporations, with cross-border trade of production inputs and outputs taking place within their networks of affiliates and contractual partners. She explained that value chain governance refers to the relationships among the buyers, sellers, service providers and regulatory institutions that operate within or influence the range of activities required to bring a product or service from inception to its final use. She further noted that the main questions regarding GVCs concern who controls the production process and how it is controlled (governance), as well as what the consequences of GVC participation (upgrading) are. With regard to governance, she explained that a number of different research projects had been developed to analyse GVC governance, highlighting a project developed by Gary Gereffi, which examined the difference between producer-driven versus buyer-driven governance.

21. When analysing governance, she highlighted the importance of considering three key independent variables which vary across industries: (1) the complexity of the production process; (2) the codifiability of standards used; and (3) the capabilities of the supply basis. Moreover, Prof. Bair noted the critical role of regulation and standards in agriculture GVCs and pointed to the importance of public and privately developed food safety, quality, and labour standards. To illustrate the concept of hybrid governance, which consists of an attempt to use buyer-driven governance to promote compliance with private and public standards, Prof. Bair explained the Fair Food Program and the Milk with Dignity Program developed in the United States of America. She concluded by noting the pressure that these standards put on producers. She acknowledged the role that hybrid governance can play in market-based enforcement of private standards which are largely based on public law.

‘Responsible Business Conduct, Social and Environmental Risk and Global Agricultural Supply Chains’  
– Tomislav Ivancic

22. In the next presentation, *Mr Tomislav Ivancic* gave an overview of the OECD-FAO Guidance for Responsible Agricultural Supply Chains and examined the linkages between compliance, voluntary standards, development challenges and responsible business conduct in agriculture. He highlighted the importance of agriculture for low- and middle-income countries and noted the challenges that smallholders face to integrate into GVCs. Mr Ivancic noted the impact that businesses may have on food security and nutrition; climate change and natural resources; women engagement; youth employment and child labour in agriculture. He highlighted the increase in regulation on responsible business conduct and governance of social and environmental impacts in supply chains.

23. Moreover, he explained the uniqueness of the OECD-FAO Guidance as it builds on and incorporates existing international standards and focuses on implementing risk-based due diligence. He further noted that the entire agricultural value chain, from upstream production to downstream suppliers, including cross-cutting intermediaries and investors had been considered in the guidance document. He also described the risk landscape in agriculture and explained how enterprises may cause, contribute, remedy, and leverage adverse social and environmental impacts. In concluding, Mr Ivancic explained how due diligence supports compliance in practice by making companies report on the activities undertaken by their sub-contractors and other business relationships beyond their first-tier suppliers. He drew the participants’ attention to the framework for risk-based due diligence adopted under the OECD-FAO Guidance.

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<sup>2</sup> UNCTAD, [World Investment Report](#), 2013, p. 122.

'Blockchain, climate change and farmer digital identity in agriculture' – Erik Van Ingen

24. *Mr Erik Van Ingen* examined how emerging digital technologies (blockchain technology and data related questions) may offer a unique opportunity for greater efficiency, transparency and traceability to the exchange of information in the agriculture sector but may also constitute an obstacle for small-scale producers to integrate in GVCs. He explained that blockchain encompasses distributed ledger technology (DLT) as a decentralised database and noted that the capabilities of blockchains are disruptive and may change business models. He highlighted the importance of analysing how sustainability issues may be addressed by blockchain and drew the participants' attention to a study undertaken by FAO and the University of Wageningen on applying blockchain to climate action in agriculture.<sup>3</sup>

25. He described the General Data Protection Regulation (GDPR) adopted by the European Union in 2016<sup>4</sup> and queried whether it could be used as an example to develop an international agriculture data protection regulation. He noted that the debate surrounding the right to be forgotten in the context of blockchain and the concept of immutable transaction could be a topic for further consideration in the LSAE project. Mr Van Ingen highlighted the emergence of digital agriculture service providers and explained the International Data Spaces and FarmStack initiatives. He drew the participants' attention to the topic of Farmer Digital Identity and noted the developments undertaken by the UN legal identity expert group and the International Platform for Digital Food and Agriculture.

'Managing food safety risks in food businesses' – Cornelia Boesch

26. *Ms Cornelia Boesch* presented the concept of food safety and how it is used to control hazards and manage risks within a food system. She noted the principle that "food is not safe unless efforts are made to ensure it is" and drew the participants' attention to the estimates developed by the World Health Organization in 2016 which acknowledged that every year food borne disease makes 600 million people fall ill and causes 420,000 premature deaths. In addition to being a public health issue, she noted that unsafe food may also affect economic development and trade as successful participation in global trade depends on alignment with internationally recognised food safety standards. She further noted that the World Bank estimated that the loss of productivity in low and middle-income countries was 95 billion USD yearly.

27. Ms Boesch described the role businesses and competent authorities play in managing food safety and noted that the success of their actions depends on an enabling environment (infrastructure, validated good practices, expertise and knowledge at reasonable price, and regulatory oversight). She emphasised the fact that a business does not operate within a void but within a system and noted that food safety risks may be minimised by the business-to-business control of incoming raw material and its inspection against quality standards. Ms Boesch concluded by highlighting that improved food safety is achievable but concerted preventive action is needed, not only after major outbreaks have occurred.

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<sup>3</sup> Van Wassenaer, L., van Hilten, M., van Ingen, E., van Asseldonk, M., 2021. Applying blockchain for climate action in agriculture: state of play and outlook. Rome/Wageningen, FAO and WUR. <https://doi.org/10.4060/cb3495en>.

<sup>4</sup> Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the Protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC ([General Data Protection Regulation](#)).



## **Session 2. Contractual structures for collaboration and integration of agricultural enterprises**

28. The second session focused on exploring partnerships and the logic of cooperation among supply chain actors for more inclusiveness. It aimed at discussing how the governance aspect of contractual networks and multiparty contracts may help address inequality and how contractual arrangements may be either obstructive or conducive to investment and financial sustainability. This session was chaired by Mr Carlo Di Nicola (Senior Legal Officer, UNIDROIT) and was composed of five presentations by Ms Karina Fernandez-Stark (Duke University Global Value Chains Center, USA), Professor Fabrizio Cafaggi (Council of State and University of Trento, Italy), Professor Lorenzo Cotula (International Institute for Environment and Development and University of Strathclyde, UK), Ms Carmen Bullon (Legal Officer – Development Law Service, FAO), and Mr Ammar Kawash (Head of Smallholder Agricultural Market Support (SAMS) and Farm to Market Alliance (FtMA) – World Food Programme).

### 'Insertion of agro SMEs in global value chains' – Karina Fernandez-Stark

29. The first panellist, *Ms Karina Fernandez-Stark*, addressed the challenges related to the insertion of smallholders in GVCs. She surveyed different types of agricultural crops and noted that smallholders typically participate in "high-value agriculture" rather than in "commodities" production. She noted that high-value agriculture comprises non-bulk agricultural products that require special handling and more labour-intensive production (e.g., fresh fruits and vegetables, speciality coffee, honey). Additionally, she explained that quality is a key factor for high-value agriculture in determining price and access to potential markets. She further noted that high-value agriculture products are generally subjected to a range of sanitary and phyto-sanitary regulations and typically provide significant income for the producer.

30. Ms Fernandez-Stark stressed the role of smallholders in GVCs and explained how their participation may be structured. She noted that, in general, there are three organisational business models for the inclusion of smallholders within GVCs: (i) smallholders may act individually through intermediaries and without much bargaining power; (ii) an association of smallholders may be established to reach out to the global buyers through an exporter or intermediary; and (iii) the association of smallholders may reach the global buyer directly. She examined the four main barriers that smallholders need to overcome to participate in GVCs regarding: (i) access to markets (e.g., lack of contacts, cultural/language differences, no website/advertising), (ii) access to training (e.g., use of new techniques, awareness of certification requirements), (iii) coordination and collaboration (e.g., limited coordination between producers and other actors, low empowerment, poor negotiating position), and (iv) access to finance (perceived as high-risk clients and smallholders usually have minimal saving to buy inputs and pay certifications). In concluding, Ms Fernandez-Stark emphasised the need to address these four obstacles in a holistic manner.

### 'Collaborative contracts in agrifood supply chains' – Fabrizio Cafaggi

31. *Professor Fabrizio Cafaggi* highlighted the importance of identifying links between the issue of access to GVCs, lack of coordination and choice of legal instruments. Referring to the Webinar's introductory presentation by Hon. Justice Lorenzetti and to the [background paper](#) prepared by the UNIDROIT Secretariat, Professor Cafaggi reiterated the four main objectives which the LSAE project may pursue: (i) improve access to market; (ii) increase the size of agricultural enterprises; (iii) ease access to critical resources (land, inputs, capital and technology); and (iv) cover unfair commercial practices (uneven distribution of power and allocation of risks, costs and benefits between GVC actors).

32. With regard to the governance and organisational models of GVCs, he queried whether it made a difference to coordinate supply chains actors by contracts or by corporate governance rules. He also raised the question of whether it would be possible to combine coordination mechanisms that operate by contracts with those that operate by ownership. He noted that coordination mechanisms by contracts are more flexible, but transaction costs are higher. Ownership may be less costly, but it is much more rigid and does not allow for the flexibility that contracts do. He explained that when contractual coordination is chosen, it is necessary to further analyse the differences between bilateral (e.g., contract between input provider and grower) and multiparty contracts (e.g., contract between input provider, retailer, processor, and grower).

33. Moreover, Professor Cafaggi noted that the digitalisation of agriculture, through digital platforms, smart farming, precision agriculture and other technologies may have an impact on the choice of organisation and coordination mechanisms. He concluded by emphasising that the differences between these forms of coordination mechanisms should be further discussed, focusing on the pros and cons of each type of instrument and how these different legal structures may be combined to benefit smallholders in agri-food global chain.

