

UNIDROIT Summer School 2023

# Agricultural Land Investment Contracts

**Lorenzo Cotula**

Head of Programme – Law, Economics and Justice

International Institute for Environment and Development (IIED)

&

Visiting Professor, School of Law, University of Strathclyde

With contributions from

**Priscila Pereira de Andrade**

Legal Officer

UNIDROIT

# Outline

ALIC Guide: context and rationale

ALIC Guide: illustrative themes

From guidance to practice



# SUSTAINABLE DEVELOPMENT GOALS

**1** NO POVERTY



**2** ZERO HUNGER



**3** GOOD HEALTH AND WELL-BEING



**4** QUALITY EDUCATION



**5** GENDER EQUALITY



**6** CLEAN WATER AND SANITATION



**7** AFFORDABLE AND CLEAN ENERGY



**8** DECENT WORK AND ECONOMIC GROWTH



**9** INDUSTRY, INNOVATION AND INFRASTRUCTURE



**10** REDUCED INEQUALITIES



**11** SUSTAINABLE CITIES AND COMMUNITIES



**12** RESPONSIBLE CONSUMPTION AND PRODUCTION



**13** CLIMATE ACTION



**14** LIFE BELOW WATER



**15** LIFE ON LAND



**16** PEACE, JUSTICE AND STRONG INSTITUTIONS

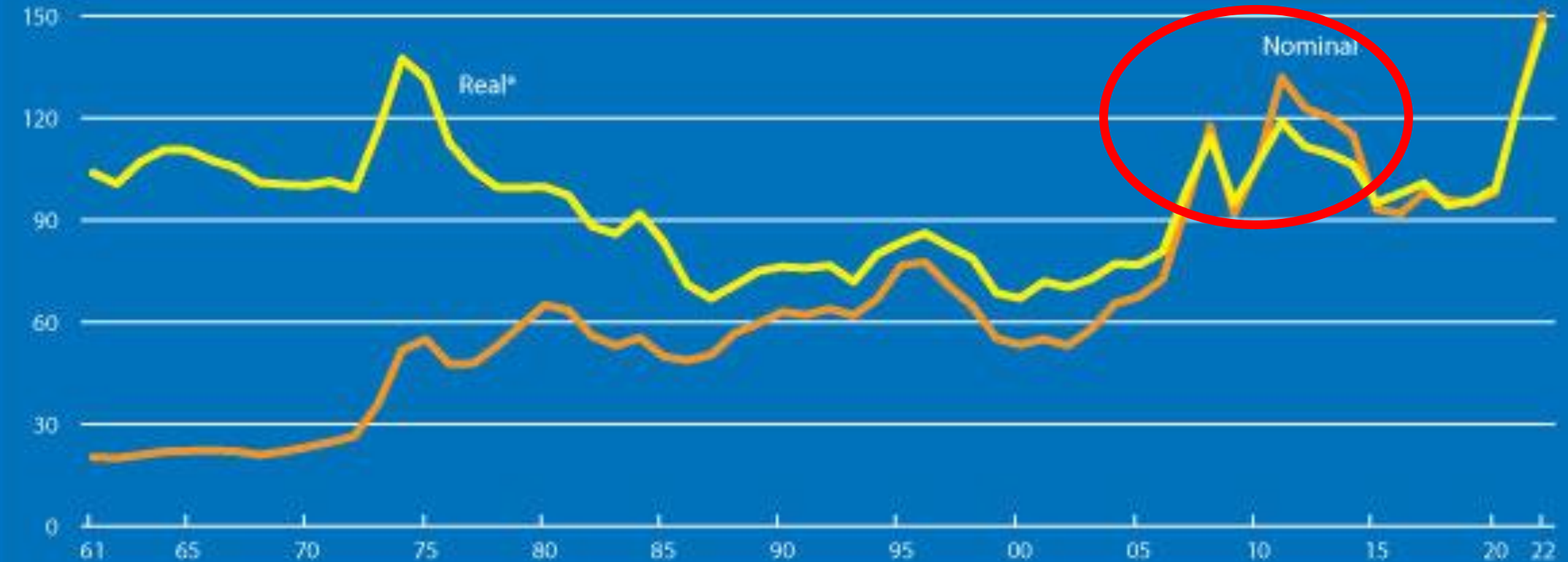


**17** PARTNERSHIPS FOR THE GOALS



# FAO Food Price Index in nominal and real terms

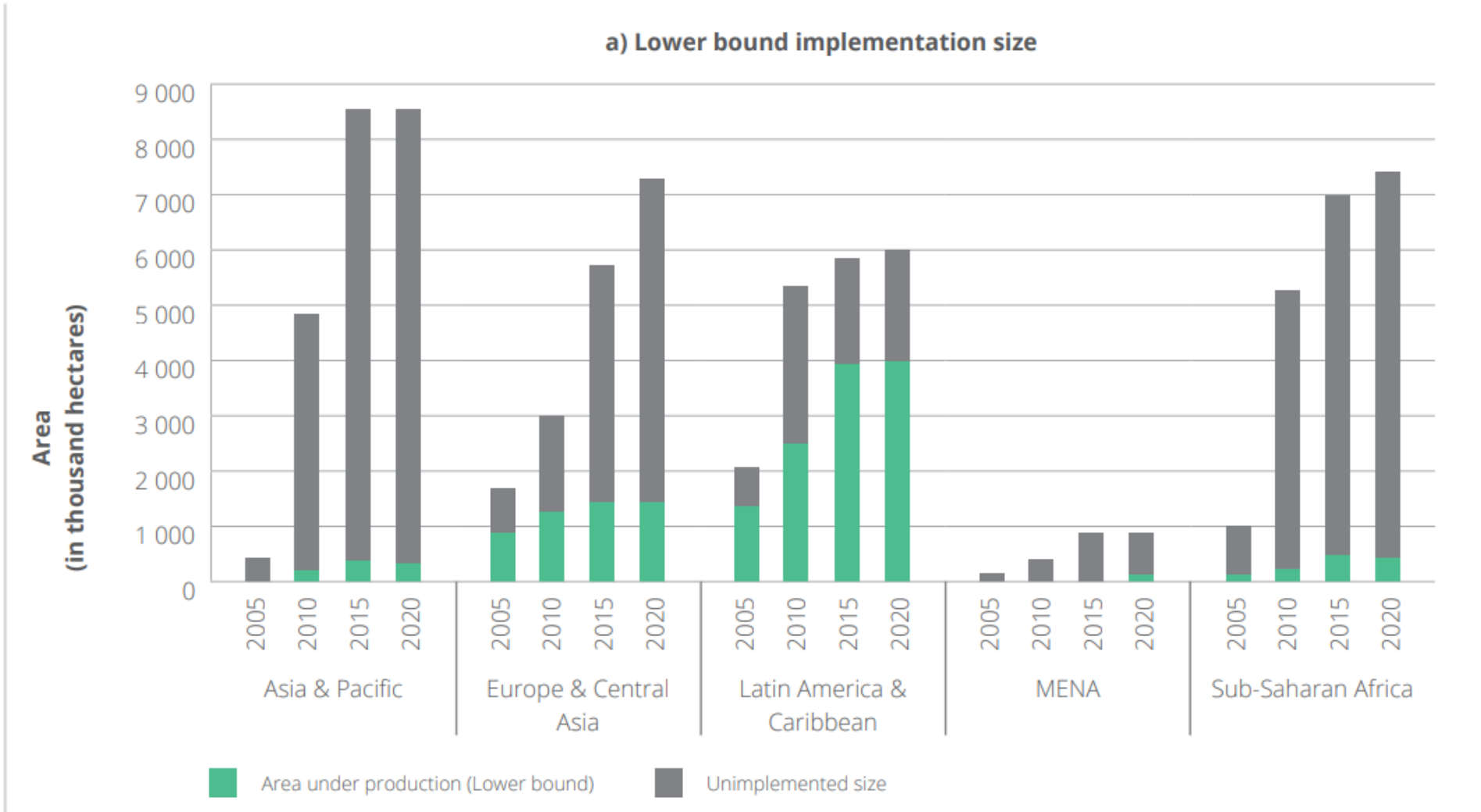
2014-2016=100



\* The real price index is the nominal price index deflated by the World Bank Manufactures Unit Value Index (MUV)

