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SUMMARY REPORT

OF THE SIXTH SESSION

(20 – 22 November 2024)

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1. The sixth session of the UNIDROIT Working Group established in partnership with the Food and Agriculture Organization of the United Nations (FAO) and the International Fund for Agricultural Development (IFAD) to prepare a Legal Guide on Collaborative Legal Structures for Agricultural Enterprises (hereinafter "the CLSAE project" or "the CLSAE Guide") was held in hybrid format from 20 to 22 November 2024 at the premises of UNIDROIT in Rome (Italy) and online. The Working Group was attended by members and observers from intergovernmental organisations, non-governmental organisations, academic institutes, and the private sector, as well as members of the UNIDROIT Secretariat. The list of participants is available in Annex II.

Item 1: Opening of the session and welcome

2. *The UNIDROIT Secretary-General* welcomed all participants and introduced Prof. Maria Ignacia Vial Undurraga, Member of the UNIDROIT Governing Council, who had agreed to serve as Chair of the CLSAE Working Group. *The Chair* opened the sixth session of the CLSAE Working Group and thanked the members for their ongoing commitment and work conducted during the intersessional period between March and November 2024 to prepare the draft discussion papers for the sixth session of the Working Group. She introduced the new members and observers of the Working Group, all of whom are included in the List of Participants in Annex II.

Item 2: Adoption of the agenda and organisation of the session

3. *The Chair* introduced the annotated draft agenda and the organisation of the session (UNIDROIT 2024 – Study LXXXC – W.G.6 – Doc. 1). She informed the Working Group that the annotated draft agenda listed all the documents that would be considered as the basis for discussion: (i) Secretariat Report (UNIDROIT 2024 – Study LXXXC – W.G.6 – Doc. 2); (ii) Draft Discussion Paper on Companies (UNIDROIT 2024 – Study LXXXC – W.G.6 – Doc. 3); (iii) Draft Discussion Paper on Multiparty Contracts (UNIDROIT 2024 – Study LXXXC – W.G.6 – Doc. 4); (iv) Draft Discussion Paper on Cooperatives (UNIDROIT 2024 – Study LXXXC – W.G.6 – Doc. 5) and, (v) Draft Discussion Paper on Digital Platforms (UNIDROIT 2024 – Study LXXXC – W.G.6 – Doc. 6). She noted that all documents had been distributed to the Working Group participants by email.

4. The Working Group adopted the agenda and organisation of the session as proposed (available in Annex I).

Item 3: Update on intersessional work and developments since the fifth Working Group session

5. *A member of the UNIDROIT Secretariat* updated the Working Group on the intersessional work undertaken since the fifth session. It was noted that the Secretariat had continued to provide support to the Working Group for the organisation of intersessional meetings to advance the review and preparation of draft discussion papers. The Secretariat had consulted with FAO and IFAD on information that would help address issues that had been raised by the Working Group during the previous session and had developed a questionnaire that FAO had distributed to its regional and country-level offices. Responses compiled by FAO had been forwarded by the UNIDROIT Secretariat to the Subgroups for consideration and incorporation into the discussion papers, the glossary and draft introduction, as appropriate. To follow-up on the suggestion for industry input that had been made by the Coordinator of the Working Group during the previous session, the Secretariat had also developed a questionnaire to gain insights from entities operating digital platforms in the agricultural sector; initial outreach efforts had not yet led to results. To assist with the development of the comparative chapter, the Secretariat had prepared two tables, one on structural aspects and the other on functional aspects of collaborative legal structures.

Item 4: Consideration of work in progress

(a) Draft Discussion Paper on Companies

Introduction

6. *A member of the Subgroup on Companies* began with an overview of the table of contents of the discussion paper, which had been prepared with the other chapters of the proposed CLSAE Guide in mind. It was explained that the introduction to the paper had not been significantly amended, other than addition of details on simplified company forms.

7. Largely for the benefit of new participants, *the UNIDROIT Secretary-General* recalled that the draft chapters were intended to contain similar content to facilitate cross-comparison. *The Coordinator of the Working Group* added that there were both structural and functional perspectives to the work and that the CLSAE Project began from the latter. It was emphasised that this distinction was extremely important when it came to the comparison as, in practice, these legal forms were not used only as alternatives but also in combination, in both the domestic and international realms.

Sole proprietorships and single-member companies

8. *The Chair* referred to the question in the discussion paper on whether, for the purposes of the CLSAE Project, the term "companies" should encompass sole proprietorships, which sparked extensive debate. Some argued that sole proprietorships did not inherently involve collaboration and were outside of the Project's scope. Others emphasised the relevance of the sole proprietorship as a starting point for micro-enterprises that often evolved into collaborative structures.

9. *The Coordinator of the Working Group* suggested that if the sole proprietorship was used to collaborate among different entities, it should be included. *The UNIDROIT Secretary-General* clarified that, in some countries, particularly those with older civil codes, the sole proprietor or sole entrepreneur engendered specific legal consequences, such as accounting obligations, inclusion in commercial registries and the ability to grant powers of attorney to others. He pointed out that some jurisdictions allowed for a single-member limited liability company, which enabled differentiation between the individual sole proprietor and the company as a distinct legal entity.

10. *Another member of the Subgroup on Companies* stressed that single-member entities should be included, especially given their importance in the agricultural sector, pointing out that most micro-enterprises started as single-member entities, whether as simplified companies in countries that provided for such a legal structure, or as sole proprietorships. As more capital, labour or other forms of cooperation were required, the single-member entity was converted, either formally or informally, into a multi-party entity. A description was given of recent developments in France that enabled sole proprietors to enjoy the benefits of limited liability; even without a formal legal entity, simply acting as an "independent professional", was enough to establish a patrimony separated from the remainder of the individual's assets.

11. *An individual observer* commented that OHADA (Organization for the Harmonization of Business Law in Africa) had made provision for the single-member entity with legal personality in its legislative texts and expressed the view that, since agriculture was so heavily based on individual actors, it was important to include such entities within the scope of the CLSAE Project; otherwise most of the entities within Africa, and probably also South America, would be excluded.

12. *Another member of the Subgroup on Companies* was of the view that the term "company" should capture the notion of a legal structure that had been facilitated by the state in some way, as opposed to an individual simply carrying on business.

13. *The UNIDROIT Secretary-General* observed that an individual could enter into collaboration in a number of different forms, including as a natural person, sole proprietor or single-member entity, but that these did not constitute a collaborative form. Notwithstanding this conundrum, the majority of businesses in the world could not be left out of the CLSAE Project. It was suggested by *a member of the Subgroup* that this could be most logically explained in the companies paper.

Purpose – profit or return on investment

14. Referring to the description of a company as designed to generate profit (para. 11), *a member of the Subgroup on Companies* postulated that companies might be better understood as vehicles for generating a return for investors, which was possibly a more precise and nuanced way of capturing the essence of this organisational form. Historically, the corporate form had been introduced to attract capital, and it was stressed that this should be kept in mind as this primary purpose had influenced the elements of corporate structure, even if today the form was being transformed to pursue other objectives beyond that of raising capital.

15. *A member of the Subgroup on MPCs* enquired about the flexibility within a company structure to distribute all or some of the profit and whether any constraints existed that prevented companies from withholding a portion of profit from distribution for diversion towards investment in the collaboration, noting this as a significant distinction from the cooperative and the MPC.

Purpose – agricultural activities

16. *An independent observer* offered an example of a company form in Italy that, despite being not-for-profit, was important in the agricultural sector, the *società consortile.* This was described as a consortia in company form, defined in the civil code as an organisation with the goal to regulate part of the activities of the enterprises that comprised the company, but without any intention of profit generation. *A member of the Subgroup on Companies* offered an example from Spain, the *Sociedad Agraria de Transformación* (Agricultural Transformation Company) and emphasised that examples of these types of companies devised specifically for agricultural activities were very relevant to consider, particularly in relation to the purpose clause; otherwise, the CLSAE Guide could be applied to any micro-business.

17. *The UNIDROIT Secretary-General* referred to "companies of means" that did not aim to develop an entrepreneurial activity to generate profit directly, but rather indirectly, by assembling means that might eventually produce returns. Such entities were closer to a cooperative but used a corporate structure and could be considered as "halfway" between a cooperative and an individual entrepreneur. As examples of these forms existed in Spain, Italy, and other countries, it was suggested these should also be considered and differentiated from cooperatives.

18. *Another member of the Subgroup on Companies* pointed out that the Annex to the discussion paper included examples of "company-like" vehicles specifically designed for agricultural activities and suggested that the paper could be enriched with these and other examples.

Purpose – sustainability

19. *The Coordinator of the Working Group* enquired about the correlation between profit and sustainability and whether situations involving individuals who collaborated by means of a company form to pursue sustainability objectives without regard to profit would be encompassed within the scope of analysis. *The representative from FAO* added that in many countries companies were created with food security as the primary objective. *The representative from IFAD* (Jonathan) added that transitioning from international (public) support to private sector support (investment) with the objective of improving livelihoods of smallholder farmers, which constituted the primary work of

IFAD, was expected to generate profit from both the demand and the supply side and was one form of enhancing sustainability.

20. *The UNIDROIT Secretary-General* reminded the Working Group that sustainability was a cross-cutting theme to be considered in relation to each of the forms. It was summarised that the paper should reflect the idea that while companies were primarily profit-oriented entities, they could also accommodate broader sustainability goals and collaborative purposes, and that consideration of specific agri-forms of companies would be included in the analysis to provide more granular guidance.

Formation – simplified process

21. *The representative from FAO* pointed out that in many developing countries, farmers would not consider forming a company because of the complexity and suggested that the CLSAE Guide should recommend simplification of the process so that incorporation would be more accessible and affordable. In response, it was explained that consideration of the simplified corporate form and efforts at the international and regional levels to simplify business entities had now been incorporated into the paper.

22. *An individual observer* noted that in many countries, agricultural companies enjoyed favoured status within the legal system and, as a result, these special forms were used at times to gain other advantages, such as reduced rates of taxation. The question was posed as to whether the CLSAE Guide should include a recommendation to require some sort of prerequisites by the founding individuals or directors to ensure legitimacy. *A member of the Subgroup on Cooperatives* pointed out that this was also a concern in the cooperative sector. While simplification of formation was certainly a valid objective, safeguards were necessary, not only upon formation but throughout an entity's lifecycle.

Formation – formalisation

23. *The UNIDROIT Secretary-General* pointed out that these comments related to the bigger question of whether the CLSAE Guide should recommend formalisation, noting that, in principle, companies should be encouraged to formalise because it fostered economic growth and facilitated taxation, which, in theory, was of benefit to the public. On the other hand, it was noted that in certain areas of the world where legal systems were still very underdeveloped, formalisation might impose burdens on small business, fail to create appropriate incentives and discourage entrepreneurship. *A member of the Subgroup on Companies* agreed that formalisation *per se* was not necessarily a goal and suggested that the downside of formality should also be mentioned in context.

24. Other participants recalled the benefits associated with formalisation, such as access to credit and better monitoring of compliance with regulations, including sustainability requirements. *The representative of FAO* added to this list - particularly for farmers - access to extension services, technical support, and incentives such as fertilisers, seeds, certification, etc. *A member of the Subgroup on Cooperatives* pointed out that the body of work on formalisation accumulated by the ILO could prove useful.

25. *The UNIDROIT Secretary-General* noted that, in principle, UNIDROIT would support a recommendation for formalisation, but whether this would be included in the CLSAE Guide was also dependent upon the positions on the matter taken by FAO and IFAD (*see also, Access to Credit – formalisation*).

Formation – sustainability

26. *The Chair* referred to the question in the discussion paper on whether sustainability issues affected formation, such as requirements to submit Environmental, Social and Governance (ESG)

policies, etc. *A member of the Subgroup on Companies* referred to Canada, where social enterprise legislation had been introduced but was cumbersome, neither well-designed nor easy to use, and imposed additional reporting requirements. While the move towards models that favoured social goals was considered a good one, the process was still emerging. Accordingly, it was suggested to recommend that, in any decision over whether or not to form a company that promoted sustainability, it would be prudent to consider whether doing so would entail onerous requirements.

27. *A member of the Subgroup on Digital Platforms* pointed out that, in the course of state efforts to create digital tools for company formation, this could create a bias in favour of one collaborative legal structure over another. This might occur, for example, by means of the kinds of templates made available or ways the online platform presented options, and it was suggested this factor be considered when individuals were offered choices among different forms.

Separate legal personality and liability

28. *A member of the Subgroup on Companies* invited comments from the Working Group on the implications of legal personality and limited liability for the smallest actors in the value chain. *An individual observer* responded that these concepts worked perfectly in theory, but in practice, lenders required personal guarantees from small companies.

29. *A member of the Subgroup on Cooperatives* said the issue was also relevant to cooperatives; whether in company or corporate form, where an entity with little capital sought credit, it was to be expected that the lender would require personal guarantees. Lines of responsibility or governance had to be in place to ensure that, after the shifting of liability, the borrower would be able to repay.

30. *Another member of the Subgroup on Companies* commented that the basic attraction of the corporate form was limited liability, and it would be difficult to justify the costs of formulation without this feature. It was explained that legal forms without limited liability were gradually falling out of use as individuals were unlikely to risk their equity in a single undertaking when use of an entity with limited liability could circumscribe the risk to whatever amount had been contributed (*but see below, partnerships*).

31. *The UNIDROIT Secretary-General* noted that one of the reasons why banks required personal guarantees from directors, particularly in small businesses where directors and shareholders tended to be one and the same individual, was because it aligned the interests of the company and the director, and thereby minimised risks of overextension.

Asset partitioning

32. *The UNIDROIT Secretary-General* pointed out that there were two interpretations of the concept of asset partitioning. One was partitioning between the company and its members, *i.e.*, the inability of a company's creditors to make claims against the personal assets of the companies' shareholders. The other was partitioning within the company, *i.e.*, the possibility of designating specific assets for different creditors. In respect of the latter, the question was posed as to why one would choose a complicated internal asset partitioning system (one that required clarity on which assets were designated for whom and assurances for lenders as to registration) when another alternative was to create another company as a limited liability vehicle.

33. *The member of the Subgroup on Companies* confirmed that it was the first interpretation that had been intended in the paper; accordingly, it was agreed that a brief explanation of the second interpretation would be included for the sake of completeness. As *an individual observer* had noted, it was a difficult subject, and its relevance to small companies was minimal.

Asset partitioning and sustainability

34. In response to a question on how asset partitioning interacted with sustainability, *a member of the Subgroup on Companies* noted that one problem of limited liability concerned involuntary creditors, *i.e.*, persons injured by shielded corporate actions. It was pointed out that there were possibly two conflicting principles that had to be balanced: one was the need to guarantee that shareholders did not incur risks beyond their contributions and another the rights of injured persons to be compensated for damages caused.

Asset partitioning and access to credit

35. *A member of the Subgroup on Companies* noted that whereas many people intuitively understood that limited liability facilitated the raising of equity capital from investors, what was not as obvious was that incorporation also increased access to credit because suppliers of credit were aware that assets of the company would not necessarily be available to the founder's individual personal creditors. It was stressed that this was an important concept to be conveyed in the CLSAE Guide as simply as possible, as it was not readily understood at first instance. *Another member of the Subgroup on Companies* agreed and cited Professor Stephen Bainbridge's theory, whereby limited liability paradoxically increased access to credit.

