



GOVERNING COUNCIL
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Item No. 10 on the agenda: Private law and development

(a) Private Law Aspects of Agricultural Finance

**(b) Guidelines for a legal framework for social enterprises
(or for a certain type of social enterprise)**

(Memorandum prepared by the Secretariat)

<i>Summary</i>	<i>Future work in the area of private law and development</i>
<i>Action to be taken</i>	<i>Request for authorisation by the Council to continue preliminary research</i>
<i>Mandate</i>	<i>Work Programme 2011-2013</i>
<i>Priority level</i>	<i>Medium / Low</i>
<i>Related documents</i>	<i>UNIDROIT 2010 - C.D. (89) 7 Add 4 and 5</i>

I. INTRODUCTION

1. At its 88th session, the Governing Council considered a memorandum by the Secretariat containing a number of preliminary thoughts on the possibility of UNIDROIT opening a line of work specifically devoted to the interplay between private law and economic and social development (UNIDROIT 2009 - C.D.(88) 7 Add. 6), and the Council agreed that the broad mandate of UNIDROIT in the area of private law offered a wide range of opportunities for the Organisation to contribute to the achievement of development goals agreed upon by the international community: opening a line of work specifically devoted to the interplay between private law and economic and social development, in particular in the area of agricultural investment and production, but also in the area of legal aspects of social businesses might also permit to better explore synergies with other inter-Governmental organisations and to develop joint projects in co-operation with them.¹

2. At its 89th session, the Governing Council considered two documents prepared by the Secretariat: one on "Private Law Aspects of Agricultural Finance" (UNIDROIT 2010 - C.D.

1 See document UNIDROIT 2009 - C.D. (88) 17, Report on the Session, paragraphs 87 – 98.

(89) 7 Add. 4) and one on “Guidelines for a legal framework for social enterprises (or for a certain type of social enterprise)” (UNIDROIT 2010 - C.D. (89) 7 Add. 5).

A. Private Law Aspects of Agricultural Finance

3. The Secretariat memorandum suggested that UNIDROIT could make a contribution in areas of private law that might be involved in foreign direct investment (FDI) in the agricultural sector such as property law or financing and the commercial law aspects that come into play in the negotiation and performance of FDI agreements in the agricultural sector. While a great deal of work is being done internationally to assist domestic legislators in improving the legal framework for secured transactions, and other initiatives in the form of providing advice or establishing national or regional programmes deal with the private law aspects of specific activities of enterprises operating in the rural sector, there does not however appear to be any international guidance document presenting the results of all of these instruments and studies and the way in which they apply to the private law aspects of transactions in the agricultural sector. The Secretariat memorandum suggested that the preparation of such an instrument, possibly in the form of a legislative guide, might provide a useful addition to the specific advice already available. The instrument should propose various options suitable for countries having different legal traditions and discuss their respective advantages and disadvantages from the point of view of the overall objective of promoting investment in agricultural production and facilitating access to rural credit.

4. The Secretariat memorandum concluded by proposing to continue preliminary research on agricultural finance as the first item of the general subject “Private Law and Development”, with a view to identifying areas relating to the financing of agricultural investment and production in which UNIDROIT could make a meaningful contribution. As a first step to that end the Secretariat envisaged organising, in cooperation with other international organisations, a colloquium in the first half of 2011 on the legal aspects of agricultural financing in order to collect information on the work done at international level in the area and assess the need for, and desirability of, developing legislative guidance on selected areas of private law that could have an impact on the availability of financing for agricultural production. This proposal was endorsed by the Council, which decided to recommend the inclusion in the Institute’s Work Programme of the topic “Private Law Aspects of Agricultural Finance”,² and this recommendation was endorsed by the General Assembly of UNIDROIT at its 67th session held on 1st December 2010.

B. Guidelines for a legal framework for social enterprises (or for a certain type of social enterprise)

5. Acting on a proposal submitted by the International Development Law Organization (I.D.L.O.) to the UNIDROIT Governing Council at its 88th session to study the possibility of a joint project between the two Organisations for the preparation of a legal regimen governing social enterprises, the UNIDROIT Secretariat prepared a preliminary study contained in a document which was submitted to the Governing Council at its 89th session (UNIDROIT 2010 – C.D. (89) 7 Add. 5). The study explored the growing importance of the role of bodies which combine a social objective and an entrepreneurial dimension and whose functions may be carried out in a wide range of traditional forms: co-operatives, associations, foundations, non-profit entities or other third sector entities, and even bodies set up as commercial companies. However, the legal regimen governing these different bodies – typically conceived for non-commercial activities in the case of the former but for the personal profit of the owners in the case of the latter – raises difficulties which hinder the recognition of these enterprises, their activities and their development.