Source: FAO food price index

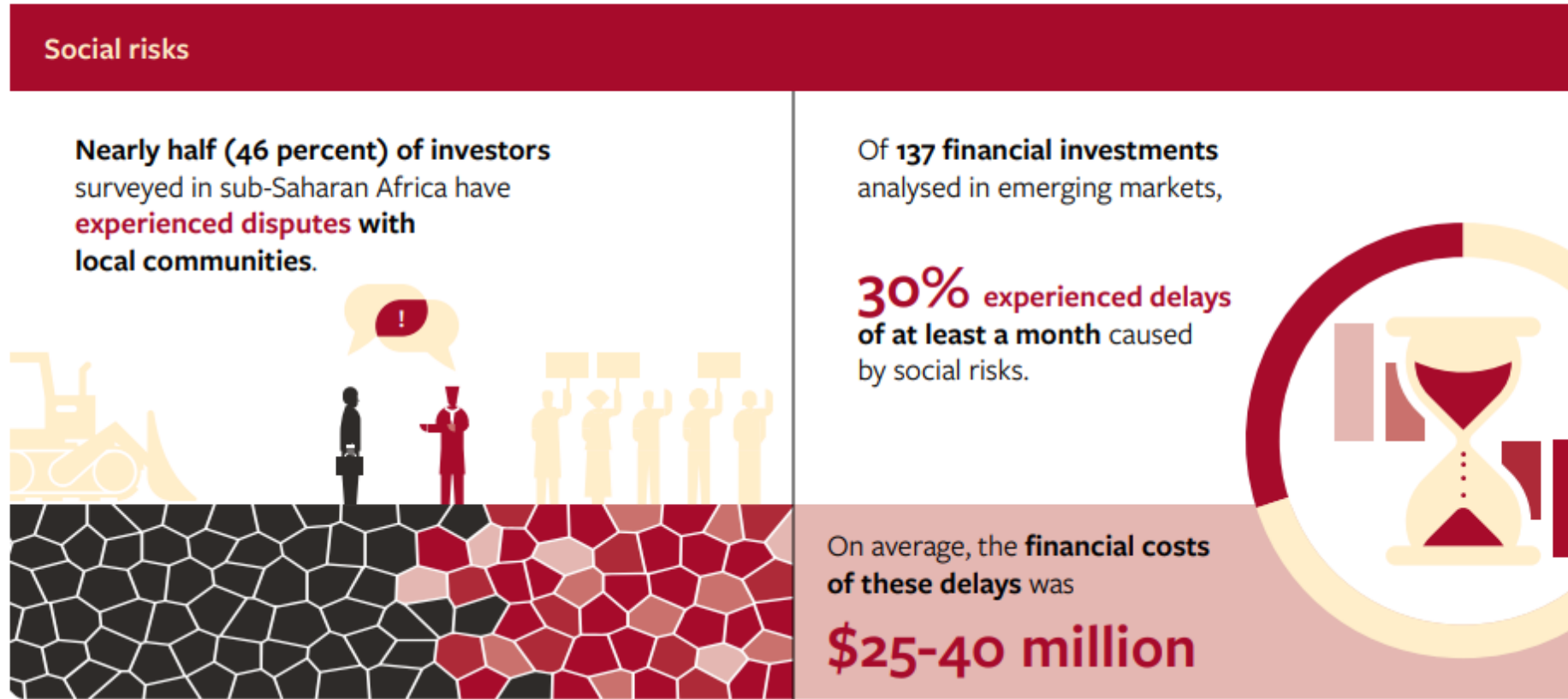
**Figure 1.5:** Cumulative contract size of operational deals over time per region



Source: Land Matrix (<https://landmatrix.org/>)



**Figure 1** Summary of findings showing business case for social risk management



Source: Feyertag, J. and Bowie, B. (2021) *The financial costs of mitigating social risks: costs and effectiveness of risk mitigation strategies for emerging market investors* (<https://quantifyingtenurerisk.org>)