Partnerships

36. Notwithstanding previous comments on the dwindling use of legal forms without limited liability offerings, *a member of the Subgroup on Companies* pointed out that partnerships continued to exist in many jurisdictions where individual partners did not enjoy the benefit of limited liability. It was acknowledged that another option in those jurisdictions, such as the US, was the limited liability partnership, which was basically a partnership model with limited liability available to some partners, or the limited partnership, where certain partners enjoyed limited liability.

37. *The UNIDROIT Secretary-General* also pointed out that individual entrepreneurship as well as partnerships continued to be plentiful in many countries and that limited liability was not the only consideration in choosing a legal form. Some types of businesses might not necessitate incorporation, the example given being that of a plumber, who might not need more than tools of the trade. It was suggested that this might be similar for those engaged in agricultural activities who, instead of incorporation to access credit, could use asset-based financing for inputs such as tractors and other equipment. It was also pointed out that the partnership form was often the default solution if the steps to incorporate had not all been effectively completed.

38. *A member of the Subgroup on Companies* elaborated on the latter point, explaining that in civil law systems, the *società di fatto* could be formed without intention, simply because the partners had associated to undertake a common purpose for profit; in common law, it was comparable with the partnership. The *società di fatto* was innumerable and served a very useful purpose in the economy. It differed from the *società collettiva*, a regular entity in which the members had unlimited liability and which, for that reason, was falling out of use; in common law, it had no comparable form. It was explained that in common law systems, partnership law was independent from the field of company law and belonged to the realm of contracts. By contrast, in the civil law tradition, partnerships were legally formed entities. It was suggested that some additional clarification should be included in the paper on these differences.

39. *Another member of the Subgroup on Companies* agreed, adding that partnerships by default provided equality in decision-making among partners and a higher degree of control over the business. By comparison, a cooperative offered equality among all members in decision-making and in a corporation, if equity investors were invited, some decision-making power over an unlimited range of issues could be conferred to outside third-parties.

Decentralised autonomous organisations (DAOs)

40. *A member of the Subgroup on Digital Platforms* explained that decentralised autonomous organisations (DAOs) were new entities with the ability to raise billions of dollars of capital with neither separate legal personality nor limited liability. While some courts have begun to deem DAOs very large general partnerships with joint and several liability ascribed to partners, contributors and founders, this characterisation was not universally accepted. As DAOs were transparent about financing and decision-making, even more so than traditionally democratic entities such as cooperatives, DAOs were attracting investment capital, despite the absence of certain core features of the corporate form. While DAOs were not yet a prominent reality in the agricultural space, some examples were emerging in blockchain agriculture.

Members – legal capacity

41. *The UNIDROIT Secretary-General* asked whether there would be any reason why a legal person should not be permitted to form another company, as this was how corporate groups were created. *A member of the Subgroup on Companies* responded that from the smallholder perspective, this type of arrangement might be too complex to manage. As to concerns that such arrangements might promote money-laundering, this could be briefly addressed and, accordingly, it was agreed that legal persons would be included.

Members – protection of minority shareholders

42. *The representative from IFAD* explained that IFAD recognised the effort made by smallholders to buy shares, even if in small quantities, which demonstrated an intention to be part of the company with the objective of making a return and accordingly, minority shareholder protection was considered important, particularly for marginalised groups. *The representative from FAO* agreed, suggesting that from a policy perspective, a government may wish to protect specific groups through the use of this legal mechanism, which was particularly relevant for smallholder agriculture, and that a recommendation to this effect could be considered.

43. *A member of the Subgroup on MPCs* postulated the case in which farmers were minority shareholders in a company where the majority shareholders represented other elements of the value chain, such as distributors or processors, suggesting that the extent to which these farmers could be protected was a core issue to consider, particularly in comparison with alternate forms.

44. Summarising the discussion, *the UNIDROIT Secretary-General* suggested that the chapter include an overview of the minority shareholder protections found in most legal systems.

Members – in-kind contributions

45. *The UNIDROIT Secretary-General* emphasised the importance of in-kind contributions and raised two issues in this regard: first, whether contributions of labour by the members themselves were possible and, secondly, how to assign value to such contributions and to what extent the difficulty and resources required for valuation (of labour particularly, but also assets) precluded contributions. *A member of the Secretariat* pointed out that FAO had provided legislation from various countries that related to in-kind contributions and that this information was reflected in the paper (specifically, footnotes 51-55).

46. *A member of the Subgroup on Companies* noted that share ownership was a function of contributions and therefore voting power, which distinguished the corporate form considerably from the other models. It was explained that in the corporate world, the question of how to allocate decision-making and voting power was usually considered upfront and could be managed in several ways, such as by valuation or agreement. Those involved with small agricultural enterprises were

asked whether decision-making and voting rights were significant obstacles and if one of the reasons for favouring the cooperative model was the ease of "one member, one vote." *A representative of IFAD* confirmed that, based on IFAD's experience, valuation of in-kind contributions was a challenge for smallholder farmers, particularly how to assign a value that would be taken into consideration before allocating decision-making power.

47. *The member of the Subgroup on Companies* responded that valuation was handled differently depending upon the jurisdiction and referred to Canada as an example, where services to the corporation must have already been rendered if shares were to be issued in exchange. Acknowledging that appraisal of contributions generally took place when made, which was when membership rights were assigned and was the norm in most countries, it was suggested that prospective collaborators should enquire whether the statute in their particular jurisdiction allowed in-kind contributions in exchange for shares and how that could be valued.

48. In response to a *member of the Subgroup on MPCs*, it was confirmed that intangibles were considered in-kind contributions. *A member of the Subgroup on Cooperatives* commented that these considerations on member in-kind contributions were valuable and would be further developed in the cooperatives paper as well.

Shareholders' agreements and voting trusts

49. *A member of the Subgroup on Companies* explained that shareholders' agreements could be extremely important in the context of agricultural businesses, particularly as collaborative instruments to bind together relationships and also prevent conflicts. Some were more informal, such as pooling agreements, and others were complex yet more effective, such as voting trusts that required the contribution of shares to a trust and created separation between equitable rights and voting rights. It was explained that it was generally easier to enforce voting trusts than pooling agreements; whereas a pooling agreement was dependent upon the written contract, a voting trust was dependent upon the trustee, a third party without any relationship to the contractual parties.

50. It was further explained that shareholders' agreements could include a number of provisions, such as pre-emptive rights; rights of first refusal for the purchase of shares or for new issuances and provisions for anti-dilution mechanisms; transfer of rights with preferences for shareholders, such as drag-along or tag-along rights, puts or calls; and buy-out agreements in the event of disputes. It was emphasised that, aside from the foundational documents of the company, *i.e.*, articles of incorporation and bylaws, shareholders' agreements were an important aspect of corporate governance.

51. *A member of the Subgroup on MPCs* referred to the differentiation that had been made between voting trusts and pooling agreements and asked for clarification on remedies and enforcement in the event of breach of such agreements. It was also suggested that an example would be helpful to illustrate how a voting trust with decisions delegated to a third party would be preferable to a pooling agreement with shared decision-making. Drawing upon research into contractual networks, she recalled that there might be some hesitancy, particularly among MSMEs, to delegate authority to third parties. *A representative of IFAD* agreed and pointed out the challenges in enforcing these types of agreements by minority shareholders, particularly in countries where the legal system for enforcement was already very weak.

52. *The member of the Subgroup on Companies* responded, clarifying that in a voting trust, the delegation was restricted; the trustee had no discretion and was required to decide in accordance with specific written instructions provided at the outset. This explained why the voting trust was considered more effective than the pooling agreement, which was simply an agreement to vote in a certain manner and where, if one of the parties did not comply, the only remedy was to seek judicial enforcement with its attendant challenges, particularly in developing jurisdictions with few experts

qualified in this aspect of corporate law. Although more costly, the voting trust was considered more effective.

53. *The UNIDROIT Secretary-General* noted that this section was an important addition to the paper, one that integrated contracts with company law. Although some of the more sophisticated provisions were perhaps too complex for use by the target audience, shareholders' agreements could be useful in smaller companies as a way to reinforce the protection of minorities under corporate law, especially for situations in which the farmer might be the minority shareholder and a larger entity held control. Although it was acknowledged that a lack of balance in ownership would probably translate into lack of bargaining power, at a minimum, the case could be made to legislators that the shareholders' agreement was an additional mechanism to protect minority shareholders.

Shareholders' agreements – strategic resources

54. *The Coordinator of the Working Group* asked whether it would it be possible and desirable in the protection of minorities to distinguish essential strategic resources, the protection of which was essential to the farmers' survival (*e.g.,* land), from other resources that could be obtained in the market.

55. *A member of the Subgroup on Companies* responded, noting that a potential drawback with the corporate model was that contributions became the property of the corporation. If a party wished to retain the right to reclaim that strategic asset upon dissolution (or otherwise), some sort of contractual arrangement would be necessary as most corporate statutes did not envisage such situations. By comparison, this issue could be addressed in a multi-party contract so that whatever was contributed could be reclaimed. *The UNIDROIT Secretary-General* pointed out that such agreements would then raise additional issues of valuation, as the contributed assets would be worth much less to the corporation.

Shareholders' agreements – fiduciary duties

56. *Another member of the Subgroup on Companies* agreed that one approach was to address such situations by means of a shareholders' agreement in which, for instance, it was provided that the contribution (*e.g.,* land) would not be alienated other than in the case of bankruptcy or foreclosure. An alternative, it was suggested, would be to establish clear duties of the directors and officers to safeguard specific assets of the company. If a conveyance was carried out in bad faith to deprive minority shareholders of a strategic asset that should have remained in the corporation, this would constitute a breach of fiduciary duties with attendant consequences for those responsible.

57. *The UNIDROIT Secretary-General* referred to the concept of corporate or social interest doctrine in European corporate law, explaining that it prevented directors from adopting decisions that ran against the interest of the company or the shareholders as a whole in order to benefit themselves or one group of shareholders. It was suggested that this might be also be considered in relation to fiduciary duties.

Shareholders' agreements and oppression remedy

58. *A member of the Subgroup on Companies* pointed out that some common law countries had included the oppression remedy in corporate statutes as a way to protect minority shareholders that would not require winding up the company and enabled a court to devise other equitable solutions. Used particularly in privately-held companies where the minority could neither sell nor exit, as the remedy required judicial intervention, outcomes were uncertain. It was suggested that the CLSAE Guide might include an explanation of the default rule that whatever assets were contributed would become the property of the company and that, upon dissolution, shareholders would receive a share of the value of the company, but not the return of specific assets contributed. Accordingly, if the

objective was to protect and preserve rights over certain assets, a contractual arrangement would be advisable.

Land

59. Referring to the discussions about land as a contributed asset, *a member of the Subgroup on Cooperatives* pointed out that there appeared to be an assumption that the company itself would be engaged in agricultural production whereas in a cooperative, members remained individual farmers who continued to produce on their own land. To become a member, it was necessary to have rights attached to the land, although these did not necessarily entail ownership. It was cautioned that land was a delicate issue; many farmers did not own their land and many states imposed restrictions on the use and transfer of agricultural land. As the discussions were based on several assumptions, it was suggested that these should be noted.

60. *A representative of IFAD* pointed out that land was often family-owned, which could complicate its availability as a strategic non-monetary resource by a company. A second issue was that in many smallholder communities, there was no market for the land on which they farmed; although the land was productive, there was no land market in order to attribute a proper value.

61. *The UNIDROIT Secretary-General* referred to the previous project between UNIDROIT, FAO and IFAD that had resulted in the Legal Guide on Agricultural Land Investment Contracts (ALIC) in which it had been acknowledged that transfer of land, and even lease of land for lengthy periods, was not good practice. Although the CLSAE Guide should mention issues concerning transfer of land to a collaborative enterprise, it was unnecessary to delve too deeply into the subject because the ALIC Guide had considered the matter and should be referenced.

Gender

62. *The Coordinator of the Working Group* asked if the Working Group considered that the possibility of protecting different types of interests within the collaborative group should be pursued further. A second question was whether property rules, such as prohibition of selling assets, might be used to protect minority interests. Thirdly, was whether gender protection should be included, with particular attention given to situations where there was a specific need for such protection.

63. *A representative of IFAD* added that, in relation to minority rights, youth also constituted an important minority group that should not be neglected. *A member of the Subgroup on Companies* agreed and suggested this issue might be expanded to take into account a broader range of minority groups that might need protection. *The UNIDROIT Secretary-General* suggested that the gender issue was one that would apply across the board to each of the possible collaborative legal forms.

64. In response to the tripartite set of questions*, a member of the Subgroup on Companies* again recalled the historical origins that had led to the design of the corporate form, namely, to attract capital. Although the corporate form was undergoing change to become more sensitive to other considerations, such as protection of strategic assets and minority protection, the form was still a work in progress. It was suggested that this should be explained in the paper at the outset and that it was possibly a limitation of the corporate model that might lead one to consider the alternate options. *The UNIDROIT Secretary-General* responded that this was precisely the purpose of the exercise – to identify the weaknesses and strengths of each of the models.

65. *The Coordinator of the Working Group* pondered the extent to which the CLSAE Project should adhere to conventional boundaries between legal forms and suggested that the question to be kept in mind was the extent to which the comparison among the forms should be based also on the specificity of agricultural values. In response to a question on whether these agricultural values were universal, it was explained that in the agricultural vis-à-vis the manufacturing or services sectors,

there was a certain specificity in the relationship with the land, especially for MSMEs where agriculture was an activity that provided the basic resources to survive. On the other hand, the traditions and positions of agriculture in different economic systems varied widely, and therefore common values in a world of heterogeneous systems could not be assumed.

Dispute prevention and resolution

66. *A member of the Subgroup on Companies* pointed out that in many jurisdictions it was difficult for smallholders to access mechanisms such as arbitration and that the discussion might need to be expanded to encompass a wider range of options for alternative dispute resolution. *A representative of FAO* pointed out the chapter on alternative dispute resolution in the Legal Guide on Contract Farming that could be used as an example.

Transfer of rights – exit and withdrawal

67. *A member of the Subgroup on Companies* referred to the questions in the discussion paper concerning the advantages of the corporate form from a succession planning point of view, one advantage being the ease with which it may be transferred, and noted that the possibility of one owner or set of owners to convey a business with ease was relevant in an agricultural context.

68. *A member of the Subgroup on MPCs* responded that this was a key section of the chapter that served as a basis for comparative analysis and should be further developed. *The member of the Subgroup on Cooperatives* and *the UNIDROIT Secretary-General* both agreed. It was pointed out that, depending on the company model, a transfer of rights would be quite different, given that in a partnership or single-person entity, rights of transfer were more restricted.

69. In response to the discussion, *a member of the Subgroup on Companies* distinguished transfer of rights, *i.e.,* the moving of one's interest to another by sale or upon death, from exit. It was explained that in the North American partnership model, once a partner withdrew, the partnership came to an end, which was a structural limitation that could only be mitigated by means of a partnership agreement. By contrast, transition was much easier with the corporate model, given that the entity continued whether a member exited (by death or otherwise) or sold its shares.

