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**SUMMARY FINDINGS  
OF THE LEGAL OPINION  
ON DELIVERING UNIFIED GOVERNANCE  
UNDER ONE CGIAR**

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20 April 2020

**LALIVE**

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**EXECUTIVE SUMMARY**

- 1 The **two key conclusions** that we draw from our analysis of the legal considerations of CGIAR moving to a unified governance under One CGIAR are the following:
  - i) There are no legal impediments for implementing One CGIAR Unified Governance as endorsed by the System Council; and
  - ii) The implementation of the One CGIAR Unified Governance presents an opportunity to move away from the current complex system, which has several flaws from a governance perspective, to enhance the governance of the Centers and the CGIAR System Organization, and thus the CGIAR System, and to bring it in line with international governance standards and best practices.
- 2 These conclusions are based on our analysis of the issues CGIAR has requested us to address in our Legal Opinion on delivering unified governance under One CGIAR.
- 3 Our findings on each of these issues can be summarized as follows:
  - i) All Centers and the CGIAR System Organization enjoy international legal personality, albeit to a greater or lesser extent, and are not, in all but two cases (IFPRI and IITA), subject to national laws or rules on governance;
  - ii) Therefore, the applicable governance framework is to be found primarily in the CGIAR Legal Entities' Governing Instruments as well as in their Secondary Internal Regulations;<sup>1</sup>
  - iii) The Centers' Boards are capable of delegating the oversight of their respective Directors General to an Executive Management Team (EMT) and the respective individual Center Boards – and by extension their individual members – only retain a residual responsibility with respect to the delegated functions;

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<sup>1</sup> See definition at par. 12 below. The defined terms used in this document have the meaning set out in the full Legal Opinion and in the enclosed Glossary.

- iv) There is no legal impediment to having the same members of the (reconstituted) System Management Board populate a 2/3<sup>rd</sup> voting majority on all Centers' Boards,<sup>2</sup> although this may require amendments to the Centers' Governing Instruments;
  - v) One CGIAR Common Board membership does not raise any meaningful fiduciary legal risks for the individual Center Board members and potential individual conflicts of interest can be avoided or properly managed through a global unified conflict of interest program;
  - vi) One CGIAR Common Board membership presents no tangible risk to the CGIAR System Organization for actions taken by the Centers' Boards and vice versa; and
  - vii) The implementation of the One CGIAR Unified Governance does not require any amendments to any Center's or CGIAR System Organization's HSA or in any way affect the privileges and immunities enjoyed thereunder.
- 4 This document presents a summary of the findings set out in further detail in our full Legal Opinion dated 20 April 2020.<sup>3</sup>

## 1 INTRODUCTION

- 5 In the Charter of the CGIAR System Organization, the Centers are committed to making all reasonable efforts to foster CGIAR's guiding purpose,<sup>4</sup> as set forth in the introduction of the CGIAR System Framework and the preamble of the Charter of the CGIAR System Organization. The Centers and the CGIAR System Organization are not-for-profit organizations designed to serve public (general) interest. Their interests are thus aligned rather than self-standing.

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<sup>2</sup> The conclusions set out in the Summary Findings and Legal Opinion would remain the same if the same members populated more than a 2/3<sup>rd</sup> voting majority.

<sup>3</sup> This document replaces the Preliminary Summary Findings that were established prior to completion of our full analysis. While the key conclusions remain unchanged, there have been changes to some of the underlying findings and explanations. The main differences between the Preliminary Summary Findings and these Summary Findings are set out in the Annex.

<sup>4</sup> CGIAR System Organization Charter (Art. 5.2).

- 6 The implementation of the One CGIAR Unified Governance does not change this; on the contrary, it will enhance the ability of the CGIAR System to focus on system-wide programmatic goals and operate more efficiently and effectively to implement its guiding purpose: to advance science and innovation for a food-secure future.
- 7 Unified governance of the CGIAR System is the cornerstone of the One CGIAR project. Establishing the One CGIAR Common Board presents an opportunity to advance the common interest of all CGIAR Legal Entities by enhancing governance across the System and by bringing CGIAR in line with international governance standards and best practices.