#### 'Small-scale rural producers and agricultural value chain contracts' – Lorenzo Cotula

34. In the next presentation, *Professor Lorenzo Cotula* noted the importance of contracts as an instrument that sustains and structures agricultural value chains; coordinates diverse economic activities, linking input suppliers to producers, all the way to end buyers; distributes risks and rewards among value chain actors; and defines standards on issues such as seeds, farming techniques, technology, and product quality. Based on a report published by the International Institute for Environment and Development (IIED) that examines contracts for commercial agriculture and analyses examples of contracts from different segments of diverse agricultural value chains,<sup>5</sup> Professor Cotula highlighted three points that may be considered in the new LSAE project.

35. First, he noted that contracts vary depending on commodities, jurisdictions, social contexts, and the structure of the value chain (global, regional, or local chains; formal or informal arrangements). He acknowledged that guidance had been developed for certain types of contracts, such as contract farming, but recognised the potential to cover a wider range of contracts in different value chain segments, including farmer-level supply agreements. He pointed out that there is a particular need to analyse the distinctive challenges faced by small-scale farmers operating in informal markets. On the one hand, he noted that taking highly formalised value chains as the entry point in the LSAE project would inherently restrict the project's relevance to certain types of agricultural enterprises – essentially, the top tier in the smallholder sector, and in many ways the types of producers that are already covered by the UNIDROIT/FAO/IFAD Legal Guide on contract farming. On the other hand, he mentioned that looking at agricultural enterprises from the perspective of small-scale farmers, rather than a lead firm, could lead to a different focus and a different set of contractual issues.

36. Second, he highlighted the importance of considering the interrelatedness of different contracts and the notion of "contracting chains" to reflect upon the market power which often enables lead firms to impose contractual terms (e.g., sustainability standards, force majeure, or termination clauses) on first-tier suppliers, who in turn must give effect to those terms in their relations with subcontractors. In this regard, he noted that it may be interesting to focus on overarching principles concerning the role contracts play in coordinating value chains, more than to elaborate detailed guidance about specific contractual provisions.

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<sup>5</sup> Cotula, L., Blackmore, E. and Berger, T. (2021) [Contracts in commercial agriculture: Enhancing rural producer agency](#). IIED, London.

37. Third, Professor Cotula noted that some of the most difficult contractual issues are often related to the process through which contracts are developed and implemented. Accordingly, he drew attention to questions regarding the participation of farmers in the overall value chain coordination and the participation of women in decision making. He noted the need to further understand the conditions required for formal participation to be meaningful and to ensure that both process and outcomes are inclusive. In concluding, Prof. Cotula recalled that process was a key aspect analysed in the Legal Guide on Agricultural Land Investment Contracts.

#### 'Enabling regulatory environment' – Carmen Bullon

38. The fourth panelist, *Ms Carmen Bullon*, noted that the contracts adopted in agricultural supply chains rely upon and are influenced by national legal frameworks. She analysed the role governments and legislations play in creating an enabling regulatory environment that facilitates sustainable trade practices and ensures: (i) fair competition, by addressing power imbalance and unfair practices; (ii) legal security and certainty, by defining clear rights and responsibilities, as well as access to dispute resolution mechanisms; and (iii) transparency, through clear rules applicable to all and increasing trust.

39. *Ms Bullon* pointed out that in addition to the specific legislation applying to contract law, there is an increase in multi-sectoral laws aligning with the food systems perspective that would also apply to the performance of the contract (*e.g.*, food safety laws, human rights legislation, commodity specific legislation, environmental and consumer protection regulations). She acknowledged the vital role the private sector may play in the development and implementation of legislation (*e.g.*, standard agreements, self- and co-regulation, public-private partnerships, and corporate social responsibility). Finally, she emphasised that the knowledge of the applicable legal framework is crucial to understand contractual structures for the collaboration and integration of agricultural enterprises.

#### 'A practical perspective from the FtMA' – Ammar Kawash

30. *Mr Ammar Kawash* described the "Farm to Market Alliance" (FtMA) which is a global partnership of six agri-focused organisations including four private sector organisations (WFP, AGRA, Yara, Bayer, Syngenta and Rabobank). He noted that the main objective of the FtMA is to improve markets for smallholders by promoting the transition from subsistence and informal production patterns to more formal market linkages with agro-processors and buyers. With regard to the use of contracts, he noted that FtMA facilitates the negotiation of private contracts between buyers (agro-processors or off-takers) and farmers (through their cooperatives). He explained that the FtMA provides for a platform of buyers which creates flexibility for all actors involved and facilitates farmers' access to formal markets and finance mechanisms.

31. *Mr Kawash* further noted that the FtMA had been working with the financial sector (mainly micro-finance institutions) to ensure that contracts are accepted as part of the collateral to facilitate access to credit and to reduce the collateralisation burden for smallholders. He also explored the issue of non-compliance with contractual obligations by buyers and highlighted the negative impacts this has had on the willingness of farmers to engage in future trade. He concluded by emphasising the importance of flexibility within the value chain.

32. At the end of the second session, a participant queried whether there was any empirical data specifying the different amount of domestic and international contracts adopted in GVCs. The panellists noted that the gathering of data on this matter is challenging considering the complexity of GVCs and limited number of contracts that are made available in the public domain. Regarding dispute resolution methods, a participant queried whether farmers and buyers were using classic or alternative resolution methods to solve the disputes arising from their contracts, to which a panellist

noted that contracting parties commonly rely on informal mechanisms, such as open communications and tend to avoid going to court.

### **Session 3. Remedies and dispute settlement mechanisms**

33. The third session discussed legal and contractual remedies, as well as dispute settlement mechanisms available to address problems of compliance and unfair commercial practices in agrifood activities. It aimed at identifying instruments that enable the preservation of the contractual relationship, focusing on corrective remedies rather than compensation and termination. This session was chaired by Professor Fabrizio Cafaggi (Council of State and University of Trento, Italy) and featured presentations by Professor Paola Iamiceli (University of Trento, Italy), Professor Carlo Russo (University of Cassino and Southern Lazio, Italy), Professor Axel Marx (University of Leuven, Belgium), Professor Matthew Jennejohn (Brigham Young University, USA) and Ms Kristina Bishop (Southern Methodist University, USA).

34. *Professor Cafaggi* introduced the correlation between contracts, remedies and different forms of dispute settlement mechanisms. He highlighted the importance of considering these topics in the LSAE project and noted the key role intermediaries play in agricultural supply chains as well as in dispute resolution and the design of collective remedies. He further noted the importance of analysing dispute resolution in contractual and corporate arrangements.

#### 'Remedies in collaborative contracts' – Paola Iamiceli

35. *Professor Paola Iamiceli* examined the role of contractual remedies in agri-food collaborative contracts and whether they should be designed differently depending on the contractual structure – whether bilateral or multiparty. With regard to the role of contractual remedies in agri-food collaborative contracts, she quoted the UNIDROIT/FAO/IFAD Legal Guide on Contract Farming to highlight that “ideally a well-conceived remedies system should ensure compliance with performance standards, not only by discouraging breach (through the threat of liability, termination or other adverse consequences), but also by encouraging performance (through facilitation of proactive error detection and correction)”.<sup>6</sup> She pointed out that the adoption of a cooperative approach to remedies implies defining remedies consensually, preferring remedies in kind (e.g., corrective measures and replacement), vesting the party in breach with a right to cure and assigning the aggrieved party a duty to mitigate.

36. With regard to the question of whether contractual remedies should be designed differently depending on the bilateral or multilateral contractual structure, Professor Iamiceli noted that a critical point to consider is the interdependence between the contracting parties. She noted that the higher the interdependence within the chain, the more severe the effects of termination, expanding to the entire contract; on the contrary, lower interdependence allows for partial termination and contract preservation for the surviving parties. In relation to the termination process to be followed in multiparty contracts, she noted that the decision is mainly taken collectively and not unilaterally. However, she drew the participants' attention to the uneven power distribution and risk of abuse by dominant parties that may exist in multiparty contracts and noted that the legal instruments to address unfair termination in bilateral and multiparty contracts may differ. She also raised the question of whether collective decision making and the right to exercise termination in multiparty contracts would help monitor the risk of abuse.

37. While emphasising that termination should be the very last resort in multiparty contracts, Prof. Iamiceli discussed whether corrective remedies and specific performance requirements should be targeted only to the party in breach or also to the other contracting parties. She highlighted that

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<sup>6</sup> UNIDROIT/FAO/IFAD Legal Guide on Contract Farming, 2015, p. 146.

cooperation is essential before a breach, but it is also necessary to solve the problem after a breach. To conclude, she reiterated that the increased need for coordination and cooperation in GVCs should also regard contract design, contract execution and remedies. She acknowledged that such a cooperative approach already existed in practice but noted that legal obstacles in conventional contract doctrines, statutory provisions depending on the applicable law, and parties' failure to explicitly design a cooperative setting within their contracts could be further addressed. She suggested that further guidance may be provided by looking at the different structures of agricultural enterprises and their roles within multiparty contracts, networks and GVCs more generally.

#### 'Unfairness in contractual structures' – Carlo Russo

38. *Professor Carlo Russo* examined the issue of unfairness in contractual structures. He based his presentation on a study of unfair trading practices in the European Union fruit value chain, which analysed unfair practices and the reasons for their occurrence, mainly in Italy and Germany. The study demonstrated that unfair practices vary depending on the value chain stages and are very heterogeneous between middlemen and retailers (e.g., unpredictable orders, unnecessary standards, commercial retaliation, misuse of confidential information, unilateral contract changes) and between farmers and middlemen (e.g., cheating on quality testing, discretionary prices, late payments). However, he highlighted that unfair trading practices are interdependent along the value chain and that the distribution of bargaining power along the supply chain can shape agricultural structures.

39. He noted that flexibility and co-design of legislation between public and private actors is an essential tool for the promotion of contractual fairness, which also implies mixing public action and private incentives.

