The Future UNIDROIT-FAO-IFAD Legal Guide on Agricultural Land Investment Contracts (ALIC)

# Collection of contributions received

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# Topic note

The process of preparing, negotiating and implementing an agricultural land investment contract in a manner consistent with the principles and standards laid out in the [*Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security (VGGT)*](http://www.fao.org/cfs/home/activities/vggt/en/) and the [*CFS Principles for Responsible Investment in Agriculture and Food Systems (CFS-RAI Principles)*](http://www.fao.org/cfs/home/activities/rai/en/), can be very challenging for investors, governments, legitimate tenure right holders and local communities alike.

The International Institute for the Unification of Private Law (UNIDROIT), in collaboration with the Food and Agriculture Organization of the United Nations (FAO) and the International Fund for Agricultural Development (IFAD), is preparing a [future Legal Guide on Agricultural Land Investment Contracts](https://www.unidroit.org/work-in-progress/agricultural-land-investment) (ALIC), to cater for the needs of legal counsels working on the leasing of agricultural land from States and local communities.

The ALIC guide’s aim is not to promote large-scale land acquisitions, but rather to raise awareness about alternative investment models. In acknowledging that land acquisitions continue to occur, however, the instrument will help to ensure that leases of agricultural land are done responsibly, with necessary safeguards to protect human rights, livelihoods, food security, nutrition and the environment, and that stakeholders’ rights, including those of legitimate tenure right holders, are both protected and respected.

The instrument, building on the success of the [UNIDROIT-FAO-IFAD Legal Guide on Contract Farming](https://www.unidroit.org/english/guides/2015contractfarming/cf-guide-2015-e.pdf) and the [UNIDROIT Principles of International Commercial Contracts](https://www.unidroit.org/unidroit-principles-2016/unidroit-principles-2016-overview/english-black-letter), is being developed by a Working Group of experts, representatives of international organisations, and stakeholders. The resulting Zero Draft is currently being circulated as widely as possible in order to solicit comments and feedback.

Structure of the ALIC Zero Draft

The instrument will address the following six main aspects:

(1) Legal framework: The applicable legal framework is made up of various domestic sources of law (e.g. legislation, judicial decisions, regulations and, in some instances, customary rules) and various international sources (e.g. international human rights treaties, investment treaties or soft law instruments). The framework may also vary according to the type of agricultural land investment contract, which might be an investment agreement, lease contract or related agreements.

(2) Parties, due diligence and formation: There are various possible parties to agricultural land investment contracts, and numerous stakeholders that could be affected by such contracts. Difficult tasks could include: (a) identifying both the holders of legal title to the land and any holders of legitimate tenure rights with respect to that land; (b) consulting with those various holders, including in customary settings in which the roles of various authorities might not be clearly defined; and (c) conducting detailed feasibility studies and rigorous impact assessments, with respect to possible tenure, social, environmental and economic impacts.

(3) Obligations and rights of the parties: The agricultural land investment contract, which may be a single agreement or series of agreements, can set out provisions addressing not only the particular tenure and related rights that are granted, but also necessary safeguards to bridge gaps in the State’s law and possible impacts of the investment.

(4) Contractual non-performance and remedies: As leases of agricultural land usually involve long-term contractual relationships, it is important to understand the inherent risks in a particular investment and to promote cooperation between the parties and stakeholders.

(5) Transfer and return: The transfer of leased agricultural land from one investor to another can raise various concerns, including whether or not the granted tenure rights are actually transferable, the transfer complies with any contractual limitations, and such transfer is disclosed to the public.

(6) Grievance mechanisms and dispute resolution: Understanding the types of grievances and disputes that commonly arise under agricultural land investment contracts and the various mechanisms for resolving them (e.g. expert determinations, negotiation, mediation, arbitration and litigation) can also create a more balanced and sustainable contract.

Your views

In this online consultation we invite you to share with us thought and inputs you may have on the Zero Draft. Comments concerning the general approach of the Guide or on specific Chapters, sections or issues would be most welcome. In particular, we are seeking feedback on the following:

1. Are there sections in the draft Guide that appear to be non-exhaustive or to have gaps in the addressed issues? If so, how would you propose to bridge them?
2. Are there sections that lack clarity? If so, how would you propose to clarify them?
3. Does the draft Guide present any sections where the content is redundant (i.e. has already been presented elsewhere)?

All comments received will be submitted to the Working Group and taken into account, as appropriate, for the draft's final revision, which is to take place between 1 October and 20 December 2019.

Subject to the final revision process in coordination with FAO and IFAD, the Legal Guide on Agricultural Land Investment Contracts will be adopted by the UNIDROIT Governing Council at its 99th session in May 2020.

Many thanks in advance for your time and valuable input.

Carlo Di Nicola

Senior Legal Officer, UNIDROIT

# Contributions received

## Dick Tinsley, Colorado State University, United States of America

An interesting subject. It looks like this is another effort for “Estate Management” of smallholder lands. If this is the case make certain you learn the lessons from past efforts in particular the major debacle of the Gizzeria Scheme the Brits attempted outside Khartoum, Sudan at the confluence of the Blue and White Nile over 100 years ago. While as a major advocate for smallholder farming, I will agree that the estate management can be more productive and provide a better opportunity to meet national food security then individual smallholders. I will also agree that it could be a toss up if an individual is personally better off economically being an independent smallholder or an estate employee. However, as you do move from one to the other it can be a sensitive shift with many issues to consider.

1. Since an estate cannot have any isolated private holder inclusions you need some form of eminent domain to assure all land is included.

2. Then if you are not outright purchasing the land and disruptively displacing people, you need some equitable relationship for the use of the land.

If I were doing it, I would look at sharecropping in which during the season of estate management the owners will receive 30% of the crop. That is basically the world-wide standard share for use of land. This would be 30% of the total estate production prorated to the farmer according to area involved and not just 30% for the land involved as time differential across the estate will make the production on individual farms unequal. I would than guarantee the farmers the opportunity to work for the estate. The combination of wage earning and share should provide a reasonable income to the farmers. Also, if the estate is only interested in one crop a year the land should be available to the owners use during the off-season for personal production of something like short season vegetables.

Anyway, just some thought on estate farming of smallholder lands.

## Jefter Mxotshwa, African Development Training Institute (ADTI), South Africa

Dear Team

After going through the document which has been worked on thoroughly, I would like to say we have done a great job.