VOLUNTARY GUIDELINES ON THE

# Responsible Governance of Tenure

OF LAND, FISHERIES AND FORESTS IN  
THE CONTEXT OF NATIONAL FOOD SECURITY







UNIDROIT | IFAD

Legal Guide on  
AGRICULTURAL LAND INVESTMENT CONTRACTS

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

ALIC Guide, para. Intro.10

# ALIC guide development process

- 2016 – The Secretariat prepared a **feasibility study** ([C.D. \(95\) 7\(b\)](#)) to examine whether a possible new instrument would be of additional benefit in this field
- 2016 – One informal meeting with experts and interested stakeholders was held at FAO in October 2016 during the CFS' 43<sup>rd</sup> plenary session
- 2016 – Inclusion in UNIDROIT's Work Programme for the 2017-2019 triennium
- 2017 – Establishment of the **Working Group** which brought together internationally recognised legal experts and representatives of other international organisations, farming community and agribusiness
  - Four WG meetings were held: May 2017, September 2017, April 2018 and October 2018
  - One informal meeting was held in October 2017 during the CFS' 44<sup>th</sup> plenary session
- 2018/2019 – **Consultations on the ALIC Zero Draft**
  - Winter 2018 – Autumn 2019: Open Internet consultations (FAO FSN Forum)
  - Three regional consultations took place in 2019 in Beijing, São Paulo and Nairobi.
- 2020 – Drafting Committee meeting held on 2-3 March 2020
- 2020 – **Approval** by the UNIDROIT Governing Council in September 2020
- 2021 – **Launch** by UNIDROIT and IFAD in September 2021. Watch on [YouTube](#)
- 2023 – Expected launch of the **French translation**.



More information online at:

<https://www.unidroit.org/instruments/agriculture/alic/>

# Why contracts?

They crystallise the parties' expectations about an investment, and how the risks, costs and benefits are distributed

*Contracting*, not just contract: formation process, compliance over often long-term contract duration

Relationship with national and international law

# Agricultural land investment contracts

Between two or more parties

For purposes of an investment in agricultural production and/or processing

“Grantor” transfers to the “investor” tenure rights in land as well as other related rights

Ongoing relationship (sales outside scope)

Denotes contract content rather than formal title

# Diversity of ALICs

Contracting parties

Applicable law

Economic activities (eg crops, operations)

Business configurations (eg joint ventures)

Parties' preferences

<b>ALIC Guide structure</b>	<b>Underlying concerns</b>
Parties, stakeholders and contract formation	Lack of consultation; land expropriations & disputes
Rights & obligations of the parties	Perceptions of one-sided deals
Managing non-performance and remedies	Limited implementation of investment projects, unmet expectations
Transfer of rights and obligations, return of tenure rights	Land speculation
Grievance mechanisms and dispute resolution	Investment-related conflict

# Contracts and national law

National law	Investment contract
Generally applicable, level playing field, known in advance	Possibly tailored, negotiated solutions
Translates/reflects national policy. Depending on context, opportunities for public participation in law making	Likely influenced by negotiating power, possible time pressures
Transparent	Often confidential but disclosure in some countries

Role of national law in setting rules (eg tax, labour, environment), and of contract in filling gaps; contractual arrangements to comply with domestic law and be tailored to the particular legal context

Pre-contract process and documentation (eg feasibility study, business plan, ESIA) provide the foundations of any contractual provisions



# From guidance to contracting

“Considering that smallholder producers and their organizations in developing countries provide a major share of agricultural investments that contribute significantly to food security, nutrition, poverty eradication and environmental resilience, States should support investments by smallholders as well as public and private smallholder-sensitive investments.”

VGGT, para. 12.2

“Responsible investments should do no harm, safeguard against dispossession of legitimate tenure right holders and environmental damage, and should respect human rights. Such investments should be made working in partnership with relevant levels of government and local holders of tenure rights to land, fisheries and forests, respecting their legitimate tenure rights.”

VGGT, para. 12.4

## Tenure rights: Legal and social legitimacy

Type of legitimacy	Illustrative examples
<b>Legal legitimacy</b> (legitimate through the law; legally recognized)	<ul style="list-style-type: none"><li>• Private ownership or other tenure rights recognized by law.</li><li>• Use rights recognized by law, including leases, cooperative, rental or sharecropping agreements, easements, and legally recognized customary rights.</li></ul>
<b>Social legitimacy</b> (legitimate through broad social acceptance even without legal recognition)	<ul style="list-style-type: none"><li>• Land rights based on customary or Indigenous tenure systems, which lack legal recognition or records in official registries.</li><li>• Shared forests and rangelands, accessed and used by multiple communities.</li><li>• Traditional fishing grounds.</li></ul>

Source: adapted from Palmer *et al.* (2009) and Cotula *et al.* (2016).