#### 'Voluntary Sustainability Standards, intermediaries and dispute settlement' – Axel Marx

40. *Professor Alex Marx* provided an overview of the role of Voluntary Sustainability Standards (VSS) as one of the intermediaries in GVCs and the mechanisms they provide to settle disputes and complaints. He highlighted the definition of VSS adopted by the United Nations Forum on Sustainability Standards (UNFSS)<sup>7</sup> and provided some examples such as the GlobalGap and the Forest Stewardship Council (FSC) to explain that VSS have a role in the governance of agricultural commodities and GVCs. He noted that VSS are operational in all countries, but better followed in developed countries. He said there is an increasing integration of VSS in public policy, such as in trade policy, regulations, and procurement requirements. He explained that VSS are relevant for legal structures of agriculture enterprises, because they provide access to GVCs and export markets. However, non-compliance with VSS can also create obstacles to trade and render integration in GVCs difficult.

40. With regard to remedies and dispute settlement mechanisms, he mentioned that certification schemes often have two tiers of complaint systems in place: (i) at the level of the certification body, usually not the VSS organisation themselves but an independent organisation, and (ii) an internal complaint system. The loss of a certification can lead to the termination of the contractual relationship between the certificate holders and the certification organisations, but it may also create a learning process and stimulate producers to comply with the VSS.

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<sup>7</sup> The [UNFSS](#) defines VSS as "standards specifying requirements that producers, traders, manufactures, retailers or service providers may be asked to meet, relating to a wide range of sustainability metrics, including respect for basic human rights, worker health and safety, the environmental impacts of production, community relations, land use planning and others".

'Governing Agricultural Production and Collaboration: Evidence from the U.S. Market' – Matthew Jennejohn and Kristina Bishop

41. Based on data extracted from research focusing on the United States, *Professor Matthew Jennejohn* and *Ms Kristina Bishop* shared information on a framework to consider the governance of GVCs. Professor Jennejohn noted that agricultural value chains combine a variety of governance mechanisms. He mentioned that research often tends to focus on contracts that link together different stages of the value chain (*e.g.*, production, marketing, retail), noting that it is also important to analyse the governance options that are available to participants at each step of the value chain. He noted that, at one end, parties may organise production within the boundaries of a "firm," use the prerogatives of property rights and allocate resources towards production. At the very opposite end of the spectrum, he noted that "spot markets" could be used and production would be organised through immediate transactions that do not have a relational context between the parties over time or within the broader network of market players. In the middle of these two organisational options, he highlighted the existence of a hybrid zone where "networks" could be established. He emphasised the importance of focusing on this hybrid zone of organisational networks to further understand the different organisational forms available to parties and the trade-offs or complementarities that may arise.

43. Focusing first on the production stage of the value chain and moving beyond the firm-based organisational form, Prof. Jennejohn explained that within the network organisational form it would be possible to add certain mechanisms to organise the value chain. Among others, he mentioned farmers could organise themselves within cooperatives, seek commercial credit and decide to lease the land or establish loan service agreements. He explained that similar variations would exist in the marketing stage of the value chain if network organisational forms were adopted. He noted that long term supply contracts and forward cash contracts could be adopted within the network for marketing purposes. In the development stage of the chain, he noted that networks would contribute to a diversification of financing options, such as venture capital, strategic contractual financing collaborations for innovation and licensing arrangements. He underlined the principle that no single contract form would apply across the value chain and emphasised the relevance of the variety of contracts that may be adopted. He highlighted that any deficiencies within one of these governance tools (*e.g.*, contracts being incomplete or insufficient to govern the exchange fully) might lead the parties to choose a different organisational form.

44. He provided some empirical data from the U.S. (USDA) to highlight how many farms were actually using contracts to organise production and noted that in 2008 just 13% of small family farms were using contracts, while 42% of the larger industrial companies were using contracts to govern production. He highlighted that the study also demonstrated that companies that have more revenue also used more contractual arrangements in the U.S.

45. In addition, Professor Jennejohn explained how informal and formal dispute resolution mechanisms also vary according to the organisational form adopted (whether firms, networks, or spot markets). Regarding informal dispute resolution methods, he pointed out that firms will generally rely on bilateral sanctions based on repeated deals. On the other hand, networks will rely on bilateral sanctions and reputational sanctions; spot markets usually use reputational sanctions. Concerning formal dispute resolutions mechanisms, he explained that within firms public courts would generally be relied upon, while network disputes may be solved via a trifurcated dispute resolution mechanism based on the problem to be solved. He further explained that if the problem to be solved regarded, for example, a coordination or technical issue between two contracting parties, then the parties would probably rely on real-time expert resolution mechanisms (neither mediation nor arbitration). However, if an intellectual property right problem occurred, then public courts would be used as the mechanism to solve the dispute. Opportunism problems would be handled by arbitration based on contract law. Professor Jennejohn raised the question regarding how informal and formal dispute resolution interact, mentioning the need for further research on this topic.

46. He concluded by highlighting the importance of focusing on systemic risks that propagate across agricultural networks, such as environmental climate, financial default cascades and failed innovation diffusion – subjects that network contracts may also address.

47. A number of panellists agreed that multiparty contracts might vary considerably depending on the jurisdiction. It is essential to look at how remedies differ across jurisdictions within the multiparty contracts and how the law can limit the incidence of breach of agreement in these kinds of contracts. Emphasis was placed on the contrast between contracts and more informal transactions. One of the panellists noted that from a legal standpoint some formal requirements, such as having a written contract, may vary across jurisdictions. Some accept, for example, verbal contracts for the sale of movable goods, while others do not; thus, the question is not only whether the informal or spot transaction is done by contract or not, but rather the duration of the contract and the degree of formalisation. Another panellist pointed out the relevance of examining the level of formality required in the enforcement system and the relationship between the formality of the contracts and the dispute resolution mechanisms. The formality of contracts was also pointed to as being instrumental to attain fairness.

## **Day Two – 16 April 2021**

### **Session 4. Corporate structures for the organisation of farmers and agricultural enterprises**

48. Producer organisations play different roles and their potential varies depending on whether they are informal groups, associations or other forms of civil society organisations, cooperatives or commercial companies. This session focused on the corporate legal structures that may be established for investment in agricultural activities and how these investments may be channelled internally and externally. The session was chaired by Ms Priscila Pereira de Andrade (Legal Officer, UNIDROIT) and featured presentations by Professor Virgilio De Los Reyes (De La Salle University, the Philippines), Professor Hagen Henry (University of Helsinki, Finland), Dr Georg Miribung (Free University of Bozen-Bolzano, Italy), Professor Antonio Zanette (Superior School of the Foundation of the Public Prosecutor's Office, Brazil), Professor Sukhpal Singh (Indian Institute of Management, India) and Ms Monica Canafoglia (Legal Officer, United Nations Commission on International Trade Law - UNCITRAL).

#### 'Juridical vehicles for community-based agricultural enterprises' – Virgilio De Los Reyes

49. *Professor Virgilio De Los Reyes* recalled that the UNIDROIT/FAO/IFAD Legal Guide on Contract Farming covered contracts between two parties (contractor and producers who could be individual farmers or organisations) and that the Legal Guide on Agricultural Land Investment Contracts covered contracts between investors and grantors of tenure rights. He highlighted, however, that the two Guides did not examine the different types of legal entities that may be established by smallholders, community-based enterprises or family farmers. He, therefore, noted the relevance of analysing, in the LSAE project, the legal entity for producers and grantors and how a "bundle of contracts" may be established to address issues regarding coordination, legal personality, and access to finance. He emphasised that the choice of the legal entity should be made in a "continuum" perspective in order to evolve according to the needs and development requirements.

50. He noted that different parts of the value chain may require the establishment of different legal entities (*e.g.*, cooperatives or corporations, non-profit or for-profit organisations, limited liability organisations, community interest corporations or joint-ventures agreements). Accordingly, he highlighted that the choice of the legal structure would depend on the position of the entity within that chain. He explored the differences between establishing transactions based on contracts and

legal entities and suggested that the LSAE project could further analyse when it would be preferable to use one structure or the other. Moreover, he drew attention to the issue of balance and the problem of inadequate contribution and rewards, also known as the “free loader problem”. He also mentioned how different types of resource mobilisation (e.g., equity, loans, supply contracts) and government incentives (e.g., preferential treatment for cooperatives to get loans), as well as mandatory expenditures or compulsory corporate social responsibility and fiscal obligations may influence the choice of the legal structure adopted.

51. In concluding, Professor De Los Reyes pointed out the challenges regarding management control and the issue of merging control and ownership. He stressed that there is no “one size fits all” structure for agricultural enterprises.

‘Agricultural cooperatives in global agri-food chains: a legal perspective’ – Hagen Henry

52. *Professor Hagen Henry* discussed, from a legal organisational point of view, the consequences of the integration of agricultural cooperatives into global agri-food chains, taking into account cooperative principles recognised by public international law, farming structure and sustainable development. He explained that the consequences could be assessed by comparing the structure of the value chains with the structure of cooperatives. He pointed out that in some instances agricultural cooperatives may form agri-food chains of their own, but generally they integrate into chains composed of other types of enterprises that lead the development and purpose of the GVCs.

53. He highlighted that the organisational coordination in these value chains is difficult as the two primary types of enterprises (capital-centred and person-centred) have different purposes and objectives. He explained that the capital-centred enterprises, such as stock companies, are investor driven and supposed to produce shareholder value, whereas the person-centred enterprises, such as cooperatives, are driven by member needs and are supposed to produce member value. He noted that according to the definition of cooperatives, as recognised by public international law, this member value consists of economic, social and cultural components. Moreover, he noted that the democratic control principle functions as a regenerator of social justice, which is a central aspect of sustainable development.

54. Professor Henry reiterated the importance of three cooperative principles: (i) democratic member control, (ii) autonomy and independence, and (iii) cooperation among cooperatives. He noted that while the relationship of the first two principles with democratic control is obvious, the significance of the principle of cooperation among cooperatives as a structural element of primary cooperatives is widely ignored. Accordingly, he noted that in capital-centred enterprises coordination measures are unlikely to lead to maintenance of democratic participation of the farmer members of the agricultural cooperatives as a mechanism to regenerate social justice. He specified that beyond corporate social responsibility measures, many countries had been implementing social and solidarity economy promotional measures with the aim of achieving greater social justice but that these measures do not compensate for what can be achieved through democratic participation.