## 2 APPLICABLE GOVERNANCE FRAMEWORK FOR INTERNATIONAL ORGANIZATIONS

**Q.1 RFP:** Is there a defined governance code or defined laws or regulations that are legally binding on International Organizations (that have privileges and immunities)? Are there any legal requirements on the part of the System Organization or a Center to abide by any specific national governance code or legislation regarding the role of the Board of Trustees/Governing Board?

- 8 International organizations have international legal personality if at least one State (usually the State with which the organization has a Host State Agreement (“HSA”)) recognizes the organization as a subject of international law. As such, international organizations are, as a rule, not subject to domestic laws or rules on governance.
- 9 All CGIAR Legal Entities enjoy international legal personality, albeit to a greater or lesser extent. The international legal personality of all CGIAR Legal Entities save for International Food Policy Research Institute (“IFPRI”) and International Institute of Tropical Agriculture (“IITA”) is based on the consent of their founding partners, as expressed in the treaty or other instrument of international law establishing the organization (the “**Constituent Instrument**”).

- 10 IFPRI and IITA present a special character since, unlike the other Centers, they are not established by an instrument of international law, but an instrument rooted in their host State's domestic law:
- **IFPRI** was established as a non-profit corporation under the laws of Washington, D.C., and subsequently its international legal personality was recognized under U.S. law by way of an executive order issued by the President of the United States but with limited privileges and immunities. IFPRI nonetheless remains a non-profit corporation subject to D.C. law;
  - As for **IITA**, its status as an organization with international legal personality is not expressly set out in its Constituent Instrument. However, in practice, it enjoys a status akin to international organizations in Nigeria.<sup>5</sup>
- 11 The CGIAR System Organization and all Centers except for IFPRI and IITA are not subject to domestic governance legislation and international law does not prescribe specific rules on governance for IOs. IFPRI is free to set its bylaws and governance structures provided they comply with Title 29, Chapter 4 of the Washington, D.C. Code on Nonprofit Corporations. As for IITA, the extent to which IITA may be subject to specific rules on governance of domestic law will require an in-depth analysis with IITA's local counsel.<sup>6</sup>

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<sup>5</sup> For the purpose of these Summary Findings and the Legal Opinion, we have not conducted an in-depth analysis of the domestic laws potentially applicable to IFPRI and IITA, as their detailed analysis exceeds the scope of the Legal Opinion. Therefore, the conclusions regarding IFPRI set out in the Summary Findings and the Legal Opinion are preliminary. We have however consulted with the local counsel of IFPRI and the input received so far confirms our preliminary conclusions. We understand from IFPRI's own local counsel that, although certain legal requirements of domestic law would need to be accounted for, there would not be any major legal impediment to the implementation of One CGIAR under the applicable laws. As to IITA, its legal counsel are currently assisting us to determine the Center's precise legal status under Nigerian law, as well as whether and to which extent the Center would be subject to domestic laws. Our findings will be communicated directly to IITA.

<sup>6</sup> IITA's Nigerian legal counsel are currently assisting us to determine whether and to which extent specific rules on governance of domestic law would apply. Our conclusions will be communicated to IITA directly.

- 12 Therefore, the applicable governance framework is to be found primarily in the CGIAR Legal Entities' Constituent Instruments and main internal rules, such as the Statutes, the Constitution, CGIAR System Charter or Bylaws (the "**Internal Legal Instruments**", and together with the Constituent Instruments, the "**Governing Instruments**"), as well as in the secondary internal rules of the IO ("**Secondary Internal Regulations**").
- 13 The Constituent Instruments generally provide certain rules on the organization's own governance structure. Often such rules can be amended by the governing bodies themselves pursuant to the terms of the Constituent Instrument. Where a Constituent Instrument does not clearly delegate the power to amend a certain rule to the governing bodies, the founding parties remain free to agree to change the terms of their own agreement establishing the international organization. By contrast, Internal Legal Instruments can be amended by the organization without the consent of the founding parties, although such amendments may be subject to specific voting requirements.
- 14 While all Centers except for IFPRI and IITA are not required to abide by binding rules of law on governance, there are non-binding international principles on good governance as well as international governance standards and best practices which it is reasonable and diligent for any organization to comply with, as they consolidate best practices and represent the state of the art. Indeed, international governance standards by their very nature correspond to the collective global view of all pertinent stakeholders as to the system by which organizations should be directed and controlled.
- 15 The International Law Association ("**ILA**") Committee on Accountability of International Organizations (1996-2004) Recommendations, the UN Principles of effective governance for sustainable development and the G20/OECD Principles of Corporate Governance provide helpful considerations for international organizations regarding good governance practices (such as transparency and democracy in the decision-making and implementation process, proper financial management, reporting and accountability etc.). These recommendations and principles are complementary to the standards and best practices recommended by the International Organization for Standardization ("**ISO**"). However, they do not (i) offer universally endorsed governance definitions, nor (ii) provide