70. *A member of the Subgroup on MPCs* reflected on the previous point that transfer, entry and exit were easier in the corporate form and reminded the Working Group of the previous point on the specificity of the agricultural context and the need to keep in mind that these were structures for collaboration. Everything that had been said on strategic investment and the importance of ensuring continuity of the collaboration might require some consideration of whether transfer and exit might be made a little bit more difficult to ensure the continuity of the collaboration.

71. *The UNIDROIT Secretary-General* suggested that the paper might include some guidance as to how the type of company might influence transfer and exit for purposes of the comparison and to assist in the choice among the different company types or other legal forms.

Corporate groups

72. *A member of the Subgroup on Companies* raised the question of whether consideration of corporate groups should be included in the companies paper or if it was a better fit in the comparative chapter. *Another member of the Subgroup on Companies* responded that this section should be retained in the companies chapter because, despite the fact that a corporate group might include other types of entities, such as cooperatives, foundations, non-for-profit associations or other legal persons, the realm of corporate groups belonged to corporate law. In response, *the member of the Subgroup of Cooperatives* quipped that it also belonged to cooperative law because cooperative

groups could be formed to include a stock company in order to access financial markets, for example, and noted that cooperative groups would be discussed during that session.

73. *A member of the Subgroup on MPCs* suggested the Subgroup might consider the hierarchical element in corporate group structure in the context of agricultural collaboration in order to better compare with other structures that might not have this hierarchical element. *The Coordinator of the Working Group* posed three questions that emerged from these discussions. The first elaborated on the point just made and whether there should be a single notion of collaboration that would include hierarchical collaboration (*i.e.,* one member that instructed other members) vis-à-vis the situation where all members agreed and consented.

74. The second question concerned aggregation. It was explained that the notion of a corporate group and an aggregation of micro enterprises or small enterprises might look very different in the developing world from what was understood in Western Europe. Thus, the question was whether there should be a single notion of a corporate group that would include hierarchical structures or whether it should it also include forms of aggregation that might appear hierarchical yet where the relationship was slightly different. The third question was in relation to cooperatives and whether a group of companies and a group of cooperatives should have the same meaning or if a second or even third order of cooperative groups should be regulated differently from a group of companies.

75. *A member of the Subgroup on Companies* responded to the second question concerning different notions of groups. One would be the hierarchical structure, which was the traditional form of corporate group, usually comprising a parent company and a number of subsidiaries controlled by the parent through share ownership or other means such as a contractual agreement. The second notion was a form of coordination with horizontal relationships among the various companies that comprised the group. This second notion was slightly outside of the realm of corporate groups and was related more specifically to a contractual type of coordination in the form of joint ventures or consortia, which could be entered into by different companies or different types of legal persons, such as cooperatives. The purpose of these types of groups was to coordinate certain phases of production, distribution, transportation or other endeavours. It was explained that the focus of this particular section of the paper was on the first type, the hierarchical group and the governance of relationships between parent companies and their subsidiaries.

Corporate Sustainability Due Diligence (CSDD)

76. *A member of the Subgroup on Companies* pointed out that corporate groups posed several challenges. One of the biggest issues was whether or not they should be viewed in the aggregate and treated as interrelated and interconnected and therefore responsible for each other's actions, particularly whether parent companies should be treated as responsible for the actions of subsidiaries. The traditional view in corporate law was not to look beyond the corporation and, as a shareholder, a parent company was not liable for the actions of its subsidiary. It was noted that legal systems around the world, particularly in North America, were struggling to find ways that were consistent with traditional corporate law to hold a parent company liable for the actions of its subsidiaries.

77. *Another member of the Subgroup on Companies* agreed, emphasising the importance of corporate groups and the liability of parent companies in relation to sustainability. It was pointed out that, in cases of environmental damage, the parent company could be deemed liable for damages caused by its subsidiary, and the Bestfoods case[1] was cited as an example. It was pointed out that this was a critical issue for agricultural enterprises. *Another member of the Subgroup on Companies* mentioned the OECD Guidelines for Multinational Enterprises on Responsible Business Conduct, noting the principles included co-responsibility between different members of a group and that the

[1] United States v. Bestfoods, 524 U.S. 51 (1998).

parent enterprise was responsible for the negative effects produced by certain actions of their subsidiaries.

78. *A member of the Subgroup on Cooperatives* agreed that this was an important matter that had to be considered and noted that it was applicable not only for subsidiaries but across supply chains, at least in Europe. *The UNIDROIT Secretary-General* pointed out that there was a forthcoming project in the UNIDROIT Work Programme on corporate sustainability due diligence along the supply chain and, accordingly, it would not be necessary for the CLSAE Project to elaborate on these issues but rather, to coordinate with that project.

(b) Draft Discussion Paper on Multiparty Contracts

Asset allocation and related liability

79. *A member of the Subgroups on MPCs* shared a Powerpoint presentation to illustrate the latest developments in the MPC discussion paper, specifically on asset allocation related to liability regimes in multi-party contracts in agriculture.

80. The core features of the collaborative MPC in agriculture were reviewed, namely, shared objectives (primarily strategic); shared resources (primarily complementary, strategic, intangible); fulfilment of common projects; requirement of specific and not easily redeployable investments; interdependent activities; and embeddedness in wider contexts and often global value chains. What was implied by these features in terms of asset management was the need for a long-term relationship to manage uncertainty over risk of loss, deterioration of assets and financial distrust, and to preserve the collaboration. Financiers might be part of the chain but not party to the multi-party contract.

Conceptual framework

81. From the point of view of a theoretical framework, the Subgroup had reviewed the literature on asset partitioning (e.g., Hansmann and Kraakman) and found a large body of work on the role of asset partitioning as a governance tool. Given the prevalence of mandatory rules imposed by regimes on this aspect, the role of party autonomy differed from other aspects of the multi-party contract: parties still enjoyed freedom of choice from among a predetermined scheme.

82. This was illustrated with the example of a multi-party contract among five farmers and a wine producer with exclusive IP rights over grape varieties and where this MPC had two purposes: wine production, and research and development. In this venture, the parties had established a common fund that comprised money, key agricultural equipment, and the wine producer's IP rights. A third-party creditor financed the R&D programme. The main questions that were examined in the paper were as follows: first, whether MPCs in this context allowed the sharing of material and non-tangible resources for collaboration and which options were available. Secondly, how parties could ensure that shared assets would be used for the common purposes without being easily reappropriated and redirected to individual purposes by the parties and seized by their personal creditors. Thirdly, to what extent multiparty contracts could limit parties' liability for obligations inherent to their collaboration within the limit of shared resources (*i.e.,* the common fund). Finally, to what extent the choice of a scheme that allowed for limited liability facilitated access to credit.

Forms of asset sharing

83. Noting that MPCs would allow sharing of material and intangible resources, it was explained that the MPC legal form might have fewer constraints than the alternative company form wherein it might be possible to share intangibles, but only if their value could be demonstrated or they belonged to a certain subset. It was suggested that this difference might be an aspect for the comparison.

84. Unlike the cooperative and company forms, it was explained that at least two options for asset sharing could be used with MPCs. One was the common ownership regime that did not constitute a distinct legal entity but rather provided that all parties had a share of ownership of all shared resources and was governed by property law. Applied to the given example, this would include the IP rights. A second option was through the use of internal regulations (of the MPC) that could prescribe rules on the use of resources and decision-making. In the given example, a contractual regime could be established whereby all parties had a license to the IP right, but the IP right remained within the exclusive ownership of the winemaker. By comparison with the cooperative and company forms, the MPC might offer greater flexibility. It was suggested that this might be another aspect for the comparison.

Asset protection

85. On the second question as to how to ensure that the shared assets would not be diverted from the common purposes and redirected towards individual purposes, it was pointed out that at least in principle, common ownership regimes were easier to dissolve and thus less stable than the ownership regimes of cooperatives and companies. In the given example, if the winemaker granted the IP rights to all parties in common, it would be possible to dissolve the common ownership at some point and claim back the IP rights, depending on the jurisdiction. Of course, contract law could step in and the parties could provide that ownership remain undivided. Examples were given of states in which the law so provided (*e.g.*, Argentinian Commercial Civil Code, art. 1458).

86. As to claims by third parties, personal creditors usually could seize the debtor's ownership shares, which illustrated another vulnerability of common ownership regimes. A contractual provision against creditor claims would have no effect because of the principle of privity of contract. However, once again, state law on some forms of multi-party contracts might provide for the protection of shared assets from creditors (Italian law on network contracts, Argentinian law mentioned above).

Limited liability and the "contractual veil"

87. On the third question concerning limited liability, whereas there was general familiarity with the corporate veil, there might also exist a contractual veil, albeit thinner. The common fund had this effect of shielding the personal assets of the parties under general contract law and the principle of privity of contract; however, the contract only had effect among the parties and could not limit liabilities vis-à-vis third parties. However, there might be cases in which the law, in order to incentivise collaboration, imbued the multi-party contract with the power to limit liability without legal personality (for example, the network contract under Italian law). Another example was Argentinian law, wherein limited liability was for "mere participants", whereas active managers within the contract were fully liable.

88. As to whether involuntary creditors (*i.e,* tort victims) could seize personal assets of a party beyond the common fund under a limited liability regime, reference was made to the Italian law on network contracts, which distinguished between voluntary and involuntary creditors. Accordingly, the network contract without legal personality provided limited liability for members, but did not apply to involuntary creditors.

Common fund and sub-funds

89. The last question concerned the situation when asset partitioning was allowed and whether the MPC could segregate a sub-fund within the common fund. Recalling the example, it was suggested the wine producer could confer its own IP rights to the multi-party contract, but that would represent a segregated fund within the common fund. In this case, when the bank provided financing against the IP rights, it would have an exclusive right to claim against that segregated collateral.

Access to credit

90. The presentation turned to the implications of this for access to credit. The literature confirmed that insofar as limited liability regimes and asset partitioning could be brought into the contractual setting, this was beneficial for access to credit: financial risk was concentrated in those partitioned assets; financiers had not priority rights but exclusive rights against those assets; interest in monitoring and assuring the efficient uses of these resources was enhanced. The situation might be different in the agricultural context, where shared resources were normally co-owned and did not belong to a separate legal person.

91. Although there were limitations in using an MPC as a way to create asset partitioning, the question was whether this limitation might be overcome with the combined use of the multi-party contract and company forms. For example, the parties to the multi-party contract could create a small company for an R&D programme as a binary strategy.

General discussion

92. The following questions were posed for discussion: whether these approaches were inconsistent with legal systems known to the Working Group; whether these approaches were relevant only for multi-party contracts; what were the most relevant limitations of these MPC rules on asset right allocation and liability from the perspective of collaboration in agriculture; to what extent could these limitations be addressed by choosing another model or overcome by combining the MPC with a limited liability company.

93. *A member of the Subgroup on Companies* agreed that in terms of company law, once assets had been contributed to the corporation, they belonged to the corporation and not the shareholder. The MPC agreements where title to assets contributed could be retained with the view of establishing exit rights were completely different because there would be no entity upon termination. It was noted that such a regime would seem possible both in common law and civil law.

94. *A representative of FAO* suggested including in Section C on multi-party and bilateral contracts a short reference or footnote to the Legal Guide on Contract Farming that explained the characteristics of contract farming as a paradigm bilateral agreement between a producer and a buyer.

95. *The Coordinator of the Working Group* suggested that one of the questions that should be discussed in terms of the general purpose of the CLSAE Guide was the extent to which resources must be differentiated and if some had to be protected differently from others. Protection was a variable that could be used by parties depending on their power, size, or ability to provide different types of protection. Specific examples could be given as to ways in which different types of commodities, credit, and interests could be protected, depending on their strategic nature. The three chapters could be integrated with at least a sentence to acknowledge that protection could be differentiated, and one of the variables to consider would be the strategic nature of the resource to be protected.

96. *The presenting member of the Subgroup on MPCs* responded that this aspect could be addressed in each chapter from different points of view and in terms of, for example, restitution upon exit or withdrawal, or dissolution of each of the forms. This was definitely relevant in respect of asset partitioning and what would be conferred upon the common fund in an MPC, and to what extent, for example, certain resources might be untouched by creditors. Certain assets, if gone, would end the collaboration. One way to protect this resource would be to partition and segregate this resource and create a sub fund within the common fund, the result of which would be that no creditor could claim rights against it (unless its claim was related to the management of that asset). Of course the possibility of asset partitioning within multi-party contracts was more limited than in other forms.

For example, within a corporate group arrangement in order to manage more critical resources, one option was to create a company. These were considerations for each chapter and would be useful for the comparative analysis.

97. *The UNIDROIT Secretary-General* asked for clarification in the example provided as to who would act externally to request the funds to finance the activities. *The presenting member* responded that from the governance point of view, someone would have power to act on behalf of and to bind all parties in relation to third partes. But if the law provided for a limited liability scheme, it had the common fund as a reference point. In terms of rights and obligations, the parties to the MPC were co-holders but in terms of asset-related liability, the law could establish that the third-party creditor might only seize the common fund and not the personal assets of the parties. In response to the suggestion to create a security interest over that asset by way of contract, it was explained that creating security rights gave priority rights to creditors, whereas asset partitioning created exclusive rights for those creditors. In most countries in the world, the premise was that all the parties to the MPC had universal liability and so it was necessary to have a law that included these provisions, such as the examples from Italian and Argentinian law that, without legal personality, allowed for this kind of limited liability scheme. For this reason, the Working Group was asked if they were aware of any other examples.

98. *The Coordinator of the Working Group* suggested that segregation of assets and partitioning might be one aspect that could be used to differentiate the three legal forms. He also pointed out that the use of a contractual network combined with a company as a special purpose vehicle to protect a specific type of resource was a very commonly used scheme in Italy. It might unfold that the "pure" forms would be less common and that integration of forms would become the most useful, and this could be addressed either in the comparative section or separately.

99. *A member of the Subgroup on Cooperatives* pondered whether the interest group that was being targeted by the CLSAE Guide would consider these issues when they collaborated among themselves, particularly when the law in most countries did not yet foresee this possibility.

100. *The member of the Subgroup on MPCs* responded by noting that limited liability was not the objective, but rather an instrument that might offer some reassurance to parties and facilitate their collaboration. Parties did not collaborate just because of assumed limited risk. Some MSMEs might prefer to start from a contractual setting if, for example, financial risk was not as important as control and flexibility, ease of exit and the possibility to reclaim critical assets. But this was not to suggest that MPCs were appropriate in all situations.

101. *A member of the Subgroup on Companies* referred to traditional forms of financing in Cameroon, such as rotating credit associations, and explained that most were informal with internal systems for savings and access to credit. At some point, when the credit that could be obtained became insufficient, individuals might move to other structures. When borrowing from financial institutions, the question was how liability would be distributed among members and what kind of security would be required. *The member* also noted her preoccupation throughout the project over whether these structures were too complex for the entrepreneurs being targeted by the CLSAE Guide and encouraged consideration on how to simplify these arrangements or how they could be better adapted to the realities of these types of borrowers.