What I could not see clearly is the political group as the target audience. These are not policy makers neither are their just other stakeholders or community but are key in influencing decisions and the implementation of such guide to rectify some sections of the law. I therefore would like a detail on the role of political groups, how they could be approached to influence land issues.

If all parties agree to this and it’s approved by some processes, how could it be marketed for domestication? Will a committee under FAO or WFP be tasked with rolling out the guide to countries and work to guide vulnerable countries involving political parties?

Dr. Jefter Mxotshwa

## FAO Publications

Here is a selection of titles proposed by FAO Publications for forum participants who would like to read more on agricultural land investment contracts.

[Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security](http://www.fao.org/3/a-i2801e.pdf)

The guidelines are the first comprehensive, global instrument on tenure and its administration. They set out internationally accepted standards of responsible practices for the use of and control of land, fisheries and forests.

[Safeguarding land tenure rights in the context of agricultural investment](http://www.fao.org/3/i4998e/i4998e.pdf)

This guide provides guidance to government authorities engaged in the promotion, approval and monitoring of investments at all stages of the investment cycle.

[Responsible governance of tenure and the law](http://www.fao.org/3/I5449E/i5449e.pdf)

This guide addresses the legal value of the Guidelines covering the governance of tenure of land, fisheries and forests by explaining the concept of legitimacy and reviewing the different stages of legislative processes, from legal assessment and law-making through implementation of legislation to settlement of disputes.

[Responsible governance of tenure: a technical guide for investors](http://www.fao.org/3/i5147e/i5147e.pdf)

This Technical Guide explains what the Voluntary Guidelines mean and how they can help firms to understand and manage risk related to land tenure.

[Legal guide on contract farming](http://www.fao.org/3/a-i4756e.pdf)

This guide is a tool for a range of users involved in these practices, in policy design, legal research and capacity-building, and will contribute to creating a favorable, equitable and sustainable environment for contract farming.

[Due diligence, tenure and agricultural investment – A guide on the dual responsibilities of private sector lawyers in advising on the acquisition of land and natural resources](http://www.fao.org/3/ca4709en/ca4709en.pdf)

This guide examines private sector lawyers’ responsibilities when advising clients on agricultural investments. It discusses how they can address, e.g. through policy statements or engagement letters, potential adverse human rights impacts on tenure rights holders.

[Enabling regulatory frameworks for contract farming](http://www.fao.org/3/I8595EN/i8595en.pdf)

This study provides guidance on appraising and reforming domestic regulatory frameworks for responsible contract farming, addressing issues such as power imbalance, dispute resolution methods and transparency.

[Model agreement for responsible contract farming − With commentary](http://www.fao.org/3/CA1772EN/ca1772en.pdf)

This paper provides practical legal tools for responsible investments. It addresses some of the challenges in contract farming, including sustainable business relationships, a transparent business environment, fair prices, and timely payments to producers.

Further reading

[Overview of the FAO Umbrella Programme Supporting Responsible Investments in Agriculture and Food Systems](http://www.fao.org/3/I6820EN/i6820en.pdf)

<http://www.fao.org/cfs/home/activities/rai/en/>

<http://www.fao.org/legal/publications/legislative-studies/en/>

<http://www.fao.org/legal/publications/legal-papers/en/>

<http://www.fao.org/tenure/resources/en/>

## Martin Zerfas, Humane Society International, United States of America

Would it be possible to add more resources and guidance related to specific issues?

The draft references the Roundtable on Sustainable Palm Oil, for example. Please consider adding a reference to the Farm Animals Responsible Minimum Standards (FARMS) Initiative's Responsible Minimum Standards (RMS), which provide technical guidance on best practice for breeding, rearing, transporting and slaughtering for five of the most farmed species. Attention to farm animal welfare has numerous benefits, including relating to food quality, food safety, environmental impact, resource usage, labor conditions and financial viability. The 1-2 page RMS are based upon principles of risk mitigation outlined in the IFC Good Practice Note on Animal Welfare in Livestock Operations. The FARMS Initiative and the RMS will be included in the Resources section of the upcoming UNEP Finance Initiative's Principles for Responsible Banking, to be launched in late-September.

The FARMS Initiative website: www.farms-initiative.com

Responsible Minimum Standards: Beef Cattle, Chickens, Dairy Cattle, Laying Hens and Pigs

Proposed description for the FARMS Initiative and the RMS to be included in Section 3.112.

"In the farm animal sector, the Responsible Minimum Standards of the FARMS Initiative provide technical guidance with respect to breeding, raising, transporting and slaughtering five of the most farmed species: Beef Cattle, Chickens, Dairy Cattle, Laying Hens and Pigs."

Thank you.

## Aliou Niang, Centre africain pour le commerce, l'intégration et le développement (CACID), Senegal

Original contribution in French

Bonjour Carlo,

Suis Dr Aliou NIANG, Jurite, chercheur et agriculteur à la fois.

Je trouve original le guide. Il y a un aspect qui me parait inntéréessant et qui doit etre abordé dans le guide et il s'agit l'éthique dans les contrats d'investissement en terre agricole. l'éthique comme comme valeur, doit constituer le fondement de ces types de contrats qui comportent des aspects économiques, des valeurs marchandes et des valeurs non marchnades telle la sécurité alimentaire, la nutrition, la protection de l'envirionnement.

Plus précisément dans le guide, il doit apparitre une partie qui traite des aspects économiques et commerciaux dans les contrats d'investissement en terre agricole et une partie qui traite des valeurs non marchandes dans ces contrats, telle l'éthique...etc.

Dr Aliou NIANG

Docteur en Droit International Economique

English translation

Hello Carlo,

I am Dr. Aliou NIANG, lawyer, researcher and farmer.

I find the guide innovative. There is one aspect that seems to me to be interesting and which must be addressed in the guide. It is the ethics in investment contracts on agricultural land. Ethics as a value must be the foundation of these types of contracts which include economic aspects, market values and non-market values such as food security, nutrition and environmental protection.

More specifically, in the guide, there should be a section dealing with economic and commercial aspects in investment contracts for agricultural land and a part dealing with non-market values in these contracts, such as ethics ... etc.

