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REPORT

1. The *President* opened the session, welcoming all those present. Apologies had been received from Mr Sen and Mr Soltysinski.

2. In his welcome address, the *President* recalled the various landmarks in the life of the Institute during his ten years as its President, years during which it had been able to retain its own identity as a leading forum for the development of modern uniform rules in highly technical areas of the law, while at the same time keeping its widely recognised expertise in more general areas of the law. Its membership had grown from 58 ten years previously to 63 today. Among the various challenges it, like other Organisations, now faced, the need to rejuvenate the Organisation and keep it fit to continue offering its distinct contribution to legal harmonisation in the years to come was of the utmost importance. He stressed the host country, Italy's commitment to support UNIDROIT in its activities despite the constraints that the current financial climate imposed on many States. In this connection, the quality of the coordination and dialogue established by the members of the Governing Council with the other organs of the Institute and with their Governments would be essential in securing the support that the Institute needed to continue doing its valuable work.

Item No. 1 on the agenda: Adoption of the agenda (C.D. (89) 1)

3. *The draft agenda was adopted as proposed (see Appendix II).*

Item No. 2 on the agenda: Appointments (C.D. (89) 1)

4. *The Council renewed Professor Arthur Hartkamp's appointment as First Vice-President of the Governing Council and appointed Professor Lyou Byung-Hwa Second Vice-President, in both cases as from the end of the 89th session to the end of the 90th session of the Council.*

Item No. 3 on the agenda: Reports 2009

(a) *Annual Report 2009 (C.D. (89) 2)*

5. The *Secretary-General*, in introducing this item, first summarised the Institute's main achievements in 2009, starting with the completion and final adoption of the *UNIDROIT Convention on Substantive Rules for Intermediated Securities* at the second session of the diplomatic Conference in Geneva on 9 October 2009. A new revised draft of the original draft Official Commentary to the Convention was to be circulated to Governments for comments by early August 2010, i.e. within the deadline set by the diplomatic Conference, so that member States would have four months to submit comments before the text was finalised and published officially early the following year. A draft Official Commentary to the *Model Law on Leasing* had also now been completed.

6. As to the Cape Town instruments, the Institute was in the process of revising the request for proposals and specifications for the selection for operating the Registry under the *Luxembourg Rail Protocol*, following the initial difficulties experienced with the bidding process. An information meeting had been organised at the Institute's headquarters in Rome which had evidenced an unexpectedly high level of interest from possible service providers, and there was now reason to be confident that this time round, the selection process would lead to a satisfactory result. With regard to the *preliminary draft Protocol to the Cape Town Convention on Space Assets*, significant progress had been made – to the point of breakthrough – and the project might be said to be back on track, with earlier opposition now being addressed in a more positive and constructive manner.

7. Major progress had also been made in 2009 on the new chapters of the third edition of the *UNIDROIT Principles*, with only one further meeting planned to finalise the text and getting it ready for the Council to authorise its publication at its session the following year.

8. On the membership front, there had not been any new accessions to the UNIDROIT Statute in 2009, but the Secretariat was in contact with four countries that had expressed interest in becoming new members: Qatar, Algeria, Morocco and Cape Verde.

9. From an institutional point of view, the Secretariat had proceeded with the co-ordination with other international Organisations, in particular with the Institute's sister organisations including the Hague Conference and UNCITRAL. The idea of a joint publication of the three Organisations presenting their work in the area of secured transactions, with a view to possibly devising joint promotional efforts, was still on the drawing board. Another very positive development in 2009 from the Institute's internal point of view had been the decision by Italy's Ministry of Cultural Heritage to release funds for renovation works in the Library building, including the provision of a multifunctional reading room. The Secretariat expressed its gratitude to the Italian Government for this work, which would further support the Institute's activities.

10. In the ensuing debate, Mr *Terada* spoke on behalf of Professor Hideki Kanda, the Chairman of the Drafting Committee of the Geneva Securities Convention, to express his gratitude for the co-operation of the member States that had participated in the diplomatic Conference. Mr Kanda had indicated that even prior to entering into force, the Convention might prove a model law for domestic legislation. Ms *Sabo* and Mr *Voulgaris* added their voices to thank the *Secretary-General* and the Secretariat staff for the progress made generally.

