



VICTORIA UNIVERSITY
MELBOURNE AUSTRALIA

UNIDROIT's work in contract farming and land investment in the broader context of agricultural development and food security

This is the Published version of the following publication

Gabriel, Henry (2018) UNIDROIT's work in contract farming and land investment in the broader context of agricultural development and food security. *Uniform Law Review*, 23 (2). pp. 270-281. ISSN 1124-3694

The publisher's official version can be found at
<https://academic.oup.com/ulr/article-abstract/23/2/270/4990918?redirectedFrom=fulltext>
Note that access to this version may require subscription.

Downloaded from VU Research Repository <https://vuir.vu.edu.au/41660/>

UNIDROIT's work in contract farming and land investment in the broader context of agricultural development and food security

Henry D. Gabriel*

Abstract

In 2011, the Governing Council of International Institute for the Unification of Private Law (UNIDROIT)¹ approved a long-term project in collaboration with other international organizations to undertake a series of projects on agricultural development and food security.² These projects are designed to use UNIDROIT's expertise in private international commercial law with the expertise that the other organizations have with agricultural development and food security. The first project, jointly undertaken with the United Nations Food and Agriculture Organization and the International Fund for Agricultural Development, resulted in 2015 in the *Legal Guide on Contract Farming*.³ UNIDROIT's second project in food security and agricultural development is a *Legal Guide on Land Investment Contracts*.⁴ In this article, I will examine the past, current, and future work of UNIDROIT in food security and agricultural development and how this work may serve as a model for the merging of private international law with broader concerns of economic and social development.

* Henry D. Gabriel, Professor of Law, Elon University; Visiting Professor of Law, Victoria University of Melbourne; UNIDROIT Governing Council. Email: hgabriel@elon.edu.

¹ The International Institute for the Unification of Private Law (UNIDROIT) is an independent inter-governmental organization with its seat in Rome. The purpose of UNIDROIT is to study the needs and the methods for modernizing and harmonizing private law, particularly commercial law, at the international level. UNIDROIT was created in 1926 as an auxiliary organ of the League of Nations. Following the demise of the League of Nations, UNIDROIT was re-established in 1940 based on a multilateral agreement. This agreement is known as the UNIDROIT Statute, and the membership of UNIDROIT is restricted to States that have acceded to the statute. There are presently sixty-three member States.

² For the Acts of a UNIDROIT Colloquium on the matter, see the *Uniform Law Review* XVII/1–2 (2012). The potential subjects set out were: (i) title to land, (ii) contracts for investment in agricultural land; (iii) the legal structure of agricultural enterprises, (iv) contract farming, and (v) the financing of agriculture.

³ <http://www.unidroit.org/studies/contract-farming> (accessed 6 March 2018).

⁴ <http://www.unidroit.org/work-in-progress/agricultural-land-investment> (accessed 6 March 2018).

I. Introduction

The topic of this year's Transnational Commercial Law Teachers' Meeting is 'transnational commercial law and natural resources'. This topic is consistent with the tradition of these meetings to focus on the way transnational law works in actual commercial practice. Consistent with this, I would like to address UNIDROIT's work in agricultural development and food security not only to give a concrete overview of what UNIDROIT is doing but also to show how there is an ever-increasing relationship between private international commercial law and the work of public law bodies and non-governmental organizations (NGOs) in food security.

In recent years, the demand for agricultural commodities has increasingly outstripped supply. This has led to high food prices and chronic hunger in low-income countries.⁵ The number of undernourished in the world, according to the last estimate made in 2015, is 795 million.⁶ Projections show that the world's population will be approximately 9.1 billion in 2050, and to feed that many people the world's food production must nearly double.⁷

There are approximately 500 million smallholder farms worldwide.⁸ In Asia and sub-Saharan Africa, smallhold farmers produce about 80 per cent of the food consumed in those regions.