102. In response to a question from *a representative from IFAD*, it was explained that, legally speaking, oral contracts and multi-party contracts were binding in principle but that in practice it would be very difficult to manage a multi-party collaboration without a written contract. Since MPCs involved long-term collaboration where the circumstances might change over time, it was important to have a transparent structure that clearly outlined the rules on decision-making and allocation of rights, duties and liabilities.

103. *A member of the Subgroup on Companies* added that the issue was enforceability and that, in some countries, contracts beyond a certain value had to be in writing in order to be legally binding. In most civil law jurisdictions, oral contracts were binding except in cases that involved real estate or contracts that required certain formalities. However, in practice, such oral contracts were worthless and particularly in developing jurisdictions in which enforcement was often difficult, an oral contract was impractical. Therefore, it was suggested that the CLSAE Guide include a recommendation that these contracts should be in writing.

104. *A member from the Subgroup on Cooperatives* noted that the question highlighted concerns over complexity because to lay down such a complex contractual structure in an oral contract would be very difficult. Referring to the comment on simplification, it was suggested this be discussed in relation to all three forms. Depending upon the growth phase of the enterprise, either a simplified or a more complex form might be appropriate, and it was suggested that should be stated in the CLSAE Guide.

105. *A member from the Subgroup on Companies* noted that what had been described as multi-party contracts in a common law system like that of Canada or the U.S. would often be treated as partnerships and asked whether, in a country like Italy, there was a clear delineation between multi-party collaborative contracts and partnerships. It was pointed out that the multi-party contract was not a concept well-developed in the common law, and much of what had been discussed would be encompassed, in a North American context, in a determination over whether or not this was a partnership and whether or not the parties were collaborating with a view to profit.

106. *The member from the Subgroup on MPCs* acknowledged that there were these typologies that existed in the middle, depending upon the jurisdiction, and that partnerships were definitely difficult to compartmentalise. It was explained that at the beginning of the CLSAE Project, it had been decided to use legal personality as a threshold, although it was recognised that the concept differed from one jurisdiction to another.

107. *The Coordinator of the Working Group* responded that the CLSAE Guide should not take a doctrinal approach, but rather a functional one, because otherwise it would be extremely difficult for farmers to choose and transplant options from one legal system to another. For example, if an Argentine group of farmers wanted to use a partnership form used in Canada, the issue would not be whether a multi-party contract was a partnership. The task was to write a glossary and a text that reflected functions, and if by looking at the functions, one discovered that a multi-party contract and a partnership performed the same function with the same features, it did not matter how they were categorised.

108. *The member of the Subgroup on Companies* responded by noting the difficulty was that in jurisdictions with partnership law, for example, it might not be possible to choose an MPC without being considered a partnership and subjected to that regime because one could not contract out of partnership law. *The Coordinator of the Working Group* suggested that the Subgroup on Companies provide examples to illustrate core issues where rules were mandatory and could not be excluded by contract.

109. *The UNIDROIT Secretary-General* commented that several of the shortcomings of the multi-party contract model, as well as those of the other models, could be overcome by combining models. If combining models did not seem to be an obvious choice, the CLSAE Guide could offer some guidance on how combining could be done.

(c) Draft Discussion Paper on Cooperatives

Structure of the paper

110. *The presenting member of the Subgroup on Cooperatives* began by emphasising the need for a more accessible structure for cooperative lawyers and proposed several adjustments: (i) Section 3, concerning the formation of agricultural cooperatives, could be merged with Section 9(d) due to overlapping themes; (ii) Sections 4 (Separate Legal Personality) and 6 (Asset Partitioning) were questioned for relevance, as the issues appeared implicit in the overall content; (iii) Section 7 (Membership) should be moved forward, given its foundational importance to cooperatives; (iv) Sections 8 and 9 on member contributions and governance required reorganisation to highlight their distinct but related aspects; (v) Section 12 (Breach of Obligations) conflated contractual and cooperative obligations, and distinctions had to be made between post-contractual and post-termination obligations; (vi) Sections 13 and 14 on collaboration and access to credit needed reordering, as credit access became irrelevant post-dissolution; (vii) Section 15 (Digitalisation and Technology) should be integrated into the broader discussion rather than treated as an add-on (suggest restructuring the paper also taking into consideration paragraph 162, below).

111. *A member of the Subgroup on MPCs* suggested revising the title "Sanctions" under point C on page 20 to "Remedies and Sanctions" to better reflect the broader scope of the content. It was noted that the section dealt not only with punitive measures but also with corrective remedies aimed at preserving collaboration within cooperatives and aligned with the agreed approach of the Working Group to prioritise remedies that support continuity, before imposing more severe sanctions like termination or expulsion. It was suggested that the "Right to Cure" could be incorporated as a subpart of the preceding paragraph to emphasise its role as a corrective measure within the remedial process.

Defining cooperatives and their identity

112. *The presenting member* explained that the definition proposed by the Working Group was enshrined in the 1995 International Cooperative Alliance Statement on the Cooperative Identity and in the 2002 Promotion of Cooperatives Recommendation (No. 193) of the International Labour Organization (see Cooperatives Discussion Paper, Section I.B for further elaboration). Secondly, these statements had been reworked over the past 100 years such that the cooperative identity was embedded therein. Thirdly, the definition incorporated the threefold objective to meet the economic, social and cultural needs of members without mention of pursuit of profit, although this was not excluded. Fourthly, membership was central, and he postulated that members as co-entrepreneurs could be read into the definition as it was not the cooperative that satisfied members' needs but rather the members themselves. He pointed out that, given the current shift towards sustainability and social responsibility among corporate actors, the issue was how to distinguish cooperatives from other types of enterprises and that the remaining distinctive feature might be the members' democratic participation in its widest sense.

113. *The UNIDROIT Secretary-General* raised a question regarding the fundamental differences between cooperatives and companies. Referring to the international definition of cooperatives as "autonomous organisations of persons united voluntarily to meet their common economic needs and aspirations through a jointly owned and democratically controlled enterprise," he noted that the only apparent distinction was this principle of democratic control.

114. *The presenting member* responded that cooperatives were distinct from corporations because of their focus on economic, social, and cultural objectives rather than profit. He highlighted cooperatives' democratic governance, whereby members acted as both participants and decision-makers, a feature crucial to maintaining autonomy and aligning governance with cooperative principles. It was also emphasised that while many enterprises, regardless of their structure, engaged in community-focused or environmentally sustainable practices, the key distinction lay in the cooperative model's obligation to do so. It was explained that this legal obligation ensured that

cooperatives could not avoid pursuing community-oriented goals, setting them apart from companies that voluntarily engaged in such activities.

115. *Another member of the Subgroup on Cooperatives* (Cynthia) agreed that cooperatives were member-focused entities where members united to achieve common goals through democratic practices and participation, rather than entities designed to serve members in a top-down manner. Using Almaria as an example, it was described how small farmers had formed marketing cooperatives to secure better prices and control over their markets, and it was suggested that consideration be given to how a critical mass of cooperative behaviour could lead to benefits that were not only economic but included stability and quality of life and the environment.

Legal personality of cooperatives

116. *The presenting member* briefly revisited the prior discussion on separate legal personality, stating that cooperatives, at least potentially, had to be legal entities. *The UNIDROIT Secretary-General* highlighted differences between common law and civil law systems and explained that in civil law, legal personality referred to the attribution of actions to the entity itself rather than its members, while in common law, partnerships might lack this attribute. He distinguished legal personality from liability, noting that cooperatives or partnerships bore primary liability, but creditors might seek recourse from members under certain conditions, and also linked this to asset partitioning, which determined whether creditors could access members' assets to satisfy cooperative liabilities.

Membership

117. *The presenting member* highlighted the variability in minimum membership thresholds, which were typically dictated by national law. While some jurisdictions such as Finland permitted one-person cooperatives, agricultural cooperatives often required seven or more members, creating barriers to formation for smaller groups of individuals or companies.

Formation and structure of cooperatives

118. *The presenting member* explained that legal recognition of cooperatives typically occurred at registration and that most jurisdictions required potential members to submit the bylaws or statutes that defined liability, representation and member responsibilities, as these details were not always in the law. Beyond these essential documents, it was suggested that the CLSAE Guide should not provide an extensive list of documents as this could prove discouraging, and requirements varied widely between countries.

119. It was proposed that a discussion of governance organs, such as the General Assembly and Board, would be incorporated into the section on structure. Importance of consistent and functional terminology was also reiterated (*discussed below under statutes and bylaws).*

Internal regulations of cooperatives

120. *A member of the Subgroup on Companies* highlighted internal regulations as critical for governing member activities and operational standards, citing examples such as payout rules, data management policies, and organic production standards. These regulations were distinguished from foundational documents, noting they were typically adopted internally, perhaps by majority vote, and directly had an impact on operations without requiring public registration. It was noted that this could be interesting for comparative analysis, because the cooperative might have special means for monitoring compliance with these internal rules, whereas a company or MPC might have to rely on shareholder agreements or other instruments to bind its members.

121. *The EURISCE Secretary-General* emphasised the open-door principle in relation to member exit, noting its impact on planning and investment. He cautioned that unrestricted exit could lead to

opportunistic behaviour and called for deeper analysis of these challenges in the paper. *The presenting member* acknowledged these suggestions and the need to distinguish between internal governance rules and external regulatory requirements.

Access to inputs

122. *The presenting member* raised the issue of access to inputs in agriculture, citing the critical role of patent rights on seeds. It was highlighted how heavily regulated and concentrated seed usage had become, with government monitoring practices restricting farmers' ability to reuse seeds. While recognizing that seed restrictions were of concern for all types of actors, it was emphasised that this issue and its implications for agricultural cooperatives would be addressed.

123. *The EURISCE Secretary-General* complemented this point by emphasising the importance of intangible inputs such as research, innovation, and knowledge sharing. He highlighted the role of agricultural cooperatives in developing and sharing these resources within communities of practice, framed as vital elements of cooperative functionality.

Democracy – individual and organizational

124. *The Coordinator of the Working Group* considered the interplay between freedom of contract and freedom of organisation within cooperatives and suggested democracy be expanded to include organisational democracy, especially in multi-layered cooperatives with a self-organised group of smallholders at one level aligned with the internationally organised entity at another. He asked about freedom of contract at the first, as compared with the second and third levels, and emphasised that when it came to the comparative analysis, it would be necessary to make a decision on whether the comparison was between homogeneous or heterogenous entities.

125. *A member of the Subgroup on Companies* added that yet another layer of governance complexities was introduced when cooperatives included both individuals and legal entities as members, and she suggested that in cases where voting might reflect multiple layers, a larger legal person, such as another cooperative representing 100 individual farmers, might have more influence.

126. *The presenting member* clarified that voting at the primary level was the same for all members – individuals and legal entities – and emphasised that democratic participation extended beyond the "one member, one vote" principle. It was pointed out that many countries had one law applicable to all types of cooperatives, the exception being special laws on social cooperatives which were becoming more numerous, such as Italy's law on social cooperatives. It was agreed that the paper would need to address these aforementioned points.

Democratic governance, voting and member contributions

127. The "one member, one vote" principle in cooperatives sparked debate, with *the UNIDROIT Secretary-General* questioning its fairness when members contributed unequally. Using the example of a farmer with greater financial risk and resources, it was suggested that this system might deter larger contributors from participating. In response, *the presenting member* emphasised the principle's focus on equality, granting all members equal representation regardless of financial input. It was noted that while debates about linking votes to financial contributions persisted, such practices remained prohibited by law. Instead, cooperatives often prioritised consensus over voting, with informal influence playing a significant role in decision-making.

128. The importance of balancing membership diversity was also underscored, highlighting the benefits of resource and knowledge sharing, such as technology transfer. However, it was cautioned that overly homogeneous groups risked stagnation and failed to capitalise on the cooperative model's strengths.

Collaboration and value chains

129. The discussion then shifted to the role of cooperatives in value chains. *The presenting member* explained that, traditionally, the cooperative had been viewed as a value chain in its entirety – "from the producer to the consumer" – but that this chain had been broken in many countries. Two options would need to be considered; one was integration into value chains where other types of entities operated, and the other was cooperation among cooperatives. *The Coordinator of the Working Group* emphasised the importance of distinguishing collaborative mechanisms in fully vertically integrated cooperatives, where production, transformation, distribution, and consumption were managed internally, from those operating within broader supply chains involving non-cooperative entities, and he suggested that the instruments of collaboration would differ.

130. *The presenting member* agreed that this distinction was important but said that full vertical integration was rare, while the more common arrangement in most countries comprised a pyramidal structure where primary cooperatives focused on production, secondary cooperatives handled processing, and tertiary cooperatives managed broader functions. He noted emerging tensions between producer and consumer cooperatives, reflecting the evolving dynamics of cooperative structures.

131. *The EURISCE Secretary-General* highlighted inter-sectoral collaboration as another dimension and cited as an example agricultural and credit cooperatives that worked together, forming unique ecosystems. He also pointed to the trend of cooperatives establishing joint-stock companies to overcome operational or legal barriers, especially in international trade, and suggested addressing the resulting tensions between cooperative principles and corporate ownership in the paper.

Cooperation among cooperatives

132. *The presenting member* discussed ICA principle six, emphasising the role of secondary and tertiary cooperatives in supporting primary cooperatives rather than operating independently. This principle, reinforced by ILO Recommendation 193, was described as enhancing stability and effectiveness within the cooperative ecosystem. It was noted, however, that these structures were often misunderstood or resisted by jurisdictions, limiting their implementation.

133. *A member of the Subgroup on Companies* raised the question of whether second-tier cooperatives had to always take the form of cooperatives and whether they replicated themselves (isomorphism) or whether alternative structures could serve similar functions. In response, *the presenting member* explained that most jurisdictions did not specify the legal form required. Secondary cooperatives often blended the economic function (activities that the primary cooperative could theoretically perform) and political functions, creating ambiguity in their classification. Tertiary cooperatives primarily served political or advocacy roles. It was acknowledged that this matter required clarification in the paper.

Cooperative ecosystems

134. *The Coordinator of the Working Group* referred to the concept of cooperative ecosystems as dynamic systems that aggregated resources to create "economies of aggregation," encompassing data providers and financial institutions and enabling collective resource management and shared ownership. It was explained that by pooling fragmented assets, ecosystems enhanced the benefits generated by cooperatives and fostered collaboration and, accordingly, it was proposed that the paper emphasise how ecosystems drove collective action and resource optimisation.

135. *A member of the Subgroup on Cooperatives* expanded on the concept of the cooperative ecosystem and the need for consideration beyond vertical and horizontal integration as the critical

mass generated by collaborative clusters were vital for promoting economic, environmental, and social sustainability through cross-sector collaboration.

136. *The EURISCE Secretary-General* reinforced this perspective, pointing to the principle of "concern for community" as central to cooperative identity. Using examples from the Korean cooperative movement, he illustrated how consumer cooperatives addressed food safety by allowing consumers to act as investors, creating mutual benefits for producers and consumers while fostering community development.