2 See document UNIDROIT 2010 - C.D. (89) 17, Report on the Session, paragraphs 112 – 115.

6. Based on examples of the experiences of several countries, the Secretariat's study proposed to establish, at international level, a legal framework for social enterprises in general – or for a particular type of social enterprise – aimed at promoting this form of enterprise in those countries lacking an appropriate legal regimen or wishing to accommodate such additional type of enterprise, and at enhancing the recognition of this type of enterprise at the international level in the context of transnational investment or the development of networks of social enterprises. The Governing Council acknowledged the interest of the project whilst stressing its complexity, in a field where the national imprint is particularly marked, and, subject to IDLO's obtaining the necessary outside funding, agreed to recommend that the project be included in the Institute's triennial Work Programme 2011-2013.³ This recommendation was endorsed by the General Assembly of UNIDROIT at its 67th session held on 1st December 2010.

II. DEVELOPMENTS SINCE THE 89th SESSION OF THE GOVERNING COUNCIL

A. Private Law Aspects of Agricultural Finance

7. With a view to determining more precisely the content and form of possible future work by UNIDROIT in this regard, the Secretariat engaged in informal consultations, in particular on the basis of a draft programme of a Colloquium which was initially scheduled to be held during the first quarter of 2011. Bearing in mind both the priority given to other UNIDROIT activities and other initiatives under way in other Rome-based organisations specialising development and/or agricultural finance, the Secretariat deemed it appropriate to postpone the Colloquium to a later date.

8. In view of the Millennium Development Goals regarding poverty alleviation and the need to increase agricultural production to ensure food security worldwide, the Food and Agriculture Organization (FAO) and the International Fund for Agricultural Development (IFAD) have given priority to the establishment in developing countries of a framework to strengthen agricultural investments and promote the inclusion of small-holder farmers in agricultural value chains and access to markets. Two meetings were held in March and in April 2011, to which the UNIDROIT Secretariat was invited to participate. A brief report on these meetings is provided below, with an indication of prospects for further collaboration between the Organisations.

1 - SYMPOSIUM ON LEGAL ASPECTS OF LARGE SCALE INVESTMENTS IN LAND: IMPLICATIONS FOR FOOD SECURITY AND RURAL DEVELOPMENT, FAO, Rome, March 4, 2011 – co-organised with the World Food Law Institute (Howard University School of Law, Washington, D.C.)⁴

9. Chaired by Ms Lorraine B. Williams, Legal Counsel of FAO, and coordinated by Professor Marsha Echols (World Food Law Institute), the Symposium brought together a number of experts from different departments of the FAO (Development Law Service, Policy Assistance Support Service, Land and Water Division, Land Tenure Team), representatives from IFAD, IDLO and UNIDROIT and external lawyers as well as one representative from an agricultural investment corporation. The presentations and discussions focused on the main issues at stake in large scale investments in land, the different business models employed and related problems.

3 See document UNIDROIT 2010 - C.D. (89) 17, Report on the Session, paragraphs 120 – 123.

4 For the Symposium programme and other reference documents, see : <http://www.strengtheninglegalexpertise.org/index.html> – The synthesis included herein was composed by the UNIDROIT Secretariat on the basis of the draft report drawn up by the FAO Development Law Service.

10. Investment in agriculture is of crucial importance for rural development and food security. A conducive environment should be put in place to prioritise domestic investment and capital mobilisation at the local level, and to facilitate access to credit and acquisition of equipment, in particular through innovative financial mechanisms. Bearing in mind the insufficiency of resources at national level and the obstacles to their mobilization, foreign investments play an important role and there has been, in recent years, an increase in large scale investment in land, encouraged by the strong incentives provided by recipient countries. Investors – usually sovereign wealth funds and foreign private or public companies – aim at achieving food security in their countries or seek high profits as a result of volatile agricultural commodity prices on international financial markets. Such investments, which are as a rule directly negotiated with the public authorities in the recipient country, may be in various forms such as acquisition of land, concession contracts, leases, joint venture contracts and contract farming agreements.