11. *The Council took note of the Secretary-General's report on the activity of the Institute during 2009.*

(b) *Report on the Uniform Law Foundation*

12. *Sir Roy Goode*, member *ad honorem* of the Council and President of the Uniform Law Foundation, offered a brief history of the Uniform Law Foundation (set up under Dutch law) and its sister foundations, the UK Foundation for International Uniform Law and the American Foundation for International Uniform Law, and of their work in raising supplementary funds for purposes not or not adequately catered for by UNIDROIT'S regular budget. Three sources of funds were available to the foundations: conferences (mostly on UNIDROIT instruments), publications (mainly Sir Roy's Official Commentaries on the Cape Town instruments), as well as grants and donations. In 2009, the sole source of income had been revenue from sales of publications, producing € 17,784. The Uniform Law Foundation had provided € 15,306 for the UNILAW data base; The UK Foundation as every year had given £ 5,000 for a scholarship, £ 15,000 to fund a further six months' salary for the assistant to Mr Martin Stanford, Mr Daniel Porras; a similar amount had been contributed by the American Foundation which also contributed \$ 50,000 for assistance to member States of the European Union for the ratification of the Cape Town Convention. The total contribution in 2009 had thus been in the region of € 90,000.

13. The financial position of the Uniform Law Foundation was very weak, with reserves of € 11,000, most of which represented unsold stock of the Official Commentaries carried at cost. The data base had now been reduced to manageable proportions, and the Governing Board, which had met on 8 May, had agreed that the data base should continue to be funded for the time being at its present levels of roughly € 33,000 a year. This left nothing for the Library, which had been almost frozen in its budget for a number of years and needed a major injection of funds. The other two Foundations were financially somewhat better placed. They were planning several conferences on UNIDROIT instruments both to raise money and propagate awareness of these instruments round the world. Preliminary talks had also been held with the President of the Italian Bar to explore the

possibility of continuing legal education programmes on UNIDROIT instruments for members of the Italian Bar. The availability of grants was being explored for projects falling within the work of UNIDROIT that might be of interest to NGO's and other potential grant-giving bodies, in particular in Africa, and attempts were being made to secure one or more major benefactions for the Library.

14. The three Foundations had to date contributed roughly € 250,000 to the work of UNIDROIT. More needed to be done, and there were several ways in which the Governing Council could help in this respect. One was to persuade their Governments to provide additional support for one or more items in the Institute's regular budget, whether by raising contributions or by donations, which would free the income of the Foundations to contribute to the cost of necessary items not within the regular budget. The second was for members to use their contacts with possible sources of funding and advising Sir Roy of any approaches that the members of other contacts might be willing to make. Sir Roy would be writing to individual members on this.

15. The *Secretary-General* expressed the Secretariat's deep gratitude, recognition and appreciation for the support given by the Uniform Law Foundation and the UK and US Foundations to the Institute's work over the years, much of which would not have been possible without it. Cases in point were the UNILAW data base and the preliminary draft Space Protocol, as well as the research scholarships programme. This sentiment was wholeheartedly echoed by Mr *Voulgaris*, Mr *Gabriel*, Mr *Govey* and the *President*.

16. *The Council took note of the report by the President of the Uniform Law Foundation, expressing its deep gratitude to him for his tireless efforts over the previous year to relieve pressure on the Institute's budget and to the American Foundation for International Uniform Law and the U.K. International Uniform Law Foundation for their invaluable support in providing extra-budgetary funding for a number of the Institute's activities.*

Item No. 7 on the agenda: Model Law on Leasing (C.D. (89) 6)

17. In introducing this item, Mr *Stanford* (Deputy Secretary-General), indicated that the principal activity conducted by the Secretariat in this context since the last session of the Council had consisted in preparation of the Official Commentary on the Model Law on Leasing. An account of the process which led up to completion of the Official Commentary was contained in the Secretariat memorandum now before the Council. The Secretariat wished to express its particular gratitude to the Chairman of the Committee of governmental experts, the Reporter and the representatives of the Governments of Canada, France and the United States of America for their invaluable assistance in the finalisation of the Official Commentary.

18. Mr *Stanford* recalled that the Official Commentary was not intended to be an exhaustive explanatory report on the Model Law: rather, it was conceived as providing clarification on specific provisions of the Model Law. Its publication was meant to encompass distribution of the Commentary in those jurisdictions that had participated in its preparation, as also, in particular, those developing countries and countries in transition to a market economy for which it was principally designed.