In contrast to this growing demand for additional food production, there has been a contrary decline in the availability of financial resources for agriculture and rural development.⁹ On the African continent, for example, despite the agricultural sector's enormous share of employment and the gross domestic product, agricultural lending has traditionally constituted less than 1 per cent of all commercial lending on the continent.¹⁰

II. UNIDROIT and food security

This all bodes poorly for the future, and, clearly, there is much to be done. But how does this relate to transnational commercial law? As the recent work by

⁵ I use the World Bank's definition of 'low-income' to describe countries whose gross national income is less than USD 1,005 per capita and whose population is over 30,000. World Bank, *How We Classify Countries*, <http://data.worldbank.org/about/country-classifications> (accessed 16 September 2017).

⁶ Food and Agriculture Organization of the United Nations, *The State of Food Insecurity in the World*, <http://www.fao.org/3/a-i4646e.pdf> (accessed 16 September 2017). There is improvement. The number of undernourished people is down 167 million over the last decade, and 216 million less than in 1990–92.

⁷ Food and Agriculture Organization of the United Nations, *Feeding The World, Eradicating Hunger* (2009), http://www.fao.org/fileadmin/templates/wsfs/Summit/WSFS_Issues_papers/WSFS_Background_paper_Feeding_the_world.pdf (accessed 6 March 2018).

⁸ These farms would come within the commonly used definition of 'small and medium-sized enterprises' (SME).

⁹ 'Development aid rises again in 2016 but flows to poorest countries dip', <https://www.oecd.org/dac/development-aid-rises-again-in-2016-but-flows-to-poorest-countries-dip.htm> (accessed 6 March 2018).

¹⁰ Jonathan Campaigne and Tom Rausch, *Bundling Development Services with Agricultural Finance: The Experience of DrumNet*, Focus 18, Brief 14, July 2010.

UNIDROIT has shown, there is a logical relationship between the expertise UNIDROIT has developed in private international law and the work of organizations whose focus is on economic and agricultural empowerment and development.

There are many areas where transnational commercial law has an impact on agricultural development. For example, the new Protocol on Mining, Agricultural, and Construction Equipment to the UNIDROIT Convention on International Interests in Mobile Equipment (Cape Town Convention)¹¹ is partly driven by the desire to develop and increase agricultural development. The food security and agricultural development project that UNIDROIT has undertaken, however, is something more direct in the development of legal rules for food security.

The UNIDROIT project on food security and agricultural development was initially discussed by the Governing Council in 2009.¹² The suggestion of this work was made by the then secretary-general of UNIDROIT Angelo Estrella Faria, who had the UNIDROIT Secretariat produce a paper entitled *Private Law Aspects of Agricultural Finance*.¹³ This paper correctly noted that little attention had been paid to the question of:

the extent to which the various fields of private law that affect investment decisions, financing and marketing mechanisms for agricultural commodities in most countries promote sustainable agricultural investment, facilitate the mobilization of capital for rural enterprises or favor rational and efficient choices for marketing of agricultural commodities.¹⁴

This paper and the subsequent discussion of it by the Governing Council resulted in the inclusion of the general subject of ‘Private Law and Agricultural Development’ in the UNIDROIT 2011–13 Work Programme.¹⁵

Although, in the abstract, this general notion of feeding the world sounded good, there still was not a concrete project as such. To further focus the potential work, UNIDROIT organized a colloquium in 2011 on Promoting Investment in Agricultural Production: Private Law Aspects in order to explore possible contributions that UNIDROIT could make in the global efforts to ensure food security.¹⁶

Two things came from the colloquium. First, there was the realization that folks that till in the area of private international commercial law do not speak the same language as those who work in the fields of economic and social development. This was a chasm UNIDROIT learned to bridge.

Second, the potential topics under the general umbrella of ‘agricultural development and food security’ were narrowed down to include: (i) title to land;

¹¹ <http://www.unidroit.org/work-in-progress/mac-protocol> (accessed 6 March 2018).

¹² UNIDROIT 2009 – C.D. (88) 7 add. 6.

¹³ UNIDROIT 2010 – A.G. (67) 9 rev.