Dr. Aliou NIANG

Doctor in International Economic Law

## Aliou Niang, Centre africain pour le commerce, l'intégration et le développement (CACID), Senegal

Original contribution in French

Je propose également qu'on réserve une partie sur la Contractualisation en matière agricole entre investisseur et producteurs suivi d'un modèle type de contractualisation standar qui peut servir de guide ou de support. Merçi

Dr Aliou NIANG

English translation

I also propose that we reserve a part on agricultural contractualization between investor and producers followed by a standard model of contractualization that can serve as a guide or support.

Thank you

Dr. Aliou NIANG

## Aklilu Nigussie, Ethiopian Institutes of Agricultural Research, Ethiopia

Dear

It looks like an interesting zero draft because it has all the necessary steps, yet it can be developed to more fully fledge.

I have read the Preface it appears good; but:-

Preface1:- land tenure in Ethiopian case good gaze from points of;

* Irrigate ( where mostly encompass the low land ago-ecological areas-or pastoral, agro-pastoral and sedentary farming (crop production)
* Rainfed system (which more of to the high lander and mid altitudes); the tenure here is grazing communal and agricultural crop production system

Preface 2:- this looks great especially the corporate social responsibility might assure the smallholder's producers for future food security and the right to invest in its own land without scarcity to access capital; social welfare and livelihood development might accelerate.

Preface 3:- it is great that the guide does not promote investors for tenure transactions as it will create more unemployment and cumulative poverty with different dimensions.

## Brandon Eisler, Nutritional Diversity, Panama

Agricultural Land contracts should be made available to farm workers in responsible and functional increments, useful territories by both private owners and by government land portions.

A positive permaculture and nature conscious movement of agriculture is both very positive to our green world and can also be the cure to many social problems, health crisis and poverty.

Education and agro-redesign directives in such a contract should be very considerate of cattle and livestock maxims per portion of land, that should not be cleared completely as is currently practiced.

Education about chemical agriculture, and the many harms from it, should be attatched to contract documents.

Converting cattle land to permaculture (multipurpose) contracts should be made most available, there should be tax break incentives to those implementing sustainable ecology and systems as it is a win win for all involved, including the cows and the greater health of everything.

The most important opportunity I see, while the FAO is drawing a useful contract set(s) for land use agricultural, that certain contracts be made for poor individuals and families, with no money to start a sustainable land development, that will use zero chemicals, utilizing all natural organic farming techniques. Possibly the mere existence of this contract standard could motivate what is needed to see the new future phases of organic natural, agricultural abundance potential take hold.

Agricultural Land Investment Contracts (ALIC) also have the opportunity to mandate a 50 / 50 % split of ownership, or 100 percent ownership of 50% of the land, etc., to lands developed agriculturally within the model of sustainable organic nature, to give security to those who tend the farm using the natural methods.

Appropriations of Federal and Nation Lands should be made available for this purpose, as a way of diversifying the assets, especially in cases of clearing and fires. This can motivate a rapid response to the casualty itself, and work as a deterrent to those who may purposely see acreage burned. For example is if x amount of natural disaster acreage could be claimed by one person's name, to be used specifically in an all natural permaculture or the like method, of reforestation, we would be then working in nature so much so to take advantage of the massive ash carbon infusions to soil.

Specifications such as how much livestock is permitted per acre, can be set.

Job creation incentives should be there for governments' also the private sector to consider, such as a Reforestation & Resource Protection officials who have the power to enforce livestock limits and chemical / GMO free small family agriculture.

Private land reserve investment can motivate wildlife and ecosystem security also, and this is the perfect conscious effort for wealthy people and companies.

Certain Species can be recommended to certain geographies and ideas like rotational re-visit style permaculture through a named resource link.

I sincerely hope that the committee can take into account these opportunities while drafting up their Agricultural Land Investment Contracts.

Please also see, best diet information, to help emphasis the optimal human health benefits that come with permaculture investment. This information is also important in fueling individual motivation towards better, all natural agricultural systems.

## Joanna Grammatiki, Agroecopolis, Greece

Good evening,

Regarding the topic of the structure of the ALIC Zero Draft i believe that part 4 which is about Contractual non performance and remedies need to be clarified! What are the proposes and ideas of achieving cooperation between parties and stakeholders? Also, part 6 is an interesting issue but lacks of details!

Thank you in advance,

Joanna Grammatiki

## [Selvankumar Thangaswamy](http://www.fao.org/fsnforum/member/selvankumar-thangaswamy), Research Department of Biotechnology, Mahendra Arts & Science College, India

The contracts should cover to sustain the soil fertility and restoration of soil microbial community.

The contracts also insist to cultivate plants, not for the trees in the specified locations.

Make a regulation to cultivate common varieties i.e. nearer to the other cultivars.

## [Yixin Xu](http://www.fao.org/fsnforum/member/yixin-xu), Southwest University of Political Science and Law, China

The agriculture sector faces multiple globally interactive environmental and social challenges: greenhouse gases emissions, biodiversity loss, food security, and human rights of tenure right holders and indigenous peoples. The ALIC Zero Draft has adopted an exciting angle to tackle these issues. By focusing on the ‘investment contracts involving transaction of tenure and related rights’, the guide actually contributes to setting in advance the framework for actors and activities on the agricultural land in the future.[[1]](http://www.fao.org/fsnforum/activities/discussions/ALIC#_ftn1) I also find it very insightful and comprehensive in terms of avoiding conflicts between various actors and improving their performances on sustainable agricultural practices.

Before going into detail, I was wondering could the working group clarify the following points about references?[[2]](http://www.fao.org/fsnforum/activities/discussions/ALIC" \l "_ftn2" \o ")

a.  ‘the Guide refrains from making specific references to States, identifying particular domestic legislation, citing case studies or quoting contract clauses.’

Does this mean the guide refrains from citing domestic cases or also from cases from international courts or arbitrations?

b.  ‘Instead, the Guide refers to international instruments…’

The following example documents are mainly international declarations and guidance, i.e., non-binding. Does the guide also refer to relevant binding international treaties or cases from international courts?

For instance, 3.111 ‘…international courts increasingly require States to conduct and demand an environmental impact assessment…’. A footnote with relevant case numbers will be helpful to support this claim.

[[1]](http://www.fao.org/fsnforum/activities/discussions/ALIC#_ftnref1) Preface 4. Focus and Guidance. ALIC Zero Draft, UNIDROIT/FAO/IFAD (2019), p. 11.