comprehensive and concrete systemic, organizational governance guidance (i.e. how IOs should be organized, directed and controlled). The recommendations and principles therefore should not be regarded as international systemic governance standards *per se*, but they support the pertinent ISO standards.

- 16 ISO is an independent, non-governmental organization and the world's leading developer of voluntary international standards, including for public organizations and NGOs. ISO has issued more than 20,000 standards which establish generally accepted international best practices, including on how organizations should be organized, governed and managed for compliance, effective environmental performance, prevention of corruption, IT security, and other matters.
- 17 For the assessment of the One CGIAR Unified Governance framework, two recent ISO management system standards are of particular interest because they outline how organizations should be governed, directed and controlled: (1) ISO 19600:2014 Compliance management systems – Guidelines (“**ISO 19600**”) and (2) ISO 37001:2016 – Anti-bribery management systems – Requirements with guidance for use (“**ISO 37001**”):
- ISO 19600 provides guidance for establishing, developing, implementing, maintaining and improving an effective compliance management system within an organization. This international standard is based on the principles of transparency, sustainability, proportionality and good governance and may be used by all categories of organizations regardless of their size or structure.
  - ISO 37001 specifies requirements and provides guidance for establishing, implementing, maintaining, reviewing and improving an anti-bribery management system. The system can be stand-alone or can be integrated into an overall management system, such as ISO 19600.
- 18 Another notable ISO standard which is currently under development is ISO 37000 – Guidance for the governance of organizations (“**DIS ISO 37000**”).<sup>7</sup> This standard is expected to be finalized within the next few

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<sup>7</sup> LALIVE Partner Daniel Bühr is representing the Swiss standardization organization (“SNV”) in the ISO Technical Committee 309 – Governance of organizations and the competent Working Group 1 for DIS ISO 37000.

months and will provide guidelines for the governance of organizations as well as a framework to guide their governing bodies. This standard will be applicable to all types of organizations, regardless of their size, structure or purpose. The standard will soon be submitted to the ISO members as Draft International Standard (“DIS”) for comments. In our view, the One CGIAR Unified Governance concept is in line with the DIS ISO 37000.

- 19 A key governance principle of both ISO standards (ISO 19600 and ISO 37001 ) is the clear distinction of the roles of (1) the governing body, which has ultimate authority, governs the organization and holds top management accountable, and (2) top management, which is the most senior executive function, reports to and is accountable to the governing body. Systemically, both roles should be separated for reasons of an effective checks and balances system.
- 20 The implementation of these standards and best practices is left to the discretion of each organization. However, an organization should demonstrate diligence in its management by following international standards. If international standards are not followed, there is no legal presumption of diligent management and the organization may be required to explain and justify why its deviation from international governance standards and generally accepted best practices is diligent under the circumstances.

### **3 CAPACITY FOR A CGIAR CENTER/ALLIANCE BOARD TO DELEGATE OVERSIGHT RESPONSIBILITIES TO A ONE CGIAR EXECUTIVE MANAGEMENT TEAM**

**Q.2 RFP:** For each Center/Alliance, based on the Center/Alliance’s own governing instruments, assess whether its Board has the authority to delegate its oversight responsibilities on performance management of the Center’s Director General to an empowered executive management team (“EMT”) as contemplated in the One CGIAR model. If this is possible, what, if any, legal exposure would individual Board members face for the actions of the executive management team – both for System Management Board members who oversee the EMT (who are also intended to constitute a 2/3<sup>rd</sup> voting majority on each Center/Alliance Board – after relevant decision making by the Center/Alliance Board) and

for Center Board members not on the System Management Board who have delegated authority to the EMT – and how could such exposure be effectively mitigated?