¹⁴ UNIDROIT 2010 – C.D. (89) 7 add. 4, para. 44.

¹⁵ UNIDROIT 2010 – C.D. (89) 17, paras. 112–15.

¹⁶ The papers of the Colloquium were published in the *Uniform Law Review* XVII/1–2 (2012).

(ii) contracts for investment in agricultural land; (iii) legal structure of agricultural enterprises; (iv) contract farming; and (v) the financing of agriculture.

It is important to recognize that UNIDROIT's work in food security and agricultural development is truly transnational. The Legal Guides, for the most part, are designed to give general legal guidance that provides models for domestic legislation or as aids for NGOs that are providing contractual guidance to parties. The rules and principles enunciated are intended to have universal recognition in a transnational context.

1. Creation of a guide on contract farming

The first subject that UNIDROIT undertook within this broad mandate was contract farming. Under a contract farming arrangement, producers organize the production process in accordance with the needs and requirements of the contractors. The agreement often includes a variety of physical and technical inputs by the contractors.

Contract farming is a highly developed practice of agricultural production in industrialized countries, and it is now well institutionalized and governed by a wide variety of laws in those countries. It is not widely used in developing agricultural economies, however, although the use of contract farming is now expanding in these regions and providing significant economic and social development by giving local producers access to markets and support for technology transfer and credit facilities. Contract farming has been found to significantly reduce poverty, contribute to rural development, and increase food security.

The UNIDROIT Working Group for the preparation of the *Legal Guide on Contract Farming* was composed of contract law experts, representatives of the Food and Agriculture Organization of the United Nations (FAO) and the International Fund for Agricultural Development (IFAD) as partner organizations and co-authors of the Guide,¹⁷ as well as observers from other

¹⁷ The Working Group counted upon the active participation of the Food and Agriculture Organization of the United Nations (FAO) and the International Fund for Agricultural Development (IFAD) as partner organizations and co-authors of the Guide: the legal discussion and analysis within the Working Group benefitted immensely from FAO's high level of expertise on contract farming theory and practice and of IFAD's experience in sustaining the inclusion of smallholder farmers in the value chains. Furthermore, IFAD awarded a grant to support UNIDROIT's activities on contract farming in 2014. The grant, which was administered by FAO, went towards funding two meetings of the Working Group, four stakeholder consultation meetings, as well as a consultant to assist the Secretariat in the review of the drafts and preparation of the final publication.

A second grant from IFAD has provided for a significant increase in the disseminating of the Guide and other materials that focus on (i) preparation of outreach materials; (ii) capacity building; (iii) online dissemination and knowledge transfer; and (iv) oversight and review. The specific goals are quite ambitious and include:

Guidelines for better contract farming operations: these will consist of one concise and reader-friendly document of about 20–30 pages, serving as a basis for two shorter publications targeting (a) farmers and (b) regulators.

An analysis of regulatory frameworks for contract farming. The purpose of the study is to identify regulatory trends that can assist countries to formulate their national legislation for contract farming.

intergovernmental organizations, representatives of agricultural producers and agribusinesses, and national institutions.¹⁸

The Working Group held two sessions in Rome in 2013 and two sessions in Rome in 2014. Consultation meetings with governmental representatives also took place in Buenos Aires, Bangkok, Rome, and Addis Ababa.

The *Legal Guide on Contract Farming* was adopted by the UNIDROIT Governing Council in May 2015. The publication in English was released in both paper and electronic form in July 2015, and the French version of the Guide was released later in the autumn of 2015.¹⁹

2. The Legal Guide on Contract Farming

What the Guide attempts to capture are the general principles that govern agricultural production contract relationships within the diverse legal world in which contract farming operates.