[[2]](http://www.fao.org/fsnforum/activities/discussions/ALIC#_ftnref2) Preface 8, References, ALIC Zero Draft, UNIDROIT/FAO/IFAD (2019), p. 12.

## Yixin Xu, Southwest University of Political Science and Law, China (second contribution)

I am also wondering whether the revision of the Zero Draft can include a format contract for users in practice as an annex attached to the guidelines. Thorough explanations and reasoning are beneficial for legal professionals, researchers, and legislators. However, the guide may be too complicated for a layman to comprehend. Notably, in rural areas in developing countries, lawyers are not so popular or widely asked to participate in contract matters. The involved lawyers from the grantors’ side may not have full professional proficiency in English. Therefore, straightforward contract clauses may be more helpful to make the guide more practice-oriented for developing countries.

The contract template can comprise a complete set of optional clauses written in a simple and clear format including fundamental operational issues and arrangements ensuring legitimate tenure rights and responsible/sustainable agriculture investment. There is not a well-known contract template published yet by any independent and authoritative organizations, especially from a perspective of contributing to sustainable development. Parties who are to be engaged in such a transaction can use this document as the basis to formalize a contract by editing, adding, or deleting clauses as they wish.[[1]](http://www.fao.org/fsnforum/activities/discussions/ALIC#_ftn1) Allowing modifications to the template is essential because it gives flexibility to the practitioners and increases the viability of the guide. At the moment, we cannot expect that all projects in relevant countries can apply the same level of responsible practices.

[[1]](http://www.fao.org/fsnforum/activities/discussions/ALIC#_ftnref1) Preface 4. Focus and Guidance. ALIC Zero Draft, UNIDROIT/FAO/IFAD (2019), p. 11.

## Yixin Xu, Southwest University of Political Science and Law, China (third contribution)

Another point relevant to the target audience is that I am worried that the private parties may not voluntarily apply these guidelines because measures to enhance environmental protection and human rights will increase costs.[[1]](http://www.fao.org/fsnforum/activities/discussions/ALIC#_ftn1) Foreign private investors may not voluntarily follow the guidelines unless there is enough price premium for more responsible agriculture activities or company branding. Then this process would need to involve independent certification schemes. Additionally, the local farmers in developing countries may not care about the environment or other long-term benefits to the extent of reducing their yearly income.[[2]](http://www.fao.org/fsnforum/activities/discussions/ALIC#_ftn2) Hence, they may not voluntarily apply the guidelines at the cost of lower income in the short term.

[[1]](http://www.fao.org/fsnforum/activities/discussions/ALIC#_ftnref1) Preface 9, Target Audience, ALIC Zero Draft, UNIDROIT/FAO/IFAD (2019), p. 12. J. M. Rodriguez, et al. "Barriers to adoption of sustainable agriculture practices: Change agent perspectives." Renewable Agriculture and Food Systems 24.1 (2009), pp. 60-71.

[[2]](http://www.fao.org/fsnforum/activities/discussions/ALIC#_ftnref2) W. E. Oates & R. M. Schwab, ‘Economic Competition among Jurisdictions: Efficiency Enhancing or Distortion Inducing?’ (1988) 35 (3) Journal of Public Economics, pp. 333-54, at 351. E. Hettig, J. Lay & K. Sipangule, ‘Drivers of Households’ Land-Use Decisions - a Critical Review of Micro-Level Studies in Tropical Regions’ (2015) 5 (4) Land, pp. 1-32, at 18.

## Policarpo Tamele, Entrepreneurship Developement Agency, Mozambique

Dear

First, thank you for the topic and the debate.

On the subject, I think it is necessary to create a legal framework that can safeguard the investor, family producers, entrepreneur. In the case of Mozambique, there is a law called Law and Use of Land Use, which unfortunately has fragility in the defense of rights mainly to family farmers, peasants. So with Legal Guide os Agricultural Land Investiment Contracts I believe it will safeguard the use and safety for investors primarily.

## Yixin Xu, Southwest University of Political Science and Law, China (fourth contribution)

Dear,

Thank you for your response.

Regarding your comment 'So with Legal Guide os Agricultural Land Investiment Contracts I believe it will safeguard the use and safety for investors primarily,' I think the legal guide also shows its intention to protect the rights of local tenure right holders.

The guide states in Preface 4. Focus and guidance (Alic zero draft p.11)

*'The Guide, however, focuses on contracts between investors and governments and investors and local communities and, in doing so, places particular emphasis on protecting and respecting the rights of legitimate tenure right holders.'*

It also shows an intention to promote the protection of small tenure right holders at other places, for example:

Intro 5, 'The failure to identify, consult and seek participation from any legitimate tenure right holders and, where applicable, obtain free, prior and informed consent (FPIC), is inconsistent with international principles and standards and may undermine those holders’ rights, the investment and even the tenure system itself, particularly when it is based on commons. The parties, instead, are to conduct the necessary due diligence and consultations in this regard, to involve legitimate tenure right holders in the preparations and to work in partnership with them...' (Alic p.14)

*Intro. 6. Complexity. '...Indeed, if an investment fails to protect and respect the rights of legitimate tenure right holders, it should not proceed.'*

Hence, I wonder whether it would be better to seek a balance between investors and local land grantors so that economic interests can be achieved simultaneously for both parties, as well as social and environmental benefits.

## Yixin Xu, Southwest University of Political Science and Law, China (fifth contribution)

Among the target audience, I think national legislators and local governments in developing countries who aim to promote the long-term benefits of a local area may be willing to adopt these guidelines. However, a barrier in practice is that the governments are lack of institutional capacity and funding to motivate and monitor the application of the guidelines by practitioners.

Furthermore, I think the guide would also be a valuable reference for the assessing criteria of two self-regulating entities: independent certification schemes for sustainable agricultural products and multilateral funds supporting projects to address environmental and social problems in agriculture activities.

## Abdesslam Omerani, Haut Commissariat aux Eaux et Forêts et à la Lutte Contre La Désertification, Morocco

Original contribution in French

*1. Y a-t-il dans le projet de guide des sections qui semblent ne pas être exhaustives ou qui présentent des lacunes dans les questions traitées? Dans l'affirmative, comment pensez-vous les combler?*

Il est à mon sens important d'inciter aux pratiques tendant à la préservation des écosystèmes et la durabilité de leurs services en les rendant profitables aux agriculteurs, agissant individuellement ou en groupements.