55. He pointed out that cooperation among cooperatives and their integration into heterogeneous value chains can contribute to the well-being of cooperative farmer members. However, he noted that an efficient and effective coordination within the value chain would depend on how the legal structures address complex and diverse situations, such as the: (i) diversity of activity (production, transformation and processing); (ii) degree of integration (operational or organisational); (iii) degree of heterogeneity of the participating entities; and (iv) participants’ interests and value chain purpose.

56. Regarding whether coordination within the value chain should be done through “traditional” or “innovative” mechanisms (contracts or corporate mechanisms), he highlighted the need to adapt these mechanisms to the needs of the individual chains. He suggested discussing the notion of



“contract organisational law”. He further noted that sometimes an entity is necessary for coordination and may have coordination as its only objective, such as the French example of “*entreprise d’agrégation*”, which also exists in other jurisdictions. In concluding, he pointed out that the analysis of coordination mechanisms requires in-depth comparative studies, an examination of private international law and applicable law, as well as an examination of how to enforce, if necessary, the applicable law.

#### ‘Indivisible reserve as a key feature of the financial structure of cooperatives’ – Georg Miribung

57. Based on a study which compared how Italian and Austrian law implement the Principles on European Cooperative Law (PECOL),<sup>8</sup> Dr Georg Miribung drew attention to the indivisible reserves as an essential part of the financial structure of cooperatives. He explained that cooperatives may have different financing sources, but all of these ultimately have to promote mutual exchange. He described some of the key features of the indivisible reserves and how they may be used to promote the interests of cooperative members and satisfy economic, social and cultural needs. He further noted that individual reserves neutralise the role of capital and strengthen the ability of cooperatives to foster sustainable development.

58. Moreover, he noted that indivisible reserves may be required on a mandatory or voluntary basis. He explained that in the case of dissolution, the assets should be devolved to a mutual fund for the promotion and development of the cooperation. Here, a concept of mutuality emerges that goes far beyond the relationship between member and cooperative and frames all cooperatives in a single system. He highlighted, however, that the indivisibility does not automatically imply unavailability, as the assets set aside in the indivisible reserve remain available to fulfil the cooperative’s social function. As such assets must be used for the cooperative’s purposes, an intergenerational patrimony is also created in case of dissolution that is only indirectly available to the members, as it helps the cooperative to promote its members’ needs. In fact, this patrimony aims to guarantee, over time, the performance of the concerned cooperative, independent of the fact that the structure of the membership base changes over time.

59. In contrast to capitalist enterprises, he highlighted that cooperatives carry out economic activities that are not primarily profit-orientated but, instead, are mutualistic in nature. He further noted that indivisible reserves, as a means of disinterested distribution, function as a shock absorber. Thus, a cooperative should have a certain amount of these reserves to help protect members’ and to reduce the risks related to cooperative’s failure.

60. Dr Miribung also highlighted some critical aspects regarding indivisible reserves. From an economic perspective, he noted that specific problems may appear when market conditions change, and cooperative members’ needs become weaker or disappear. Because the unallocated capital is locked in indivisible reserves, a cooperative is hard to shut down. Moreover, if the remaining assets are transferred to common funds in the event of a liquidation, there is no incentive to dissolve an inefficient cooperative as long as there are assets that can be used by the members. He noted that adopting specific governance structures or developing specific membership programs could help solve some of these issues, however, these solutions could also weaken the concept of cooperatives. He recalled that the PECOL provides a useful tool for answering such questions.

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<sup>8</sup> Georg Miribung, The agricultural cooperative in the framework of the European Cooperative Society. Discussing and comparing issues of cooperative governance and finance in Italy and Austria, Springer 2020.

'Cooperatives and other corporate legal structures for inclusive agricultural business: a legal perspective from Brazil' – Antonio Zanette

61. *Professor Antonio Zanette* shared practical examples of farmer organisational models used in Brazil, focusing his presentation on some of the peculiarities regarding cooperatives and "rural condominiums" ("*condomínio agrícola*"). On the one hand, he noted that cooperatives are successful in organising agricultural production of small- and medium-sized producers, as they manage to increase their bargaining power for the acquisition of supplies and commercialisation of agricultural products. He explained some of the peculiarities that render cooperatives' legal structure unique in Brazil. First, he noted that the Brazilian Constitution (Article 5, XVIII) recognises any form of association and cooperation as a fundamental right and forbids State intervention. He also mentioned some of the main cooperative organisational principles, including limitation of capital, limitation of transferring shares, one vote per member and the form of distribution of results (due in a non-profit basis). He also highlighted issues regarding gender imbalance and noted the need to further encourage the participation of women in value chains.

62. On the other hand, Prof. Zanette drew attention to another form of agricultural organisation: the rural condominium ("*condomínio agrícola*"). He explained the role of the rural administrator and how shares may be divided between farmers that produce in the same area. He further noted that the plantation and harvest were jointly organised by the farmers who shared facilities, machinery and others.

'Producer companies as new generation cooperatives' – Sukhpal Singh

63. *Professor Sukhpal Singh* introduced the rationale of producer companies (PCs), also known as New Generation Cooperatives (NGCs) in India. He noted most cooperatives had failed to link small producers to markets in India and, for this reason, he pointed out a growing interest in new types of legal structures for commercial agriculture development. He gave examples of other countries which had also adopted NGCs, such as Denmark, Canada, Australia, and New Zealand and explained some of their key features.

64. He illustrated some types of cooperatives and producer enterprises that had been adopted in India before NGCs, such as cooperative societies, mutually aided cooperative societies, mutual benefit trust, private and public limited companies. He explained that PCs had become operational in 2003 after entry in force of the Companies (Amendment) Act. He highlighted a number of differences between cooperatives and PCs regarding: membership (co-ops are open to any individual while PCs are only open to producer members and their agencies); area of operation (co-ops have restricted areas while PCs can operate throughout India); shares (co-ops have untradable shares while PCs have shares that are tradable within membership only); voting rights (in both co-ops and PCs the one person one vote principle applies, however in co-ops governments may have veto power while in PCs non-producers cannot vote); role of government (significant in co-ops and minimal in PCs); profit sharing (limited dividend on capital in co-ops while PCs' profit sharing is based on patronage); borrowing power (is restricted for co-ops and PCs have many options); dispute settlement (co-ops use their own system while PCs generally opt for arbitration).

65. He explained PCs could be formed by ten or more individual producers or by two or more producer institutions. He further pointed out that their memberships is open, unlimited and voluntary, liability is limited by shares and PCs may form joint ventures, subsidiaries, and buy shares from other producer companies. Professor Singh highlighted that many PCs are involved in contract farming, insurance contracts and other arrangements. In concluding, he pointed to some challenges PCs may face regarding ownership, lack of collateral, impossibility to access grants as commercial entities, lack of social capital formation, lack of business plans and value chain mapping, as well as poor market linkages and orientation.

'The adaptability of the future UNCITRAL legislative guide on limited liability organization (UNLLO) to agricultural Micro, Small, and Medium-sized Enterprises (MSMEs)' – Monica Canafoglia

66. Ms Monica Canafoglia introduced the Draft UNCITRAL Legislative Guide on Limited Liability Organization (UNLLO)<sup>9</sup>, prepared by UNCITRAL Working Group I, and explained how it may become a valuable tool for agricultural Micro-, Small-, and Medium-sized Enterprises (MSMEs). Acknowledging the crucial role MSMEs play in businesses around the World, she noted MSMEs may have different forms according to the legal traditions of the countries where they are established. She explained, however, that despite their differences they usually face similar obstacles and challenges regarding access to credit and limited source of employees, among many others.

67. She emphasised that UNCITRAL's project in this field was aimed at removing legal obstacles for MSMEs and noted that the project had considered the challenges regarding simplification of incorporation and transition from informal to formal economy. She specified that the limited liability organisation was meant to be a flexible business form based on several countries' experience and on the paradigm "think small first" to provide for a relevant tool for small businesses. However, she clarified that the draft UNLLO did not aim at reforming or simplifying existing company law regimes.

68. Ms Canafoglia explained that the UNLLO is a "neutral business form" which can be established for any lawful commercial and business activity, including agriculture. She clarified that the interpretation of the terms "commercial" and "business" in the draft UNLLO had been very broad. Moreover, she mentioned two essential features of the UNLLO regarding the legal personality and limited liability of its members. She also mentioned other important provisions of the draft UNLLO, such as the formation upon registration with minimum information and minimum capital requirement, as well as the principle of members' equal rights and freedom of contract. She pointed out that the draft UNLLO contains some mandatory provisions, such as standards to ensure transparency and to protect third parties (e.g., managers' duty of care and loyalty, as well as the prohibition of improper distributions). Default provisions had also been included in the draft UNLLO, for example, to protect against circumstances or events that may not be foreseeable and to fill gaps regarding default provisions on management, transfer of rights, among others.

69. She concluded by highlighting the relevance of the draft UNLLO to encourage start-ups by creating a simple structure with accessible rules. With regards to the application of the draft UNLLO to agricultural enterprises, she reiterated that it can be instrumental as it offers limited liability protection and it is a legal structure that is easy to establish, manage, and transfer; thus, it is highly beneficial for small and medium farmers.

70. In the ensuing discussion, one participant queried whether the LSAE project should consider focusing on the kinds of legal structures that could favour the formalisation of agricultural activities. A panelist also raised a question regarding the possibility to dissociate land or tenure ownership from the ownership of other assets of the agricultural enterprises (e.g., machinery). A panellist recalled that the choice of the legal entity should be made in a continuum, noting that it may change over time. The importance of flexibility for the continuation of family businesses by future generations was further highlighted. Then, it was noted that change of the corporate form should not undermine the parties involved in the business or related third parties' rights.