The Guide is written at a level of some generality to embody the full spectrum of contract farming agreements. This is necessary as these agreements vary significantly in formality. Thus, while some contract farming ventures have detailed written contracts that are registered and monitored by the contractor; others may rely entirely on informal oral arrangements.²⁰

The Guide is designed to provide general guidance on legal principles within the scope of best practices without targeting any specific domestic legal system. Contract farming is governed by a widely diverse set of laws. Given the global nature of contract farming, the Guide recognizes both the common law as well as the civil law. The Guide also notes that part of the governing law could be international law.²¹

Contract templates, to be developed by FAO and the International Institute for Sustainable Development (IISD). The templates, that will fully adhere to the principles and recommendations of the Legal Guide, will be produced to cover different categories of commodities, considering different types of contracts ('market specification' and 'input resource provision' types). Preparation and validation in pilot workshops of extension training materials for use in workshops and e-learning platforms that adapt in simplified language and correspond to each of the eight different chapters of the Legal Guide.

¹⁸ The following intergovernmental and non-governmental organizations were also represented in the Working Group: The World Bank / International Finance Corporation, the World Food Programme, the Technical Centre for Agricultural and Rural Co-operation (CTA) (ACP-EU Cotonou Agreement). Representatives from the World Farmers' Organization (WFO), as well as two Experts from the Food Manufacturing and Marketing Industry took also an active part in the Working Group. Finally, the following national institutions were represented as observers: the Fondation de droit continental (France), the World Food Law Institute (USA), and the National Court Administration (Republic of Korea).

¹⁹ The full text of both versions is freely accessible on the UNIDROIT website. <http://www.unidroit.org/studies/contract-farming> (accessed 6 March 2018).

²⁰ In India, for example, companies contracting with hundreds of farmers for tomatoes and potatoes sometimes operate only on one-time oral arrangements with farmers. In Indonesia, tobacco ventures often rely on oral agreements with tens of thousands of separate farmers.

²¹ For example, to the extent that the core transaction is an international sale of goods agreement, the agreement could be governed by the United Nations Convention on Contracts for the International Sale of Goods (CISG).

In addition to the express terms between the parties, the underlying legal system may provide default and mandatory terms under both general contract law as well as specialized legislation that govern contract farming. This may be provided by a variety of civil codes,²² agrarian codes,²³ general contract legislation,²⁴ specific agricultural contract legislation,²⁵ sector- or product-specific legislation,²⁶ as well as the various industry and trade standards and codes. Within this wide array of potential legal frameworks, the Guide attempts to extract the best legal principles to provide for a fair and balanced relationship between the contracting parties.

The Guide analyses the relationships and obligations among all of the parties throughout the supply chain from producer to consumer, but the Guide is primarily directed at the producers and contractors of the producers. The producers may be individuals, or they may be cooperatives or associations, which by forming groups and collectives are able to increase their collective production and often their bargaining power. The range of contractors includes individual entrepreneurs, international agribusiness companies, retailers, and wholesalers.

Contract farming can be either a sale or a service contract,²⁷ and the Guide covers both. Thus, producers may agree to produce and sell to the contractor a specific crop

²² For those countries with a civil code, in contract farming much of the general contract principles, such as formation will be governed by the code. The civil codes also generally provide default rules for how price is determined, general obligations of the buyer and seller, and a remedial structure. Regardless of other applicable law, the civil code will normally serve as overall background rules for the contractual arrangement.

²³ Some countries have specific agrarian codes that regulate contract farming. This is the case, for example, in France, Panama, and the USA (both federal law as well as many state laws). This often includes not only statutory frameworks, but detailed regulatory structures as well. Regulations often include the elements that certain agricultural contracts should indicate, including specification of the product, mutual obligations of the parties, contract duration, and conditions for its renewal. The regulations and statutes often also cover force majeure clauses, arbitration procedures, and provisions on compensation for damages in case of non-performance. The agrarian codes, such as those in the France, Panama, and the USA are not comprehensive, and therefore much of the operative law will be governed by general contract law principles in civil codes or statutes that govern general contract law and case law.

²⁴ Many countries have either general legislation regulating all contracts or legislation that regulates specific types of contract that would include contract farming.