Ainsi, la prise en compte de dispositifs de paiements pour services éco systémiques dans les contrats d’investissement en terres agricoles favoriserait, en assurant l'internalisation d'externalités environnementales, la régulation des activités agricoles et forestières.

Ces PSE permettraient, dans l’optique de la promotion d’une solidarité territoriale et générationnelle, de rémunérer les agriculteurs, fournisseurs ou protecteurs des services environnementaux, par les bénéficiaires de ces services. Les parties impliquées dans ces arrangements pourraient être des personnes privées et les pouvoirs publics ou des personnes privées uniquement.

English translation

*1. Are there any sections in the draft guide that do not appear to be exhaustive or that are deficient in the issues addressed ? If so, how do you plan to address them?*

In my opinion, it is important to encourage practices aimed at preserving ecosystems and ensuring the sustainability of their services by making them profitable for farmers, individually or in groups.

Thus, the inclusion of payment schemes for eco-systemic services in investment contracts for agricultural land would promote the regulation of agricultural and forestry activities by ensuring the internalisation of environmental externalities.

With a view to promoting territorial and generational solidarity, these PES would make it possible to remunerate farmers, suppliers or protectors of environmental services, through the beneficiaries of these services. Parties involved in such arrangements could be private persons together with public authorities or private persons only.

## Yixin Xu, Southwest University of Political Science and Law, China (sixth contribution)

Indeed, a guide cannot make every interest group happy. However, a widely applicable guide with a practical dimension should provide everyone something they need. Foreign investors, grantors, national legislators, NGOs providing aid to negotiating a contract, and third-party certification schemes, every actor has different focuses, perspectives, rights, and responsibilities. The guide has done an impressive job of handling their roles. What would be more helpful is to give guidance from different perspectives and follow the same order of discussion on every issue. For example, in Part I Chapter 2 about legitimate tenure right, the guide can start with the rights and responsibilities of the investors, issues they need to pay particular attention. Then goes to local tenure rights holders, the local or national regulator, and NGOs and third parties afterward.

## Fabiano de Andrade Correa, FAO, Italy

Dear all,

This is a valuable resource in an area where not sufficient guidance is available, I believe it will be a helpful instrument for the stakeholders involved.

One suggestion would be to make the document a bit more 'digestible' for readers, as it is quite long and complex. As suggested by some below, a summary with quick guidance by topic focusing on the different stakeholders (e.g. investor, grantor, legitimate right holder, etc) could be developed, building on the checklist already prepared at the end of the draft, and potentially including potential 'model clauses', (though the latter is a complicated undertaking).

## Fabiano de Andrade Correa, FAO, Italy (second contribution)

A concern of mine (as a lawyer worried about precision of language) is with regards the term "responsible investments". I would suggest to provide a definition of it, and also to maintain consistency as sometimes “responsible investment” is used, others “responsible and sustainable” - both subjective terms for which no definition is provided.

Here's a suggestion that could be adapted as needed: Responsible agriculture investment can be defined as the “creation of productive assets and capital formation, which may comprise physical, human or intangible capital, oriented to support the realisation of food security, nutrition and sustainable development”. It requires “respecting, protecting and promoting human rights, including the progressive realisation of the right to adequate food in the context of national food security”, and “entails respect for gender equality, age, and non-discrimination and requires reliable, coherent and transparent laws and regulations” (CFS RAI Preamble). The VGGT further adds that responsible investments should “do no harm, safeguard against dispossession of legitimate tenure right holders and environmental damage (VGGT 12.4). In addition, the VGGT notes that while States “should promote responsible investments in land, fisheries and forests (12.1) and “provide safeguards to protect legitimate tenure rights, human rights, livelihoods, food security and the environment” (12.6), investors also have a “responsibility to respect national law and recognize and respect tenure rights of others and the rule of law” (12.12)".

Would also be interesting to hear the insights of other members of this Forum about this term, how it is perceived and what it entails, and how would national policy makers view it.

## Fabiano de Andrade Correa, FAO, Italy (third contribution)

Another consideration I would add, is a reflection on the role for the laws of the investor’s state in incentivizing/requiring responsible investments - as this is not explored in the guide or mentioned as an area of concern for those performing due diligence.

The VGGT (12.15) says that when states invest or promote investments abroad, they should ensure that their conduct is consistent with the protection of tenure rights, food security, etc.

So should also a paragraph be inserted to expand a bit more on this issue?

Some suggested sources where this is discussed:

http://www.fao.org/3/a-i5802e.pdf

http://www.foncier-developpement.fr/publication/guide-to-due-diligence-of-agribusiness-projects-that-affect-land-and-property-rights/

<https://www.land-links.org/wp-content/uploads/2016/09/USAID_Operational_Guidelines_updated.pdf>

## Fabiano de Andrade Correa, FAO, Italy (fourth contribution)

With regards to the section on the rights and obligations of the parties (chapter 3), food security and realization of the RTF is the CFS RAI principle 1, yet it is not mentioned among the social/economic issues. Is this something that should be included, and that need to be considered when negotiating an investment in agriculture?

For the state the obligation is more obvious, but does the investor also have a responsibility to safeguard FS in the host state, e.g. through a due diligence not to invest in crops that would potentially present a challenge for FS such as biofuels or export crops? What is the balance here?

Public health (e.g. pest control) and phytosanitary standard concerns are also not mentioned, but could also be contemplated under a contract (CFS RAI 8)?

## Wei Yin, Southwest University of Political Science and Law, China

Generally speaking, it shows that the guide, once finalised, may contribute to sustainable investment in agricultural land and the implementation of the Sustainable Development Goals (SDGs). The aim of this guide is of value. But for a more practical and useful guide, there might be something that needs to be improved. The first thing that I intend to raise is similar to one of the recent contributions below, i.e. the definition of 'sustainable investment', 'responsible and sustainable investment' and similar expressions. It would be helpful, if the guide can provide definition of these terms for the purpose of realising the aim of this guide. In academic papers, policy papers and/or some international soft law instruments or statements, these terms do not have a shared or unified definition, but usually there are some key elements that were usually mentioned to defining these terms. Since this guide focuses on Agricultural Land Investment Contracts, it is important to define these terms in this field, providing specific elements or factors. Secondly, as a guide for different stakeholders or to be adopted by different parties, the structure and content of the guide need be clear and easy to read and follow. Although the table of content follows a clear order but in each Chapter, the content is not in a proper order or the content or main point of each paragraph is not that clear or reader-friendly. Thirdly, I want to raise a small technical question in relation to ‘local communities’. For the contract between investors and local communities, even though the word of ‘local community’ is known to many people or entities, but in some countries, the meaning or definition of ‘local community’ is not clear or even in some countries, the so called ‘local community’ cannot sign land contract with other investors.