19. Recalling that the Governing Council had, at its previous session, endorsed the Secretariat's proposal that it hold off from organising promotional seminars for the time being, in particular whilst awaiting completion of the unofficial versions of the Model Law to be prepared in Arabic, Chinese, Russian and Spanish, Mr *Stanford* noted that the Arabic, Russian and Spanish unofficial versions were now available, and the Chinese unofficial version was being prepared. The Secretariat had sketched a potential programme for promotion in its memorandum, and believed that such promotion could not be put off much longer without seriously compromising the Model Law's chances of success. It was, however, important to note that the Model Law had already served as the basis of the leasing laws passed in Jordan, Tanzania and Yemen and that it had provided the basis for the laws under

consideration by the Afghan Parliament and the Legislative Assembly of the Palestinian National Authority. The Secretariat was proposing that a number of seminars be envisaged over either a longer or a shorter number of years.

20. While only too aware of the serious constraints on the Institute's budget, the Secretariat nevertheless felt it was necessary to weigh the negative consequences of a failure by the Secretariat to assume its responsibilities in this regard, notably in respect of a project undertaken specifically at the behest of African member States concerned that the Institute's work programme did not adequately reflect the needs of such countries.

21. The Secretariat recommended that it work, wherever possible, with other Organisations for the promotion of the Model Law, and in particular with the *Commonwealth Secretariat* and the *International Finance Corporation*.

22. In the debate that followed, Mr *Voulgaris* recalled that the 18th International Congress on Comparative Law that was to be held in Washington 2010, at which the former Secretary General, was the general rapporteur on leasing and who had prepared a detailed questionnaire on the issue, would provide an excellent opportunity to promote the Institute's work in this area. It had been thanks to this questionnaire that Greece, which had not ratified the 1988 Ottawa Conventions because its shipowners feared confusion with charterparties, might now change its mind, and others might follow suit.

23. Support for publication of the Official Commentary was voiced around the table. Mr *Gabriel* pointed out that it was an important ancillary part of the Model Law, and its publication would have particular significance for developing economies. Mr *Tricot* added that in helping to re-write the OHADA Uniform Acts, under World Bank auspices, he had noted unmistakable signs that some OHADA member States stood in need of just the type of leasing contract contemplated by the Model Law and that the time therefore seemed ripe for a Uniform Act based on the Model Law. The promotional effort should target the right kind of audience, focusing on lawyers and civil servants rather than university professors, in both the French and English-speaking member States of OHADA. Ms *Sabo* for her part injected a note of financial caution as to the promotion activities proposed by the Secretariat, warning against any significant outlay of the Institute's funds. She also pointed out that in addition to the possible partners specifically mentioned in the Secretariat memorandum, the Institute should be looking at opportunities for promotion and co-ordination with UNCITRAL, so that the latter's legislative guide on security interests and the UNIDROIT Model Law could be promoted and used most efficiently. Mr *Opertti Badán* urged that the text be published in as many languages as possible. Mr *Carbone* wondered whether some specification might be needed to underline the difference between leasing and the charterparties.

24. In reply, Mr *Stanford* took Mr *Tricot*'s point about getting in touch with OHADA, not least since the African countries were particularly seen as the beneficiaries of the Model Law. Another way of reaching out to the North African States was through the Union pour la Méditerranée. Given the Institute's straitened financial circumstances, he suggested that an appeal might once more be made to the well-proven willingness of the UNIDROIT correspondents, in particular Mr DeKoven, to help the Institute in this task at their own expense, and to look to Governments actually to provide the resources for the holding of seminars. He agreed with Ms *Sabo* that whatever was done should be done in conjunction with UNCITRAL. There was no intention to limit teamwork to the Organisations mentioned in the memorandum. As Mr *Opertti-Badán* of course was aware, Uruguay had already asked for a Spanish version of the Model Law, possibly with the preparation of a national law in mind. As to Mr *Carbone*'s comment on charterparties, he recalled that the Ottawa Convention actually contained a provision on these but that this had, as Mr *Voulgaris* had mentioned, led to trouble with the shipowners. He suggested that the Governing Council might agree to set up a small drafting

group including Messrs Carbone and Gabriel to draft such an amendment for inclusion in the introductory part of the Official Commentary.