11. As the actual situations in different African countries (Liberia, Madagascar, Mozambique, Uganda, Zambia) have illustrated, large-scale investments can provide opportunities for economic and social development in the host countries: tax revenue as well as non-monetary benefits such as the development of transport and communications infrastructures, direct and indirect employment opportunities, improvement of living conditions in the rural environment, in particular as concerns health services, education and housing, support for small-holders and local farmers as well as value-added downstream activities. However, they may also involve very high risks: among the crucial consequences are the fate of local populations whose rights with respect to the land and natural resources are not always adequately defined and registered, the impact on the environment as well as, generally, the unequal positions of local populations and farmers, public authorities and investors, with the result that the benefits for the host country may not be commensurate to the profits obtained by the investors.

12. This asymmetry between the parties involved is a feature of the various forms investment transactions may take, whether on the basis of contractual relations – in the different stages of contract negotiation, conclusion and performance – or in the context of a joint-venture. Pilot projects have been carried out at local level and different intergovernmental organisations have undertaken the preparation of guidelines or principles of sound land governance and of responsible investment in agriculture, but targeted initiatives are needed in a number of areas to help small-holder farmers improve their investment and production capacity and establish fair and mutually beneficial partnerships with investors.

13. Discussions at the Symposium showed that many and complex private law issues were involved in agricultural development and highlighted the importance of establishing an adequate policy and legal framework governing foreign investments in the areas of land ownership, access to natural resources and food production with a view to ensuring sustainable development of the agricultural and rural sector and food security in developing countries, consistently with the interests of all stakeholders, in particular at local (with special attention to traditional rights of local populations), regional and national levels.

14. During the discussions, a number of orientations were suggested as possible examples of how to increase the security and fairness of foreign investment transactions and the parties' rights. The importance was stressed of engaging investors by means of a public bidding process which would encourage competition among investors, favour transparent and fair negotiations, and provide better guarantees to contracting parties and stakeholders. Other issues concerned the inclusion in the contract of certain clauses dealing with property rights and investors' obligations, for example as regards the communities involved and the level of their participation in the project, the benefits for the country at large, the maintenance of utilities and infrastructure. Mention was also made of the complex aspects inherent to the long term of the contract and to its performance in a context subject to change (e.g. in local regulation, in variations on the food market), the right to terminate the contract and the consequences in case of non-performance of the investors' obligations, situations of

renewal of the contract or substitution of the investor, and issues of enforcement of contracts and dispute resolution.

15. The organisations participating in the Symposium expressed their general intention to strengthen cooperation between themselves while involving external partners and to create a network of lawyers on investment agreements; the preparation of an information document for practitioners who negotiate, draft and apply such agreements was envisaged which would explain the key features to be regulated in international agriculture investment contracts and the clauses recommended for inclusion. In this context and in view of its expertise in the field of contract law, it was acknowledged that UNIDROIT could make a significant contribution to the preparation of such a document dealing with the legal aspects of long term contracts for investment in agricultural production.

2 – SMALLHOLDER AGRICULTURE AS A BUSINESS: LEGAL DIMENSIONS OF BUILDING INCLUSIVE VALUE CHAINS, IFAD, Rome 7-8 April 2011 – IFAD and the International Finance Corporation (IFC) round table⁵.

16. Over the last few years the International Fund for Agricultural Development (IFAD) has been exploring new ways of carrying out its mission of mobilizing and deploying resources to alleviate rural poverty. Principal among these is the shift to direct supervision of IFAD-funded projects, a new orientation toward the private sector in order to increase its involvement in rural development, and a growing emphasis on building inclusive value chains for agriculture.