Financial institutions within cooperative ecosystems

137. Linking these ideas to the financial realm, *the presenting member* emphasised the critical role of cooperative banks and credit unions within cooperative ecosystems. Unlike commercial banks, these institutions were better equipped to evaluate cooperatives' stability, as they understood the internal control mechanisms unique to cooperative structures. This mutual understanding facilitated access to credit without over-reliance on collateral or liability assessments. Referring to the EURISCE Secretary-General's earlier points, he underscored the importance of integrating financial cooperatives into agricultural ecosystems, noting that they were indispensable for sustaining primary agricultural cooperatives and essential for addressing the financial needs of smaller members, and he suggested that this relationship be explicitly addressed in the paper.

Member contribution and capital

138. *The presenting member* stressed the importance of internal financing mechanisms for preserving cooperative autonomy in line with ICA principles, explaining that most countries had no minimum capital requirement for cooperatives and that membership contributions, unlike corporate shares, were financial contributions for operations that did not entitle members to dividends or asset claims. Reserve funds, particularly indivisible ones, were highlighted as key to ensuring long-term stability and intergenerational sustainability. By way of example, Italy's cooperative system was noted as exemplary, where a portion of the surplus had to be paid into the reserve fund and another portion into a common fund during the life-time of the cooperative. It was noted that there was a series of internal financing instruments, particularly in the United States, that was worth examining. Also mentioned was that, in the past, members remained personally liable for the debts of their cooperative with a sense of pride, but that such rules were no longer in operation. However, many jurisdictions still had mechanisms by which the members could be forced to contribute, should the cooperative encounter financial difficulty. Apart from the foregoing, it was pointed out that the primary way a cooperative formed capital was through transactions that generated surplus.

139. Noting that transactional obligations were a cornerstone of cooperative financing, the *EURISCE Secretary-General* criticised the ICA principles for not adequately emphasising the expectation that members transact with their cooperatives, warning that this oversight exposed cooperatives to free-riding. He elaborated on enforcement challenges, particularly in jurisdictions where competition laws restricted exclusivity agreements. While U.S. laws explicitly exempted cooperatives from such restrictions, most jurisdictions lacked similar clarity, complicating sustainability efforts.

Reserves and asset partitioning

140. *A member of the Subgroup on Companies* highlighted the resilience of cooperatives during financial crises, attributing it to their ability to create reserves within this unique patrimonial structure. She distinguished reserves from asset partitioning, explaining that while reserves were internal and used for reinvestment, they did not provide creditor protection. Instead, reserves enhanced cooperatives' collaborative capacity by funding investments and initiatives approved by members. It was suggested that the paper further explore these distinctions to illustrate how reserves strengthened cooperatives compared to companies or multi-party contracts.

141. *The EURISCE Secretary-General* reinforced this point, emphasising the role of patrimonial reserves in promoting longevity and as a key difference from corporations. Using Italian cooperatives as an example, he explained how incrementally growing reserves provided long-term financial stability and suggested this be emphasised in the paper. *The presenting member* agreed, highlighting the intergenerational role of reserves in fostering sustainable development. Unlike corporate models that prioritised short-term financial gains, cooperatives produced long-term stable results. It was noted that reserves could and should be used, with the basic objective to benefit members based on transactions rather than financial contributions.

External financing

142. *An individual observer* agreed that membership should prioritise individuals directly involved in cooperative activities, such as farmers and producers, while excluding financial investors whose objectives might conflict with cooperative principles. However, it was pointed out that excluding financial investors created challenges in scaling cooperatives, and a suggested mechanism was to balance member contributions and financial sustainability. The example from Italy was cited, wherein larger members were able to offer financing, but then the question arose as to whether such members should have a different position.

143. *The presenting member* pointed out a tendency among legislators to allow such external investment but suggested that if a cooperative required extensive capital from outside sources, perhaps the better solution would be transformation. It was acknowledged that both internal and external financing had yet to be addressed in the paper.

Access to credit issues

144. The issue of credit access was raised by *the IFAD representative*, who highlighted the challenges faced by smallholder farmers, particularly in the context of genetically modified organisms (GMOs). It was noted that factors such as climate-resilient seeds, pesticide residues, and non-replicable certified seeds often complicated financing, and it was explained that financial institutions were frequently scrutinised for supporting GMOs, creating barriers in regions where cultural or legal resistance to GMOs existed. While not exclusive to cooperatives, these challenges disproportionately affected smallholders due to their limited awareness of financing mechanisms.

145. *A member of the Subgroup on Companies* referred to paragraph 25, asking whether cooperatives faced unique challenges in accessing credit compared to corporations and if so, whether this was due to the cooperative structure, governance framework or other elements. It was also suggested that the Subgroup might wish to consider the connection between this point and paragraphs 85 and 86, which identified additional challenges faced by cooperatives that could be useful for the comparison. *The presenting member* responded that credit access often hinged on the availability of cooperative-friendly financial institutions. *The EURISCE Secretary-General* added that younger cooperatives, with lower capitalisation, faced greater hurdles, whereas older cooperatives with established reserves encountered fewer obstacles.

Financing and digitalisation

146. *A member of the Subgroup on Digital Platforms* highlighted the dual pressures of digitalisation and financialisation on cooperatives, emphasising how reliance on external "tech behemoths" exacerbated power and informational asymmetries. This reliance risked undermining democratic participation, a cornerstone of cooperative governance.

147. Two approaches were suggested: to adopt external systems, which compromised autonomy, or alternatively, to develop proprietary digital infrastructure, which was often cost-prohibitive. The speaker underscored the financial strain imposed by digital agriculture, where traditional funding sources, such as member dues, could not cover the substantial costs of digital projects. This

dependence on external capital introduced challenges, including the inclusion of investor members, which could erode democratic structures and increase the risk of corporatisation. He pondered whether the CLSAE Guide should include cautions on collaborating with corporate actors or explore alternative large scale financing methods that avoided reliance on venture capital.

Data and digitalisation

148. *The presenting member* noted that although paragraph 107 underlined the importance of data and digitalisation, a broader review of this topic across the paper was necessary. *Another member of the Subgroup on Cooperatives* (Cynthia) asked for clarification on the approach that would be taken.

149. *A member of the Subgroup on Digital Platforms* suggested that one aspect would be to consider how digital tools could enhance governance by improving transparency and streamlining democratic processes. A suggestion was to examine the role of digitalisation in enhancing market opportunities for cooperatives.

Breaches and dissolution

150. *The presenting member* emphasised the need to distinguish between breaches of rules concerning cooperative organisation and breaches related to collaborative projects. While the paper touched upon these issues, it was noted that the sanctions applicable to members who violated such rules could be clarified further. It was also suggested to revisit the grouping of termination of membership and cooperative dissolution in Section 12, as these were distinct concepts. It was explained that cooperative legal entities endured beyond the exit of an individual member, reinforcing their unique identity and continuity.

Terminology – agricultural activities

151. Referring to the definition of an agricultural cooperative as one involved in carrying out an agricultural activity (paragraph 27), *the presenting member* had expressed concern that this might create the impression that cooperatives, as enterprises, were directly engaged in agricultural activities, which was not generally the case. To address this, it was recommended to refine the language to reflect cooperatives’ role as facilitators rather than primary producers. *A member of the Subgroup on Companies* added that the use of “agricultural activities” lacked consistency across the cooperative and company papers and proposed standardising the terminology.

152. *A member of the Secretariat* referred the Working Group to the Glossary in Annex 1 of the Secretariat Report and explained that the definition for the term “agricultural activities” had been derived from FAO responses to a UNIDROIT questionnaire. It was explained that the legislative examples from several countries generally encompassed practices involved in primary production, such as crop cultivation, livestock farming, aquaculture, and forestry. It was further noted that the term "agri-food value chain" encompassed both primary production and secondary activities such as agribusiness and it was suggested that the definition in paragraph 27 might be revised to align with this broader scope.

Terminology – Peasants and Farmers

153. *The presenting member* referred to footnote 4 and clarified that it was not that the Subgroup preferred the term "peasants" over "farmers," but rather, that the distinctions should be clarified in the glossary as the two required different approaches.

Terminology – Statutes and Bylaws

154. *The presenting member* had flagged these terms during his presentation, and the *UNIDROIT Secretary-General* noted that confusion arose from different interpretations of terms like "statute"

and "bylaws" across jurisdictions. *A member of the Subgroup on Companies* explained that in U.S. common law, "statute" referred to a law enacted by a legislative body, while in civil law systems it commonly denoted foundational documents (such as company bylaws in France). The divergence in legal systems was such that foundational documents, such as articles of incorporation and bylaws, were distinct in common law but unified under terms like "*statuto*" in Romance languages. *The presenting member* pointed out that in the Arab-speaking world, "bylaws" referred to government regulations.

155. *Another member of the Subgroup on Companies* proposed adopting neutral and functional terminology to reduce ambiguity, such as using "organisational rules" for bylaws and "formation documents" for foundational documents. Examples could be sourced from international models, such as the UNCITRAL Legislative Guide on Limited Liability Enterprises, which employed simplified language. This approach was supported by other participants, and it was agreed that these terms would need to be clarified in the Glossary to ensure consistency and comprehensibility.

Terminology – Share

156. *The presenting member* highlighted concern over the use of the term "share", which might mislead readers into equating membership shares with ownership stakes in cooperative assets. It was suggested to use alternative terms like "contribution" to better reflect cooperative principles.

Terminology – Secondary and Tertiary Cooperatives

157. *An individual observer* suggested introducing a formal definition of secondary and tertiary cooperatives in the paper to clarify their roles and purpose. It was emphasised that a clear description would enhance the understanding of these structures and their significance.

Terminology – Post-Contractual Obligations

158. *A member of the Subgroup on MPCs* suggested clarifying the term "post-contractual obligations" and proposed the use of "post-termination obligations" instead to provide more functional and precise language. This adjustment could reduce confusion and align terminology across the discussion papers.

Terminology – Member

159. *The Working Group* explored the use of "member," noting its inconsistent application across legal systems. *The presenting member* expressed concern about potential confusion, as "member" was standard in cooperative law but less common for other entities. *A member of the Subgroup on Companies* explained that "stockholder" and "shareholder" were typically used for corporations and "partner" for partnerships, while "member" was reserved for limited liability companies (LLCs). *Another member of that Subgroup* noted that "member" was preferred over "shareholder" in the United Kingdom, highlighting regional variations.

160. *The UNIDROIT Secretary-General* supported the term "member" for its neutrality and broad applicability; however, after *another member of the Subgroup on Cooperatives* pointed out that, at one of the earlier meetings of the Working Group, it had been agreed that the term "member" was fundamental to cooperatives; he suggested to use "shareholder" for capital companies, "partner" for partnerships, "member" for cooperatives and also when referring generically to any of the entities in order to be consistent with what had been agreed already and with other instruments of international law. *The Secretariat* pointed out that the Glossary included definitions distinguishing the term for cooperative members from its use in other entities.

Terminology – Contract

161. *A member of the Subgroup on MPCs* identified an inconsistency between the definition of "contract" (paragraph 124) and the concept of multi-party contracts outlined in the paper on MPCs, particularly in balancing conflicting versus common interests. It was suggested either revising the definition in paragraph 124 or rewriting the multi-party contracts chapter to ensure coherence. *The presenting member* acknowledged the need for adjustments to address this inconsistency.

162. *The UNIDROIT Secretary-General* emphasised the importance of a comparative approach in identifying best practices for cooperatives, noting that the project should incorporate key elements of cooperative typologies even if they were not explicitly part of the international definition. He encouraged the experts to freely highlight essential aspects that reflected the core characteristics of cooperatives across jurisdictions, as their expertise was crucial to the success of the project.

(d) Draft Discussion Paper on Digital Platforms

163. *The presenting member of the Subgroups on Digital Platforms* shared a Powerpoint presentation to illustrate the latest developments in the Digital Platforms discussion paper and distributed a set of questions for discussion with the Working Group.

164. *The presenting member* began by noting that prior discussions had revolved around questions similar to those considered by the other Subgroups, such as decision-making, governance, entry and exit function; however, distinct issues arose because digital platforms were often seen as a product or service developed by a for-profit (usually) platform operator. It was noted that, whereas regulation of digital platforms had, to date, largely addressed effects on markets, data, users and workers, it was a novel approach to analyse digital platforms as distinct organisations, similar to cooperatives or companies.

165. The presenting member emphasised that there were risks for farmers in using digital platforms, such as loss of their operational autonomy due to automation or use of personal and non-personal data by platforms operators in opaque and potentially harmful ways. Accordingly, it was cautioned that digital platforms could exacerbate power asymmetries between smallholder users and the businesses that operated them.

What is the current legal definition of digital platforms in the context of collaborative models in agriculture? Are agricultural digital platforms different from other digital platforms, and if so, how do they differ?

166. *The presenting member* explained that the Subgroup had explored definitions in academic literature, including from the fields of information systems, industrial economics, and law. One common definition described (transactional) digital platforms as two-sided or multi-sided online marketplaces facilitating value-enhancing transactions between groups. Beyond transactional platforms, innovation platforms provided technological foundations for third parties to develop their services (*e.g.,* Apple Store). Based on information that had been provided by FAO and others, it would appear that most platforms in the agricultural sector were primarily transaction-based. Within the framework of that understanding, the presenting member reviewed a number of definitions from various international and other bodies that varied widely, noting that of most relevance to the CLSAE Project would be definitions of transactional platforms.

167. It was pointed out that another element to consider was the maturity of platforms and their direct and indirect network effects, which were crucial to their value generation, with an impact on governance and financial viability. The presenting member proceeded to review five factors that distinguished digital platforms from other collaborative legal structures.

168. The first factor was their ability to coordinate a large number of participants as many more members could participate in a digital platform than what was practically possible in other forms. As a result, some of these other forms had begun to use digital platforms to enable cooperatives to scale governance and operations. The example given was the Drivers Cooperative in New York, which had scaled to over 4,000 members possibly as high as 10,000 but unconfirmed within two years, highlighting the transformative potential of digital platforms.

169. A second feature was that digital platforms enabled multiple layers of collaboration, allowing users to create or enhance collaborative projects distinct from the collaboration represented by the platform operator itself and creating a "double collaborative layer." The first layer involved the collaborative effort at the level of the platform operator enabling the platform's existence and operation, whereas the second layer concerned additional collaborations developed by users through the exchange space and services provided by the platform. The example given was Kleros, a worker cooperative that developed an online dispute resolution protocol whereby the issuance of governance tokens allowed the second layer of collaboration to vote on technical features of the platform, distinct from decisions made at the first layer. This decoupling of decision rights between the operator and the platform organization represented a distinctive feature of platforms comparable to a certain extent to primary and secondary cooperatives or corporate parent-subsidiary relationships, where ownership, equity, or membership arrangements typically defined decision-making structures.

170. The third distinctive feature was centrality of intermediation to digital platforms. While all organisational forms involved some type of intermediation, in many digital platforms, intermediation was the main, if not the only, task, setting them apart from organisations where intermediation was ancillary to other functions.

171. Another feature was the relative ease of entry and exit for members and resources, demonstrating a flexibility that was often absent in other structures. For instance, the distinction between being a member and a non-member tended to be more porous and vague compared to cooperatives, where membership rights were explicitly outlined.