71. Regarding the question on how legal frameworks may improve formality, it was noted that this issue had different associated features depending on the perspective of analysis. It was mentioned that improvement of formality could be analysed through the lens of legislation drafting, as well as from the perspective of involvement of stakeholders in the implementation of legislation (e.g., certification schemes which have participatory guarantee systems that allow self-certification of the quality of products). A panelist asked for clarification regarding the reasons for formalisation

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<sup>9</sup> UNCITRAL, Draft Legislative Guide on an UNCITRAL [Limited Liability Organization](#), November 2020.

and whether it should be analysed according to its function, such as to improve access to credit or sought for labour, technology or tax purposes.

72. A participant mentioned that certain topics had not been addressed in the draft UNLLO, such as the different types of contractual cooperation options and networks that may be established prior to formalisation and establishment of legal entities. One of the panelists noted the need to distinguish the topic of corporate structures and legal identity of agricultural enterprises from the topic of structures that may be established when enterprises cooperate. The need to distinguish cases where agricultural enterprises cooperate horizontally (same level of the supply chain) and instances where they cooperate vertically (different level of the supply chain) was also mentioned.

73. With regards to the role cooperatives may play in vertical cooperation within the supply chain, one of the panelists recalled that historically the original idea of cooperatives was to organise the production from the producers to the consumers to ensure that the value-added is properly distributed among all the participants of the chain. It was further noted that even if vertical coordination through cooperatives had been successful in the past, currently they could also act as competitors rather than coordinators of value chains. The discussion revealed the need to further analyse the effects of vertical and horizontal integration.

#### **Session 5. Challenges for agricultural finance and access to credit**

74. This session considered some of the challenges to promote inclusive agricultural finance and aimed at analysing how the legal structures of agricultural enterprises may have an impact on access to credit and adequate domestic and to regional and global agricultural markets. This session was chaired by Professor Anna Veneziano (Deputy Secretary-General, UNIDROIT) and featured presentations by Ms Jeannette Tramhel (Senior Legal Officer, Organization of American States), Mr Christopher Brett (Lead Agribusiness Specialist, World Bank), Mr Massimo Pera (Programme Officer, Agricultural market Development, FAO), Mr Dagmawi Habte-Selassie (Programme Officer, IFAD), Mr Steve Nocka (Founding partner and Chief Risk Officer of CrediLinq) and Ms Isabelle Deschamps (McGill University, Canada).

75. *Professor Anna Veneziano* highlighted a number of UNIDROIT instruments which covered some aspects of access to finance in the agricultural sector, such as the Protocol to the Convention on International Interests in Mobile Equipment on Matters specific to Mining, Agricultural and Construction Equipment (MAC Protocol), which provides an international legal regime to facilitate asset-based financing of high-value agricultural equipment. She explained that the MAC Protocol addressed traditional loans using a high-value movable as collateral, but also via leasing and sales with retention of titles. Despite its focus on high-value equipment, she explained that the MAC Protocol does not only target large enterprises and noted that smaller-scale enterprises may also benefit from it, especially if they pool their resources together. She also mentioned that the UNIDROIT/FAO/IFAD Legal Guide on Contract Farming addressed the issue of agriculture finance as one of the aspects of the bilateral contractual relationship established between producers and buyers. Moreover, she recalled that the UNIDROIT/FAO/IFAD Legal Guide on Agricultural Land Investment Contracts gave guidance on how to structure investment relationships in a responsible way, taking into account economic, social and environmental concerns.

77. In addition, Professor Veneziano drew attention to other ongoing UNIDROIT projects which could be helpful to reflect upon certain aspects of agriculture finance in the LSAE project, such as the projects on warehouse receipts and factoring which aim at overcoming challenges regarding access to traditional modes of financing. In concluding, she invited the panellists to share their views on the role legal structures of agricultural enterprises may play to enhance access to credit.

'Legal structure: a prerequisite for credit' – Jeannette Tramhel

78. Ms Jeannette Tramhel drew attention to the Organization of American States (OAS) regional Model Law on the Simplified Corporation<sup>10</sup> to highlight that it complemented the draft UNLLO developed by UNCITRAL and could potentially be useful to the LSAE project. She referred to a recent report on the status of regional reforms based on this Model Law<sup>11</sup> suggesting in particular consideration of the “emerging international standards for a simplified corporation” which include: legal personality, limited liability, no minimal capital, broad purpose clause, and no mandatory intermediaries required for incorporation (e.g., notary).

79. She recalled the objectives of the LSAE Project that had been mentioned in the introductory session of the Consultation Webinar: access to market, increased size and soundness of agricultural enterprises and access to resources; and highlighted that simplification of the business form (in the case of the LSAE project, an agri-enterprise) “is not an end in itself, but rather a means towards an end” – i.e., improved access to credit. Noting that the agricultural sector represents the highest level of informality around the world (over 93%), she explained the consequences of this informality for access to credit; if informal businesses can obtain credit it is usually at high rates of interest and without protection of the law. She explained that without credit, farmers frequently have no choice other than to sell their business assets (e.g., livestock, seeds, or equipment) to obtain liquidity to meet immediate needs, which is prejudicial for the continuation of their business. She stressed the importance of encouraging: 1) formalisation of businesses to enable access to credit and 2) a simplified process of incorporation, making it fast and affordable. In this regard, she pointed out two World Bank initiatives, “Enabling the Business of Agriculture”<sup>12</sup> and “Doing Business”<sup>13</sup> which include access to credit and simplified business start-up among the indicators used in their analysis. She noted the interlinkages between the process of establishing a legal structure and the operationalisation of some of the Sustainable Development Goals (SDGs), such as equal access to financial resources (SDG 2.3) and the promotion of development-oriented policies that specifically encourage formalisation and growth of MSMEs, including through access to financial services (SDG 8.3).

80. While acknowledging common needs for credit across all sectors (i.e., for short-term credit, which enables response to immediate crisis; medium-term credit, which enables recovery and purchase of inputs for the next production cycle; and long-term credit, which enables rebuilding resilience and ability to capitalise on new opportunities), she pointed out that the unique nature of agriculture entails special challenges. For example, a long growing season followed by all-at-once harvest leads to the “lumpy” nature of payments; perishables require timeliness in distribution and transport, as was evidenced during the COVID-19 pandemic crisis, all of which illustrates the special needs for credit in the agricultural sector.

81. She briefly reviewed different types of investment vehicles, noting the pros and cons when used in the agriculture sector: (i) traditional loan against land, which may be disadvantageous to women and other marginalised groups; (ii) loan against movables, which has been the object of many legal reforms related to secured transactions and enables loans against crops and livestock, as well as other inventory; (iii) warehouse receipt financing; (iv) assignment of receivables and (v) factoring. She highlighted the need in the LSAE Project to analyse which of these mechanisms would be most suitable for the development of agricultural enterprises, given the range in typologies found

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<sup>10</sup> OAS (2012). [Model Act on the Simplified Stock Corporation](#).

<sup>11</sup> OAS (2021). [Model Law on the Simplified Corporation: Status of Reforms in the Region](http://www.oas.org/en/sla/dil/docs/Model_Law_on_the_Simplified_Corporation_Status_of_Reforms_in_the_Region.pdf). [http://www.oas.org/en/sla/dil/docs/Model\\_Law\\_on\\_the\\_Simplified\\_Corporation\\_Status\\_of\\_Reforms\\_in\\_the\\_Region.pdf](http://www.oas.org/en/sla/dil/docs/Model_Law_on_the_Simplified_Corporation_Status_of_Reforms_in_the_Region.pdf)

<sup>12</sup> Available at: <https://eba.worldbank.org/en/eba>.

<sup>13</sup> Available at: <https://documents1.worldbank.org/curated/en/688761571934946384/pdf/Doing-Business-2020-Comparing-Business-Regulation-in-190-Economies.pdf>

in the agricultural sector, and conversely, to consider the needs of MSMEs and smallholders in the development of appropriate financing instruments.

83. Recalling the previous presentations and noting the forthcoming [UN Food Systems Summit](#), Ms Tramhel emphasised the importance in the LSAE Project of designing integrated legal instruments that support the re-design of global food systems, and concluded that formal legal structure will invariably continue as a prerequisite for formal credit.

#### 'Maximising finance for development' – Christopher Brett

84. With regards to supply chain finance, *Mr Christopher Brett* noted that the World Bank (WB) Group and, in particular, the International Financial Corporation, propose a number of different financial instruments to support value chain liquidity. However, noting the impact of the COVID-19 pandemic crises specially on MSMEs, he emphasised the need to adapt and transform some of the traditional financial instruments. He presented data from a survey developed by the World Business Council for Sustainable Development (WBCSD) to highlight that only 8 to 10% of farmers were actually being integrated. Mr Brett highlighted the increasing demand for development finance and noted that around 40% of the WB's portfolio was destined to agriculture value chain development (e.g., palm trees, fruits and vegetables).

85. He emphasised the importance of contributing towards the development of domestic market and the promotion of nutritious and safe food. He noted the strong role governments play in the development of the agribusiness but highlighted that few incentives promote a sustainable transformation (e.g., considering broader aspects such as environmental management to tackle climate change). He explained that the World Bank had been working intensely with governments advising them how adapt their investments to maximise sustainable finance development. He stressed the need to switch from the traditional ways of investment to invest more in sustainable development agriculture and new technologies (e.g., research development for climate smart agriculture) as well as to strengthen the social aspects that are expected to be developed within the agricultural sector (e.g., improved labour conditions).

86. Furthermore, Mr Brett shared information on the WB's Program-for-Results Financing (PforR) to incentivise policy change, further engagement of the private sector and enforcement of regulations that address social and environmental concerns. He raised a question regarding the type of agriculture desired in the future and suggested that the concept of "farming of the future" should consist of farmers being paid for good quality product at competitive prices and receiving income for their environmental and social engagement. He highlighted the relevance of supporting farmers in changing their land practices through, among other instruments, payment for environmental services and/or development of agroforestry systems. He, thus, emphasised that there are new forms of developing finance, which may be very attractive to farmers and, at the same time, may contribute towards the process of formalisation which may help agri-MSMEs face some of their main challenges, such as those related to taxation, transparency, and scrutiny. In concluding, he referred to the WB programme "Enabling the Business of Agriculture"<sup>14</sup> to highlight how it aims to contribute towards best practices through benchmarking and by showing governments, civil society and the private sector what works and what does not.

