



INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW
INSTITUT INTERNATIONAL POUR L'UNIFICATION DU DROIT PRIVE

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**UNIDROIT Working Group for the
preparation of a Guide on Legal Structure
of Agricultural Enterprises**

First session (hybrid)
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SUMMARY REPORT
OF THE FIRST SESSION
(23 – 25 February 2022)

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1. The UNIDROIT Working Group for the preparation of a Guide on the Legal Structure of Agricultural Enterprises (LSAE) was set up pursuant to a decision taken by the UNIDROIT Governing Council at its 100th session in 2021.¹ As consistent with UNIDROIT's established working methods, the members and observers of the Working Group were selected by UNIDROIT, in consultation with its partner organisations, due to their legal expertise in the field of contract law, corporate law, commercial law, property law, agricultural law, among others, as well as economists and experts in finance, digitalisation, agriculture and sustainability. 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.

2. The first session of the LSAE Working Group, which was held in Rome at the seat of UNIDROIT and via videoconference from 23 to 25 February 2022, was attended by 10 Working Group members, 8 representatives from the institutional partners, namely the Food and Agriculture Organization of the United Nations (FAO) and the International Fund for Agricultural Development (IFAD), as well as by 15 observers, including representatives from international and regional intergovernmental organisations, farmers associations, non-governmental organisations and private sector representatives. The UNIDROIT Secretariat was represented by 6 staff members and 3 interns. The complete list of participants is available in [Annexe I](#).

Item 1: Opening of the session and presentation of the tripartite co-operation between UNIDROIT, FAO and IFAD

3. *The UNIDROIT Deputy Secretary-General, Professor Anna Veneziano*, welcomed all participants to the first session of the LSAE Working Group. She briefly provided background information on the mandate of UNIDROIT and its working methods to develop uniform law instruments for the modernisation, harmonisation and coordination of private and commercial law for business transactions. She explained that different types of instruments (e.g., treaties, model laws, principles and legal guides) could be developed by the Institute to facilitate trade, international cooperation and also the achievement of Sustainable Development Goals (SDGs).

4. She drew the attention of participants to the line of work devoted to Private Law and Agricultural Development and to the tripartite partnership established with two other Rome-based intergovernmental organisations, namely the FAO and IFAD. She noted that after the Legal Guide on Contract Farming (LGCF) and the Legal Guide on Agricultural Land Investment Contracts (ALIC)², the future LSAE Guidance Document would represent the third jointly developed project. In addition to the projects developed under the UNIDROIT/FAO/IFAD tripartite partnership, she illustrated other UNIDROIT instruments and projects that cover the field of access to credit and finance in the agriculture sector, such as the fourth Protocol to the Cape Town Convention on International Interests in Mobile Equipment - the Protocol on Matters specific to Agricultural, Construction and Mining Equipment (the MAC Protocol) and the project developed in collaboration with the United Nations Commission on International Trade Law (UNCITRAL) to formulate an international Model Law on Warehouse Receipts. Lastly, she recommended that the LSAE Working Group focus on further defining the scope and content of the prospective Guidance Document to delineate what problems could be addressed and the type of guidance that could be developed. Her presentation was followed by opening remarks from FAO's Legal Counsel, Ms Donata Rugarabamu, and IFAD's General Counsel, Ms Katherine Meighan.

5. *The Legal Counsel from FAO* welcomed the diversity of the participants in the Working Group. Drawing attention to the UN Decade of Family Farming (2019-2028) and to the UN Food Systems

¹ UNIDROIT 2021 – [C.D. \(100\) B Misc. 2](#): Summary of the conclusions.

² The LGCF and the ALIC Legal Guide were respectively adopted in 2015 and 2020. For more information on these two guides see: www.unidroit.org/agriculture

Summit organised in 2021, she noted that the LSAE project was particularly timely to highlight the relevance of smallholders, as well as family farming for food security, rural livelihoods, and for the transformation of agri-food systems towards greater efficiency, resilience, inclusiveness and sustainability. She emphasised the important role that Micro-, Small-, and Medium-sized Enterprises (MSMEs) play in transforming agri-food systems and invited the LSAE Working Group to enhance their recognition by considering the special circumstances of small producers and agri-MSMEs operating in the “missing middle”.

6. In addition, she noted that the development of the LSAE guide could contribute towards the achievement of SDG 1 “No Poverty” and SDG 2 “Zero Hunger” and to FAO’s “Four Betters” strategic framework (better production, better nutrition, better environment, and better life). In particular, she mentioned that the prospective LSAE guide could be useful for “better production” by ensuring that “sustainable consumption and production patterns, through efficient and inclusive food and agriculture supply chains at local, regional and global level ensure resilient and sustainable agri-food systems in a changing climate and environment”. In terms of delineating the scope of the project, firstly, she suggested that the LSAE Working Group could consider ways to minimise the opportunity costs for small producers and agri-MSMEs who may be operating in informal contexts prior to transitioning into more formal agricultural enterprises. Secondly, she encouraged the Working Group to analyse legal structures in a gender-sensitive manner, to ensure greater inclusivity of the LSAE project.

7. As one of the three UN food agencies, the *General Counsel from IFAD* indicated the institutional efforts made to finance rural smallholder farmers working on and off farms, which are often overlooked in the missing middle segment of the supply chain. She highlighted that the marginalisation, vulnerability and fragility of smallholders and agri-MSMEs would increase in the post-COVID pandemic scenario and supported the ongoing partnership between UNIDROIT, FAO and IFAD to address some of the forthcoming challenges. She invited the LSAE Working Group to look not only at the opportunity costs, but also at the benefits of transitioning towards more formalised agricultural structures. While doing so, she recommended focus on equality and equity, in particular in terms of gender and youth.

8. She shared some of IFAD’s experiences assisting in this area, highlighting the common challenges faced by individual farmers, farmer groups, and cooperatives to: (i) access markets for inputs, outputs, technology and information; (ii) access rural financial services; and (iii) set up agricultural entities. She explained that some small farmers are not even aware of the costs, benefits and liabilities of having a legal structure to their enterprise and that, in some countries, State or government support is only available if a particular legal structure is chosen. Therefore, she emphasised that the LSAE project would be important in helping those farmers decide which legal structure of agricultural enterprise best suits their purpose.