25. *Subject to consideration of the most appropriate means of indicating that the Model Law on Leasing covered charter-parties, the Council authorised publication of the Official Commentary on the Model Law, with the rectification proposed by the Secretariat. The Council also approved the holding of seminars in those regions of the world for which it was principally designed, in particular developing countries, subject to the availability of supplementary funding for that purpose.*

Item No. 5 on the agenda: International Interests in Mobile Equipment

(a) Implementation and status of the Cape Town Convention, Aircraft Protocol and Luxembourg Protocol (C.D. (89) 4(a))

26. Mr Atwood (UNIDROIT Secretariat) referred the members of the Council to the Secretariat memorandum before them, before looking more closely at some of the points raised therein. Turning first to the *status* of the Convention and its Protocols, he indicated that Gabon had since the memorandum was finalised become a Contracting State of the Convention. Further accessions were expected by European Union member States, while several States, particularly in Asia and Oceania, were moving towards ratification of or accession to the Convention and the Aircraft Protocol. The European Union had signed the Luxembourg Protocol in December 2009, and an instrument had been received from one State for accession to that Protocol.

27. As to the Convention and the *Aircraft Protocol*, Mr Atwood referred, first, to the Secretariat's involvement in some expert consultations with States to assist them both in their understanding of technical issues involved in accession and in the accession process itself, particularly as regarded declarations. It had thus hosted delegations from the *Russian Federation* and the *Republic of Latvia*, consisting of both ministry officials and industry representatives. It was only due to the complexities of the accession process in the Russian Federation that its instrument of accession had not yet been deposited, the final outstanding issue with the declarations on insolvency having in the meantime been resolved. The Secretariat had also had discussions with a representative of the *United Arab Emirates* to resolve a difficulty with one of the declarations posted to the Registry, and this problem was now well on its way to being successfully resolved.

28. There having been some questions and uncertainty about the scope available to EU member States in making their declarations on some of the key issues under the Convention and the Aircraft Protocol, including that of insolvency, UNIDROIT had hosted a seminar to promote and in some cases introduce or re-introduce the Convention and the Protocol, as well as its economic models and benefits, to the EU member States and to examine the situation with the declarations and possible options. The conclusions of that seminar dovetailed with another initiative that the Secretariat had been contemplating independently, which was to enable Contracting States on a voluntary basis to provide information about how they had been implementing the Convention and Protocol. Moreover, the Secretariat would also be looking at some changes to the explanatory memorandum that provided guidance to States on the issue of declarations. Finally, Mr Atwood indicated that a number of minor grammatical discrepancies in the official texts of the Convention and the Aircraft Protocol had been identified in the course of translation, and a rectification process involving ICAO would have to be initiated.

29. Moving on to the *Luxembourg Rail Protocol*, following the breakdown of the previous year's negotiations with a potential operator of the Registry, he briefly recalled the various stages of the procedure that had been followed since that time to undertake a second tender process. The preparatory commission convened in Berne in October had endorsed some revisions to the

documentation with a view to ensuring that the issues that had arisen during the first process did not recur, and agreed to hold an information session to which prospective bidders would be invited. That meeting had been well attended by over 20 entities and sufficiently positive feedback had been received to suggest that there would be a competitive process for the position of Registrar of the Rail Registry. The tender documentation now needed to go through a process of review and enhancement following questions, concerns, and comments raised at the information session, specifically the need to elaborate the business case of operating the Registry, with a September or October deadline to arrange a selection process in mind.

30. In the ensuing discussion, Mr *Bollweg* expressed his satisfaction at the success of the Aircraft Protocol. The Cape Town Convention was now well on its way to becoming one of the Institute's most successful Conventions to date. He also felt more confident about the fate of the Luxembourg Protocol following the positive outcome of the Berne meeting. Ms *Broka* indicated that Latvia was on its way to ratifying the Convention, and stressed how helpful the meeting organised for EU member States had been, in particular as regarded the issue of declarations which had been the main stumbling block. Latvia was also looking very carefully at the Rail Protocol with a view to possible accession.