## Wei Yin, Southwest University of Political Science and Law, China (second contribution)

In every part of this draft guide, I can see the intention of drafting organisations to contribute to sustainable and responsible investment in agricultural land and to achieve goals set in SDGs, in particular those in relation to agriculture and food. The guide mentioned CSR, responsible business conduct, and also mentioned negative risks (e.g. human rights, social and environmental impacts) that may occur if investment is not sustainable. However, the guiding instruments as the basis for this guide mainly focuses on human rights, while other relevant instruments in relation to social and environmental elements can seldom be seen in this guide. And in page 14-Intro 5, the guide mentions the consistence with the UN Guiding Principles, the VGGT, the CFS-RAI Principles and other international instruments. What does the ‘other international instruments’ refer to? For Chapter 6 – Grievance Mechanisms and Dispute Resolution, grievance mechanisms can also be regarded as a kind of dispute resolution mechanism and it might be a judicial one or non-judicial one. The classification of dispute resolution mechanisms and the order or title of this part can be reconsidered. The guide mentions Mediation in Chapter 6, however, it would be helpful if the guide can mentions the United Nations Convention on International Settlement Agreements Resulting from Mediation-Singapore Mediation Convention in the part of ‘Enforcement of Settlements or Decisions Resolving A Dispute’.

## [Yixin Xu](http://www.fao.org/fsnforum/member/yixin-xu), Southwest University of Political Science and Law, China (seventh contribution)

The ALIC zero draft has mentioned many times that environmental issues are one of the important components of the bargain.[[1]](http://www.fao.org/fsnforum/activities/discussions/ALIC#_ftn1) The draft provides four pathways to ensure positive environmental results, whereas some of them are slightly hidden in the texts. After explaining that there are national and international laws on relevant environmental issues, the draft mainly addresses these issues by suggesting a feasibility study for the investors to be aware of the environmental risks and environmental impact assessments (EIA) as required by the law.[[2]](http://www.fao.org/fsnforum/activities/discussions/ALIC#_ftn2) The draft also suggests that ‘in response to these potential impacts, investors ought to prepare management programs that create operational procedures, practices, plans, and legal agreements ... These ought to include environmental and social action plans with measurable targets as well as for monitoring and review as well as for stakeholder...’[[3]](http://www.fao.org/fsnforum/activities/discussions/ALIC#_ftn3) Lastly, the investor may be obliged to pay compensation for the misuse of the land as discussed in Chapter 5.[[4]](http://www.fao.org/fsnforum/activities/discussions/ALIC#_ftn4)

These pathways are thoroughly listed in the text, whereas the draft should also make it more evident in the table of contents and make it more visible with subtitles. Then it would be easier for practitioners to locate where to look when the non-performance, transfer, and dispute are about environmental issues in Chapters 4, 5, and 6.

Also, it is doubtful whether international and national legal systems can provide a credible EIA to mitigate environmental risks, hence they may not be able to provide ‘assurances that environmental standards will be maintained’.[[5]](http://www.fao.org/fsnforum/activities/discussions/ALIC#_ftn5) The EIA is sometimes not binding under international law. For instance, in the case of CDM agriculture activities, whether to conduct an EIA is subject to the decision of the designated national authority, and relevant international agencies do not conduct a substantial review.[[6]](http://www.fao.org/fsnforum/activities/discussions/ALIC#_ftn6) The national/local authorities may have deficient standards or lack of the institutional and financial capacity to hold a credible EIA.[[7]](http://www.fao.org/fsnforum/activities/discussions/ALIC#_ftn7)

It is a smart idea to ask investors to make environmental plans to prevent future risks. It has happened in international cases, that a project was terminated because the NGOs discovered significant adverse environmental impacts during the implementation. In the case concerning Gabcίkbvo-Nagymaros project, the International Court of Justice (ICJ) ruled the Hungarian government to continue the project, and both parties should apply newly developed norms of environmental law.[[8]](http://www.fao.org/fsnforum/activities/discussions/ALIC#_ftn8) However, would the private investors be willing to bear such a responsibility (as suggested below, state maybe investors as well. But the discussion here focuses on the private investors)? For those who invest in sustainable agricultural production, are they institutionally and financially capacity to design and implement a mechanism that even international and national authorities could hardly achieve, and then what kind of mechanism it would be? If it is possible, the revision of the draft would be very beneficial for the investors to give more details on the design of such a mechanism (combining operational procedures, practices, plans, legal agreements, and action plans) to mitigate environmental risks.

[[1]](http://www.fao.org/fsnforum/activities/discussions/ALIC#_ftnref1) E.g. ALIC Zero Draft, UNIDROIT/FAO/IFAD (2019), p. 17, 23

[[2]](http://www.fao.org/fsnforum/activities/discussions/ALIC#_ftnref2) Ibid., p. 24

[[3]](http://www.fao.org/fsnforum/activities/discussions/ALIC#_ftnref3) Ibid., p. 47

[[4]](http://www.fao.org/fsnforum/activities/discussions/ALIC#_ftnref4) Ibid., p. 116

[[5]](http://www.fao.org/fsnforum/activities/discussions/ALIC#_ftnref5) Ibid., p. 24

[[6]](http://www.fao.org/fsnforum/activities/discussions/ALIC#_ftnref6) Para. 132, Annex 1, Clean Development Mechanism Validation and Verification Manual, CDM EB 55 Report, p. 26.

[[7]](http://www.fao.org/fsnforum/activities/discussions/ALIC#_ftnref7) Ibid., p. 112; L. Schneider, Is the CDM Fulfilling its Environmental and Sustainable Development Objectives? An Evaluation of the CDM and Options for Improvement. Öko-Institut for Applied Ecology, 2007 (248), p. 1685.