²⁵ Several countries have enacted legislation that specifically governs contract farming. Spain is an example. Enacted in 2000, the legislation defines the principles that regulate contractual relations between agricultural producers, buyers, and processors. The law provides sample contracts that are agreed upon among representatives of producers, buyers, and processors and the Ministry of Agriculture, Food and Environment. The law requires that the contracts contain minimum standard clauses, and the contracts must be submitted for the competent authority's approval. The law also establishes a monitoring committee that plays an important role in approving and promoting the use of sample contracts.

²⁶ Several states in the US have product-specific legislation on contract farming, usually for the poultry and livestock industry. Another example is Kenya's Dairy Industry Act, which regulates the entire dairy industry, including contracts between producers and processing and trading businesses. The Act provides an oversight board, and requires the registration and licensing of dairy producers. Kenya has similar acts to govern sugar marketing.

²⁷ A true employment contract is not contract farming, and what distinguishes an employment contract from a contract farming arrangement may depend on such factors as whether the underlying legal obligation is civil law or common law. Overview of common law perspective: The more control a company exercises over a worker's performance, the more likely the worker is an employee rather than an independent contractor. Provision of training, knowledge sharing by the buyer, and the continuity of the relationship between the buyer and the farmer are other factors that may indicate a possible employment relationship.

or livestock, with the contractor paying according to an agreed price determination. This is a sales contract. Producers may agree to provide a service for agricultural or livestock production that is owned by the contractor. This is a service contract. Producers may agree to plant and grow on their land the seeds provided by the buyer. This is also a service contract. These different types of contracts have different implications for the rights and obligations of the producers and the contractors, and the Guide captures this in an extensive chapter on party obligations.

The Guide addresses the primary provisions of an agricultural production contract and places them within the context of the parties' respective obligations. These include:

- (i) the commodity that producers commit to sell or the service;
- (ii) inputs;
- (iii) contract duration;
- (iv) terms of payment;
- (v) quantity and quality requirements;
- (vi) liability for inputs supply;
- (vii) risk of losses;
- (viii) delivery;
- (ix) contract termination; and
- (x) dispute resolution.

The Guide also addresses the major impediments to contract performance, such as *force majeure*,²⁸ market price fluctuations,²⁹ and change of government policies. The most prevalent risk in an agricultural production contract, though, is non-performance by one of the parties—a breach of contract—and this is one area that the Guide gives extensive treatment.

A common source of a potential breach is an inadequate understanding of the respective obligations of the parties. For this, the Guide gives extensive treatment of problematic contract terms and a clear explanation of the terms and how to avoid potential problems with them. These include:

- (i) lack of clarity in price determination;³⁰

Overview of civil law perspective: Subordination is the factor that characterizes the employer-employee relationship. The employer is the party that gives directives to the worker, while the independent contractor is free to decide how to perform its duties and, for this reason, bears the risk.

²⁸ *Force majeure* refers to unpredictable situations that are beyond the parties' control, such as natural disasters or pest outbreaks. Agricultural production is particularly vulnerable to weather and disease. Extreme rainfall or drought, abnormally high or low temperatures, and pests or diseases could all devastate a farmer's production.

²⁹ Extreme market price fluctuations might make contract performance highly impractical. To protect the parties in this situation, contracts could provide for price renegotiation if the market price rises or falls outside specified limits.

³⁰ Clauses related to the determination of price are often unclear, complex, or ambiguous, which can lead farmers to misrepresent or misunderstand how the price is calculated. Farmers may not always understand complex technical language. This is frequent in livestock production contracts where payment may be based on a complex formula combining factors such as the weight gained relative to the feed consumed, mortality, and injuries. In crop production contracts, the price is

- (ii) liability for production losses;³¹
- (iii) large investments required for a short-duration contract;³²
- (iv) unilateral termination clauses;³³
- (v) confidentiality clauses;³⁴
- (vi) liability for environmental damage;³⁵ and
- (vii) abuse of mandatory arbitration clauses.³⁶

Throughout the Guide, best business practices are emphasized. Although this guidance cannot anticipate all unforeseen events or party misbehavior, the Guide does direct parties to agreements that maximize incentives for efficient production and minimizes incentives to avoid obligations.

