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Item No. 5 on the agenda: Ongoing legislative activities

(f) Legal structure of agricultural enterprises

(prepared by the Secretariat)

<i>Summary</i>	<i>This document provides an update regarding work on the preparation of an international guidance document on legal structure of agricultural enterprises</i>
<i>Action to be taken</i>	<i>The Governing Council is invited to take note of the progress made</i>
<i>Mandate</i>	<i>Work Programme 2020-2022</i>
<i>Priority level</i>	<i>High</i>
<i>Related documents</i>	<u>UNIDROIT 2019 – C.D. (98) 14 rev.2</u> ; <u>UNIDROIT 2020 – C.D. (99) B.5</u> ; <u>UNIDROIT 2021 – C.D. (100) B.5</u> ; <u>UNIDROIT 2021 – Consultation Webinar (Summary Report)</u> ; <u>UNIDROIT 2022 – Study LXXXX – W.G. 1 – Doc. 2 (Issues Paper)</u> ; <u>UNIDROIT 2022 – Study LXXXX – W.G. 1 – Doc. 3 (Summary Report)</u>

I. INTRODUCTION

1. The Legal Structure of Agricultural Enterprises (hereinafter the LSAE project) was approved by UNIDROIT'S General Assembly, at its 78th session in 2019, to be developed in partnership with the Food and Agriculture Organization of the United Nations (FAO) and the International Fund for Agricultural Development (IFAD) during the 2020-2022 Work Programme. The purpose of this document is to update the Governing Council on the work undertaken to develop the LSAE project since the 100th session of the Council in September 2021. It briefly recalls the background of the project (Section II), describes the composition of the Working Group (Section III), summarises the main outcomes of the first session of the Working Group (Section IV) and provides information on future steps (Section V).

II. BACKGROUND

2. In 2020, as a first step for the development of the LSAE project, the Secretariat conducted a stocktaking exercise and feasibility analysis to ascertain whether UNIDROIT could make a useful

contribution without overlapping with other international initiatives.¹ On the basis of the preliminary research conducted, the Secretariat reported back to the Governing Council at its 99th session and confirmed the lack of international guidance to best streamline supply chain relationships. The Secretariat also drew the Council's attention to the strong interest identified, in particular from economists, to undertake work on the private law aspects of the way agricultural enterprises are structured, and, in particular, on how (i) to improve market access; (ii) to improve forms of coordination of agricultural enterprises; (iii) to ease access to critical resources and insurance; and (iv) to address unfair commercial practices.

3. In 2021, on 15 and 16 April, the Secretariat co-organised a [Consultation Webinar](#) with FAO and IFAD to gather further input on the topics that could be potentially covered in the Guidance Document. The conclusions and recommendations of the Webinar were presented at the 100th session of the Council.² The Governing Council acknowledged the LSAE project's broad object of analysis and agreed with the Secretariat's proposal to upgrade the status of the LSAE project to allow for the establishment of a Working Group and to permit the allocation of resources for experts to continue the delineation of the scope and content of the prospective guidance document.³ The General Assembly supported the recommendation by the Governing Council, allocating high priority status to the LSAE project at its 80th session in December 2021.

4. On 9 and 10 December 2021, the Secretariat organised an informal exploratory meeting with a core group of experts to identify the topics and questions that needed to be further developed in an annotated issues paper for discussion during the first session of the Working Group. A first full Working Group meeting was convened for 23-25 February 2022.

III. COMPOSITION OF THE WORKING GROUP

5. As consistent with UNIDROIT's established working methods, the members and observers of the Working Group were identified by the UNIDROIT Secretariat, in consultation with FAO and IFAD. The experts were selected for their legal expertise in contract law, corporate law, commercial law, property law, and agricultural law, as well as for their experience in economics, finance, digitalisation and sustainability with regard to the agricultural sector.