172. Lastly, the governance mechanisms of digital platforms often differed from those of the platform operator. The example given was the worker cooperative, Kleros, where the operator might decide some issues using a one-member, one-vote system, while the digital platform itself might employ governance mechanisms based on the voting rights assigned to user tokens.

173. *A member of the Subgroup on Companies* expressed the view that digital platforms seemed to be more like tools than legal structures, but noted that they were sometimes presented as alternatives to co-operatives, companies, and multi-party contracts, and asked for an explanation of this connection.

174. *A member of the Subgroup on Cooperatives* agreed, noting that terms like "platform cooperatives", might seem like a new type of enterprise, but were probably more akin to a tool. It was noted that for cooperatives, this posed significant challenges to core principles such as autonomy and self-determination because a platform often involved reliance on a third party, which conflicted with cooperative ideals. Referring to the given example of the Drivers Cooperative, it was asked whether this was truly a worker cooperative. Referring to similar arrangements in Europe, it was suggested that these were access service providers for individual entrepreneurs, rather than cooperatives.

175. *A member of the Subgroup on MPCs* agreed that digital platforms should not be presented as a fourth legal form, as it was more of a functional concept than a formal one. For that reason, it was suggested that emphasising the purpose and function of digital platforms in agriculture should take precedence and be discussed earlier in the chapter, and that examples from the agricultural sector would be more helpful in making the connection with collaboration in agriculture.

176. In response, *the presenting member* replied that one of the intentions of the paper was to examine whether claims of the digital platform as a distinct organisation could stand up to scrutiny, while also addressing issues similar to those of other chapters. In the course of doing so, one question to consider was whether to ensure convergence with the other chapters, or to focus solely on digital platforms and provide particular guidance for smallholders facing challenges of digitalisation, as that would result in a very different type of document. Even in that latter case, it was necessary to lay the groundwork.

177. Concerning the Drivers Cooperative, the presenting member explained that this worker cooperative had two types of members, the drivers and the internal software developers who built their internal platform, rather than relying on a third-party. A clash of interests arose between the drivers and developers, demonstrating the problem of heterogeneity of interests as has often been seen in multi-stakeholder cooperatives. In an effort to compete with a well-funded entity such as Uber, the cooperative had tried to rely on volunteer software workers, which was not sustainable, and pressure to digitalize led to financialization by seeking external investors, illustrating the point that digitalization and financialization were very entangled.

178. *Another member of the Subgroup on Companies* asked if there was a distinction between for-profit and not-for-profit digital platforms and whether this affected governance mechanisms or other aspects.

179. In response, *the presenting member* referred to the Open Food Network, which combined foundations and cooperatives, and in some cases, companies, demonstrating that within one larger ecosystem, both for-profit and non-profit players could use an open-source digital platform. They might all contribute to the global governance of the platform, but their own governance structures could differ significantly.

180. *The UNIDROIT Secretary-General* referred to financial platforms and clearinghouses, in which cases there was an underlying organizational structure, usually a corporation, that was typically regulated, and he asked whether these were comparable to the digital platforms under consideration, in other words, whether there was a legal entity behind these structures. What seemed to be emerging was that the digital platform was not an alternative to a cooperative, company, or network alliance, but rather a means to develop activities, and that its novelty complemented rather than replaced traditional structures.

181. *The presenting member* responded that many platforms, especially in agriculture, had an operator behind them with responsibility for privacy policies and terms of use. The example given was Facebook, a platform operated by Meta, a complex legal entity; (an earlier example had illustrated the distinction between Kleros, the worker cooperative, and the Kleros dispute resolution platform). It was explained that the distinction being made was between operator-led governance and the growing tendency towards cases where platform users, who were not members of the operator, were given some control over platform features. If the operator was the focus, it raised the question of whether discussions on platforms should be integrated into the company, cooperative, and multi-party contract papers. So far, it had been a stand-alone chapter due to the range of issues unique to platforms and the rise of hybrid super-platforms, combining marketplaces, financial services, and networking functions, which added regulatory complexity.

182. *An individual observer* commented that multi-party contracts or agricultural cooperatives often had special status, with unique tax or bankruptcy rules favouring agriculture, and asked whether digital platforms in agriculture should have similar special rules or whether they should be considered indistinguishable from platforms in other sectors. For instance, platforms selling both agricultural and non-agricultural products operated without clear sector-specific distinctions.

183. *A member of the Subgroup on MPCs* suggested categorising and providing a taxonomy of agricultural digital platforms, such as marketplaces, financial services, training, or equipment-sharing platforms in order to then explore whether these platforms used cooperative, company, or contractual structures, or whether new legal infrastructures were emerging. This would help connect the functional and legal aspects, distinguishing between the platform's operational purpose and its structural legal framework.

184. *A representative of FAO* noted that the chapter was very pertinent, as many countries were concerned over use of digital platforms and the problems associated with sale of agricultural inputs, particularly medicines or pesticides. It was suggested that the chapter could be more structured, as it currently combined very different realities with the only common nexus being the use of digital means to operate. Mapping these different realities, as was done for multi-party contracts, would make the chapter easier to understand and navigate. The chapter should (i) provide clarity on the different types of contracts through which farmers could engage with these platforms and how they could be used; (ii) consider platforms governed by third parties and how different countries regulated their obligations, in terms of data collection and transparency, particularly in international trade (it was pointed out that digital platforms were altering the rules of international food trade, enabling massive amounts of food products to bypass import controls because purchases were made individually); (iii) reflect on how digital platforms interact with the rules governing food imports and exports; (iv) include a dedicated section explaining blockchain contracts and their potential applications; and (v) expand section 8 on dispute resolution. *The UNIDROIT Secretary-General* agreed with these suggestions.

185. *The presenting member* referred to the issue of the legal design of digital platforms, noting that many, including some in agriculture, used open-source or copyleft licenses which gave others freedom to replicate, modify, and even fork the platform, which was very different from closed-source platforms (*e.g.,* Meta). Both open- and closed-source models were relevant to agriculture. It was pointed out that in many regions the digital platforms most commonly used by farmers were Facebook, WhatsApp, and Instagram. The rules governing these platforms were not designed by farmers, by comparison with platforms developed collaboratively where farmers had control over governance and decision-making. This distinction was being disentangled. The presenting member mentioned that it was difficult to find examples with comprehensive legal documentation that was publicly available and welcomed suggestions for any such examples.

186. The presenting member explained that the Subgroup did aim to analyse platforms governed by clear legal frameworks, as well those that relied on blockchain and decentralised models. As DAOs were not yet widely relevant to agriculture, depending upon how future-facing the CLSAE Guide should be, they were worth mentioning nonetheless because they introduced distinct legal challenges.

187. *A member of the Subgroup on MPCs* pondered whether platforms might make traditional organisational structures superfluous by eliminating the need for intermediaries between individuals and markets. *The presenting member* responded that it was interesting to see platforms adopt ICA cooperative principles without formal cooperative structures (*e.g.,* Social.coop) and noted that these platforms might foreshadow new models of collaboration. However, as highlighted in recent U.S. cases over DAOs, there was concern over these "structureless" platforms in terms of joint and several liability and their lack of separate legal personality. Addressing liability and governance challenges was essential. New liability rules and remedies for users could support these emerging platforms while mitigating risks.

188. *A member from the Subgroup on Companies* referred to the overarching question of whether digital platforms were distinct from the other legal structures or interconnected and pondered whether platforms might represent the latest evolution in the way businesses interacted with each other. Disentangling these pressures could clarify how digital platforms interacted with legal

structures and whether adaptations were needed, and he suggested that these macro-level considerations could tie the prior discussion to this topic.

Sustainability

189. Noting that sustainability, being a systemic goal, required coordination among numerous stakeholders, *the presenting member* postulated that digital platforms were well-suited to this function and could also monitor environmental performance across multiple actors and, serving as organisational structures governing entire value chains, they could complement or in exceptional circumstances surpass other collaborative structures in achieving sustainability goals, climate change mitigation, and adaptation strategies.

Main actors

190. *Platform operators*: *The presenting member* referred to existing international legal guidance and model rules that defined platform operators as traders – natural or legal persons, private or public – acting for purposes related to their business, craft, or profession. The example given was the Open Food Network, a global network of local not-for-profit organisations that combined global software development with localised operations.

191. *Platform members* were described as a specific category of users who entered membership agreements with the platform operator, which was contrasted with *platform users*, who engaged with platform services without formal membership. For instance, a farmer selling produce via Facebook Marketplace would be considered a member, while a one-off consumer would be a user. It was pointed out, however, that this distinction is often blurred, as digital platform services tended to expand over time, and terms used in contracts or agreements might not reflect the factual relationships between parties.

192. *Software developers* were described as playing a significant role because their technical choices affected what the platform did, who could join, and how operations were structured. In some cases, software developers were members with decision-making rights, whereas in other cases they were external contributors. While some developers were employees of the entity, others contributed as open-source collaborators, which raised questions about the nature of their duties and potential liability for such contributions. These complexities were becoming increasingly relevant as developers' societal roles continued to grow, as evidenced by the growth of case law on software developers' liability.

Which functions and roles do (digital) platforms play in agriculture?

193. *The presenting member* explained that platforms performed many functions in the agricultural sector and gave a number of examples, including: providing access to expensive equipment; facilitating information sharing; offering agri-consultancy and advisory services; handling payment remittances for produce, wages, and subsidies; providing education and training; and generating data. It was noted that platforms often digitised earlier systems, like agricultural market information managed by public authorities, but went beyond these systems. Benefits of agricultural platforms included enhanced productivity and efficiency, possibly to negotiate prices of inputs with suppliers; direct access to markets; integration into global value chains; increased farmer incomes; and reduced waste of energy and resources. However, these advantages often came with significant drawbacks, including "lock-in" of farmers' data, weak bargaining positions of farmers, fragmented data, lack of protection, and misuse of data. Digital technologies could be a "double-edged sword" – on the one hand, States needed to facilitate technology transfer and access and on the other hand, States needed to regulate businesses to ensure their respect of rights and data protection. In moving forward, one suggestion that emerged was to focus on data access rather than data ownership.

194. *A member of the Subgroup on MPCs* suggested elaboration of the paper to illustrate the use of digital platforms in agricultural collaboration. *A member of the Subgroup on Companies* asked about obstacles and ease of access for smallholders who did not have the technology or the knowledge to use digital platforms and whether there were some platforms, perhaps in the not-for-profit sector, that had digital outreach as their mission. *The Chair* enquired about digital exclusion and whether this should be considered. In response, *the presenting member* acknowledged that platforms privileged educated users, thereby excluding less literate farmers and perpetuating disparities, noting the reference to the (gender) digital divide (paragraph 31); he pondered that while it was one thing to acknowledge, the question was how this should be addressed in the Guide, with recommendations, for example, that digital platforms should be designed with digital exclusion in mind, and to include considerations and best practices.

How is ownership allocated and managed within digital platforms?

195. *The presenting member* explained that a core issue was the difficult choice smallholders faced: farmers were often drawn to free marketplaces, such as those offered by Facebook and other large corporate platform operators, because of low cost, extensive reach, and a large existing user base. These platforms were attractive for selling produce and as a space for networking with other users, but farmers had very little control over the platform's design or its use of their data. The other option was to build a collaborative platform where farmers had significant rights in decision-making, platform design, and governance; however, such platforms were expensive to develop from scratch and maintain. The presenting member then referred to the example of the Open Food Network and highlighted it as an example of how governance could operate at multiple levels while also addressing concerns specific to smallholders. It was explained that this was where the analysis was currently focused – to view these platforms from the perspective of smallholders and consider their vulnerabilities under either model.

What is the legal architecture governing a digital platform in agriculture?

196. *The presenting member* explained that digital platform ecosystems often had multiple layers of collaboration and referred again to the Open Food Network, a global network of individuals and organisations working together to develop open, shared resources, including digital infrastructure and knowledge. It was further explained that while the software and platforms were co-developed globally, the marketplaces themselves were locally rooted through "local instances" that were democratically run and managed by local producers. At the hyper-local level, were buying groups, wholesalers, merchants, and farms that formed food hubs that acted as producers within the platform. The other side comprised buyers and consumers, including enterprise users and end-users. The structure was illustrated with a graphic.

197. The presenting member pointed out that this three-layered model embodied a participatory governance approach to running a digital platform, but that there were still many organisations behind the platform at the national and local levels. It was explained that at the global level, the Open Food Network did not have a single, overarching legal entity (unlike SWIFT in the financial sector) but that instead the Open Food Foundation held the intellectual property and branding rights and played a limited role as the licensor. While the foundation could be considered the operator and had specific responsibilities, its role was more limited compared to other more mainstream platforms, and it did not have unilateral authority over the broader governance of the network. Community values were developed collaboratively through discussions within the global community. Signing onto these values was a prerequisite for becoming a member.

How are entry and exit regulated within digital platforms in agriculture?

198. Continuing with the Open Food Network example, *the presenting member* explained that membership agreements, pledges, and regular participation in global meetings were part of the entry

process for local affiliates. These elements, though collaboratively developed, carried significant legal weight, as they governed how local affiliates would join and operate within the network.. These aspects further distinguished platforms like the Open Food Network.

199. *A member from the Subgroup on MPCs* acknowledged that the governance structure of the Open Food Network appeared to be very bottom-up, enabling significant participation and voice from members. However, it was observed that contracts were made between the member and the foundation, suggesting that the foundation did have a governance role. While the legal design might be open and participatory, it appeared that the foundation served as a coordinator or operator with its own philosophy and responsibilities.

200. *The presenting member* responded that while the foundation certainly had governance power, it was not the sole entity with such power. For instance, the process of onboarding a new affiliate involved more than signing an agreement with the foundation; the community played a significant role in selecting which applicant would be chosen, reflecting a participatory and deliberative process. Similarly, the resolution of disputes often involved community discussion rather than a purely legal or top-down decision from the foundation (paragraph 71). Another crucial aspect was the distinction between intellectual property and organisational governance; because the software and platforms developed by the Open Food Network were open-source, anyone could create an instance of the platform without joining the network, leading to a separate category of users that could adopt and modify the software for their own purposes, provided they adhered to the copyleft license and refrained from using the Open Food Network's branding. The presenting member summarised that the foundation played an important role, but the participatory structure ensured that decision-making power was distributed across multiple levels with implications for both the inclusivity and technical functionality of the platform.

How is liability managed within digital platforms?

201. *The presenting member* explained that the remainder of the paper considered how liability was managed in different contexts, such as conflicts between platforms and members or users. Referring back to the Open Food Network and its U.K. affiliate, structured as a community interest company, its liability management included measures like indemnity clauses, limitations of liability, and third-party content disclaimers. These clauses aimed to protect both the foundation and local affiliates while balancing their responsibilities.

Structure

202. The presenting member asked the Working Group whether the chapter should be aligned more closely with the others by providing more prescriptive recommendations or whether it should be acknowledged that digital platforms were a distinct topic and then structure this chapter differently.

203. *A member of the Subgroup on Cooperatives* suggested that the chapter should provide clear indications of the specific challenges associated with digital tools in collaborative mechanisms and potential legal solutions at the national and international levels.