- 21 The One CGIAR Unified Governance approach as endorsed by the System Council and the System Management Board envisages an empowered EMT that has oversight responsibilities on performance management of the Directors General of Centers.
- 22 We have not identified in the Centers’ Constituent Instruments or Internal Legal Instruments any rules that would constitute a legal impediment that would prevent a Center’s Board from delegating the oversight of its Director General’s performance management or other functions deemed necessary for the effective functioning of One CGIAR to a One CGIAR EMT, although it would require certain amendments to IFPRI’s Bylaws. It would, however, be advisable to amend the Internal Legal Instruments of all Centers to make express provision for the contemplated delegation (**Section 3.1**).
- 23 Good governance requires clarity on authority and delegation of functions and powers within an organization, i.e. a “thread of governance” from the governing body to top management. The delegation of the oversight over the Center’s Director General’s performance to an empowered EMT is transparent and coherent and there are no obstacles to such delegation, as long as all organizational bodies involved each formally decide on the delegation of functions and powers (**Section 3.2**).
- 24 If a Center’s Board delegates its oversight function to another organ or body such as the EMT, its individual members retain a residual responsibility for actions or omissions of the EMT relating to the delegated functions and powers during their tenure. However, the risk of a possible legal exposure of individual Centers’ Board members arising from such a delegation of their oversight function as contemplated under One CGIAR is in our view rather theoretical since 2/3<sup>rd</sup> of each Center’s Board voting members will be on the One Common Board and will thus be in a position to ensure that the oversight function they delegated is adequately carried out by the EMT. Moreover, we have not identified a risk of legal exposure arising from the mere fact that a Center’s Board member voted in favor of One CGIAR

and/or on the principle of a delegation of certain functions and powers to the EMT, in particular given the already existing alignment of interests between the Centers and the CGIAR System (**Section 3.3**).

- 25 To mitigate the risks resulting from a delegation of functions and powers, members of governing bodies must act with all diligence when selecting, instructing and supervising the individuals to which duties are delegated (**Section 3.4**).

#### **4 IMPACT OF 2/3<sup>RD</sup> COMMON VOTING MEMBERSHIP ACROSS THE CENTERS' BOARDS**

**Q.3.1 RFP:** Are there any legal concerns, including in relation to notions of organizational independence and autonomy, with the same group of people who are the voting members of the System Management Board also populating, as a 2/3<sup>rd</sup> voting majority, all of the Boards of CGIAR Centers/Alliances (with all legal entities having international organization legal status (with privileges and immunities in the jurisdictions of their operations), and which collaborate in different ways, and will increasingly operate on the basis of common policies and business processes and practices)?

- 26 The 2/3<sup>rd</sup> common voting membership across the Centers' Boards has no bearing on Centers' autonomy and independence from a legal standpoint, i.e. in terms of their legal personality and statutory organs (as opposed to their operational or financial autonomy and independence).
- 27 Insofar as the implementation of the 2/3<sup>rd</sup> common voting membership across the Centers will entail changes to their Center's Board, this reform will also require amending the Internal Legal Instruments and, in some cases, the Constituent Instruments, of each of the Centers. As a result, the One CGIAR Unified Governance approach would become part of the constitutional set-up of each of the Centers with due consideration for their organizational independence and autonomy, as well as their common purpose.

- 28 The implementation of the One CGIAR Unified Governance does not require any amendments to the relevant HSAs.<sup>8</sup> Even though the Constituent Instrument of certain Centers is incorporated in the HSA (e.g. ICARDA and ICRAF), the implementation of the One CGIAR Unified Governance would not require any amendments to the Constituent Instruments – or for that matter, the HSA – because the only changes required for those Centers would be at the level of their Internal Legal Instruments.
- 29 We also understand that the One CGIAR Unified Governance will not affect any right of the host States to appoint *ex officio* Board members. If such rights were to be affected, amendments to the relevant HSAs would need to be negotiated.

**Q.3.2 RFP:** Specifically, would each Center/Alliance Board constituted as described in the One CGIAR approach be able to effectively carry out its statutory duties under the Center/Alliance’s own governance documents? If there are issues, how could those be effectively mitigated through appropriate governance arrangements (whether committee structures, conflicts of interest provisions, or other relevant approach)?