17. While increasing agricultural income has long been a central goal of IFAD projects, the main instruments for achieving this were usually promotion of yield-increasing and labor-saving technologies at the farm level, as well as area expansion. Increasing incomes through greater economic participation of the poor higher up along the marketing chain has now become a central objective under a pro-poor value chain approach.⁶

18. Against this background IFAD has launched an institution-wide effort to identify ways to increase the involvement of, and support to, the private sector in rural development projects, with a growing emphasis on building inclusive value chains for agriculture to yield higher financial returns and produce greater social impacts for smallholder farmers. The Round Table of 7-8 April 2011 focussed on the legal dimensions of this general policy orientation, the objectives of which were to draw up an action plan for IFAD in-house lawyers regarding the way to support a favourable business environment in rural areas, to review the legal instruments at lawyers' disposal and formulate recommendations for their improvement, and to design a framework for increased collaboration and knowledge sharing between IFAD and other international organizations that have particular areas of expertise, such as the IFC which deals exclusively with private sector financing, IDLO which promotes the rule of law in developing countries with a strong focus on capacity building, and UNIDROIT which seeks to harmonize private and commercial law internationally.

5 For the Round Table programme and other reference documents, see: <http://www.ifad.org/events/legal/agenda.htm>. The synthesis included herein was composed by the UNIDROIT Secretariat.

6 IFAD refers to the following definition made by USAID in the paper "Value chain program design: promoting market-based solutions for MSME and industry competitiveness", October 2007: "Value chains encompass the full range of activities and services required to bring a product or service from its conception to sale in its final markets — whether local, national, regional or global. Value chains include input suppliers, producers, processors and buyers. They are supported by a range of technical, business and financial service providers. Value chains have both structural and dynamic components. The structure of the value chain influences the dynamics of firm behavior and these dynamics influence how well the value chain performs."

19. The Round Table was chaired by Mr Rutsel Martha, Legal Counsel, and Mr Kevin Cleaver, Associate Vice-President of IFAD, and was structured in 5 panels. During the presentations and discussions ample reference was made to practical ground experience and a variety of projects underway within IFAD or IFC.

20. *Panel 1* focussed on how financing agreements and legal services support value chain-oriented projects – from smallholders to large agribusinesses –, and on IFAD’s institutional tools and policies which have recently been revised with a view to allowing the provision of financing support directly to the private sector. Today IFAD has different modes of private sector financing which include: direct financing through the establishment of trust funds and grants, indirect financing through on-lending by the government, and ancillary financing through the provision of guaranties and insurance. IFAD also has different modes of regulatory or legislative intervention, primarily contractual, which include: the conditions attached to receiving IFAD funds contained in the financing (loan or grant) agreement, as well as the special covenants undertaken by the Borrower/Recipient, which in turn can inform targeting strategies and require the adoption of new policies or laws, and the explicit application of IFAD (gender/corruption/private sector/targeting) policies to particular projects; finally the project description contained in the financing agreement can itself contain details as to the business models to be adopted when pursuing a private sector partnership. Examples were provided as to how financing schemes were made conditional upon compliance with certain requirements, and so used as development tools to ensure that the relationships between larger actors, smaller actors, and beneficiaries are mutually beneficial.

21. *Panel 2* was devoted to policy and regulatory elements for building enabling frameworks that can increase small-holder farmers’ inclusion in value chains and opened with a presentation on “*Basic Elements of a Favourable Legal Framework for Agricultural Financing: Mobilising Capital through Collateral Security*” by the UNIDROIT Secretary-General. Various aspects were tackled during the presentations and discussions, among which the importance of facilitating (secured and unsecured) access to finance, issues of land tenure security and access to natural resources, the various levels of intervention at policy level (including competition, tax and food safety issues), the various stakeholders and their participation in the process, and the complex and potentially risky issues at stake in developing possible models for legal reform. Against this background it is submitted that a document presenting the different international instruments concerning secured financing and their specific applications for the agricultural sector would be of definite utility, such document being prepared in co-operation with all concerned organizations, such as EBRD, OAS, OHADA, UNCITRAL, the World Bank.

22. *Panel 3* dealt with the types of entities and business models best suited to facilitating the construction of inclusive value chains (commercial, non-profit, hybrid), and opened with a presentation on “Available options and legal structures for farmers’ organisations” by Ms Frederique Mestre of the UNIDROIT Secretariat. The following discussions highlighted specific problems, in particular the strong need for capitalisation at every level of the value chain and related issues such as small farmers’ access to credit through microfinance and traditional money lenders, the IFC policy and procedures to support medium-size businesses through equity participation and the focus placed on the quality of management, the importance of adequately drafted commercial laws to foster the creation and expansion of businesses, and to facilitate, for firms, the drawing up and entering into contracts, and access to credit. In this context the importance was stressed of improving the investment climate and lowering the level of risk in developing countries with a view to facilitating support from multilateral financing agencies. The preparation of a document dealing with the forms or features of agricultural enterprises and their capacity both to respond to economic performance requirements and to enhanced social standards for the protection of smallholder farmers could be instrumental in this perspective.