204. *A member of the Subgroup on Companies* agreed. The chapter should inform readers about challenges while offering guidance on potential solutions. However, it did not need to mirror the structure of other chapters, as digital platforms presented unique issues.

(e) Other exogenous factors: sustainability and access to credit

Sustainability

205. Noting that sustainability was one of the two exogenous factors that were to be taken into consideration by the Working Group, *a member of the Secretariat* recalled the recommendation that had emerged out of the previous session, namely that an overview of the meaning and importance of sustainability would be included in the Introduction to the CLSAE Guide and then considered in the comparison and integrated throughout the other chapters. This approach would be consistent with that of the two previous legal guides. It was recalled that the FAO representative had emphasised a perspective through the lens of the Sustainable Development Goals and consideration of all three aspects of economic growth, social inclusion and environmental protection as an interconnected whole. It was noted that, for the most part, comments on sustainability made during the last session had been addressed in the discussion papers. What was open for discussion was how to address sustainability in terms of an entity operating in the agri-food sector, for example, whether one of the legal forms could better enable an entity to make a shift towards sustainable agriculture, notwithstanding that consideration of what constituted "sustainable agriculture" was outside the scope of the CLSAE Project. While one aspect to be considered was whether outputs of the entity were sustainable, another aspect was whether operations of the entity itself were sustainable.

206. *A member of the Subgroup on MPCs* suggested that sustainability be addressed within each chapter in the section regarding purpose. It was acknowledged that this could be less challenging for MPCs wherein the definition of purpose is relatively open and similarly so for cooperatives, but perhaps more challenging for companies, given the need to balance the profit purpose and social responsibility, as had been discussed previously. Another section in which sustainability could be incorporated would be in relation to governance, given that the wide concept of sustainability could involve conflicting values and necessitate choices between environmental, social, or other interests that might require consultations with stakeholders and local communities. A third possibility would be to consider sustainability in relation to post-contractual obligations and the redistribution or reallocation of assets in such a manner so as to protect third parties.

207. *A member of the Subgroup on Cooperatives* emphasised that these aspects of sustainability – social, economic and environmental, and even political stability – were not elements from among which one was to be chosen over another, but rather, all had to be considered as an integrated "whole". Although complex, it was imperative that sustainability be addressed as it was now part of the law. It was explained that "sustainable development" had entered the field of law in the late 1990s in a decision by the International Court of Justice; whether as a concept, goal or principle was unclear, but it had made headway ever since and was now being included in international treaties (such as the founding documents of the World Trade Organization), national constitutions and laws.

208. It was suggested that sustainability was an important mechanism for comparison of the legal forms. Firstly, while it had become commonplace for management of almost any type of enterprise to highlight actions taken in the name of sustainability, an essential difference was whether such actions were freely chosen or a legal obligation. The cooperative was the only type of legally created enterprise where sustainability was built into the structure. As the social aspect was included in its definition, the cooperative was required to pursue this objective, which also encompassed economic and cultural aspects. Secondly, the definition also referred to a jointly owned and democratically controlled enterprise, which was noted as an important mechanism to carry out the objectives and generate social justice at the level of the cooperative and thereby also contribute to social justice as an aspect of sustainable development at the global scale. Given our interconnectivity as a human species as inherently recognised in the concept of sustainability, the necessity to address climate issues in one part of the world as well as social issues in another became self-evident. Once again, despite this complexity, for these reasons it would be necessary to consider sustainability in our work. Thirdly, the changing roles of the State and private entities were noted; whereas a couple of

decades ago, people would have said that "the business of business is business", today no one would deny the requirement of any enterprise to take sustainability into consideration in the course of its activities. While this was now the case in Europe (implicit reference to the recent EU directive 2024/1760 on Corporate Sustainability Due Diligence), it would eventually become required in other parts of the world as well. Accordingly, in conducting the comparison, the question for the Working Group would be to consider what value could be added by each of the respective legal forms.

209. *A member of the Subgroup on Companies* agreed with the previous speaker but pointed out that there was still a great deal of controversy in this particular field of the law. While Europe and Canada were further ahead, in the United States there were proponents and authors that adhered to Milton Freedman-type theories whereby the only responsibility of business was to maximise profit for shareholders. While expressing agreement that the matter had to be addressed, the speaker queried the manner of doing so. First was to consider what exactly was meant by sustainability, and whether it was to be equated with environmental, social, and governance ("ESG"). If corporate governance encompassed sustainability, then it was also necessary to consider whether it was applicable only to listed corporations and publicly-held entities, or also to closely-held entities, which constituted the majority of agricultural enterprises in developing jurisdictions.

210. Second was whether the system for encouraging sustainability would be voluntary, such as in the case of B corporations, for example, entities created by law but in which private parties voluntarily decided to undertake activities that were beyond the profit motive; or, whether the system would be mandatory, a set of rules applicable to everyone and not only enforceable but also reported upon on a yearly basis, such as in the case of the recent European Union directive on corporate sustainability due diligence. Another consideration would be which sectors should be obliged to undertake such measures. The example was given of Indonesia, one of the first countries that adopted mandatory ESG and sustainability principles, particularly for extractive industries. It was noted that there would be a big difference depending upon the purpose of the entity and its type of business; in the energy or extractive sector, no doubt environmental provisions would be necessary, and in the retail industry or clothing manufacture, measures to prevent child labour and exploitation of workers would be required, and so forth. As the sector really mattered, it was said there was no "one size fits all" kind of rule that could be applied to all kinds of enterprises.

211. Third was to ask what would be the means to achieve a good system of sustainability and how could it be enforced. The speaker pointed out that reporting as a means to measure different topics concerning ESG was not necessarily ideal because in many cases it became a box-ticking exercise in which companies, basically in a formalistic fashion, filled out forms that then were sent to a governmental authority, and a lot of greenwashing would take place in these types of activities. This was described as a very complex area that should not be oversimplified. It was suggested that the Working Group could either propose a very simple, straightforward principle or delve into the intricacies of sustainability, which would go beyond the scope of the CLSAE Project.

212. *A member of the Subgroup on Cooperatives* responded by pointing out that as the ICJ had recognised sustainability as a principle, this would allow for a variety of solutions, given that a principle was not a rule. Hence, the issue could be addressed according to the sector or whatever the situation, provided that the solution was derived from the principle.

213. *An individual observer* considered that agricultural enterprises were certainly in the middle of the ESG phenomenon and that therefore it would be appropriate to give some guidance in this respect. Referring to the companies discussion paper and the section on management, the speaker noted that the paragraphs dedicated to ESG were well done but could be further developed. If one were to set up a new agricultural company today in Italy, and probably in any other country, it would be necessary to include something on sustainability in the articles of association. Accordingly, that could be suggested in the CLSAE Guide.

214. It was acknowledged that currently the rules in the European Union were becoming more rigid by comparison with other parts of the world, but that these also offered instruments for evaluation, such as ESG certification. Noting that an ESG certification could be relevant when seeking financial support, that was a second recommended inclusion in the CLSAE Guide, at least for companies and possibly also for cooperatives.

215. In terms of the social aspect, it was explained that there were often many undocumented labourers in the agricultural sector, certainly in Italy and probably in other countries, and associations that provided certification on this aspect as well. Accordingly, this was a third suggestion to be considered for the CLSAE Guide, for companies and cooperatives.

216. *Another member of the Subgroup on Companies* (Isabelle) clarified that the discussions on sustainability and sustainable development in the companies paper reflected work in progress and that the intention was for a more uniform approach throughout the paper, with the objective to elucidate the relationship between sustainable development and the features of companies and the choices to be made in regard to these features. As the work progressed, the comparative aspect would be kept in mind. The speaker agreed that cooperatives had an inherent social objective, but noted that social enterprises, which could be social companies but were not necessarily formally regulated as such, would be further developed in the companies paper.

217. A clear correlation between collaboration and sustainable development was pointed out, and it was suggested that this be emphasised, perhaps in the Introduction, which would also be the place for an explanation of the CLSAE Guide's approach to sustainability. The Working Group was invited to consider whether it was fully endorsing collaboration or suggesting it as one option among others to operate sustainably.

218. Reference was made to an OHADA conference in Cameroon on social responsibility in which it had been discussed that many enterprises in Africa were being overlooked because they were unable to adhere to certain sustainability requirements of their Western partners; it was suggested that the Working Group might consider the issue that sustainability requirements could lead to exclusion for certain kinds of enterprises.

219. *A member of the Subgroup on MPCs* responded that the correlation between sustainability and collaboration should be underlined exactly for the aforementioned reason, *i.e.*, the risk that sustainability requirements could preclude the smallest players from global value chains. As collaboration could be a means for smallholders to meet these upgraded standards, the mainstream message should be to consider sustainability as shared responsibility along the chain, rather than shifting responsibility and cost down the chain to the smallest player.

220. *A member of the Subgroup on Cooperatives* responded that although larger players might use the sustainability terminology, this often constituted "greenwashing", and that they had the means to set the rules for the smaller players. By contrast, as farmers had an interest to carry on the business for the next generation, one might view that as an inherent sustainable aspect.

221. Reflecting on earlier comments, it was explained that registration as a cooperative alone was not enough to meet sustainability requirements; reliable reporting was also important, but in many countries, cooperatives had lost the tradition of a specific audit. Although today reports addressed turnover, growth and market share, etc., very little was being reported on whether the cooperative had satisfied the needs of the members and this, the speaker felt, should be noted.

222. *The member of the Subgroup on MPCs* responded to the first point by noting that hard law did oblige large companies to comply and that their behaviour was checked against greenwashing. Although unfair practices continued to exist, sustainability was no longer a choice but was becoming a duty.

223. *A member of the Subgroup on Digital Platforms* mentioned the importance of human rights in relation to sustainability and referred to the UN Guiding Principles on Business and Human Rights ("Ruggie Principles") . Particularly noteworthy was "the role of business enterprises as specialized organs of society, performing specialized functions required to comply with all applicable laws and to respect human rights" and that "these guiding principles should be understood as a coherent whole and should be read, individually and collectively, in terms of their objective of enhancing standards and practices with regard to business and human rights so as to achieve tangible results for affected individuals and communities…with particular attention to the rights and needs of, as well as the challenges faced by, individuals from groups or populations that may be at heightened risk of becoming vulnerable or marginalised, and with due regard, the different risks that may be faced by women and men", including in rural areas.

224. *The Coordinator of the Working Group* highlighted two aspects of the relationship between agricultural enterprises and sustainability that could be discussed. First, on governance and inclusion, one of the major changes that sustainability was bringing about was a shift in enterprises based on freedom of contract: namely, a shift from the freedom to exclude to a duty to include, and this was occurring in different ways throughout the organisation.

225. Secondly, on externality, it was recalled that liability in environmental law and liability in social law was based upon the idea that externalities – in terms of harm to third parties – were prohibited. Sustainability appeared to be modifying that approach and moving from prohibition to externalise, to promotion to internalise. It was explained that when there were benefits associated with the engagement in agricultural activities, the basic starting point was that such benefits should be shared and internalised, and that to exclude anyone from any benefit should be modified; there was a right to share and that right was very close to collaboration. Such collaboration would not work, however, if there was not a fair and equitable allocation of profits and losses in enterprises. In summary, the suggestion was that by operationalising sustainability, the Working Group might further discuss inclusion and internality as opposed to exclusion and externality, and examine how inclusion and internality might be linked to collaboration.

226. *A member of the Subgroup on Companies* suggested that the tension with regard to corporations stemmed from the fact that the corporate form was developed to facilitate attracting capital. Today, it was acknowledged that such attention had to be managed and balanced against other factors. Nonetheless, the model was designed to facilitate raising capital. Debates that ensued concerned the extent to which systems that would regulate or manage that tension within the model could be internalised and the extent to which external regulation would be required. Perhaps alternate models might be required – forms of social enterprise that were more deliberately structured and where requirements for sensitivity to other factors, such as sustainability, were included in their design. Thus, the question would become whether one wanted to sign onto a model that was particularly good at helping to raise capital and credit, or a model somewhere further down the spectrum. The problem, it was noted, was that these alternate models for social enterprises were still a work in progress and were not as well-developed or understood. Some countries, such as the U.K., had had more success with these alternatives than others, such as the U.S. and Canada, and although Canada had introduced legislation, the model had not taken off. The speaker noted with interest that as people have seen the limitations of corporations, they had not suggested a return to cooperatives; the need appeared to be a different model that still demonstrated sensitivity and an ability to bring in investors, but that placed more weight on these other objectives.

227. *The Chair* summarised that it had been agreed to include sustainability in the Introduction, with ample elaboration given its overarching goal of the CLSAE Guide, and to explain its direct connection to collaboration. Thereafter, sustainability would be considered throughout each of the papers on the different legal forms to illustrate how these can affect or foster sustainability, all of which would be taken into account in the comparative chapter.

Access to Credit

228. *A member of the Secretariat* explained that another exogenous factor that was to be taken into consideration was access to credit and that at the last Working Group session it had been decided that the Introduction would include an overview of the needs for access to credit and that each chapter would incorporate analysis of how that particular legal form could facilitate such access. The CLSAE Guide would not explain mechanisms to access credit but rather would include references to relevant instruments in that regard. It was noted that the difference between external and internal credit, a topic that had been raised earlier during this session, might also be addressed.

229. In response to a request for clarification on the meaning of access to credit versus "financing" as well as internal and external credit, the *UNIDROIT Secretary-General* explained that "access to credit" was standard terminology in reference to financing and one of the lines of work at UNIDROIT and other international organisations. He further explained that the intention was to examine to what extent the choice of legal form could influence access to credit, which encompassed credit for the formation of the company, running the business, and its eventual restructuring, although the focus of the CLSAE Project was primarily on the first of these. He pointed out that there were many ways of providing financing; it was not just money, but could include provision of commodities from suppliers, etc.

230. *A member of the Subgroup on MPCs* pointed out connections between access to credit, digitalisation and sustainability. The first link was between credit and digitalisation, specifically digital platforms, because of the economic value of data. Use of data was somehow translated into money, which explained why large companies were willing to finance certain projects through digital platforms because of the access to large volumes of data. As some collaborative structures that generated data became more attractive, lenders became more willing to finance certain projects. Even if this resulted in data that could be used for other purposes, in practice it was very relevant, although it made analysis more difficult.

231. The second link was the correlation between credit and sustainability. The example given was a digital platform used by farmers that generated data about their lending practices. As the data was managed, it enabled the platform to provide services to the farmers based on that data, for example, how to optimise use of pesticides and water, etc. It was suggested that this three-way connection be considered, at least in the chapter on digital platforms, but to some extent also in other chapters.

232. *A member of the Subgroup on Digital Platforms* referred to a published report that some financial institutions were willing to accept certain types of farmers' data as collateral and enquired whether any participants had more information. In response, a member of the Subgroup on MPCs reported that this topic had been discussed during a conference organized by the European Law Institute (ELI) and that materials could be sought from ELI.