9. She introduced an IFAD project developed in Lesotho which targeted different types of farmer groups (e.g., commodity-based farmers associations, districts, local associations, registered farmers cooperatives, informal farmer organisations, producer interest groups, market intermediaries, agribusiness input suppliers, and others), but focused on rural women and rural youth to showcase the need to support rural resilient businesses. She explained that through the introduction of smart technology, high quality inputs, and training, the project in Lesotho had illustrated opportunities of bringing farmers together into more formalised legal structures capable of ensuring better access to markets. Because of its success, the project had been extended until 2026 and upon its completion it would probably impact, directly or indirectly, about 17% of the total population of the country. She emphasised the broad range of stakeholders involved to highlight the need to strengthen the links between agricultural producers, processors and other market players.

10. Lastly, the General Counsel from IFAD recommended the Working Group to consider how producers may transition to more formal enterprises in an inclusive way, by considering not only gender and youth-sensitive aspects but also climate adaptation finance.

Item 2: Election of the Chairman and Coordinator of the Working Group

11. The *UNIDROIT Deputy Secretary-General* explained that in accordance with the UNIDROIT practice,³ the Working Group would be presided over by a Governing Council member. She noted that the Council member Justice Ricardo Lorenzetti (Justice at the Supreme Court of Justice of Argentina) had agreed to Chair the Working Group. She also indicated that the participants could consider appointing Professor Fabrizio Cafaggi (Judge at the Council of State Italy and Professor at the University of Trento) as the Coordinator of the Working Group given his experience and involvement in previous work at UNIDROIT in the field of private and agricultural law. She informed that both the Chairman and the Coordinator would be working side-by-side with the Secretariat to organise and coordinate the Working Group sessions and intersessional work.

12. *The Working Group agreed with both proposed appointments.*

Item 3: Adoption of the agenda and organisation of the session

13. *The Chair* expressed his gratitude to the UNIDROIT's President, Professor Maria Chiara Malaguti, to the Secretary-General, Professor Ignacio Tirado, and to the Deputy Secretary-General for proposing his name. He also thanked the representatives of the partner organisations, the members and observers of the Working Group, as well as the Secretariat's staff for agreeing to his appointment.

14. In terms of methodology, he explained that the Working Group would generally meet twice a year, with three-day meetings. Intersessional work and *ad hoc* workshops would be organised where appropriate. Regarding the proposed timeline of the project, he informed that the finalisation of the draft LSAE Guide would be envisaged for the end of 2023, followed by a period of consultations before submitting the complete draft for adoption by UNIDROIT, FAO and IFAD in 2024.

15. He, then, introduced the annotated draft agenda and the organisation of the session (UNIDROIT 2022 – [Study LXXXC – W.G.1 – Doc. 1](#), available in [Annexe II](#)). He explained that the Working Group deliberations would be conducted under Chatham House Rules and that decisions would be adopted through consensus. The Chair informed that the Issues Paper prepared by the Secretariat would be considered as a basis for discussion (UNIDROIT 2022 – [Study LXXXC – W.G.1 – Doc. 2](#)). Lastly, the Chair acknowledged the significant expertise of the participants and invited everyone to provide input and to share experiences during the course of the project.

16. *The Working Group agreed with the proposed organisation and adopted the annotated draft agenda.*

Item 4: General background of the LSAE project

17. *A member of the UNIDROIT Secretariat*, Ms Priscila Andrade (Legal Officer) introduced the general background of the LSAE project (Section I.A of the Issues Paper). She noted that the project

³ [UNIDROIT Statute](#), Article 13 (2).

had been proposed for inclusion in the 2020-2022 Work Programme and had been approved by UNIDROIT's General Assembly, at its 78th session in 2019.

18. She recalled that in 2020, as a first step for the development of the project, the Governing Council had recommended that the Secretariat conduct a stocktaking exercise and feasibility analysis to ascertain whether UNIDROIT could make a useful contribution without overlapping with other international initiatives.⁴ On the basis of the preliminary research conducted, the Secretariat had not identified any international organisation undertaking work in the area of formulating guidance regarding the private law aspects of legal structure of agricultural enterprises. Therefore, considering the significant gaps identified in terms of specific legal analysis, the Secretariat, in consultation with FAO and IFAD, suggested that the LSAE project could pursue four main objectives.

- (i) *improve market access* by identifying the legal structures that limit entry to agricultural markets and by making recommendations as to which legal structure most effectively facilitates access to adequate domestic and global agricultural markets, with special attention to both smallholders and 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 investment vehicles best suited to promote access to capital, know-how, and technology; and
- (iv) *address unfair commercial practices* by analysing the remedies, as well as the dispute settlement mechanisms that may be used to address compliance issues and unfair commercial practices in agri-food chains.

19. She finally recalled that in 2021, the Governing Council had recommended the Secretariat to continue its consultations and preliminary feasibility analysis. Accordingly, a [Consultation Webinar](#) was co-organised with FAO and IFAD, on 15 and 16 April 2021, to further outline the topics that could be covered in the Guidance Document. The conclusions and recommendations of the Webinar had been presented at the 100th session of the Governing Council which agreed to upgrade the level of priority of the LSAE project in order to allow the Secretariat to establish a Working Group to continue delineating the scope and content of the LSAE project (UNIDROIT 2021 [C.D. \(100\) B.5](#)).

Item 5: Consideration of matters identified in the Issues Paper

1. Preliminary matters

Target audience

20. *The Chair* drew the Working Group's attention to the proposed target audience (Section I.B of the Issues Paper). He noted that the LSAE Guidance Document needed to be relevant to all jurisdictions irrespective of their particular legal tradition. He suggested that the Guide could aim to assist certain actors involved in agri-food supply chains, in particular legal professionals representing smallholders and smaller enterprises and, to a certain extent, legislators and policymakers.