23. *Panel 4* dealt with the assessment of the rural business environment and the performance assessment tools and indicators developed by IFAD, and their comparison with similar instruments prepared by other organizations, especially the World Bank's *Doing Business Index*. Such instruments – which are highly complex, continuously updated and improved – play an important role in informing investors of the investment climate and risks at country level, establish lending policy criteria for the financing organizations, and also play a powerful role in promoting policy reforms. The discussion focused on whether specific indicators and benchmarks were needed for assessing specifically the rural business environment and agribusiness performance and their possible features. In this context the question was raised as to the criteria which could be used to assess the level of compliance of national legislation with international commercial law instruments, which seem to be lacking or insufficiently accurate.

24. *Panel 5* was specifically devoted to developing new models for private sector engagement: IFAD and IFC presented their respective policies, procedures and strategies for providing support to the private sector. The discussion explored opportunities for collaboration between these organizations, identified useful synergies that could be put in place, and outlined possible practical procedures and projects. The Round Table concluded with the expression of interest by all organizations represented to share their expertise and knowledge through partnerships – on the basis of some institutional co-operation to be formalized.

B. Guidelines for a legal framework for social enterprises (or for a certain type of social enterprise)

25. Since the last Governing Council session, notwithstanding the interest reaffirmed by IDLO in carrying out jointly with UNIDROIT the preparation of an instrument for social enterprise, IDLO has not been able to secure the necessary funding to that effect. Consequently, and also in view of the priority given to other matters within the Secretariat, no further work has been devoted to this topic.

26. However, it is beyond doubt that the topic remains highly topical as in all countries the economic and social conditions of the less better-off parts of the population are continuously deteriorating, and it is increasingly necessary to support by appropriate public policy measures – in particular in the field of social finance – the various kinds of social enterprises as well as the different forms of networks and partnerships between such enterprises. It may be recalled here that the study prepared by the Secretariat on social enterprise – and the issues which had been identified as regards the need to protect a certain social purpose while insuring the economic sustainability of businesses – could be relevant, with the necessary adaptations, in the context of the work UNIDROIT may envisage undertaking in the area of agricultural development (see above paragraph 22).

III. CONCLUSIONS

27. The consultations which have taken place over the last year with several international organisations working for the promotion of agriculture and agriculture finance, in particular FAO and IFAD, have laid the bases for institutional co-operation whereby UNIDROIT could make a useful contribution through its particular mandate and expertise in the formulation of uniform rules in the area of private law, and the comparative law method it applies in its work. As indicated in the Secretariat memorandum submitted to the Governing Council at its 89th session, the areas concerned may include, for instance, private law aspects that have not thus far been dealt with by other private law rule-making agencies, such as property law, and additional areas may include financing and commercial law aspects that come into play in the negotiation and performance of FDI agreements in the agricultural sector. Furthermore, a number of issues were identified during the FAO Symposium and the IFAD Round Table which have been reported above in this document

and which could be appropriately analyzed, expanded and completed in the framework of a UNIDROIT global project on private law and agriculture.

28. With a view to defining the content of such a project, the Secretariat would propose the holding of a Colloquium, as a follow-up to the exchanges with the interested organizations, which would also involve representatives of member States' Governments, as well as of professional circles – in particular the agribusiness industry – interested in private law issues and agricultural development. The Colloquium could be organized over three days and include the following three main topics: I – Land property and usage (covering the following sub-topics: Land property rights and agricultural production; Land title, mortgages and agricultural finance; Limitations to property rights: easements, access to land and streams; Landowner liability and Limitations to property rights: easements, access to land and streams); II – Farm legal structure and operation (covering the following sub-topics: Farm organisation: legal structures and capitalisation; Legal issues on marketing of rural commodities; Land leases and contract farming; Agricultural input regulation and liability); III – Equipment acquisition and livestock financing and crop financing (covering the following sub-topics: Agricultural equipment financing; Livestock financing Agricultural receivables financing and Agricultural futures markets). The draft programme of the Colloquium is presented as an Annex to this document.