Access to credit and formalisation

233. *The UNIDROIT Secretary-General* noted that adequate formality was required to establish the requisite levels of confidence to gain access to finance. Reference was made to a presentation at an earlier session by the International Finance Corporation in which it had been said that, in IFC's experience, the type of business form was irrelevant in terms of access to credit; the key point was whether the business was formal or informal. It had yet to be clarified whether the assertion had been made only in reference to IFC investments, *i.e.,* loans to the private sector by way of equity, primarily to corporate entities.

234. It was also noted that perhaps it might be necessary to differentiate between private and public financing, such as multilateral institutions and national schemes that supported agricultural

development, and that perhaps another consideration would be differences in the size of borrowers. For example, once a smaller entity grew to a certain size, it might fall outside the scope of microfinance, as microfinancing institutions lent not against collateral, but rather on capacity of repayment. It was suggested that the Working Group should consider this continuum and differentiate ways of accessing credit based on size within each of the three models. It would also be valuable to bear in mind the differences between access to banking finance, alternative mechanisms of finance, commercial finance (suppliers, etc.) and corporate finance, if corporate groups were to be considered. As another project was to be launched after completion of the CLSAE Guide that would focus on financing of agricultural enterprises with analysis of warehouse receipts financing, factoring, etc., there was no need for extensive examination, and the Working Group was invited to reflect on whether access to credit should be considered in relation to each legal form or more broadly in a separate chapter.

235. *A member of the Subgroup on Companies* responded to the position of the IFC, noting that the relative lack of importance of the type of business entity vis-à-vis access to credit was understandable. Practice showed, particularly in developing nations, that the idea of unlimited liability tended to be illusory given the lack of enforcement that characterised most of these jurisdictions. For example, in a partnership in which partners were liable for any unsatisfied debts which the partnership might incur, the ability of a creditor or a third party to enforce his or her rights against those partners would be complicated. By the same token, the World Bank had emphasised that the type of collateral used to obtain credit was of the essence, and the more easily this collateral could be executed, the more security the lending institution would have. This is why secure transactions had been promoted, in which movable property or chattel was not subject to the application of civil law principles, such as the *pactum commissorium*, whereby the creditor could not appropriate the property for himself. Secured transactions operated exactly the opposite and allowed a kind of self-executory system for creditors. For this reason, the World Bank had emphasised that the type of security was probably more important than the type of business in terms of gaining access to credit. It was suggested that something along those lines could be included in relation to agricultural activities and noted that secured transactions were extremely important in common law jurisdictions in which it was possible to pledge future crops, in addition to inventories, raw materials and cash accounts. According to the World Bank, in the long run, secured transaction lending tended to lower interest rates and increase access to credit because the risks the financial institution incurred were reduced.

236. *A member of the Subgroup on Cooperatives* responded to the question of whether the Working Group should push for formality by suggesting that instead of pursuit of formality as an end in itself, the limitations that might arise if the business did not formalise should be explained. It was pointed out that a certain degree of informality was necessary to enable certain activities and developments to occur. It was noted that the International Labour Organization encouraged formality and suggested that the cooperative form would be the best way to do so.

237. Referring to the suggestion by the UNIDROIT Secretary-General that the Working Group should differentiate ways of accessing credit by size, clarification was requested on whether this referred to size of membership, as turnover was problematic for cooperatives. Nonetheless, the importance of such analysis was acknowledged, and further thought would be necessary on the criteria to determine size.

238. *A member of the Subgroup on MPCs* pointed out that the question of collateral was critical for farming enterprises because the collateral would either be the land, equipment, or the crops, i.e., either a means for the activity or a means for livelihood, because a pledge of crops would mean that the farmer was no longer able to produce a livelihood or revenue. Thus, it was suggested the Working Group should consider what other purpose the collaboration might serve, such as to strengthen the financial health of these enterprises in ways other than merely pledging all of their assets as collateral. As to the IFC comment that the legal form was irrelevant, the speaker agreed that if the

sole purpose of the financing institution was to recover the loan, then collateral would be very important, but noted there might be a different type of financing institution where the project was important. For example, a group of farmers might have an opportunity to produce more sustainably, to enable the local community to live from the agricultural production in more sustainable way, to digitalise, to improve and innovate new techniques, and so on. In such a case, of course recovery of the extended financing was important, but the way in which the project was carried out, its effectiveness and whether the purposes of the project were fulfilled would be of interest to the financing institution as well. It was pointed out that this exemplified once again the link between financing and sustainability; it would be in the interests of the financial institution to ensure that the project would not produce an adverse environmental or social impact. And in such a case, the form of collaboration would indeed be important to the financier.

239. *An individual observer* pointed out that although the discussion concerned access to credit, it was also necessary to consider public financial support to the agricultural sector, which did not have to be repaid. Of course, to be eligible, it was usually necessary to demonstrate that certain criteria could be met, i.e., organisation, type of project, non-financial guarantees, adherence to ESG rules, etc.

240. *A member of the Subgroup on Companies* referred to the recently-published UNCITRAL draft materials on Access to Credit for MSMEs, which summarised the sources of credit used by MSMEs and discussed ways to enhance access to credit, including formalisation. The speaker pointed out that it was important to also keep informal sources of credit for agri-MSMEs in mind, which included family and friends, digital platforms, rotating credits, savings associations, etc.

241. *Another member of the Subgroup on Companies* pointed out that within the private sector, providers of capital were most comfortable providing it to organisational forms with which they were already familiar. Some of the organisational forms that might be better suited to the pursuit of sustainability were less familiar to providers of capital in the private sector, and public financiers might not be all that different in terms of the preferred organizational form. Corporations were more effective in raising capital because people were used to that form and an entire infrastructure of lawyers, investors, etc. was built around it. It was similar for the insurance industry. The suggestion was to keep this reality in mind.

Access to credit and strategic resources

242. *The Coordinator of the Working Group* noted that while access to credit was important, perhaps the broader issue concerned access to what economists called critical resources as there were many resources apart from credit without which it would be impossible to engage in any type of agricultural activity. Therefore, the Working Group was invited to consider whether to frame access to credit within a more general question concerning access to critical resources for agriculture*, i.e.,* inputs, data, water and so forth, and secondly, what would be the relationship between access to credit and sustainability.

243. *The UNIDROIT Secretary-General* saw these as two different issues: access to credit in general should be relevant to the CLSAE Project because it affected the collective exercise of entrepreneurial activities in the agricultural sector. To look at strategic assets in addition to access to credit would be more useful for the project.

244. *A member of the Subgroup on MPCs* asked for clarification of the proposal from the *Coordinator of the Working Group* and doubted that the intention was to add another layer to the analysis but rather that it was more a question of framing. Perhaps one approach would be to analyse credit as one of the critical resources and acknowledge that there were others. Another approach could be to add another section about access to critical resources such as water, and to address that aspect to the extent that we consider sustainability.

245. *The Coordinator of the Working Group* explained that the work had begun by trying to understand a common framework that would allow to examine the ways in which sustainable agricultural enterprises could be structured and described. He invited the Working Group to consider the relationship between the different types of resources. Each one had very technical specificities and instruments that would differentiate the ways that very different institutions would grant availability of these resources. The more general idea was that the sustainable enterprise was an enterprise that granted access to the necessary resources that markets were often unable to grant, and as a consequence, specialised institutions were needed that would provide those general critical resources. The point was not to discuss the differences between access to credit, water and data, but rather whether there was a possibility to answer the original question as to a general framework for sustainable enterprises.

246. *The Chair* summarised that there should be two different sections, one directed to access to credit and the other to strategic resources. She suggested further reflection and possible discussion at the next Working Group session.

(f) Open discussion on combining and comparing the collaborative legal forms

247. *A member of the Secretariat* explained that, in order to assist with the development of the comparatives chapter and at the request of the Coordinator, two tables had been prepared, one on structural aspects and the other on functional aspects of the collaborative legal structures, and that these tables compared the three legal forms on each basis. Noting that these tables had not been distributed, given that the Coordinator had not yet had adequate opportunity for review, it was agreed that after receipt of his input, the tables would be shared with the Subgroups and Drafting Committee. *The UNIDROIT Secretary-General* suggested that each Subgroup continue to work on its own paper while at the same time, some would be asked to help with drafting the comparative chapter. To facilitate the comparison, the Secretariat would prepare an outline or very brief paper for a 1 – 2 hour online brainstorming session sometime in January or February to consider how to compare and draft that chapter on the basis of the new iterations of the papers.

248. *A member of the Subgroup on Cooperatives* noted that a section on comparison had been included in the cooperatives paper but that it did not fit well and could be moved to the comparison.

249. *A member of the Subgroup on Companies* referred to the table that had been included as an appendix to their paper, which compared different company forms and their features, and suggested this could be used as a tool in the comparative chapter.

250. *The member of the Subgroup on Cooperatives* pointed out an additional challenge for the Companies Subgroup was due to the different types of company forms that were covered and noted that the comparative chapter would probably not compare the other two legal forms with each of these, but rather, with the generic company form.

251. *A member of the Subgroup on MPCs* noted that their own challenge might be even greater as many more options were possible with MPCs.

(g) Structure of the future instrument, draft introduction and draft glossary

<u>Glossary</u>

252. *A member of the Secretariat* referred to Doc. 2, Annex I, the glossary, and explained that the first draft had been discussed during the last session and that additions and revisions had been made to reflect the comments that had been made at that time. The Secretariat guided the Working

Group through the revised glossary, pointed out changes and noted that the glossary was also still a work in progress. In the interests of time, *the UNIDROIT Secretary-General* invited those who had comments on the revised glossary or wished to suggest addition or removal of terms to communicate their suggestions to the Secretariat, who would incorporate those suggestions in the next draft.

Structure

253. *A member of the Secretariat* referred to Doc. 2, Annex II, the preliminary draft structure of the instrument, and explained that the first draft had been discussed during the last session. The Secretariat guided the Working Group through the document and pointed out additions and revisions that had been made to reflect comments made at the last session. The Secretariat also mentioned a possible new consideration for the Introduction that had arisen informally during the current session, namely, the aspect of culture; one of the participants had pointed out that choices over whom to include in a collaboration and the degree of willingness on the part of smallholders to include "outsiders" could vary considerably and was in part dependent upon the cultural context.

254. *A member of the Subgroup on Companies* noted that, as a result of the discussions, access to credit and sustainability were no longer considered exogenous factors, and the draft structure should be revised accordingly. *A member of the Subgroup on MPCs* pointed out that the chapter on digital platforms was missing and noted a few typographical errors. The Chair explained that the proposed chapter on implementation of the CLSAE Guide would be discussed at a later date. In regard to the proposed subsection on challenges due to differences in legal systems, she mentioned that it might be necessary to include something on conflict of laws and party autonomy, which might not be relevant to a domestic collaboration but important in an international context.

Inclusion of country examples

255. *A member of the Working Group* explained that, according to the practice in China, digital platforms were required to be established in accordance with government regulation. The monitoring system for platform operators and information on goods or services had to be published and reported to the market. If supervisors and management found violations of the law, timely measures had to be taken. Currently, e-commerce was developing rapidly, so the legal system had to adapt to this reality. Agricultural digital trading platforms in the processing of agricultural products should emphasise quality and safety of agricultural products to ensure that the agriculture products were being traded in line with the relevant quality and safety standards. If the agricultural digital trading platform involves financial services, such as providing agricultural supply chain finance and other services, it was engaged in financial business and had to obtain a financial license following the provisions of the financial regulatory authorities. It was suggested that the CLSAE Project should focus on issues not only in developed countries but also developing countries.

256. *A member of the Subgroup on MPCs* enquired whether the previous speaker could offer any material or any examples of collaboration, either in the form of MPCs, cooperatives or companies in China or in Asia more generally, in the field of agriculture. The speaker was aware that a Chinese law existed on contractual joint ventures but did not know whether that form was used in agriculture.

257. *A member of the Subgroup on Cooperatives* noted that China had a special law on agricultural cooperatives since 2007 and expressed an interest in any information on the implementation of that law, the success stories as well as the challenges. It was understood that the law was to be a test run that was to be followed up with additional special laws on cooperatives for specific sectors.

258. *The member of the Working Group* responded there were indeed new rules in China and would make best efforts to collect these and send them to the Secretariat for further distribution to the Working Group.

Item 5. Organisation of future work

259. *The UNIDROIT Secretary-General* explained that intersessional work would continue to include meetings of each Subgroup as well as work on the cross-cutting themes, such as sustainability, access to credit and the chapter on comparison and combining different collaborative legal forms.

260. The dates for the next Working Group session were proposed for 9-11 April 2025. However, it was decided that the UNIDROIT Secretariat would inform the Working Group of the exact dates at a later stage.

Item 6 and 7. Any other business. Closing of the session

261. In the absence of any other business, *the Chair* and *the UNIDROIT Secretary-General* thanked all the participants for their input and closed the session.

Annex I

AGENDA

1. Opening of the session and welcome
2. Adoption of the agenda and organisation of the session
3. Update on intersessional work and developments since the fifth Working Group session (*Study LXXXC – W.G.6 – Doc. 2 – Secretariat Report)*
4. Consideration of work in progress
    (a) Draft Discussion Paper on Companies *(W.G.6 – Doc. 3)*
    (b) Draft Discussion Paper on Multiparty Contracts *(W.G.6 – Doc. 4)*
    (c) Draft Discussion Paper on Cooperatives *(W.G.6 – Doc. 5)*
    (d) Draft Discussion Paper on Digital Platforms *(W.G.6 – Doc. 6)*
    (e) Other exogenous factors: Sustainability and Access to Credit
    (f) Open-discussion on combining and comparing the collaborative legal forms
    (g) Structure of the future instrument, Draft Introduction and Draft Glossary *(W.G.6 – Doc. 2)*
    (h) Other matters identified by the Secretariat
5. Organisation of future work
6. Any other business
7. Closing of the session

Annex II

LIST OF PARTICIPANTS

MEMBERS

Ms Maria Ignacia VIAL UNDURRAGA *Chair*	Professor of Law Universidad de los Andes
Mr Fabrizio CAFAGGI *Coordinator* *remotely*	Judge at the Council of State Italy and Professor at the University of Trento and LUISS
Mr Virgilio DE LOS REYES *remotely*	Dean De La Salle University
Ms Isabelle DESCHAMPS *in-person*	Lawyer, Consultant Law and development, Canada
Mr Matteo FERRARI *excused*	Professor University of Trento
Ms Cynthia GIAGNOCAVO *remotely*	Professor Universidad de Almeria
Mr Hagen HENRŸ *in-person*	Professor University of Helsinki
Ms Paola IAMICELI *in-person*	Professor University of Trento
Mr Georg MIRIBUNG *remotely*	Professor Eberswalde University for Sustainable Development
Mr Morshed MANNAN *remotely*	Lecturer in Global Law and Digital Technologies Edinburgh Law School
Mr Francisco REYES VILLAMIZAR *in-person*	Adjunct Professor, University Javeriana Partner at Francisco Reyes & Asociados SAS
Mr Carlo RUSSO *excused*	Professor University of Cassino and Lazio Meridionale
Ms Dongxia YANG *remotely*	Professor China University of Political Science and Law

INSTITUTIONAL PARTNERS

FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS (FAO) *remotely*	Mr Simon BLONDEAU Legal Officer (LEGN)

in-person	Ms Carmen BULLON Legal Officer
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