Screenshot from: Cotula, L. and Knight, R. 2021. *Protecting legitimate tenure rights: From concepts to practice*. Legal Brief 2. Rome, Food and Agriculture Organization of the UN. (<https://www.fao.org/3/cb4489en/cb4489en.pdf>)

“the Guide encourages alternative models of agricultural investments which do not involve large-scale leasing agreements with a very long period or definitive transactions of tenure and related rights to investors. This refers to investments both by and with smallholder farmers, as well as partnerships with them and local communities [...] [Further,] the various forms and models of investment are not necessarily mutually exclusive [...]”

ALIC Guide, para. Intro.20

Identifying legitimate tenure right holders and other “stakeholders” – a key step in contracting

Consultation and FPIC

Local landholders as contracting parties, depending on context

From contract to contracts

# Rights and obligations of the parties

“Responsible investments [...] should strive to further contribute to policy objectives, such as poverty eradication; food security and sustainable use of land, fisheries and forests; support local communities; contribute to rural development; promote and secure local food production systems; enhance social and economic sustainable development; create employment; diversify livelihoods; provide benefits to the country and its people, including the poor and most vulnerable [....].”

VGGT, para. 12.4

## Chapter 4 (ALIC)

- I. Land tenure
- II. Social and economic issues
- III. Environment
- IV. Protection of investment and regulatory autonomy
- V. Implementation and monitoring

Investor “shall: [...] Provide employment opportunities and training to the community”

“[...] in the event of a conflict between this Agreement or the rights, obligations and duties of a Party under this Agreement, and any Law, including administrative rules and procedures [...], or applicable international law, then this Agreement shall govern the rights, obligations and duties of such Party.”

Monetary obligations: no global one-size-fits-all, reflecting diverse realities, jurisdictions and party preferences

Different combinations of revenue streams may lead to different results in terms of distribution of revenues over time, sharing of risk between the parties, and ease of revenue collection

In negotiated contracts – project documentation, financial modelling and economic expertise key

Where grantor is a public authority, policy considerations beyond revenues alone (eg water fees affecting incentives for efficient water use)

Periodic review clauses

Grant of tenure rights and related rights – and associated limitations and obligations

Project development parameters – eg targets/KPIs, timelines

Employment creation, access to (“skilled”, “unskilled”) jobs, labour rights

Local content and processing

Outgrowers

Social infrastructure, community development funds

Environmental obligations, including links to climate policy

“[Company] shall give preference for employment at all levels of financial, accounting, technical, administrative, supervisory and senior management positions and other skilled positions to qualified [Country] citizens as and when they become available, it being the objective of the Parties as soon as is practicable that the operations and activities of [Company] under this Agreement should be conducted and managed primarily by [Country] citizens. Subject to availability of qualified applicants, [Company] shall cause [Country] citizens to hold at least 30 per cent of the ten most senior management positions within 5 years of [entry into force], and at least 50 per cent of such positions within 10 years of [entry into force]”

Varying contracting party preferences about economic benefits and associated trade-offs; how can contracts maximise effectiveness of options chosen?

Some contracts require prioritising local nationals in recruitment, training and promotion for skilled positions (managerial, technical)

Percentage-based targets on a sliding scale, whereby local employment percentage increases over project duration

Realistic targets in the light of socioeconomic conditions; requirements for both educational and on-the-job training, including timelines and (where relevant) minimum annual financial commitments; and reporting & monitoring arrangements

## Example of possible “Environmental and Climate related contractual clauses”

“[Company] hereby commits to pursuing continuous improvements in methods of production, in ways that produce equal benefits for people of all genders and social groups, including indigenous groups, in order to:

- (a) Reduce GHGs generated by the investment project;
- (b) Capture and store carbon through the project’s operations;
- (c) Support [Legitimate Tenure Rights Holders] / [the Local Community] / [Contract Farmers] to build resilience and adapt to climate change [and access payments for ecosystem services];
- (d) Prevent deforestation, restore deforested areas and, and restore and protect biodiversity [including through practices such as agroforestry];
- (e) Reduce air and freshwater pollution and land contamination.”