#### 'Digital technologies to address challenges in accessing finance for Agri-SMEs' – Massimo Pera

87. *Mr Massimo Pera* explored financing issues connected to digital technologies. He recalled some of the challenges to invest in agriculture, such as the general lack collateral and guarantees. Moreover, he explained that investing in agriculture is very expensive, especially in developing

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<sup>14</sup> Available at: <https://eba.worldbank.org/en/eba>

countries, where the transaction costs are very high since farmers usually live in remote areas. He emphasised that the obstacles were particularly perceived by the so-called “missing middle” which included farmers and MSMEs that are not small enough to benefit from microfinance instruments but not large enough to become traditional bank clients.

88. Mr Pera further highlighted that lack of information was one of the main reasons for limited financing in the agriculture sector. He noted that, generally, financial institutions and investors do not have an intelligence unit that understands agricultural markets and trends and, therefore, they cannot properly identify investment opportunities and risks. He pointed out that this explains why agriculture financing is usually done by non-institutional providers, such as value chain actors (e.g., processing companies) who have the benefit of accessing information. However, he drew the participants attention to a transforming agricultural landscape and noted the increasing role played by information technology. He also explained how platforms and delivery channels had been increasing lenders’ access to data. He pointed out that access to “big data” reduced transaction costs and could help overcome traditional barriers faced by farmers and facilitate investor’s due diligence process.

89. He noted that the use of technology leads to an increasing number of fintech companies and e-commerce services, which may address some of the inefficiencies of agricultural value chains, especially in terms of coordination and governance. He further explained that e-commerce platforms can help streamline farmers access to clients, retailers and consumers. He noted that it is also possible for e-commerce platforms to provide financial services or form partnerships with financial institutions to ensure their clients’ access to finance and increase their trade volume within the platform.

90. In concluding, Mr Pera highlighted some of the disadvantages and risks that fintech companies and the overall increasing role of technology may create for the agricultural sector. He explained that these new financial services may only be available for those who have access to technologies (e.g., smartphones) and who are able to interact with the e-service providers. In addition, he briefly explored the issue of data protection and raised the issue regarding data ownership and obstacles to regulate technology development.

#### ‘Blended finance for Agri-SMEs development. An example from Uganda’ – Dagmawi Habte-Selassie

91. Mr *Dagmawi Habte-Selassie* explored the mechanism of blended finance for smallholder development in the agricultural sector and shared practical information on the Yield Uganda Fund. He briefly recalled that IFAD traditionally offers loans and grants to governments and focuses on building capacity for small-scale farmers to help them increase their production productivity, develop rural infrastructure and have better access to finance. He noted, however, that IFAD had recently started engaging with the private sector directly, mainly through blended capital impact funds, such as the Yield Uganda Fund. He explained that a number of key institutions took part in the blended finance of the Yield Uganda Fund, such as governments, donor agencies and private and commercial financial institutions, namely IFAD, the European Union (EU), the National Social Security Fund Uganda (NSSF), and the Pearl Capital Partners (PCP).

92. He highlighted that the Yield Uganda Fund had been focusing its investment in the “missing middle” since they represent 90% of the businesses in sub-Saharan Africa and play a relevant role in youth employment. He highlighted the challenges faced by SME in Uganda in accessing adequate capital and noted that the Yield Uganda Fund had two main mechanisms aimed at supporting these SMEs. On the one hand, the Fund itself, managed by PCP, which invested around 20 million euros in companies by offering debt investment, equity, and quasi-equity. On the other hand, the Fund had a Business Development facility (BDS), which aimed at improving operational processes and

marketing of companies, as well as at promoting compliance with Environmental, Social and Governance (ESG) standards.

93. He illustrated three examples of agri-SME investments that had been conducted through the Yield Uganda Fund: (i) the Raintree Farms Ltd., a company which is using an innovative Secured Income Programme model to offer farmers a regular monthly payment; (ii) the Pristine Foods Ltd., an innovative start-up which aims at setting up a network of “buying centres” and a digital platform to connect to farmers; and (iii) the Chemiphar, an internationally accredited analytical laboratory and inspection company focused on export-oriented agro-firms. In concluding, he emphasised Yield Fund is the only Fund domiciled in Uganda and that in addition to investing and supporting the capacity of SMEs, IFAD is undertaking a number of activities in partnership with local authorities to improve the policy and regulatory environment in Uganda for vehicles like the Yield Fund.

#### ‘Challenges of lending to smallholder agri-SMEs’ – Steve Nocka

94. *Mr Nocka* explored some of the challenges of providing a loan successfully to a smallholder or agri-SMEs in developing markets. He first noted the high-risk profile of agriculture investments (e.g., price volatility, currency and convertibility issues, logistical challenges, weather and climate-related risks) and pointed out that agriculture investment is a relatively unattractive sector to lenders.

95. With regards to the lending structure, he noted that agriculture lending requires specialised knowledge (e.g., crop seasonality, supply chain structure, logistics, borrowing needs and cash conversion cycle). He illustrated some examples of mechanisms that may effectively function when lending to agri-SMEs in developing markets, such as: (i) trade finance structures, which consist in supply chain finance and lending against contracts; and (ii) blended capital, as a short and intermediate term solution providing a loan subsidy tied to impact or even a loan or portfolio guarantee to address higher default rates, especially for non-export crops. In concluding, Mr Nocka explored the issue of cooperatives acting as borrowers. He noted that this mechanism could have a number of benefits in terms of reaching out to the smallholder farmers through aggregation and to deliver the required technical assistance and other services. However, he also specified some of the challenges cooperatives may face when borrowing, mainly in terms of management and governance, few lendable assets, and difficulty to get guarantees from management or board.

#### ‘Learning from women’s experiences with community-based financing in West and Central Africa’ – Isabelle Deschamps

96. *Ms Isabelle Deschamps* highlighted the importance of adopting a gender-sensitive approach when considering possible legal structures for agriculture enterprises and of looking at the interaction that may exist between commercial and business laws and modes of organisation of market women and female micro-entrepreneurs, as well as their socio-economic specificities (e.g., illiteracy as an obstacle to access credit). She shared practical information on community-based financing vehicles used by women working in the agri-food value chain in West and Central Africa and explained how the successes and challenges of these vehicles could provide valuable insight for devising an international instrument on the legal structure of agricultural enterprises and for the promotion of more inclusive agricultural finance.

97. She noted the need to adopt a flexible approach when considering legal structures of agricultural enterprises and to analyse the possibility of limiting the requirement for written documents where appropriate. She recalled that the issue of the written requirement had been discussed in the context of the elaboration of the draft UNLLO by UNCITRAL’s Working Group I and noted that it had been covered to a certain extent. She, therefore, emphasised the need to consider the perceived advantages and disadvantages of alternative financing mechanisms such as



community-based financing vehicles used by women in the agri-food value chain. She also highlighted the need to strike a balance between the objective of encouraging trust and the objective of limiting the need for writing. She explained that community-based financing vehicles in West and Central Africa often take the form of rotating savings and credit associations (also known as “*tontines*” or “*réunions*” in French). She noted that the rules that govern the *tontines* are binding and each member is required to contribute to the treasurer with a mandatory and previously fixed deposit. The amount collectively collected is distributed on a rotating basis to each *tontine* member.

98. Ms Deschamps emphasised the importance of mutual trust as a pre-condition for the effectiveness of the *tontine* and noted the importance of a common identity in this regard (e.g., *tontines* may regroup only women or men, farmers from the same neighbourhood or farmers that produce the same crop). With regards to the regulation of the *tontines*, she noted the existence of a “grey zone” as usually no specific national law regulates them, but micro-credit related rules may apply in certain circumstances. In comparison to formal credit providers, she explained that the advantage of *tontines* is their flexibility and accessibility. However, she noted that one of their weaknesses may reside in the unfair treatment between the creditors and debtors.

99. A participant queried to which extent the legal structure of agricultural enterprises influenced access to finance and the decision to lend, as well as whether there were any preferences for a certain type of enterprises (e.g., contract integration, specific type of legal entity or cooperative which incorporates a group). A panellist noted that enterprises are generally required to comply with due diligence and transparency requirements to fulfil certain social and environmental safeguard standards to obtain credit. However, it was noted that the legal entity and company act may not necessarily guarantee that those requirements are fulfilled.

## **Session 6. Next steps towards the delineation of the LSAE Project**

100. Chaired by Professor Ignacio Tirado (Secretary General, UNIDROIT), the final session of the Consultation Webinar included conclusions presented by the chairs of the previous sessions, Mr Teemu Viinikainen, Mr Carlo Di Nicola, Prof. Fabrizio Cafaggi, Ms Priscila Pereira de Andrade, Prof. Anna Veneziano, as well as had the participation of Mr Buba Bojang (Legal Officer, FAO) and Mr Andres Uribe-Orozco (Legal Officer, IFAD) regarding the overall objectives of the LSAE project.

101. The *Secretary-General* of UNIDROIT thanked all the panellists for their presentations and noted the high quality of content and discussion over the course of the Webinar. He recalled that the LSAE project was at its initial stage and explained that UNIDROIT had received a mandate from its Governing Council to define its scope more precisely before establishing a working group. He invited the chairs of the different sessions to summarise the key takeaways that should be included in the work ahead.

102. Mr Teemu Viinikainen summarised session 1 by recalling how the decision-making space of producers and other stakeholders participating in food supply chain is inherently linked to a number of key aspects such as the economic features of the commodities, new technologies, and regulatory demands from the public sector and private standards. He recognised the importance of the value chain approach but acknowledged that the food systems perspective might provide new entry points to analyse the legal questions proposed in the LSAE project. Mr Viinikainen noted, however, that the value chains perspective should not be ignored, in particular in terms of analysing its governance methodologies and to further understand whether the value chains are trader-driven, buyer-driven or hybrid. He noted that these different governance options may have an impact on the legal structure smallholders and SMEs opt for to conduct their businesses. With regards to the increasing use of technological solutions, Mr Viinikainen highlighted that the LSAE project could consider comparing these with more traditional solutions (e.g., bank loans). Furthermore, he noted the LSAE project could consider highlighting the benefits certain legal structures create, for instance, for the implementation of food safety requirements at the producer level in developing countries.