6. The Working Group is chaired by the Governing Council member Justice Ricardo Lorenzetti (Justice at the Supreme Court of Justice of Argentina) and coordinated by Professor Fabrizio Cafaggi (Judge at the Council of State Italy and Professor at the University of Trento and LUISS) given his expertise and involvement in previous work at UNIDROIT in the field of Private Law and Agricultural Development. Both the Chairperson and Coordinator are working side-by-side with the Secretariat to organise Working Group sessions and intersessional work.

7. As of May 2022, the Working Group is composed of the following members⁴:

- Jennifer Bair, Professor, University of Virginia (United States)
- Virgilio de Los Reyes, Dean, De La Salle University (Philippines)
- Matteo Ferrari, Professor, University of Trento (Italy)
- Cynthia Giagnocavo, Professor, Universidad de Almeria (Spain)
- Hagen Henry, Professor, University of Helsinki (Finland)

¹ For the initial feasibility study see : UNIDROIT 2020 [C.D. \(99\) B.5.](#)

² For more information see: UNIDROIT 2021 [C.D. \(100\) B.5.](#)

³ For the report of the 100th session of the Governing Council see: [UNIDROIT 2020 - C.D. \(100\) - B.24.](#) Paragraphs 65-80 summarise the discussion related to the LSAE project.

⁴ Additional participants may be invited in the future, depending on the needs of the Working Group and to ensure balance in terms of gender, geographical representation and interdisciplinary expertise.

- Paola Iamceli, Professor, University of Trento (Italy)
- Matthew Jennejohn, Professor, Brigham Young University (United States)
- Georg Miribung, Researcher, Free University of Bozen-Bolzano (Italy)
- Carlo Russo, Associate Professor, University of Cassino and Lazio Meridionale (Italy)

8. The Working Group includes representatives of FAO and IFAD legal departments and technical experts from other departments (FAO's "Agrifood Economics Division" and "Food Systems and Food Safety Division", as well as IFAD's "Research and Impact Division" and "Inclusive Rural Finance, Markets and Value Chains"). A significant number of observers, representing international and regional intergovernmental organisations, farmers associations, non-governmental organisations, and the private sector have also been invited to join the Working Group, which include the following:

- Asian Farmers' Association for Sustainable Rural Development (AFA)
- Eastern Africa Farmers Federation (EAFF)
- Emerging Ag
- International Development Law Organization (IDLO)
- International Cooperative Alliance (ICA)
- International Institute for Environment and Development (IIED)
- Organisation for the Harmonisation of Business Law in Africa (OHADA)
- Organization of American States (OAS)
- United Nations Commission on International Trade Law (UNCITRAL)
- World Bank Group (WBG)
- World Food Programme (WFP)
- World Food Law Institute

9. In addition, within the framework of a grant received from the Italian Ministry of Foreign Affairs (MAECI) in January 2022, UNIDROIT will be appointing a senior or mid-career researcher/professor to assist the Secretariat with comparative research and data collection, as well as with the analysis of gender equality in the various collaborative forms of agricultural enterprises considered within the LSAE project. The call for applications will soon be available on the UNIDROIT website, with the successful candidate expected to assist the Secretariat from September 2022 onwards. For more information on the UNIDROIT-MAECI Chair Programme see document C.D. (101) 18, regarding the UNIDROIT Academy, paras. 29-31.

IV. FIRST SESSION OF THE WORKING GROUP (23-25 FEBRUARY 2022)

10. The first session of the LSAE Working Group took place in Rome at the seat of UNIDROIT and via videoconference from 23 to 25 February 2022 and was attended by 40 participants who were welcomed by opening remarks from the UNIDROIT Deputy Secretary-General Professor Anna Veneziano, the FAO's Legal Counsel Ms Donata Rugarabamu, and IFAD's General Counsel Ms Katherine Meighan. The discussions were guided by an Issues Paper ([Study LXXXC – W.G. 1 – Doc. 2](#)) prepared by the Secretariat in collaboration with the FAO, IFAD and a number of members of the Working Group. This section summarises key discussions, recommendations and decisions made during the first Working Group session. For more information, see the detailed report ([Study LXXXC – W.G. 1 – Doc. 3](#)) available on UNIDROIT'S website.