[SUSTAINABILITY](#) » [POLICIES & STANDARDS](#) » [E&S PERFORMANCE STANDARDS](#)

## PERFORMANCE STANDARDS



# RSPO Principles and Criteria for Sustainable Palm Oil Production





# Transfer of rights & obligations

Who the investor is matters – capacity to conduct pre-contract processes and deliver on contractual commitments. See also ALIC Guide provisions on

- Disclosure of information about corporate organisation, including affiliates
- Guidance on investor due diligence – and the place of feasibility studies, business plans in investment contracting

Concerns about land speculation

From the investor's perspective, transferability may be necessary eg as part of exit strategy, or to obtain financing

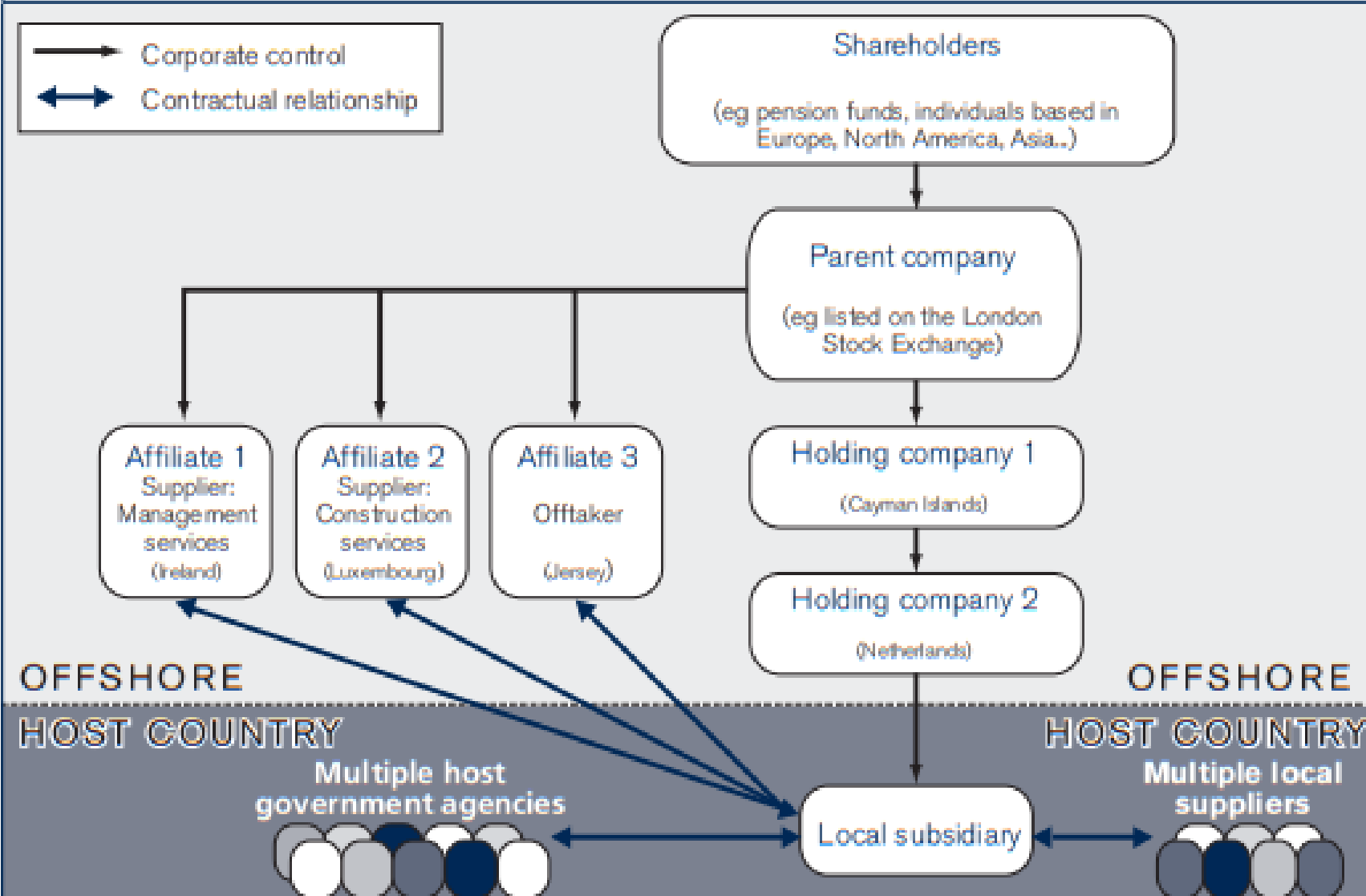
Domestic law requirements – including possible restrictions on transfer