29. As regards the second item of the general subject "Private Law and Development", i.e. the preparation of Guidelines for a legal framework for social enterprises (or for a certain type of social enterprise), the Secretariat proposes to continue consultations with IDLO, but also with other organizations which may be interested in co-operating with UNIDROIT in this field, while bearing in mind the possible links between the issue of forms of social enterprise and those relating to agricultural enterprises, in the context of the first item of the subject, i.e. the private law aspects for agricultural finance.

30. The Governing Council may wish to authorise the Secretariat to continue its preliminary research into the general subject of "Private Law and Development", with a view to identifying areas relating in particular to the financing of agricultural investment and production (first item) in which UNIDROIT could make a meaningful contribution, and in this context to continue its consultations with the interested international organisations.

UNIDROIT COLLOQUIUM

PRIVATE LAW AND AGRICULTURE

Venue: Villa Aldobrandini, Via Panisperna 28, 00184 Rome

Date: (Fall 2011)

DRAFT PROGRAMME

[1st day]

Land Property and Usage

9:00 am – 10:00 am Arrival and Registration of Participants

Opening Session

10:00 am – 10:30 am *Opening remarks*

1st Session - Land property rights and agricultural production

10:30 am – 12:30 am

*[Promoting agricultural investment and production: the role of property rights]
[Lessons learned from land titling programmes]*

12:30 pm – 1:00 pm Comments/Questions: Participants

1:00 pm – 2:30 pm L U N C H

2nd Session - Land title, mortgages and agricultural finance

2:30 pm – 4:00 pm

*[The collateral value of land in agricultural finance]
[Mortgage registration and enforcement: practical problems]*

4:00 pm – 4:30 pm Comments/Questions: Participants

3rd Session - Limitations to property rights: easements, access to land and streams, landowner liability

4:30 pm - 6:00 pm

*[Fences, easements, stream access, access to land- locked public lands]
[Limitations to usage of water and other natural resources]
[Landowner liability for environmental damage or damage to neighbours]*

6:00 pm – 6:30 pm Comments/Questions: Participants

[date of 2nd day]

Farm Legal Structure and Operation

1st Session - *Farm organisation: legal structures and capitalisation*

9:00 am – 10:30 am

[Choice of legal form and capitalisation]

[Sources of equity capital]

10:30 am – 11:00 am Comments/Questions: Participants

11:00 am – 11:30 am Coffee break

2nd Session - *Legal issues on marketing of rural commodities*

11:30 am – 12:30 am

[Marketing cooperatives]

[Competition law issues]

12:30 pm – 1:00 pm Comments/Questions: Participants

1:00 pm – 2:30 pm L U N C H

3rd Session - *Land leases and contract farming*

2:30 pm – 4:00 pm

[Contract farming and leases]

[Livestock production contracts]

4:00 pm – 4:30 pm Comments/Questions: Participants

4th Session - *Agricultural inputs regulation and liability*

4:30 pm – 6:00 pm

[Pesticide liability]

[seed failure and GMO liability]

6:00 pm – 6:30 pm Comments/Questions: Participants

[date of 3rd day]

Equipment acquisition, livestock and crop financing

1st Session - Agricultural equipment financing

9:00 am – 10:30 am

[Equipment lease: relevance of legal framework]

[Equipment import and security interests: possible benefits of extending the Cape Town system to agricultural equipment]

10:30 am – 11:00 am Comments/Questions: Participants

11:00 am – 11:30 am Coffee break

2nd Session - Livestock financing

11:30 am – 12:30 am

[Financing structures and securitization]

[Security rights and perfection]

12:30 pm – 1:00 pm Comments/Questions: Participants

1:00 pm – 2:30 pm L U N C H

3rd Session - Agricultural receivables financing

2:30 pm – 4:00 pm

[Asset-backed securities: warehouse receipts and other negotiable instruments]

[Factoring, forfeiting and bulk assignments of agricultural receivables]

4:00 pm – 4:30 pm Comments/Questions: Participants

4th Session - Agricultural futures markets

4:30 pm – 6:00 pm

[Contract structure and parties]

[Regulatory environment]

6:00 pm – 6:30 pm Comments/Questions: Participants

6:30 pm – 7:00 pm Closing remarks