- 30 One CGIAR Unified Governance builds on the aligned interests of the Centers and the CGIAR System Organization in service of the public (general) interest and of CGIAR’s purpose: to advance science and innovation for a food-secure future. As such, the 2/3<sup>rd</sup> voting membership across the Centers’ Boards proposed as part of the One CGIAR Unified Governance is essentially a more effective governance structure for the realization of the Centers’ and the CGIAR System Organization’s common purpose and interests.
- 31 We have not identified any legal impediment of the One CGIAR Unified Governance to the ability of the Centers’ Boards to effectively carry out

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<sup>8</sup> For the purpose of the Summary Findings and the Legal Opinion, only the HSAs entered between the Centers and the State in which they have their headquarters have been examined, as they are the most relevant to the issues we have been asked to address, to the exclusion of agreements concluded with other States in which the Centers may have regional offices and conduct operations.

their statutory duties under their own governance instruments. In fact, the Governing Instruments of the Centers already provide mechanisms whereby governance arrangements can be put into place to mitigate concerns related to the adoption of the One CGIAR Unified Governance approach.<sup>9</sup> However, in the case of IFPRI (and possibly IITA), such measures would likely need to be put in place to ensure One CGIAR Common Board members' compliance with their legal obligations.

- 32 From a governance perspective, the concept whereby the voting members of the One CGIAR Common Board will populate, as a 2/3<sup>rd</sup> voting member majority, all of the Center Boards, increases the Center Boards' powers, duties and accountability towards the overall CGIAR System. It also has essential governance advantages by creating a framework for effective common leadership, values, principles, culture and performance which are critical to produce the research results required in these challenging times.

**Q.3.3 RFP:** Expressly, does any mergers and acquisitions national legislation apply to the situation of One CGIAR common board members being appointed by each legal entity to its own Board?

- 33 National mergers and acquisitions legislation are not relevant to any of the proposals for a One CGIAR Unified Governance approach, including the issue of the 2/3<sup>rd</sup> voting membership, as it would not result from a change of ownership in the relevant organizations but a change in their governance framework.

## 5 LEGAL LIABILITY OF BOARD MEMBERS

**Q.4.1 RFP:** Could Board members of Centers/Alliances and the System Organization be held legally liable for breaching their fiduciary responsibilities if they facilitate and implement the proposals for unified governance under the One CGIAR approach and, if so, what is the

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<sup>9</sup> As explained in further detail in Sections 4.2.2 and 4.2.3 of the full Legal Opinion.

likelihood and impact of those risks and how can they be effectively mitigated?

- 34 While the interests among the Centers and the CGIAR System Organization are aligned, the question nonetheless remains as to whether the One CGIAR Unified Governance approach, and in particular the 2/3<sup>rd</sup> voting membership, might pose any problem for the One CGIAR Common Board members who wear different hats when sitting on the Boards of each of the Centers and the CGIAR System Organization. In particular, the situation can be examined with respect to fiduciary duties and conflicts of interest which, for the purpose of this Legal Opinion, are defined as follows:
- **Fiduciary duties** generally refer to the duty to act in the interest of the beneficiary. In the case of the Centers, the Board members must act in the interest of the Center which they serve. As noted above, the Centers' interests are aligned with the interests of the entire CGIAR System, as the CGIAR Legal Entities all serve public (general) interest and do not have their own individual interests. Accordingly, the Centers' Board members' duty is also to serve in the public (general) interest. Fiduciary duties include, among other things, the duty of care and the duty of loyalty. The duty of care requires Board members to act on a fully informed basis, in good faith and with due diligence. The duty of loyalty requires board members to proactively act in the interest of the organization and its stakeholders.
  - In the context of One CGIAR, a personal **conflict of interest** could potentially occur if a member of the One CGIAR Common Board would have or could be perceived as having either (a) conflicting professional or (b) conflicting private interests which actually or potentially affect the objective exercise of her or his fiduciary and loyalty duties towards a Center or the CGIAR System Organization.
- 35 Whilst only limited provisions expressly address fiduciary duties in the Centers' Governing Instruments and Host State Agreements, such duties can nevertheless be inferred from those instruments and the general practice of

IOs. All Centers' Board members should accordingly be considered bound by such duties (**Section 5.1.2**).