21. Focusing on the challenges faced by smaller enterprises, he noted that the LSAE Guide could identify good practices and possible solutions for the adaptation of the legal structure of agricultural

⁴ UNIDROIT 2020 [C.D. \(99\) B.5](#).

enterprises to different scenarios. The challenges faced by agri-food supply chain leaders operating downstream (e.g., large retailers) could also be considered, but 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.

Relationship with existing international initiatives

22. A member of the UNIDROIT Secretariat explained that Section I.E of the Issues Paper provided an overview of existing international initiatives and instruments that would be relevant to consider when developing the LSAE Guidance Document. Participants were invited to express their views on any additional international instruments that should be considered.

23. It was suggested that the LSAE work could build on the following additional international initiatives, events and instruments: the UNCITRAL Colloquium on Contractual Networks and other forms of Inter-Firm Cooperation; the work undertaken by the Inter-American Juridical Committee of the Organization of American States (OAS), in particular the Guide on the Law Applicable to International Commercial Contracts in the Americas and its recent work on contracts between parties of different bargaining power; the International Labour Organization's Recommendation No. 204 on the Transition from the Informal to the Formal Economy and the 2002 ILO Promotion of Cooperatives Recommendation No. 193; the 1995 International Cooperative Alliance Statement on cooperative identity; the studies developed by the Donor Committee for Enterprise Development, in particular those related to informality and business enabling reforms; the World Bank work on Business Enabling Environment, and FAO's Sustainability Assessment of Food and Agriculture Systems (SAFA Guidelines). At the European level, it was suggested to consider the Directive 2019/633 of the European Parliament and of the Council on Unfair Trading Practices in Business-to-Business relationships in the Agricultural and Food Supply Chain and also the COPA-COGECA EU Code of Conduct on Agricultural Data Sharing by Contractual Agreement.

2. Scope of the Guidance Document

24. The Coordinator presented the proposed scope of the Guidance Document (Section II of the Issues Paper). He explained that the LSAE project could focus on the transformations in the 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. He noted that the main focus of the project could be on collaborative legal structures that support small producers and agri-MSMEs to do business with one another, access markets and improve collaboration with different agri-food chain actors. He indicated that a conceptual framework could be used to distinguish both the endogenous and exogenous factors that affect the choice between contracts, cooperatives and corporate legal forms. However, the endogenous and exogenous variables would not be the focus of the project but would help analyse the different choices of legal structures that serve the purpose of collaboration among smallholders and agri-MSMEs.

25. He indicated that the endogenous factors to be considered could be those traditionally considered by lawyers, such as: (i) the regulation of entry and exit of members or contractual parties; (ii) liability and creditors' rights (asset portioning); (iii) governance (distinction between contractual and corporate governance); (iv) breach of corporate obligations and breach of contractual obligations; and (v) remedies (remedies in the corporate forms and in the contractual forms for breach). In terms of exogenous factors, he recalled that the choice of legal forms of collaboration do not occur in a vacuum and noted the importance of considering the overall enabling and disabling business environment. He suggested that the Working Group consider how the choice of collaborative legal instruments may depend on multiple factors, such as the final destination of the agricultural produce, whether it be for local, regional or global markets and whether collaboration includes sharing resources or resources which remain within the ownership of individual partners. Moreover, he indicated that services and service providers could also be affecting the content and functions of

collaboration. He pointed out the challenges that financial and insurance institutions, technology (particularly digital technology) and sustainability may be placing on the forms of collaboration adopted by agricultural enterprises.

26. He suggested that the LSAE Guide could move forward from the conventional approach to consider developing guidelines on a set of legal structures aimed at collaboration. The diversity of addressees of geographical and business environment would require a plurality of instruments among which parties can choose. Therefore, instead of covering a single type of legal instrument, such as multi-party contracts and describing its parties, content, breach, remedies, and dissolution mechanisms, the LSAE Guide could address different instruments and identify good practices and the best legal structures for specific purposes, for example to increase accessibility to critical financial resources. He explained that, as a soft law instrument, the nature of the LSAE Guidance Document would not be binding, and it would not have a prescriptive function.

27. 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. Therefore, by adopting an illustrative function, the LSAE Guide would, to the extent possible, give indications and make recommendations on the best set of legal structures for agricultural enterprises. It would consider how the inputs, resources, outputs and the distribution of gains and losses would be addressed in the different contractual and corporate models. The Coordinator noted that good practices and the most adequate or best set of legal structures could be identified in terms of efficiency and distributional values to generate outcomes that are beneficial across the agri-food systems.

28. *One participant* observed that typically pre-existing market power and imbalanced distribution of control between a larger buyer and a small farmer within the value chain of the agri-food systems could predict the legal structure of agricultural enterprises (e.g. instances where the buyer forces the farmers to create a cooperative to reduce transaction costs and have a local coordinator). These asymmetries and the disabling business environment within which the actors operate would not always result in an abuse of power, but smallholders could be affected and receive less returns on investment. Therefore, it was suggested that the Guidance Document could also consider the scenario in which the space of choice is constrained. The Coordinator emphasised that it would be a mistake to assume freedom of contract as a reality in practice and noted that a part of the Guide could be devoted to unfair commercial practices and cases of abuse of power or dominant position.

29. *A participant* suggested that the Guide could start by analysing the adequate instrument for a specific problem and then consider whether there is a limitation in the choice or not. If necessary, the Guide could address the eventual barriers that may exist, as well as the enforcement mechanisms to expand the space of choice and constrain the space of power. *Another participant* questioned how unfair practices of large and powerful agribusiness entities would be addressed in the Guide and suggested the development of a legal toolbox to empower smallholders and agri-MSMEs to adopt enterprises that give them better access to markets and benefit their needs.

30. The Working Group discussed the categories of legal structures and agricultural enterprises that could be covered in the Guidance Document. A participant questioned whether it made sense to distinguish between corporate entities and cooperatives, noting that certain types of enterprises such as family enterprises would not necessarily fall in those traditional categories. Family enterprise is usually not a legal form but a functional category that could be considered when ownership structure is decisive. It was argued that while cooperative law may be taught in a law school course on corporate law, for the purpose of the LSAE project, corporations and cooperatives could be distinguished in two different categories considering their different motivations (for profit or not) and governance structures. One expert underlined the diverse forms that cooperatives could take, ranging from property right schemes to ownership.