Contractual solutions – eg investor can transfer rights subject to grantor's agreement, which is not to be unreasonably withheld

Procedural requirements eg prior notice, time limits

Legitimate tenure rights holders, consent and “legacy” issues

**Figure 6.** Corporate structure of a hypothetical business



Source: Adapted from Gilchrist, 2012.

Screenshot from: Cotula, L. 2016. *Foreign investment, law and sustainable development: A handbook on agriculture and the extractive industries*. IIED. (<https://pubs.iied.org/12587iied>)



# A long-term relationship

Compliance monitoring, communication channels

Non-performance: remedies, procedures

Force majeure

Grievance mechanisms and dispute resolution

# Stabilisation clauses (contractual)

- Regulatory change or contract renegotiation can adversely affect investor's legal rights and/or economic benefits
- Contractual device to mitigate political risk, diverse approaches
- Freezing clauses: applicable law is the one in force at time specified in contract => regulatory changes not applicable to project
- Economic equilibrium clauses link changes in law to restoration of the economic equilibrium of the contract => regulatory change applicable but requires rebalancing measures
- Hybrid clauses

**“Any legislative or regulatory provisions** which becomes [sic] effective after the date of this Agreement and **which may result in** restricting or reducing the rights of the Investor, [the local subsidiary], their Affiliated Companies or Sub-contractors, under this Agreement and the Current Legislation, or in increased obligations upon them, **will not be applicable to them.”**

**If regulatory change** (incl legislation, court decisions, and ratification of international treaties) “has a **material adverse effect** on the Company” or if it “causes the benefits derived by the Company from the Project ... or the value of the Company to the shareholders to materially decrease,”

**then** the state must “**restore**” the Company and/or the Shareholders to the same or an **economically equivalent position** it was or they were in prior to such change

**or** in default, pay “**prompt, adequate and effective compensation.**”

“...in a number of cases the stabilization clauses are in fact drafted in a way that may allow the investor to avoid compliance with, or seek compensation for compliance with, laws designed to promote environmental, social, or human rights goals.”

Andrea Shemberg, *Stabilization Clauses and Human Rights: A Research Project Conducted for IFC and the United Nations Special Representative to the Secretary General on Business and Human Rights* (International Finance Corporation and Office of the United Nations High Commissioner for Human Rights, 2008), <http://documents.worldbank.org/curated/en/502401468157193496/pdf/452340WP0Box331ation1Paper01PUBLIC1.pdf>, para. 146.

“States should maintain adequate domestic policy space to meet their human rights obligations when pursuing business-related policy objectives with other States or business enterprises, for instance through investment treaties or contracts.”

UN Guiding Principles on Business & Human Rights  
(Principle 9)

“Contractual stabilization clauses, if used, should be carefully drafted so that any protections for investors against future changes in law do not interfere with the State’s *bona fide* efforts to implement laws, regulations or policies, in a non-discriminatory manner, in order to meet its human rights obligations.”

UN Principles for Responsible Contracts  
(annexed to the GP on Business and Human Rights)  
& ALIC Guide para. 4.140