- 36 While differences may arise between the Centers and the CGIAR System Organization on how to best achieve the CGIAR System's purposes and objectives and how to best pursue its policies (even if the Centers' purposes and objectives are aligned with those of the CGIAR System), such differences do not necessarily create a conflict of interest for an individual Board Member. Indeed, the legal concept of conflict of interest is narrower than the existence of differences of views on the implementation of (in this case, common) objectives or policies, even if those differences concern the allocation of resources or funding.
- 37 That said, conflicts of interest at the level of individual Board members are inevitable in practice and do not arise as a consequence of adopting a 2/3<sup>rd</sup> common voting membership or adopting the One CGIAR Unified Governance approach, which should result in an increased and better coordinated overview and alignment of the activities of the One CGIAR Board members and Centers' Board members. This will allow conflicts of interest situations to be even better managed should they materialize (**Section 5.1.3.1**). Moreover, conflicts of interest at the level of individual Board members can be avoided/properly managed through a global unified conflict of interest program (**Section 5.1.3.2**).
- 38 A unified conflict of interest program at the global level would mitigate potential conflicts of interest and would increase the understanding of the CGIAR Centers/Alliances Board members of the overall One CGIAR framework and increase their sense of accountability. The key to the management of conflicts of interest is transparency and a proper effective process as to the identification of potential conflicts of interest and the ongoing monitoring of new situations that might give rise to such conflicts.

**Q.4.2 RFP:** What, if any, legal liabilities could arise for Board members in their home country or another jurisdiction linked to their work for the CGIAR Center/Alliance in relation to them exercising their functions and responsibilities for the relevant Center/Alliance Board?

- 39 The implementation of the One CGIAR Unified Governance will not trigger additional liabilities for Centers' Board members.

- 40 In any case, as a rule, Center’s Board members enjoy privileges and immunities in most host States in relation to acts performed in the exercise of their functions. Depending on the applicable law they may also benefit from privileges and immunities outside of the host States.

## 6 SPECIFIC LEGAL RISK CONSIDERATIONS

**Q.5.1 RFP:** Extended liability: With common board membership (whilst maintaining separate governing instruments), what is the risk that the System Organization would be held legally liable for the decisions of a Center/Alliance Board and vice versa? If material, how could this risk be effectively mitigated?

- 41 The regime of responsibility of Board members described in the previous Sections will not be modified as a result of the implementation of the One CGIAR model.
- 42 With common Board membership there is no meaningful or tangible risk that the CGIAR System Organization would be held legally liable for the decisions of a Center/Alliance Board and vice versa. (**Section 6.1.1**).
- 43 Similarly, Centers cannot be liable for the decisions of the One CGIAR Common Board. Their respective boards will continue to exist and remain liable to the Centers (**Section 6.1.2**).

**Q.5.2 RFP:** Host country agreements: Is there a risk that the unified governance under the One CGIAR approach could jeopardize any Center or System Organization host country agreement?

- 44 We have not identified any basis to conclude that the unified governance under the One CGIAR approach could jeopardize any Center or CGIAR System Organization’s HSA. While considerations arising from discussions with the host States may have to be taken into account in implementing the One CGIAR approach, from a legal standpoint these do not constitute legal impediments to change or put the HSAs at risk.

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**ANNEX TO THE SUMMARY FINDINGS**

- 45 This Annex summarizes the main differences between these Summary Findings dated 20 April 2020 and the Preliminary Summary Findings dated 30 March 2020 that were established prior to completion of our full analysis.
- 46 While the key conclusions remain unchanged, there have been changes to some of the underlying findings and explanations. The main differences result from : (i) the new information and documents we received since our Preliminary Summary Findings were issued, (ii) the completion of our analysis of the CGIAR Legal Entities' legal instruments and relevant documents which was still ongoing at the time of drafting of the Preliminary Summary Findings, (iii) the changes made further to comments received from CGIAR on our Preliminary Summary Findings, and (iv) the finetuning of the language used in the Summary Findings.
- 47 The paragraphs of the Preliminary Summary Findings which have undergone the main substantives changes are listed below with an indication of the corresponding paragraphs of the Summary Findings:

<b>Comparison Preliminary Summary Findings and Summary Findings (main changes)</b>	
<b>Preliminary Summary Findings</b>	<b>Summary Findings</b>
5(1)	3(i) and (ii)
7 to 9	9 to 11
11	15
18 to 24	22 to 25
25 to 29	27 to 30 and 34
38 to 39	35 to 37 and 39 to 40