[[8]](http://www.fao.org/fsnforum/activities/discussions/ALIC#_ftnref8) ICJ, Summaries of Judgments and Orders, Case Concerning Gabcίkbvo-Nagymaros Project (Hungary/Silovakia), Judgment of 25 September 1997.

## [Wei Yin](http://www.fao.org/fsnforum/member/wei-yin)****,**** Southwest University of Political Science and Law, China (third contribution)

In the part of IV. Protection of Investment and Regulatory Autonomy, there are few things that need to be improved or clarified. First, in 3.126, the guide mentions ‘domestic investment codes’, but I would suggest not to use the term ‘codes’ but ‘law’ or ‘rules’ or ‘regulation’ since in many countries they do not have investment “codes” but investment law, or regulation, or provisions in relation to investment in other codes or law. The term of ‘codes’ is not frequently used in investment law field. In 3.132, when mentioning ‘indirect expropriation or regulatory taking’ or ‘tantamount’, other similar alternatives or terms can be also mentioned for wide readers, e.g. ‘creeping’, or ‘de facto’ expropriation. In 3.134 (page 79), whether the examples of ‘discounted cash flow method, book value, replace value’ can be further explained or with footnotes provided. In 3.139 (page 80) and 3.140, it would be helpful if the term ‘economic equilibrium clauses’ or ‘stabilisation clauses’ can be explained since many other people may not be familiar with these technical terms. Actually, there are two basic types of stabilisation clause, i.e. ‘freezing clauses’ and ‘economic equilibrium clause’. The guide in this part may have to clarify the relation of these clauses to make readers clearly understand it. In addition, this part seems to provide an approach or an view to address or reflect the conflict between protection of investment and protection of the right to regulate and try to make a balance, however, the obligation (binding or non-binding) of investors has seldom been mentioned. It seems that the view of this part is mainly to provide measures or approaches that the government can take to balance this conflicting interest but not the measures or approaches that the government can take to protect its right to regulate, i.e. countermeasures. The guide mentioned CSR, responsible business conduct or similar expression but in this part these terms do not appear. Given that, for the readers, the obligation or soft responsibility of investors is not a key issue but this is also very important for the purpose of achieving sustainable investment.

## [Omoyemen Lucia Odigie-Emmanuel](http://www.fao.org/fsnforum/member/omoyemen-lucia-odigie-emmanuel), Centre for Human Rights and Climate Change Research/ Nigerian Law School, Nigeria

**CHAPTER 1 - THE LEGAL FRAMEWORK**

**1.1.** Overview. An appropriate and effective legal framework can foster responsible agricultural investment and incorporate necessary safeguards to protect legitimate tenure right holders, human rights particularly the right to food, livelihoods, food security and the environment. The legal framework applicable to an agricultural investment is made up of the law of the State in which the land is located (including customary law), international law (e.g. treaties, custom and principles of law), and the agricultural land investment contract, of which the State’s law is the most important component.

**1.2.** Interplay between domestic law and the contract. At its best, domestic law creates a level playing field for all comparable investments, reflects policy choices made through democratic processes, and establishes transparent and public terms. In those situations, an agricultural land investment contract might only need to address a narrower set of issues (e.g. location of the land, rental rates, and community development aspects). In other situations, however, the law might not address critical issues, or there might be gaps in its implementation. In these instances, an agricultural land investment contract could include provisions and covenants addressing, to the extent possible, such issues or gaps needed to protect right holders. Under either scenario, the agricultural land investment contract plays a significant role in the legal framework applicable to an agricultural investment.

**1.3.** Freedom of contract. As a general matter, parties are free to enter into a contract and to determine its content how they see fit, based on the freedom of contract.1 In transactions involving governments and local communities in an area as critical to the realization of the right to food and food security, human rights and environmental protection as agricultural investment, however, that freedom is subject to various mandatory rules, which restrict the parties’ freedom of contract without jeopardizing customary tenure system and land rights.

**1.4.** Mandatory rules. The agricultural land investment contract must comply with mandatory rules whether of national, international or supranational origin. Mandatory rules of national origin are those enacted by States autonomously which cannot be varied by express agreements of the parties (e.g. legislation or judicial decisions), while mandatory rules of international or supranational origin are those derived from international conventions (e.g. human rights conventions), custom and principles of law or adopted by supranational organisations (e.g. EU competition law). The Guide’s notion of such rules is meant to be broad. In some domestic systems, for example, mandatory rules may also derive from general principles of public policy (e.g. prohibition of corruption, protection of human dignity, prohibition of discrimination on the basis of gender, race or religion).2 If the parties’ contract fails to comply with those rules, it runs the risk of being unenforceable and overturned, thereby undermining the agricultural investment.

**1.11.** Customary and Religious rules. While legal professionals are likely familiar with the roles of legislation, regulations and judicial decisions in various legal systems, often there is not the same level of familiarity with customary and religious rules. Such rules may play a significant role in some legal systems, and they often derive from practices, traditions and religion, may be neither codified nor written, and may deal with matters such as personal status, family relationships, inheritance, governance and use of land and other natural resources, rights over livestock or seasonal rights to land for the grazing of livestock. Those latter rights may also be collective and pertain to the whole community. With respect to agricultural land investment contracts, customary rules and religious may deal with who is entitled to hold rights to land, the capacity of persons to enter into and execute an agreement on behalf of group right holders, the validity of agreements, issues of form and evidence, or performance and sanctions for non-performance. Such rules may be exclusionary and inconsistent with human rights and public policy, for example by prohibiting women from owning or inheriting land or from entering into contracts.

**1.12.** Recognition of customary and religious rules. Customary and religious rules are recognised in certain States, by the State’s constitution, statute or judicial decision. The applicability and scope of these rules, how they are recognised, and how possible conflicts between the various autonomous legal orders are to be solved, depend on the particular features of each State’s legal system. In other settings, customary rules and religious rules may be applied by courts as local customs or usages,6 and these two concepts are often conflated. Even when a particular practice or tradition does not legally amount to a custom, the parties to an agricultural land investment contract should carefully take them into account in their dealings, especially when the relationship has a strong social, cultural and personal dimension. In this regard, the parties should also keep in mind that there may be differences, for example, between how a State’s court interprets and applies a local community’s customary rules and how those communities interpret and apply them.