A. Proposed targets

11. The Working Group discussed the issue of formality and informality of actors operating in the value chain and a number of participants recommended focusing on improving the business environment of already formalised enterprises, as addressing the challenges they face to grow could eventually stimulate the formalisation of informal enterprises.

12. The Working Group generally agreed that the Guide could start by developing guidance for legal professionals representing smaller enterprises and the challenges faced by large agri-food supply chain leaders operating downstream would be analysed, if necessary, at a second stage. However, the Working Group considered that the framing of the LSAE Guide should resonate with the realities and challenges faced by actors operating in the midstream segment and in low- and middle-income countries. Further, it was generally accepted that the LSAE project could go beyond the “production stage” to focus on the challenges faced by actors that add the most value to agri-food products and who operate on stages beyond the farm gate (e.g., input providers, processors, traders and retailers). The main target, therefore, would be those enterprises that have the potential to grow and contribute to rural and urban development, but because of a disabling business environment they are impeded from fully leveraging their potential to do so. The Group agreed to revisit the definition of “agricultural enterprises” in the intersessional meetings, but generally agreed that the relevant audience of the Guide would be smallholders and agri-MSMEs that are working towards higher degrees of formality.

B. Scope of the Guidance Document

13. Regarding the scope of the Guidance Document, the Working Group generally agreed that the LSAE project could focus on the challenges that financial and insurance institutions, technology (particularly digital technology) and sustainability may be placing on agri-food supply chains and their effects on the choice of legal forms of collaboration among agricultural enterprises, including both horizontal and vertical collaborative ventures. It was considered that focusing on collaborative schemes would contribute to narrowing the scope of the project to specific forms of coordination that use legal instruments such as contracts, corporations and cooperatives to coordinate the activities of economic actors. Therefore, the main focus of the project would be on “collaborative legal forms” that support smallholders and agri-MSMEs to do business with one another, to access markets and improve collaboration with different agri-food chain actors.

14. Participants favoured developing the LSAE Guide as a “legal toolbox” which would showcase the most useful collaborative legal structures that parties can use for different purposes. The Working Group discussed the possibility of focusing the analysis on three categories of instruments aimed at promoting efficient commercial collaboration between parties: (i) contracts, including bundle of contracts and multiparty contracts, (ii) companies, with or without limited liability, and (iii) cooperatives. Other types of legal structures, beyond contracts, corporations and cooperatives would only be considered where relevant and practical. Through the lens of collaboration, the LSAE Guide could provide potential solutions to contractual incompleteness or asset incompleteness and to the issue of market power and abuse.

C. Content of the Guidance Document

15. The Working Group supported the idea that the content of the Guidance Document should be evidence-based and agreed to revisit the methodology for the empirical research as the work makes progress. The legal toolkit’s purpose would not be to identify the best legal structure but inform parties of the “menu” of available institutional alternatives. A general overview of the endogenous and exogenous factors influencing the choice between and within instruments would be described, as well as diversified according to the different needs of the addressees. The Working

Group discussed that the Guidance Document could be flexible enough to transcend international, national, regional, and sub-regional levels, as well as adaptable to, at least, three different variables: geography, commodities and communities.