The Guide emphasizes throughout the practical economic and business implications of a sound legal agreement. Thus, for example, the Guide encourages terms that provide for objective third party inspection of the goods to prevent one party from taking advantage of the other party.

Likewise, parties are encouraged, where appropriate, to include provisions for contractor participation in production, technical assistance, and close control over the producer performance to enhance the quality of the final production to the benefit of both parties.

often determined at the time the contract is entered into. Premiums and discounts may be applied in relation to quality, but in some contracts, the quality requirements demanded by the buyer ('grade specifications') are often not clearly specified.

³¹ Some contracts specify that farmers do not have title to the crops or livestock. (Normally, these are considered service contracts.) This arrangement has two major advantages for contractors. First, contractors are able to retain intellectual property rights in the crop's genetic material. Second, the contractor is better able to prevent the producers' creditors from claiming legal rights on the object of the contract. These service contracts will typically impose some or all of the risk of production losses on producers.

³² When a short-duration contract requires large upfront investments by a farmer, the farmer is exposed to significant investment risks. For example, production contracts for poultry or livestock often require the construction of facilities built to exact specifications. The payback period for this capital investment may be long, so farmers could fall into serious indebtedness should contracts be cancelled or not renewed.

³³ Some contracts include a unilateral termination clause, which allows buyers to terminate the contract at any time and for any reason. In the case of large up front investments, a unilateral termination clause poses great risks for farmers. Other contracts allow buyers to terminate the contract in case of failure by the farmer to comply with the terms of the contract, without providing the complementary right to farmers.

³⁴ Confidentiality or nondisclosure clauses may potentially create problems resulting from information asymmetry between contracting parties. A confidentiality clause prevents farmers from disclosing contract terms and conditions to other individuals. Thus, the clause may keep farmers from seeking outside technical and legal advice on contracts or simply comparing their contracts with those of other farmers to make sure they are getting a comparable and fair deal.

³⁵ Because contract farmers are independent contractors, the risk of liability for the environmental damage that may arise from the production may be upon the producer.

³⁶ In many contracts, producers are forced to sign mandatory arbitration clauses. This effectively forecloses recourse to the court system. Arbitration can provide quicker and cheaper dispute resolution but it is also important that farmers are informed and accept to use arbitration. Furthermore, arbitral tribunals might be more limited than a court for the types of claim that may be heard and the type of compensation that may be given.

The Guide goes beyond the strictly legal aspects of the relationship and provides guidance on the business aspects of the relationship as well. The goal is to provide guidance for long-term sustainable business relationships that maximize benefits to both parties.

Although the Guide focuses on the contractual relationship between contractors and producers, other parties, particularly those in the supply chain up to the consumer are affected by the agricultural production agreement. The Guide fully discusses these interests as they affect the primary relationship between the producer and the contractor.

The Guide is addressed broadly to three groups:

- (i) parties involved in contract farming;
- (ii) governments that want a guide for future legislation and policy formation for contract farming; and
- (iii) NGOs that may be involved in the development and implementation of contract farming.

The Guide is clearly not directed at countries that already have well-developed systems of contract farming. Its target audience is developing agricultural economies, including the government sectors that may desire to develop their own contract farming laws as well as those organizations that are working in agricultural development. The extent of its influence is yet to be seen, but as UNIDROIT's first experiment in working cooperatively with other organizations and using its expertise beyond traditional private international commercial law, it has garnered praise.