103. *Mr Buba Bojang* highlighted two overall objectives that the LSAE project could pursue from FAO's perspective. Firstly, it could consider how smallholders form agricultural enterprises and the legal structures they take and, secondly, the project should adopt a gender-sensitive approach, as well as should comply with the SDG Agenda. With regards to the legal issues, Mr Bojang noted the need to determine best practices of legal structures that integrate smallholder producers in domestic, regional and global value chains.

104. *Mr Andres Uribe-Orozco* emphasised the need to consider developing a legal guide that is usable in practice and reiterated IFAD's availability to contribute towards the dissemination of the instruments developed throughout their country offices.

105. *Mr Carlo Di Nicola* summarised session 2 and emphasised that the LSAE project could aim at facilitating the development of inclusive value chains and the move from subsistence and informal production patterns to more formal market linkages. He noted the choice of legal forms of agricultural enterprises could affect the ability to pursue different objectives such as access to finance and highlighted the relevance to examine how the use of collaborative contracts in agriculture supply chains may address the multiple barriers smallholders face to participate in value chains.

106. Summarising session 3, *Professor Fabrizio Cafaggi* reiterated the connection between remedies and the different types of formal or informal dispute resolution mechanisms. He emphasised the need to include an analysis which covers issues regarding fairness and unfairness of contractual power within the chain. He highlighted that private law and contracts may be used to implement transnational standards but may also be used to analyse the different remedies available for either product or process requirements. He therefore reiterated the need to distinguish between the set of remedies available in bilateral and multiparty contracts.

107. Based on the presentations undertaken in session 4, *Ms Priscila Andrade* noted the LSAE project could consider analysing: (i) the effects of integration in value chains, both operationally and organisationally; (ii) the challenges of identifying the applicable law that governs the different stages of value chains; (iii) the risk of dissipation of financial and other responsibilities; and (iv) the risks and possibilities of dissociating ownership of assets and capital. She confirmed the interest and need to further analyse the challenges and best practices related to formalisation, integration and inclusiveness.

108. *Professor Anna Veneziano* summarised key messages from session 5 and noted the LSAE project could consider access to financial resources as one of the main objectives when providing guidance regarding the organisational or contractual structures of agricultural enterprises. She highlighted that the choice of legal structure could be considered as a precondition to evaluate creditworthiness and, therefore, emphasised the need to coordinate the LSAE project with initiatives developed by other international organisations, such as the ones developed by UNCITRAL and the OAS which provide guidance for simplified legal structures. She noted that alternative financing vehicles may contribute to the achievement of policy objectives (e.g., SDGs) and increase the use of technology and innovation. She highlighted the importance of exploring the role of contracts along the value chain to shape the relationship with financing entities and to facilitate access to credit.

109. *Professor Ignacio Tirado* explained the next steps of the LSAE project and mentioned UNIDROIT, FAO and IFAD would prepare a joint document to specify topics that the LSAE project would potentially consider. He noted the issues paper would be presented for approval at the 100<sup>th</sup> session of the UNIDROIT Governing Council in September 2021. He thanked all the participants and closed the Consultation Webinar.

## Annexe I



Food and Agriculture  
Organization of the  
United Nations



Investing in rural people



### Presentation

Private Law and Agricultural Development is an important branch of the [Work Programme](#) of the International Institute for the Unification of Private Law (UNIDROIT). First introduced in 2012, the Institute has since produced two instruments in cooperation with the Food and Agriculture Organization of the United Nations (FAO) and the International Fund for Agricultural Development (IFAD): the [Legal Guide on Contract Farming](#) and the [Legal Guide on Agricultural Land Investment Contracts](#).

The **new project on Legal Structure of Agricultural Enterprises** represents the next logical step in the work of the tripartite partnership between UNIDROIT, FAO and IFAD. A preliminary [background paper](#) was prepared by the UNIDROIT Secretariat in 2020 and the UNIDROIT Governing Council, at its 99<sup>th</sup> session, authorised the organisation of a colloquium to discuss and specify the potential scope, content and form of such an instrument. The Consultation Webinar will be held online on **15 and 16 April 2021, from 1 p.m. to 5.30 p.m. CEST**.

The Global Sustainable Development Report (2018) identified Food Systems transformation as one of the key accelerators for achieving the 2030 Agenda for Sustainable Development. The UN Food System Summit (September 2021) has further positioned Food Systems high on the international agenda, providing countries and stakeholders the space to share experiences, accelerate progress and mobilise support. Countries' food systems are facing challenges on a number of fronts, from food insecurity and the triple burden of malnutrition (overnutrition, undernutrition, and micronutrient deficiencies), competitiveness issues within the agrifood sector, the impact of climate change on productivity and farmers' livelihoods, and the ensuing pressure on natural resources. At the same time, countries are keen to adopt innovative technologies and foster digitalisation to propel and modernise their agrifood system using a green growth approach aimed at improving the livelihoods of rural people, generating attractive employment opportunities for women and youth, ultimately driven by domestic and international consumer markets seeking nutritious, affordable, and sustainably produced food.

Under the aegis of food systems, international development discourse has also increasingly emphasised the importance of the middle segment of agrifood value chains for pro-poor and sustainable growth in developing countries. More specifically, due to their embeddedness in the local community fabric, small and medium agrifood enterprises (SMAEs) can better adapt to local circumstances a range of essential services such as transportation, food processing and distribution. In doing so, these small firms make important grassroots investments in rural areas, in addition to connecting farmers to markets, adding value locally to agricultural produce, and creating employment opportunities that are inclusive of women and young people. Given the growing demand for food driven by population growth and urbanisation, there is increasing scope for SMAEs to contribute to rural development objectives.

However, for this to happen, enterprises need to receive the appropriate technical and policy support. An examination of existing agrifood legal structures within which SMAEs operate, how they function internally and how they collaborate with other market participants, and an analysis of past failures and successes is therefore necessary.

The Consultation Webinar will serve as a brainstorming session and will focus on the legal and business aspects of agricultural enterprises based on practical experience. It will bring together experts from a wide diversity of backgrounds including academics, representatives of international organisations, representatives of the private sector, NGOs, think tanks, etc. Notably, the Webinar will inform the drafting of an annotated list of contents and possible topics to be addressed in a prospective future instrument and will explore the nature of the contribution to be made by UNIDROIT, FAO and IFAD in light of their respective mandates and expertise. Participants are invited to actively take part in the workshop by sharing experience and knowledge.

### PROGRAMME

#### Day One – 15 April 2021 (Thursday)

<b>Opening remarks on the UNIDROIT/FAO/IFAD collaboration in the field of private law and agricultural development</b>	
<b>13:00 – 13:15</b>	Prof. <b>Maria Chiara Malaguti</b> ( <i>President, UNIDROIT</i> ) Ms. <b>Donata Rugarabamu</b> ( <i>Legal Counsel, FAO</i> ) Ms. <b>Katherine Meighan</b> ( <i>General Counsel, IFAD</i> )
<b>Introduction to the new project on Legal Structure of Agricultural Enterprises and preparatory work</b>	
<b>13:15 – 13:30</b>	Hon. Justice <b>Ricardo Lorenzetti</b> ( <i>Supreme Court of Argentina and Member of the UNIDROIT Governing Council</i> )
<b>Session 1</b> <b>Regulatory demands and new technology scenarios</b>	
<i>The first session will introduce some of the current constraints, opportunities, and specific needs of the agricultural (and related) sector(s) to improve SMAEs' access to market. The debate will focus on analysing how the choice of agrifood enterprises' legal structure is linked to economic features, technology, and regulatory demands, highlighting the benefits expected from organising farmers as economic actors. It will identify some of the variables influencing the assessment of the possible legal structure of agricultural enterprises to obtain more efficient and inclusive agrifood systems.</i>	
<b>13:30 – 14:55</b>	Chair: Mr. <b>Teemu Viinikainen</b> ( <i>Legal Consultant, FAO</i> )  <u>Speakers:</u> <ul style="list-style-type: none"> <li>○ Ms. <b>Siobhan Kelly</b> (<i>Agribusiness Economist, FAO</i>). <u>Food systems overview</u></li> <li>○ Prof. <b>Jennifer Bair</b> (<i>University of Virginia, USA</i>). <u>Global value chains and the challenges of hybrid governance</u></li> <li>○ Mr. <b>Tomislav Ivancic</b> (<i>Advisor, Responsible Business Conduct and Global Agricultural Value Chains, FAO</i>). <u>Responsible business conduct, social and environmental risk and global agricultural supply chains</u></li> <li>○ Mr. <b>Erik Van Ingen</b> (<i>Blockchain and data specialist, FAO</i>). <u>Blockchain, climate change and farmer digital identity in agriculture</u></li> <li>○ Ms. <b>Cornelia Boesch</b> (<i>Food Safety Officer, FAO</i>). <u>Managing food safety risks in food businesses</u></li> </ul> <i>Open discussion</i>
<b>14:55 – 15:00</b>	5-minute break