31. The Working Group agreed to concentrate on three categories of instruments aimed at promoting efficient commercial collaboration between parties: contracts, including bundle of contracts and multiparty contracts, companies with or without legal personality, and cooperatives. Other types of legal structures, beyond contracts, corporations and cooperatives would be considered only where relevant and based on the reality in practice. The Working Group generally supported the inclusion of forms of enterprises adopted in the informal sector in the scope of the project.

32. A number of participants proposed to adopt a systematic approach when developing the Guidance Document to address issues raised beyond the context of supply chains. It was argued that the legal structure of an agricultural enterprise did not necessarily need to be analysed from a traditional perspective. Therefore, a more holistic, circular, cross-sectoral and community-based approach could be used for the development of the Guide. Hence, it would be important to consider the interrelationship between the different legal structures. *The Coordinator* proposed that a modular approach to the guide could be adopted to develop a common set of principles useful for different business environments. The toolkit's purpose would not be to identify the best legal structure but to provide parties' choices with the information related to 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.

33. It was discussed that the Guidance Document could be an instrument based on empirical data and flexible enough to transcend international, national, regional, and sub-regional levels, as well adaptable to, at least, three different variables: geography, commodities and communities. A participant indicated that it would be important to understand the different needs in terms of instruments for MSMEs and questioned whether it would be feasible within the Guide's scope to address all of the features specific to the range of enterprises operating in the agri-food sector.

34. The Working Group supported the idea that the guide should be evidence-based and agreed to revisit the methodology for the empirical research once the work progressed.

35. Some participants raised questions regarding certain key concepts and the terms used. A number of participants underlined the need to clarify the term "collaboration" and its different meanings in different disciplines, such as economics and law. With regard to the notions of collaboration and coordination, one participant argued that these concepts do not coincide in either economic terms nor in legal terms. The Coordinator clarified that the idea of focusing on collaboration would contribute to narrowing down 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. While recognising the importance of collaboration, one participant questioned how non-collaborative concerns would be captured in the Guide and which challenges would be excluded of the analysis by considering collaboration as the entry point of the guidelines.

36. *Most experts agreed with the need to translate economic realities into legal thinking by identify common ground definitions for, among others, the notions of formality, informality, institution, transaction, governance, supply chain, value chain, and multiparty contract. It was suggested that further thought should be given to the concepts that should be covered and how they ought to be defined. The Working Group agreed to consider developing a comparative legal and economic glossary to describe key terminologies.*

3. Content of the Guidance Document

37. *The Chair* drew the Working Group's attention to Section III of the Issues Paper concerning the content of the Guidance Document. He informed participants that some members of the Working Group and representatives from FAO and IFAD would give brief presentations to guide the discussions (the PowerPoint of each presentation is available in [Annex III](#)).

38. The Chair invited Professor Carlo Russo to present the topic regarding “The impact of market structure on agricultural enterprises” (Section III. A of the Issues Paper).

The impact of market structure on agricultural enterprises

39. *Professor Russo* started his presentation by comparing the proposed LSAE Guidance Document with the UNIDROIT/FAO/IFAD Legal Guide on Contract Farming (LGCF) which had covered the life-cycle of the bilateral agricultural production contract between farmers and buyers. He highlighted that the perspective in the LSAE project could be expanded to cover cases of interdependence among other supply chain actors and collaborative legal structures for better allocation of risks and profits along agrifood chains. Moreover, the LSAE project could focus on stages beyond the farm gate to further understand how input providers, processors and retailers affect the production process and the evolution of farming. He noted that determining which legal structure is most appropriate would require an analysis of the possible interactions that may take place among different market players operating at the upstream and downstream levels.

40. The Working Group considered a number of issues relating to market structure and coordination to understand how the legal structure could be affected. The following four main areas of impact were identified and discussed:

- (i) forms of coordination: several forms of coordination were identified, ranging from contracts, ownership, merger and acquisitions, and informal networks. It was suggested to consider analysing the frequency and intensity of these different organisational forms in the agricultural sector/market;
- (ii) drivers of cooperation: several drivers, such as technical, technological, informational, and financial factors may affect the choice of the legal structure and push towards different forms of organisation and cooperation;
- (iii) dimensions: horizontal and vertical coordination requires different legal structures. Participants discussed whether the LSAE project should consider one or the other, or the combination of both dimensions;
- (iv) collaboration: it was debated whether collaboration could be considered a valid response to ensure coordination and whether collaboration would be different depending on the reason for which coordination is required (e.g., need to implement sustainability standards or to deploy a technology or a platform).

41. *The Coordinator* noted three additional variables that could affect the choice of legal structure: (i) size of the enterprise (micro, small, medium or large enterprises); (ii) destination market (domestic, regional or international); and (iii) types of resources to be coordinated (technology, data, machinery, etc). He also indicated that the choice between contract or ownership depended on transaction costs and asset specificity, as well as on distributive concerns (e.g., gains and losses, allocation of risks). Moreover, it was suggested that different market power could be a driving factor for choosing one legal structure over the other. An expert indicated that often large companies influence the ability of farmers to enhance their market power and use new legal structures and innovative business approaches (e.g., machinery and artificial intelligence). It was argued that collaboration may be necessary among smallholder farmers specially for the purchase of inputs. *A representative from FAO* noted that that levels of perishability in the agri-food sector is often a strong driver vis-à-vis collaboration and contractual conditions. Perishable commodities are generally high-value and these chains often contain a lead firm which plays a strong coordination role; cash crops and food crops also influence the contractual structure and coordination in chains. whether the project would focus on perishable or non-perishable value chains. The Group considered that further discussion was required to define the content of the variables to focus on.

42. *The Chair* invited Ms Siobhan Kelly (FAO), Mr Athur Mabiso (IFAD) and Dr Jonathan Agwe (IFAD) to present Section III. B of the Issues Paper which covered the potential target group and envisaged audience of the LSAE Guide.