3. Future work in agricultural development and food security

A. Land investment contracts

Following the completion of the *Legal Guide on Contract Farming*, UNIDROIT has now made a second foray into agricultural development and food security by undertaking work on land investment contracts. As with the *Legal Guide on Contract Farming*, UNIDROIT is working jointly with the FAO and IFAD on this project. Both sister organizations have experience in this area, and it has been understood from the beginning of this project that heavy reliance on the already developed expertise of these organizations would play a significant role in the Guide.³⁷

³⁷ Thus, for example, it is anticipated that the Guide will incorporate FAO's 'CFS-RAI Principles': The CFS Principles for Responsible Investment in Agriculture and Food Systems – known as RAI – acknowledge that the starting point for defining how responsible investment in agriculture and food systems can contribute to food security and nutrition is the recognition and respect for human rights. They are a set of ten principles that apply to all types and sizes of agricultural investment including fisheries, forests and livestock. They address all stakeholders and apply to all stages of the value chain. As a soft law instrument, they are globally applicable and include actions to address a range of environmental, social and economic issues. <http://www.fao.org/cfs/home/activities/rai/en/> (accessed 6 March 2018).

At the time of the completion of this article,³⁸ the Working Group has met twice in Rome to draft an instrument on agricultural land investment contracts.³⁹ Thus far, the Working Group has prepared a draft outline of the future instrument.⁴⁰

Agricultural investment contracts, by definition, cover a significant number of different types of transactions.⁴¹ The scope of the Guide, however, will probably be limited to in-depth analysis of leases and concessions for agricultural land.⁴²

The structure of the Guide follows closely the structure of the *Legal Guide on Contract Farming*, with chapters covering the legal framework of agricultural land investment contracts, contract negotiation and formation, the rights and obligations of the parties, non-performance, termination, and dispute resolution.⁴³ As with the *Legal Guide on Contract Farming*, the *Guide on Land Investment Contracts* will emphasize best practices.

The complexity and scope of land investment transactions give rise to a host of questions about the rights, obligations, and responsibilities of the parties. Water rights and environmental concerns often are of importance, although all aspects of the agreement, such as changes in local regulations, supply fluctuations in the local market that affect food security in the host country, non-performance and its consequences, the termination of the contract, its renewal, the transfer of the contract or of the obligations under the contract, and settlement of disputes can have a substantial impact.

The guidance to be provided in the Guide will include not only technical legal advice on contracts but also laws and regulations that govern:

- (i) land tenure and administration;
- (ii) human rights (including food security and gender);
- (iii) environment (including water);
- (iv) finance (for example, tax, accounting rules, and anticorruption measures); and
- (v) the protection of investments.⁴⁴

An assumption underlying the Guide is that a well-drafted agreement can have a positive social and economic impact beyond its effect on the contracting parties. For example, a common problem with land investments contracts is that a lack of transparency with the public authorities can lead to abuse and corruption. The

³⁸ 15 October 2017.

³⁹ 3–5 May and 13–15 September 2017.

⁴⁰ UNIDROIT 2017 – Study 80B – WG2 Inf.1 rev., Agenda, pp. 3–14.

⁴¹ There are, in general, two sources of law that govern land investment contracts: (i) domestic law, i.e. the law of the State where the investment is made, and (ii) international investment treaties, such as bilateral investment treaties or investment chapters in trade agreements between the host State and the home State of the investor. These contracts are referred to collectively as ‘land investment contracts’.

⁴² UNIDROIT 2017 – Study 80B – WG2 Inf.1 rev., Agenda, p. 4.

⁴³ *Ibid.*, pp. 3–14.

⁴⁴ *Ibid.*, p. 5.

Guide will emphasize the importance and necessity of open and transparent procedures that can ameliorate this potential problem.

Social and human rights are to be particularly emphasized in the Guide. Agricultural land investments often have negative impacts on local communities through the displacement of the population as the result of agricultural development and intensive farming programs. The Guide will explore ways in which the investment contract can be used to ensure that community rights are considered and that the community can participate in the negotiations. This may be particularly important if the governing legislation and the public authorities of the host country do not fully recognize and protect community rights.⁴⁵ The Guide will give specific advice and guidance in the negotiation and drafting agreements to take these concerns into consideration.