<p><b>Session 2</b></p> <p><b>Contractual structures for collaboration and integration of agricultural enterprises</b></p> <p><i>This session will analyse the logic of cooperation among supply chain actors for more inclusiveness. It will aim at discussing how the governance aspect of contractual networks and multiparty contracts may help address inequality and how contractual arrangements may be either obstructive or conducive to investment and financial sustainability.</i></p>	
<p><b>15:00 – 16:15</b></p>	<p><u>Chair</u>: Mr. <b>Carlo Di Nicola</b> (Senior Legal Officer, UNIDROIT)</p> <p><u>Speakers</u>:</p> <ul style="list-style-type: none"> <li>○ Ms. <b>Karina Fernandez-Stark</b> (Duke University Global Value Chains Center, USA). <u>Insertion of SMAEs in global value chains</u></li> <li>○ Prof. <b>Fabrizio Cafaggi</b> (Council of State and University of Trento, Italy). <u>Collaborative contracts in agrifood supply chains</u></li> <li>○ Prof. <b>Lorenzo Cotula</b> (International Institute for Environment and Development and University of Strathclyde, UK). <u>Small-scale rural producers and agricultural value chain contracts</u></li> <li>○ Ms. <b>Carmen Bullon</b> (Legal Officer – Development Law Service, FAO). <u>Enabling regulatory environment</u></li> <li>○ Mr. <b>Ammar Kawash</b> (Head of Smallholder Agricultural Market Support (SAMS) and Farm to Market Alliance (FtMA) – WFP). <u>A practical perspective from the FtMA</u></li> </ul> <p>Open discussion</p>
<p><b>Session 3</b></p> <p><b>Remedies and dispute settlement mechanisms</b></p> <p><i>This session will analyse legal and contractual remedies, as well as dispute settlement mechanisms available to address problems of compliance and unfair commercial practices in agrifood activities. It will aim at identifying instruments that enable the preservation of the contractual relationship and the participation of smallholders and SMAEs in global value chains – correcting rather than terminating the relationships.</i></p>	
<p><b>16:15 – 17:30</b></p>	<p><u>Chair</u>: Prof. <b>Fabrizio Cafaggi</b> (Council of State and University of Trento, Italy)</p> <p><u>Speakers</u>:</p> <ul style="list-style-type: none"> <li>○ Prof. <b>Paola Iamiceli</b> (University of Trento, Italy). <u>Remedies in collaborative contracts</u></li> <li>○ Prof. <b>Carlo Russo</b> (University of Cassino and Southern Lazio, Italy). <u>Unfairness in contractual structures</u></li> <li>○ Prof. <b>Axel Marx</b> (University of Leuven, Belgium). <u>Voluntary Sustainability Standards, intermediaries and dispute settlement</u></li> <li>○ Prof. <b>Matthew Jennejohn</b> (Brigham Young University, USA) and Ms. <b>Kristina Bishop</b> (Southern Methodist University, USA). <u>Governing Agricultural Production and Collaboration: Evidence from the U.S. Market</u></li> </ul> <p>Open discussion and closing remarks</p>

**Day Two – 16 April 2021 (Friday)**

<p><b>Session 4</b></p> <p><b>Corporate structures for the organisation of farmers and agricultural enterprises</b></p> <p><i>Producer organisations play different roles, and their potential varies depending on whether they are informal groups, associations or other forms of civil society organisations, cooperatives, or commercial companies. During this session, the discussion will be focused on the corporate legal structures that may be established for investment in agricultural activities and how these investments may be channelled internally and externally among these different entities, using as key criteria members’ participation, access to capital, decision-making procedures, the allocation of risks and responsibilities, and profit-sharing.</i></p>	
<p><b>13:00 – 14:45</b></p>	<p><u>Chair</u>: Ms. <b>Priscila Andrade</b> (Legal Officer, UNIDROIT)</p>

	<p><u>Speakers:</u></p> <ul style="list-style-type: none"> <li>○ Prof. <b>Virgilio De Los Reyes</b> (<i>De La Salle University, the Philippines</i>). <u>Juridical vehicles for community-based agricultural enterprises</u></li> <li>○ Prof. <b>Hagen Henry</b> (<i>University of Helsinki, Finland</i>). <u>Agricultural cooperatives in global agri-food chains: a legal perspective</u></li> <li>○ Prof. <b>Georg Miribung</b> (<i>Free University of Bozen-Bolzano, Italy</i>). <u>Indivisible reserve as a key feature of the financial structure of cooperatives</u></li> <li>○ Prof. <b>Antonio Zanette</b> (<i>Superior School of the Foundation of the Public Prosecutor's Office, Brazil</i>). <u>Cooperatives and other corporate legal structures for inclusive agricultural business: a legal perspective from Brazil</u></li> <li>○ Prof. <b>Sukhpal Singh</b> (<i>Indian Institute of Management, India</i>). <u>Producer companies as new generation cooperatives</u></li> <li>○ Ms. <b>Monica Canafoglia</b> (<i>Legal Officer, United Nations Commission on International Trade Law</i>). <u>The adaptability of the future UNCITRAL legislative guide on limited liability organization (UNLLO) to agricultural MSMEs</u></li> </ul> <p><i>Open discussion</i></p>
<b>14:45 – 14:50</b>	5-minute break
<p><b>Session 5</b>  <b>Challenges for agricultural finance and access to credit</b>  <i>This session seeks to analyse the optimal legal structures to promote access to credit, which can in turn assist in enabling access to adequate domestic and global agricultural markets for SMAEs.</i></p>	
<b>14:50 – 16:40</b>	<p><u>Chair:</u> Prof. <b>Anna Veneziano</b> (<i>Deputy Secretary-General, UNIDROIT</i>)</p> <p><u>Speakers:</u></p> <ul style="list-style-type: none"> <li>○ Ms. <b>Jeannette Tramhel</b> (<i>Senior Legal Officer, Organization of American States</i>). <u>Legal structure: a prerequisite for credit</u></li> <li>○ Mr. <b>Christopher Brett</b> (<i>Lead Agribusiness Specialist, World Bank</i>). <u>Maximizing finance for development</u></li> <li>○ Mr. <b>Massimo Pera</b> (<i>Agribusiness Investment Officer, FAO</i>). <u>Digital technologies to address challenges in accessing finance for Agri-SMEs</u></li> <li>○ Mr. <b>Dagmawi Habte-Selassie</b> (<i>Programme officer, IFAD</i>). <u>Blended finance for Agri-SMEs development. An example from Uganda</u></li> <li>○ Mr. <b>Steve Nocka</b> (<i>Founding partner and Chief Risk Officer of CrediLinq</i>). <u>Challenges of lending to smallholder agricultural SMAEs</u></li> <li>○ Ms. <b>Isabelle Deschamps</b> (<i>McGill University, Canada</i>). <u>Learning from women's experiences with community-based financing in West and Central Africa</u></li> </ul> <p><i>Open discussion</i></p>
<b>16:40 – 16:45</b>	5-minute break
<p><b>Session 6</b>  <b>Next steps towards the delineation of the LSAE Project</b>  <i>This session aims at identifying the most common legal issues that appeared throughout the webinar and how UNIDROIT, FAO and IFAD with their respective mandates and expertise may contribute to the development of a new international legal guide.</i></p>	
<b>16:45 – 17:30</b>	<p><i>Roundtable with Chairs of each session and other experts</i></p> <p><b>Concluding remarks:</b></p> <p>Prof. <b>Ignacio Tirado</b> (<i>Secretary-General, UNIDROIT</i>)</p>

**Annexe II****List of Registered Participants****SPEAKERS**

Donata RUGARABAMU	Legal Counsel, FAO
Katherine MEIGHAN	General Counsel, IFAD
Ricardo LORENZETTI	Supreme Court of Argentina and Member of the UNIDROIT Governing Council
Teemu VIINIKAINEN	Legal Consultant, FAO
Siobhan KELLY	Agribusiness Economist, FAO
Jennifer BAIR	University of Virginia, USA
Tomislav IVANCIC	Advisor, Responsible Business Conduct and Global Agricultural Value Chains, FAO
Erik VAN INGEN	Blockchain and Data specialist, FAO
Cornelia BOESCH	Food Safety Officer, FAO
Karina FERNANDEZ-STARK	Duke University Global Value Chains Center, USA
Fabrizio CAFAGGI	Council of State and University of Trento, Italy
Lorenzo COTULA	International Institute for Environment and Development, UK
Carmen BULLÓN	Legal Officer – Development Law Service, FAO
Ammar KAWASH	Head of Smallholder Agricultural Market Support (SAMS) and Farm to Market Alliance (FtMA) – WFP
Paola IAMICELI	University of Trento, Italy
Carlo RUSSO	University of Cassino and Lazio Meridionale, Italy
Axel MARX	University of Leuven, Belgium
Matthew JENNEJOHN	Brigham Young University, USA
Kristina BISHOP	Southern Methodist University, USA
Virgilio DE LOS REYES	De La Salle University, Philippines
Hagen HENRY	University of Helsinki, Finland
Georg MIRIBUNG	Free University of Bozen Bolzano, Italy
Antonio ZANETTE	Superior School of the Foundation of the Public Prosecutor's Office, Brazil
Sukhpal SINGH	Indian Institute of Management, India
Monica CANAFOGLIA	Legal Officer – UNCITRAL
Jeannette TRAMHEL	Senior Legal Officer, OAS
Christopher Ian BRETT	Lead Agribusiness Specialist, World Bank
Massimo PERA	Agribusiness Investment Officer, FAO
Dagmawi HABTE-SELASSIE	Programme officer, IFAD
Steven NOCKA	Founding partner and Chief Risk Officer of CrediLinq
Isabelle DESCHAMPS	McGill University, Canada

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**(INTERNATIONAL ORGANISATIONS)**

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Valerie JOHNSTON  
Nabila BARMAKI  
Cornelia BOESCH  
Buba BOJANG  
Nargis BOZOROVA  
Kyseline Jean-Mary CHERESTAL  
Fabiano CORREA

Moussa DJAGOU DI  
Erika FANI  
Nathalia FORMENTON CARDOSO  
Blaise KUEMLANGAN  
Lan LI  
Lorenzo MONCADA  
Divine NJIE  
Cristiana PAOLI  
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**World Food Programme**

Angélica MARCANO

Matteo MAZZONI

**IISD**

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Francine PICARD

**OECD/Italy**

Marco NICOLI

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**(BY STATE)**

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Sebastián COLL  
Rossana EPULEF  
Luis Gabriel ESCOBAR BLANCO  
Xavier ESQUIVEL  
Natalia KIM  
Maria Eugenia MARICHAL

Daniel MICHELOUD  
Ana María ORTEGA Y MILANESI  
Leonardo PASTORINO  
Marcia REMONDEGUI  
Pilar RENAU  
Ignacio TASINAZZO  
Carlos VACA

**Armenia**

Olga GRIGORYAN

**Bolivia**

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