The role of midstream agri-MSMEs in contributing to rural transformations

43. In the first presentation, *Mr Mabiso* highlighted the instrumental role that MSMEs play in connecting farmers to markets but noted that their operations are conditioned to improved infrastructure and rural financial services, including credit and other business support services. He presented two case studies undertaken in Benin and Malawi to underline the varying degrees of formalization and the tendency toward informality, as well as the disproportionate level of engagement in terms of gender and youth. He emphasised the need to promote inclusive agricultural enterprises to enable growth opportunities and noted that business registration alone had a low impact on the expansion of access to formal markets and critical resources.

44. Sharing empirical evidence from an IFAD-supported Project in Lesotho, he indicated a number of common concerns among farmers and MSMEs regarding: (i) the cost of registration of enterprises; (ii) the ability to meet legal requirements (e.g., compliance with tax laws, labour laws, accounting, audits, industry standards, etc.); and (iii) the fear of disqualification from government support. Another IFAD-supported Project in Rwanda for Rural Incomes through Exports (PRICE) found that farmer cooperatives appear to be a relevant legal entity for linking farmers to markets, including export markets. In this case, the cooperatives were not only focused on providing access to input for production, but also engaged in processing and in obtaining certification. Lastly, he noted an example of productive partnership developed in Papua New Guinea that demonstrated the relevance of local processors and small-scale traders and wholesalers, as major players.

45. In the second presentation, *Ms Kelly* initially described the definition of the term “missing middle” or “hidden middle” by referring to the absence of SMEs in low- and middle- income countries where many micro-enterprises (mostly informal) and some large firms operate. Drawing lessons from certain business model assessments of SMEs operating in the rice sector in Africa, she indicated that while the definition of MSMEs varied between countries, it was generally accepted that those actors operate close to the farm gate and are made up of agro-dealers, truckers, processors, wholesalers and street vendors, among others.

46. She explained that these smaller actors are generally involved in the transformation process of the agri-food systems. She presented a case from Senegal to illustrate the links between the various components of an agri-food processor including procurement, finance, operations, human resources and management, as well as marketing and sales and the impacts of these components on various aspects of rural and urban development – farmer market linkages; generation of skilled and unskilled employment; adding or depleting nutritional value to food; food security; attracting investment customized to small actors in the agrifood sector; advocating for utilities in rural areas (energy, water, wastage infrastructure). These impacts touch on a range of sectors and the policy domains of various institutions (health, finance, trade, agriculture, employment). As such, the adoption of a systems approach would enable the cross-fertilization and integration of policy inputs and support from the various sectors mentioned thereby leveraging the multifunctional contributions that MSMEs in the agri-food sector make to development.

47. In the third presentation, *Dr Jonathan Agwe* highlighted a number of challenges that could be considered in the LSAE project from the smallholder perspective. He explained that the rural market space where smallholders operate is heterogenous and highlighted six thematic areas that demonstrated this variety depending on whether it was for: (i) agricultural development; (ii) rural development; (iii) credit and finance; (iv) irrigation; (v) marketing, storage and processing; or (vi) livestock. He stressed the challenge of developing a Guidance Document that responds to the various needs of the thematic areas and the various smallholders and agri-MSMEs.

48. Moreover, he reiterated the complementary and contradictory functions that agricultural enterprises may exercise at the same time (e.g., a producer may simultaneously be an input provider and a consumer depending on the perspective of analysis). Lastly, he explained that although the “Public-Private Producer Partnerships – 4Ps” implemented within IFAD-funded projects had contributed to formalisation, they had also created risks and pushed some actors out of business. Therefore, he cautioned against approaches that addressed formality as inherently beneficial and instead emphasised the need to consider both the advantages and disadvantages of formalisation (e.g., taxation, traceability, etc.).

49. Preliminary views were exchanged within the Working Group regarding the formal and informal dimensions of actors operating in the agri-food supply chain. Participants considered whether the project should focus on legal structures for formalised agricultural enterprises or whether it should also address the challenges faced by enterprises operating informally (e.g., through kinship networks). Participants also expressed their views on whether and how the project could overcome the idea of formalisation as a pre-condition to define the target group and audience of the LSAE Guide. One expert observed that a small number of actors take the risk of formalisation, suggesting that these few actors could be considered as the entry point of analysis. They explained that the focus on improving the business environment of already formalised enterprises and the challenges they face to grow could eventually stimulate the formalisation of informal enterprises. While recognising the importance of formalisation, an expert noted that creating formalised legal structures did not necessarily mean that all socio-economic relationships had to be formalised.

50. *A representative from FAO* argued that the discussion on formality and informality depended on whether the focus would be on perspectives stemming from the institutional or transactional aspects of agricultural enterprises. He indicated that focusing the discussion on formalisation from the institutional perspective would potentially call for an analysis of public law in addition to private law. Therefore, he invited participants to consider whether the project should focus on either the institutional or transactional perspective or a combination of both. Moreover, a participant questioned whether the Working Group was considering the formalisation of the economic activities or the formalisation of the “rules of the game” which would make the agricultural activity and markets more efficient, but also fair and inclusive.

51. *A participant* recalled that the notion of informality should not be considered as something illegal or extra-legal and developed outside the boundaries of State Law. He stressed the growing trend of the informal sector in several countries, including in European countries and highlighted the need to consider a broad notion of law and a variety of different legal traditions when discussing formality and informality. Further, he emphasised that the analysis of legal structures of smallholders and agri-MSMEs would need to be broader than the traditional common and civil law centred analysis. Another participant suggested that the formality and informality issue should be viewed as a matter of degree, rather than in an affirmative or negative way. He recalled that a number of informal transactions are legally valid (e.g., verbal transactions) and that requirements of form vary depending on the type of transaction. In addition, it was noted that the issue of formality and informality also had enforcement implications that should be considered.