Several other major international organizations have created, or are working on, land investment contracts,⁴⁶ and, therefore, one may fairly ask what UNIDROIT might bring to the subject that is unique and might not otherwise be available through the work of other organizations. To a large extent, the justification and drive behind this project is the fact that it was conceived and is effectively a continuation of the work on contract farming with the same major co-sponsors.⁴⁷ Just as the FAO and IFAD found that the technical legal expertise that UNIDROIT could bring to the project greatly enhanced the *Legal Guide on Contract Farming*, it is also assumed that UNIDROIT's legal expertise will enhance the guide for land investment contracts.

Although the Working Group has not finalized what the target audience of the guide will be, it might be used as a guide for drafting contracts and as a reference for national legislators to improve domestic legislative and regulatory law.⁴⁸

B. Land tenure

Within the wide umbrella of UNIDROIT's work in agricultural development and food security, what might be the next project after land investment contracts? One suggestion has been land tenure.⁴⁹

The need is there. In many countries, there is limited access to equitable or formal land tenure systems. For decades, the international development community has invested hundreds of millions of dollars to provide legally recognized systems of land tenure for the world's poor. There has been limited success,

⁴⁵ Often the inclusion to the principles enshrined in the non-mandatory international instruments on responsible investments and sustainable development such as the Performance Standards on Environmental and Social Sustainability, which were developed by the International Finance Corporation (IFC) can help ameliorate some of these problems.

⁴⁶ UNIDROIT 2017 – Study 80B – Doc. 1 Rev., Annex 2, pp. 29–30.

⁴⁷ Food and Agriculture Organization of the United Nations (FAO) and the International Fund for Agricultural Development (IFAD).

⁴⁸ UNIDROIT 2017 – Study 80B – WG2 Inf.1 rev., Agenda, p. 3.

⁴⁹ See n 2.

though, and in many low-income countries, most of the population remains outside any formal system of land tenure.⁵⁰

To meet the problem of land tenure reform, the World Bank has identified a common set of challenges, for which country-specific solutions would need to be developed: (i) incomplete or outdated legal and regulatory frameworks; (ii) rigid land tenure classifications that do not reflect all local ethnic, cultural, and legal traditions; (iii) dispersion and overlap of responsibilities across different institutions; (iv) outdated technology that makes land demarcation, regularization, and titling a lengthy and expensive process; (v) poor integration of relevant land information systems; (vi) limited accessibility to critical land administration services, including conflict resolution, by some portions of the population; (vii) inadequate mechanisms to ensure transparency, good governance, citizen participation, and recourse in the various phases of land administration, from demarcation to titling and enforcement.⁵¹

As suggested by this list, there are many structural and political issues that would have to be addressed before effective land tenure systems can be implemented. As important as this subject is, given its political overtones, it is unclear that this is a subject that UNIDROIT can handle adequately and for which UNIDROIT can make a substantial contribution.⁵²

III. Conclusion

The extent that UNIDROIT will continue to work beyond its traditional focus on private international commercial law in areas such as its current project on food security and agricultural development is yet to be seen. Although, as I have mentioned, I do not see a viable project in land tenure, there are other potential projects that have been identified under the general subject of food security and agricultural development.⁵³ There may be other projects identified in the future. It would be fair to say, though, even at this early point in UNIDROIT's work outside its traditional focus, that there have been some discernable benefits. First, and probably foremost, this work may have a greater social impact. It also has expanded the recognition of UNIDROIT and, through the cooperative relationships with other organizations, it has provided a new source of funding.

⁵⁰ http://www.rabobank.com/content/about_us/rabodevelopment/tanzania.jsp (accessed 6 March 2018).

⁵¹ <http://www.worldbank.org/en/results/2013/04/15/land-policy-results-profile1> (accessed 6 March 2018).

⁵² It is also worth mentioning that land tenure raises issues of basic property law. UNIDROIT has traditionally worked in area of contract and commercial law where it is possible to bridge the differences in legal systems. The differences in basic property law rules between civil and common law systems may be more profound than the differences in contract and commercial law thus making a project in land tenure a technically more difficult undertaking.

⁵³ See n 2.