16. The Working Group compared the proposed LSAE Guidance Document with the UNIDROIT/FAO/IFAD Legal Guide on Contract Farming which had covered the life-cycle of the - mostly- bilateral agricultural production contract between farmers/producers and buyers. It was generally accepted that the perspective in the LSAE project could be expanded upon to cover cases of interdependence among other supply chain actors and collaborative legal structures for better allocation of risks and profits along agri-food chains. Moreover, the Working Group considered a number of issues relating to market structure and coordination to understand how the legal structure could be affected. For example, the Working Group discussed the digital transformation underway in the agri-food sector and how it affected the internal and external functioning of agricultural enterprise, as well as promoted new data-driven business models. It was recognized that the Internet of Things and Big Data were expressions increasingly employed in the agri-food domain and that it would be worth considering the effects of digitisation in the LSAE project as it could influence the choice between contractual, corporate and other forms of collaboration. The Working Group agreed that further discussion was required to define the content of the variables to focus on (e.g., size of the enterprise; destination market; and types of resources to be coordinated for the adaptation to new technology and sustainability requirements).

17. The Working Group also analysed the use of multiparty contracts for collaboration in agri-food supply chains that involve not only the farmer and the buyer, but also financial and insurance institutions, concerning the coordination of diverse aspects such as input supply, credit, finance and offtaking in the production segment. Beyond multiparty agreements, the Working Group also discussed wider forms of multiparty processes to coordinate value chain activities and to facilitate dialogue among different actors. One of the problems identified was the lack of effective coordination in the value chain, concerning the alignment of different contractual requirements, such as pricing standards, delivery, product specification, *force majeure*, etc. Moreover, distributive concerns had also been identified, particularly in terms of the distribution of gains and losses, as well as regarding the allocation of risks across the value chain. The LSAE Guide could aim at addressing problems relating to the intersections between interdependent legal structures. This might involve focusing on overarching principles concerning process, choice, and the interrelationships between different instruments rather than a particular instrument *per se*.

18. While the role of contracts was recognised, it was also suggested to not look at one legal structure in isolation but to instead consider the interlinkages between different legal instruments, for instance between creating cooperatives or marketing committees and developing contractual arrangements for finance, input supply and market access. The Working Group considered it necessary to further explore the notion of multiparty contracts or interlinked agreements, the diversity of value chain configurations and to think about the overarching principles that could be the object of guidance.

19. Among other matters examined, the Working Group considered that the current title of the project was very broad and needed to be adapted to reflect the content that would be covered in the Guidance Document. Overall, the Working Group concluded that more data needed to be collected and analysed in greater detail, in particular from the perspective of smallholders and agri-MSMEs from developing countries. The Working Group concluded that having a more robust empirical basis to draw from would facilitate a greater understanding of the real operational dynamics affecting smallholders and agri-MSMEs, in particular from developing countries

V. FUTURE STEPS

20. Following the first session of the Working Group, the Secretariat agreed with FAO and IFAD a working schedule for intersessional meetings. It is envisaged that at least three intersessional subgroup meetings will be held before the second session of the Working Group, scheduled to take place on 2-4 November 2022.

21. The first intersessional meeting will potentially be held remotely on 16 June 2022. The second and the third meetings will be planned for July and September 2022. These intersessional meetings will aim at: (i) further clarifying topics that remain open and (ii) revising the issues paper which will be considered during the second session of the LSAE Working Group.

22. Regarding the proposed timeline of the LSAE project, the Secretariat has proposed to carry over the activities concerning the LSAE project to the new Work Programme 2023-2025 (C.D. (101) 4). It is envisaged that the prospective Guidance Document will be developed over five Working Group sessions in the period 2022-2024, followed by a period of consultations before submitting the complete draft for adoption by UNIDROIT, FAO and IFAD. The following would be a tentative work plan for 2022-2024:

- Sessions of the Working Group:
 - Second session: 2-4 November 2022
 - Third session: April 2023
 - Fourth session: September 2023
 - Fifth session: February 2024
- Consultations: scope of which to be determined
- Review of first draft: May 2024
- Final draft for approval by UNIDROIT, FAO, and IFAD: June 2024.

VI. ACTION TO BE TAKEN

23. *The Governing Council is invited to take note of the status and development of the project on Legal Structure of Agricultural Enterprises.*