52. *The Coordinator* highlighted that there were at least two functional meanings of formalisation that needed to be carefully distinguished to avoid ambiguity and conceptual confusions in the discussion. On the one hand, the process of formalisation should not be considered as a means to increase the degree of legal protection. In other words, informality should not be linked to the idea of low legal protection. On the other hand, formalisation should not be considered as a way to legalise social norms which are the basis of many communities and agricultural businesses. He mentioned that the LSAE Guidance Document could consider both social and legal norms. It was suggested to include some caveats in the Guide to clarify that it would not advocate for formality or informality and would indicate their different meanings.

53. *A representative from FAO* drew the Group's attention to the fact that informality existed due to the absence of an adequate business enabling environment, noting that the focus on formal, informal or both would also depend on the clarification of the actual audience of the LSAE Guidance Document. It was argued that the focus of the Guide seemed to be on the actors that add the most value to agri-food products in the mid-segment of the chain (e.g., traders, wholesalers, processors, etc). The main audience, therefore, would be those enterprises that have the potential to grow, and contribute to rural and urban development as described in para 46, but because of a disabling business environment and their informal nature they are impeded from fully leveraging their potential to do so.

54. The discussion regarding the target audience of the Guidance Document highlighted the need to further reflect upon where value is added and for whom. The Group agreed to revisit the boundaries between formal and informal in the future and generally supported the proposal to consider smallholders and agri-MSMEs that are perhaps working towards higher degrees of formality as the relevant audience of the Guide.

55. The Chair invited Professor Matthew Jennejohn to take the floor to present on the set of problems in agricultural production networks and solutions of economic organisation.

Mapping the problems and solutions of economic organisation

56. *Professor Jennejohn* proposed a number of questions for the Working Group to consider in order to clarify the range of problems that the Guidance Document could potentially cover. First, he questioned how different legal structures maximise positive externalities and minimise negative externalities, as well as equalise those externalities across all constituencies. Then, he drew participants attention to the third-party interests and third-party effects that may occur in transactions. He also invited participants to further reflect on how the LSAE Guide could set forth solutions to contractual incompleteness or asset incompleteness and to the issue of market power and abuse.

57. He explained the heterogeneity in governance models and highlighted the role of collaborative contracting as a complement to other forms of organisation, such as: integration (governing economic activity through the rights of ownership); hybrid (governing economic activity through socially embedded, often long-term contracts – a blend of formal and informal contracting); and spot market transactions (governing economic activity through short-term, socially disembedded contracts). To potentially help the audience of the Guide decide whether to adopt for a contract, corporate-like or other type of governance model, he noted that the Group could consider identifying some sort of comparative institutional advantage that different legal structures and governance tools have with respect to different hazards.

58. *A participant* questioned the tendency of focusing on traditional supply chain problems and on very sophisticated agri-food chains and whether the problems identified from that perspective really captured the challenges that faced smaller farmers involved in agricultural enterprises. Another participant proposed that the Group could specify the place of the target group within the stages and context of the global food industry. It was suggested that guidance could be developed for those actors that need empowerment. Moreover, a participant noted that many enterprises do not only seek maximization of profits and emphasised the need to consider other types of enterprises besides corporations, namely the capitalistic enterprise.

59. *The Coordinator* pointed out that the level of sophistication of the enterprises and the complexity of the reasoning used for the development of the Guidance Document would not hinder its meaningfulness to less sophisticated legal structures. The conceptual framework proposed could be used to analyse enterprises with different types of purposes, being them efficiency-based or distributional-based. He explained that empirical evidence would be important to define the legal

toolkit and that nothing prevented the Working Group from deciding to focus the toolkit on community-based enterprises.

60. *The Chair*, then, invited Professor Lorenzo Cotula to present Section III. C of the Issues Paper regarding the use of collaborative contracting chains in the LSAE project.

Contractual arrangements for collaboration in agri-food supply chains: use of multiparty contracts

61. *Professor Cotula* initially stated that many of his insights had been drawn from a project developed by the International Institute for Environment and Development (IIED) on “Empowering Producers in Commercial Agriculture” (EPIC project), implemented together with partner organisations in Malawi and Nepal. Diverse types of contracts had been considered, ranging from different value chain segments, as well as government contracts impacting value chain relations. He noted that besides setting commercial terms between the parties, the value chain contracts had often been used as regulation instruments and forms of governance, in particular for long-term relationships where coordination among actors was felt necessary. The contracts defined standards on issues such as seeds, farming techniques, labour conditions, technology, environmental protection, product quality, and so on.

62. He stressed that different market power often allowed the ultimate buyer to impose terms, not only on the direct contractors but also on the wider sphere of influence. The lead firm could require its contractors to transfer terms onto their own contractors and subcontractors. He drew attention to the notion of interdependence and interconnectedness in the chain of contracts with terms cascading down from one contract to the other. He noted that farmers and smaller enterprises in the value chain were often contract takers, rather than contract makers. One of the problems identified was the lack of effective coordination in the value chain, in the alignment of different contractual requirements, such as pricing standards, delivery, product specification, force majeure, etc. Moreover, distributive dimension problems had also been identified, in particular in terms of distribution of benefits, costs and risks across the value chain.

63. He briefly discussed multiparty contracts or interlinked agreements 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 of the value chain. Beyond multiparty agreements per se, he also drew attention to wider forms of multiparty processes to coordinate value chain activities. He shared information on a case study concerning the production of green beans in Kenya for export to the United Kingdom to discuss opportunities and challenges in multiparty processes for the facilitation of dialogue among different actors. He also highlighted the great diversity of value chain configurations, including arrangements centred on territorial markets, and the different set of issues arising. He gave the example of EPIC work undertaken in Nepal to highlight how market access had been facilitated through the strengthening of informal trading arrangements, the development of more formalised supply agreements with trusted offtakers, and the establishment of cooperatives enabling farmers to have greater control on aggregation, distribution and marketing.