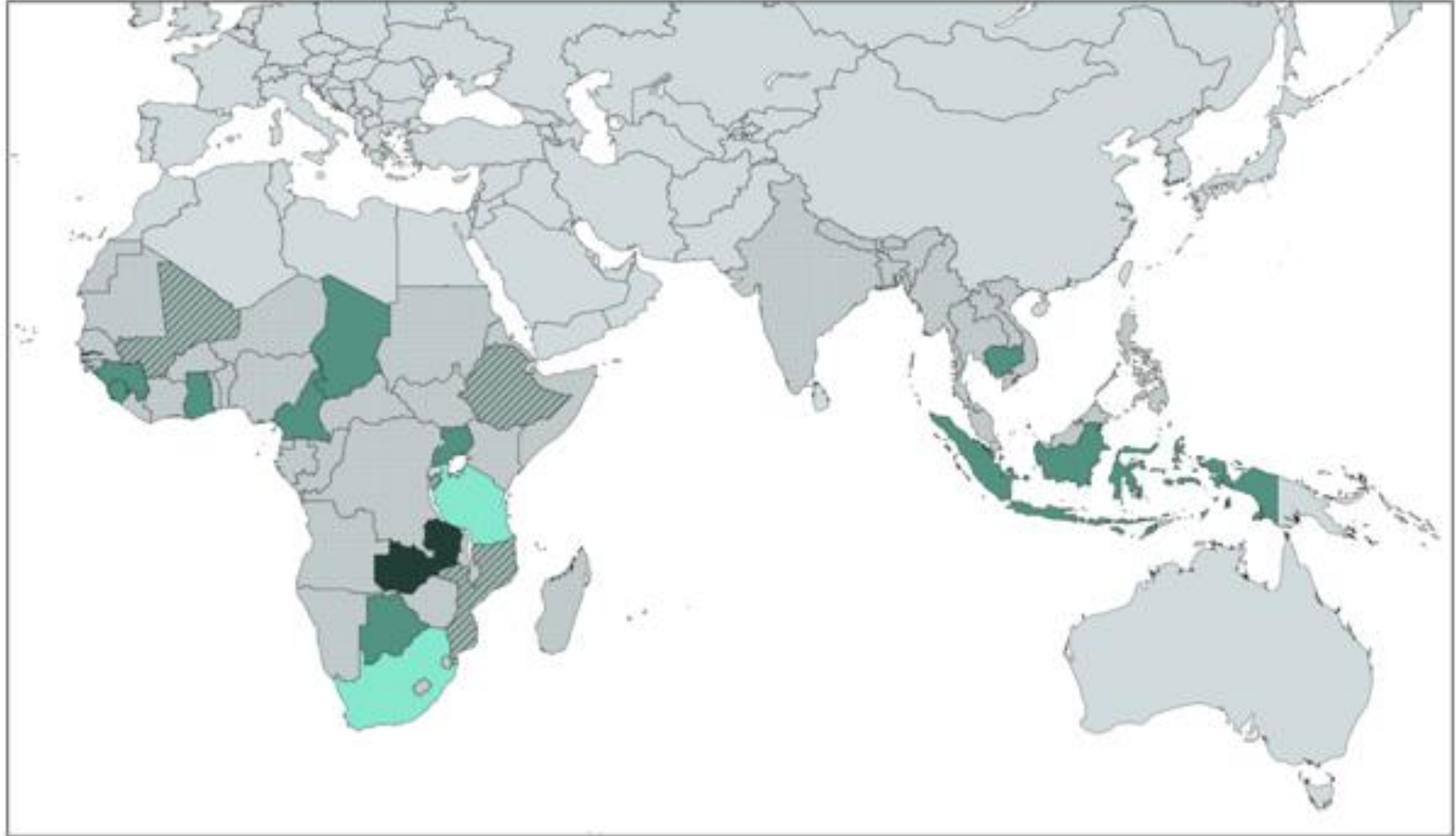


# Promoting use & uptake of the ALIC Legal Guide

- Translation of the Legal Guide into other languages

2022

- Complete version in French – Launch event expected in November 2022
  - Executive Summary in Spanish
- Presentation of the Legal Guide at key international conferences
    - IBA Capacity Development Webinar for Lawyers : Responsible Land-Based Investments in Agriculture
    - ILC Global Land Forum
    - WBG Land and Poverty conference
  - Online dissemination through the Landportal.org, AfronomicsLaw, and others
  - Preparation of a comparative study of regulatory frameworks
  - Establishment of a Community of Practice
  - Preparation of outreach materials (brief leaflet)
  - Contract templates





Contracts matter – but need to be considered in context

Processes, not just documents

Multiple, possibly conflicting considerations – and shared interests too

International guidance – with operationalisation tailored to context