**1.22.** Human rights. Various human rights instruments establish civil, cultural, economic, environmental, political and social rights. States have a duty to respect, protect and fulfil such rights,16 and investors have a corresponding responsibility to respect human rights and to identify and assess the potential negative impact their investment would have on rights and establish precautionary ,easure to avoid such negative impacts and also to remedy any negative impacts they have on such rights.17 There are various areas of human rights law that might be affected by agricultural investment including, inter alia:

• Food security and the right to food: Ensuring food security for all and the progressive realisation of the right to adequate food are central tenets of the VGGT and the CFS-RAI Principles.18 In accordance with the VGGT and CFS-RAI Principles, a host State’s legal framework may contain laws or regulations that seek to ensure food security, for example, by temporarily banning the export of food if there is a threat to food in that State. Because an agricultural investment could pose as an obstacle to pose as an emerging obstacle to the right food thus negatively affect food security. ~~and a~~ Any perceived threat to food security could provoke strong local opposition to a possible agricultural investment, it is essential that a risk assessment be conducted in this regard (see Chapter 2.IV.B.2).

## Yixin Xu, Southwest University of Political Science and Law, China (eighth contribution)

Another idea that may be interesting for the parties is the possibility to combine multilateral funding for sustainable agricultural activities. There are multilateral funds that support biodiversity conservation, climate change mitigation and adaption, and capacity building, such as the Global Environmental Fund, Green Climate Fund, and Adaptation Fund. If the planned agriculture activities are relevant to any of those themes above, the parties may consider applying for additional funding and repay with the positive environmental and social results that would be generated regardless. In this context, the parties may need to arrange in their investment contract, which area is for such funding and their relevant rights and responsibilities.

## [Yixin Xu](http://www.fao.org/fsnforum/member/yixin-xu), Southwest University of Political Science and Law, China (ninth contribution)

Regarding the certification schemes for sustainable agricultural products and supply chains, the draft may also consider adding more clarifications and details. Several separate places mentioned relevant concepts very briefly: para. 2.26. ‘certification providers’ (p. 30), para. 2.56 ‘certification schemes’ (p. 36), para. 3.112 ‘private standards and multi-stakeholder certification schemes’ (p. 74), para. 3.122 ‘private certification schemes’ (p. 77), para. 3.150, ‘certification bodies, which may be public or private entities’ (p. 82). It may be stronger to provide a clear definition at the beginning and explain a bit more about how these certification schemes operate and specific rights and responsibilities that need to be agreed on in the land investment contracts.

## [Yixin Xu](http://www.fao.org/fsnforum/member/yixin-xu), Southwest University of Political Science and Law, China (tenth contribution)

Some private companies are willing to invest in sustainable agricultural activities to show their leadership in addressing global environmental or social challenges. However, these investing companies themselves may not be specialized in agricultural projects. Instead of investing directly, they may seek intermediaries. Such intermediaries may have various forms, such as development banks and private companies. They usually have their own teams of experts and codes of conduct. Many explanations of basic legal knowledge may not be helpful for them. For instance, ‘this is because domestic courts can exercise compulsory personal and subject matter jurisdiction over persons and disputes located in that State’s territory’(p.123). Hence, after defining a clear scope of the audience in the revision, the draft may consider rearranging the structure of texts so that legal experts can locate the core issues easier.

## Wei Yin, Southwest University of Political Science and Law, China (fourth contribution)

There are few things that can be improved in Chapter 1- The Legal Framework. First, after reading this chapter, the structure and classification of each part is not that clear and sometime overlap. It would be helpful if the drafting team can reconsider a more logical structure of this chapter. Second, in 1.5 (page 15), it mentions ‘customary land rights’ and ‘customary rights’. Would it possible to provide footnotes or examples on this? In 1.8 – Domestic legal system in general, it mainly discusses and/or mentions constitution or constitutional system. While, in some countries, the institution does not specifically mentions contract regulation or provide information on how to regulate contract with public factors. This part can provide few more general information concerning the domestic legal system. In part A-Domestic Sources 1.10, the guide use ‘legal rules’ to include all mandatory domestic legal sources, but I have some reservations about it. The case law may not be described as ‘rules’. The guide puts the 1.10, 1.11, and 1.12 into parallel parts, while it seems that the three parts might not be the same level. Or it would be nice if considering putting the ‘customary rules’ and ‘recognition of customary rules’ in one part with sub-titles. There are also overlaps in part B- International sources and Part II. Relevant Areas of Law, especially when mentioning international instruments concerning human rights. In 1.21, the guide mentions applicable tax and finance regime, but in the bullet points, it only emphasises fiscal regime and accounting standards.

## [Fabiano de Andrade Correa](http://www.fao.org/fsnforum/member/fabiano-de-andrade-correa), FAO, Italy (fifth contribution)

I'd also raise a point with regards to FPIC, and its potential applicability beyond indigenous communities. Though it was originally formulated with regards to indigenous peoples, FPIC is nowadays considered an applicable principle to all types of communities potentially affected by land transactions. In fact, FPIC is nowadays considered an expression of the realization of different human rights (adequate housing, culture, etc.)

In addition, the VGGT Technical Guide on FPIC emphasizes that, as an expression of the right to self determination, “FPIC can be fairly interpreted as applying to all self-identified peoples who maintain customary relationships with their lands and natural resources, implying it is enjoyed widely in rural Africa and Asia” (for instance).

In this regard, shold the guide make reference for consultations with other non IP communities tofollow the FPIC standards and allow a “right to say no”?

Attachment:

<http://www.fao.org/fsnforum/sites/default/files/discussions/contributions/ALIC%20Zero%20Draft%201%20June%202019%20ID%20%28CLEAN%29%20-%20FAC%20comments%20Oct%202019.docx>

## [Yixin Xu](http://www.fao.org/fsnforum/member/yixin-xu), Southwest University of Political Science and Law, China (eleventh contribution)

The newly amended Land Administration Law of the People's Republic of China was issued on 26th August 2019 and will become effective from 1st January 2020. It shares some common ground with the ALIC. It prioritizes biodiversity conservation and sustainable development (Art. 18). The acquisition of land is limited to clearly defined purposes and procedures (Art. 45-7). The amendment strengthens the protection of tenure right holders (Art. 48) and simplifies the procedure of the transaction of land tenure rights to non-local entities and individuals (Art. 13).

Considering the international audience of the ALIC, it would be beneficial to have an appendix at the end showing the available official online sources of relevant countries’ national legislation.