64. He invited the Group to take into account that most farmers do not operate on the basis of formalised contractual arrangements. Informal spot transactions and verbal contracts tend to dominate trade on many agricultural commodities in both local, national and even regional markets. In these settings, the problems farmers faced were not primarily of a legal nature and very often comprised organisational, practical and logistical problems. Legal aspects are relevant, however – for example, where farmers navigate questions on whether, how and to what extent they should consider formalising their value chain relations. While recognising the role that contracts may play, he also suggested not to look at one legal structure in isolation and to consider instead 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. Lastly, he noted that the title of the project “Legal Structure of Agricultural Enterprise” was very broad. He invited participants to clearly identify the specific problem the guide seeks to respond to, and to delineate the scope of the guide around a workable set of issues. One option he mentioned was for the guide to address 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.

65. During the discussion participants generally agreed with the important role that contracts play in regulating forms of collaboration within agri-food supply chains. It was suggested, however, that it would be necessary to clarify how much emphasis would be given to the contractual instrument in the Guidance Document as some of the contracts may not cover a number of the socio-economic relationships that are undertaken within the agri-MSMEs sphere. The Coordinator of the Group noted that the LSAE project did not intend to promote one instrument over the other and reiterated that the effort should be to understand what constitutes good practices and the best instrument options to inform the choice of legal structure of agricultural enterprise. The complementarity between contracts and corporate structures could be considered.

66. *The Working Group considered it necessary to further explore the notion of multiparty contracts and the diversity of value chain configurations and to think about the overarching principles that could be the object of guidance. Participants agreed to continue the discussion at a subgroup level.*

67. The meeting continued on the following day with an open-discussion on sustainability, green finance and a presentation on digitalisation matters (Sections III. D and E of the issues paper).

The impact of Sustainable Development Goals, green finance and insurance on the structure of agricultural enterprises

68. *A representative from IFAD* pointed out that the legal structure of agricultural enterprises could have implications for sustainable development outcomes, particularly SDGs 1 (No poverty), 2 (Zero hunger); 5 (Gender equality); 8 (Decent work and economic growth); and 12 (Responsible consumption and production). The Working Group discussed how sustainability is increasingly becoming an opportunity for market opportunities and innovation rather than a barrier to access supply chains. The discussion initially focused on the new types of markets and increasing interdependence among supply chain actors, as well as how legal structures of agricultural enterprises had been affected by sustainability requirements, consumer expectations and the use of Environmental, Social and Governance (ESG) standards. It was generally accepted that the agri-food sector cannot solely focus on environmental dimensions when working towards sustainability, but must also consider socio-economic, nutritional and social justice perspectives.

69. It was suggested that the Guidance Document could provide a range of legal tools to assist farmers and agri-MSMEs to address those challenges by adopting collaborative arrangements to ease access to inputs, technology, insurance from both the institutional, organisational and transactional perspective by considering: (i) the role of cooperatives, networks and clusters to support compliance with sustainability standards and (ii) the role of contracts to fairly distribute the allocation of costs of compliance. Similarly, the Working Group considered whether and, if so, how sustainability requirements needed to be internalised in contracts and/or monetised. It was agreed that future discussions on the sustainability aspects were necessary, as well as on the role of finance and insurance.

The impact of technology on agricultural enterprises

70. The Chair invited Professor Matteo Ferrari to present the issues regarding digitisation.

71. *Professor Ferrari* drew the Working Group's attention to the digital transformation underway in the agri-food sector and to how it affected the internal and external functioning of agricultural enterprise and promoted new data-driven business models. He noted that artificial intelligence, the Internet of Things and Big Data were expressions increasingly employed in the agri-food domain and, therefore, emphasised the need to consider the effects of digitisation in the LSAE project as it could influence the choice between contractual, corporate and other forms of collaboration. He indicated that data was a new production factor capable of changing the structure and operation of agricultural enterprises and highlighted that digital transformation involved different actors in the collection, storing, and processing of data. Moreover, the provision of digital services required specific infrastructure and know-how.

72. He argued that big data analytics represented a way for developing new products and services that could potentially make the agri-food chain more secure, sustainable and efficient. Precision agriculture was illustrated as one of the most promising applications of digitisation to optimise farming operations. He noted that there were increasing investments, mergers and acquisitions, as well as partnerships being established in the digital farming domain. Professor Ferrari shared a number of examples of procurement strategies and market distribution with new (digital) intermediaries. Lastly, he stressed that the question of how digitisation processes impact on agricultural enterprises intersected with a broad set of legal issues, ranging from intellectual property, de facto control of data, role of contracts and antitrust law.

73. The discussion initially focused on whether the provision of digital services represented a new variable capable of adding value within the agri-food chain. The role of traditional intermediaries and whether new intermediaries were emerging, for example, through online sale platforms was also considered. Participants discussed to what extent the use of technology was persuasive for farmers and whether they could opt to use digital services in just one part of their agricultural enterprise structure and for a limited period of time. Participants raised further issues for cautious analysis, such as how ownership and control of data affect the regulation and contracting processes.

74. Examples of the use of blockchain technology in Uganda and Zambia were given to highlight the need to think about the limits that should be defined with respect to privacy, consent and the ability of small players to limit access to data. Moreover, it was observed that farmers in different countries face varying levels of access to digital services. It was suggested to consider the perspective of second and third tier cooperatives which could facilitate the generation and responsible use of data, as well as agri-digital innovation hubs and the role they may play in supporting agri-MSMEs.

75. Overall, it was felt 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 Group concluded that having a more robust empirical basis to draw from would facilitate a greater understanding of the real operational dynamics affecting these stakeholders and better delineate how the topic of digitisation could be addressed within the LSAE Guide.

Item 6: Organisation of future work

76. *The Secretariat* informed all in attendance that the second session of the Working Group would tentatively be held at the end of September or beginning of October 2022. In the interim period, intersessional meetings would be organised to continue the discussions initiated in the first session. All participants would be invited to express their interest in joining one or more of the subgroup meetings.

77. With respect to additional stakeholder dialogue to ensure that the voice of the end users of the Guidance Document is duly considered in describing the legal toolkit, it was understood that the

Working Group could be supplemented with additional members and observers, who would eventually be invited to join the second meeting.

ANNEXE I**LIST OF PARTICIPANTS****MEMBERS**

| | |
|------------------------------------|---|
| Mr Ricardo LORENZETTI Chair | Justice Supreme Court of Justice of Argentina |
| Mr Fabrizio CAFAGGI Coordinator | Judge Italian Council of State and Professor University of Trento and LUISS |
| Ms Jennifer BAIR (excused) | Professor University of Virginia |
| Mr Virgilio DE LOS REYES | Dean De La Salle University |
| Mr Matteo FERRARI | Professor University of Trento |
| Ms Cynthia GIAGNOCAVO | Professor Universidad de Almeria |
| Mr Hagen HENRÿ | Professor University of Helsinki |
| Ms Paola IAMICELI | Professor University of Trento |
| Mr Matthew JENNEJOHN | Professor Brigham Young University |
| Mr Georg MIRIBUNG | Researcher Free University of Bozen-Bolzano |
| Mr Carlo RUSSO | Associate Professor University of Cassino and Lazio Meridionale |

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INSTITUTIONAL PARTNERS

| | |
|--|---|
| FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS (FAO) | Ms Donata RUGARABAMU Legal Counsel (LEG) |
| | Mr Buba BOJANG (<i>excused</i>) Legal Officer (LEGN) |

Mr Teemu VIINIKAINEN (*excused*)
Legal Consultant (LEGN)

Mr Sisay YESHANEW
Legal Consultant (LEGN)

Ms Siobhan KELLY
Agribusiness Officer
Food Systems and Food Safety Division (ESF)

Mr Thibault Meilland
Agrifood Economics Division (ESA)

INTERNATIONAL FUND FOR AGRICULTURAL
DEVELOPMENT (IFAD)

Ms Katherine MEIGHAN
General Counsel

Mr Ebrima CEESAY
Legal Counsel

Mr Athur MABISO
Senior Technical Specialist

Dr Jonathan AGWE
Lead Regional Technical Specialist Inclusive
Rural Finance, Markets and Value Chains

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INSTITUTIONAL OBSERVERS

ASIAN FARMERS' ASSOCIATION FOR
SUSTAINABLE RURAL DEVELOPMENT (AFA)

Ms Esther PENUNIA
Secretary-General

Mr Antonio SALVADOR
Legal Consultant

EASTERN AFRICA FARMERS FEDERATION
(EAFF)

Mr Stephen MUCHIRI (*excused*)
Executive Director

INTERNATIONAL DEVELOPMENT LAW
ORGANIZATION (IDLO)

Mr Roland FRIEDRICH (*excused*)
Director of Programs

Ms Inmaculada DEL PINO ALVAREZ
Program Lead Food Security and Rule of Law

Ms Alessandra MISTURA
Programme Coordinator

INTERNATIONAL COOPERATIVE ALLIANCE
(ICA)

Mr Santosh KUMAR
Director

INTERNATIONAL INSTITUTE FOR
ENVIRONMENT

Mr Lorenzo COTULA
Principal Researcher

| | |
|---|--|
| AND DEVELOPMENT (IIED) ORGANISATION FOR THE HARMONISATION OF BUSINESS LAW IN AFRICA (OHADA) | Mr Matthieu GARDON-MOLLARD (<i>excused</i>) Advisor to the Permanent Secretary |
| ORGANIZATION OF AMERICAN STATES (OAS) | Ms Jeannette TRAMHEL Senior Legal Officer |
| UNITED NATIONS INDUSTRIAL DEVELOPMENT ORGANIZATION (UNIDO) | Mr Dejene TEZERA Director |
| UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW (UNCITRAL) | Ms Monica CANAFOGLIA Legal Officer |
| WORLD BANK GROUP | Mr Christopher Ian BRETT Lead Agribusiness Specialist |
| WORLD FOOD PROGRAMME (WFP) | Mr Ammar KAWASH Head, Smallholder Agricultural Market Support Unit at WFP Rwanda |
| | Mr Matteo MAZZONI (<i>excused</i>) Legal Consultant |
| WORLD FOOD LAW INSTITUTE | Ms Marsha ECHOLS Professor Howard University School of Law |

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INDIVIDUAL OBSERVERS

| | |
|--|--|
| Mr Brian BALDWIN | Development and Policy Advisor |
| Ms Rosemary NAVARRETE | Stakeholder Engagement Manager Emerging Ag |
| Ms Saweda LIVERPOOL-TASIE (<i>excused</i>) | Associate Professor Dept Agricultural, Food & Resource Economics Michigan State University |
| Ms Mariana PARGENDLER | Professor Fundação Getulio Vargas - FGV |
| Mr Sukhpal SINGH (<i>excused</i>) | Centre for Management in Agriculture Indian Institute of Management |
| Mr Edward Kyei TWUM | PhD Candidate University of Cassino and Lazio Meridionale |

UNIDROIT SECRETARIAT

| | |
|------------------------------|--------------------------|
| Mr Ignacio TIRADO | Secretary-General |
| Ms Anna VENEZIANO | Deputy Secretary-General |
| Mr Carlo DI NICOLA | Senior Legal Officer |
| Ms Priscila ANDRADE | Legal Officer |
| Ms Philine WEHLING | Legal Officer |
| Ms Myrte THIJSSSEN | Legal Officer |
| Ms Michelle RESÉNDIZ ALVAREZ | Intern |
| Mr Marco IMPAGNATIELLO | Intern |
| Mr Yaman GÜRSEL | Intern |

ANNEXE II**ANNOTATED DRAFT AGENDA**

1. Opening of the session and presentation of the tripartite co-operation between UNIDROIT, FAO and IFAD
2. Election of the Chairman and Coordinator of the Working Group
3. Adoption of the agenda and organisation of the session
4. General background of the LSAE project and envisaged outcome
5. Consideration of matters identified in the Issues Paper (Study LXXXC – W.G.1 – Doc. 2)
 - a. Preliminary matters;
 - b. Scope of the proposed Guidance Document; and
 - c. Content of the proposed Guidance Document
6. Establishment of thematic sub-groups and organisation of future work
7. Any other business
8. Closing of the meeting