31. *The Council took note of the progress that had been achieved in implementing the Institute's Depositary functions under the Convention and its Protocols.*

(c) *Preparation of other Protocols to the Cape Town Convention, in particular on matters specific to agricultural, mining and construction equipment (C.D. (89) 4(c))*

32. Mr *Atwood* (UNIDROIT Secretariat) reported on the follow-up to the decision taken by the Council the previous year to mandate the Secretariat to sound out industry and business interests on the possible development of a Protocol covering agricultural, mining and construction equipment, and on ways to narrow down the scope of such a Protocol. The Secretariat had initially worked with two of the members that had presented and reported the strongest levels of (potential) interest from their industries, Germany and the United States. A stakeholder meeting had been organised in Berlin in March 2010, which had evidenced a level of support and recognition of the potential for such a protocol to assist sectors of the industries that would be affected by the scope as envisaged. In the United States, the Department of Transport had coordinated a number of consultations with key industry sectors, involving UNIDROIT and reporting to it. The industry consulted to date had been very positive about the potential for the Protocol to assist sectors of the industry, in particular in relation to enhancing security interests and the recognition of security interests in key export markets. However, the stage had not yet been reached where those potential benefits and questions about narrowing or expanding the scope in any precise way could be dealt with or resolved with any great certainty, and the best way forward at this point would appear to be to continue a dialogue with the industry in a more structured and focused way.

33. The discussion that followed threw up a measure of consensus on the need to proceed with this project in some way. Mr *Gabriel* noted that where there was undoubted industry support in Germany and the United States of America, it would be important to set up a focused study group to gauge the scope and potential of such a Protocol. Such work would also be in line with UNIDROIT's interest in moving its work beyond some of its more limited impact to maybe a broader impact in the world and might contribute to the vexed question of developing agricultural industries and food production in a world threatened with widespread starvation in the foreseeable future. Mr *Lorenzetti* supported this, arguing that the global problem of world food supply demanded that resources be moved to boost agricultural production. The problem could therefore no longer be regarded as one contained strictly within national borders. Ms *Sabo* agreed there was a case for moving forward, but advocated a more informal, and hence more budget-friendly, form of consultation, an "as resources allow" approach.

She did have some qualms about the risk of interfering with domestic secured transactions regimes and doubts as to whether and to what extent agricultural and mining equipment actually crossed borders. Mr *Tricot* stated that he was now convinced despite initial hesitations that there was a case for the Secretariat to continue its investigations in respect of all three types of equipment – agricultural, mining and construction equipment. He saw a link with the work done on the aircraft and rolling stock projects, which might usefully serve as a basis for a first draft in this new area in the not too distant future. Mr *Voulgaris* likewise stated that he had now overcome his initial opposition (on *lex rae sitae* grounds) to investigatory work on this project going forward, and that there was an international dimension. However, since in this area the contractual parties were not of the same strength, the other Protocols, where the parties did have equal bargaining power, should not be used as a blueprint.

34. Mr *Bollweg* agreed with Mr Gabriel's point on world food production and third world development, and as such the project might usefully involve a joint venture with FAO. He joined in calls for a continued dialogue with the industry in the form of a study group. He stressed that construction and agricultural equipment were an export business, the equipment usually being manufactured in the industrialised world and exported to the developing countries. He concurred that such a Protocol might be quite easy to draft in the wake of the aircraft and rail Protocols. The only problem would be identifying the security object.

35. Ms *Moss*, on the contrary, stated that the United Kingdom Government was still not persuaded that there was any strong case for taking forward this Protocol at this stage. It was also concerned that such a project would use up limited resources without actually having something for which there were potential benefits. Ms *Bouza Vidal* for her part pointed out that it might be judicious to couple this project to the Institute's future work in financing agriculture projects. It might be necessary to be less ambitious and concentrate efforts in the agricultural area, even though it might be advantageous to have another Protocol in the field of mining and construction.

36. Mr *Harmathy* confessed to some sympathy for the positions expressed by Ms Sabo, Ms Moss and Mr *Voulgaris*, yet was inclined to agree with Mr Gabriel and Mr *Bollweg* and favoured continuing the work, however cautiously.

37. The *Secretary-General* concluded that there was clearly a great deal more support for this project than there had been the previous years. While the issue of priorities, brought up by Ms Moss, would come up later in the meeting when all proposals for future work were being considered, he felt it would be useful for the Council to take a decision at this stage as to whether the work was to be included in the Work Programme or not. He suggested that it might be more appropriate not to focus too much on the name given to the consultation process. Rather than call it a study group, the Secretariat might envisage organising a consultation meeting to which it would invite industry representatives, scholars, government representatives and so on, probably in early 2011 in Rome, in consultation with the other Rome-based Organisations that had an interest in the area. That meeting might attempt to narrow down the issues, address the issue of the internationality of the problem, the relevance of the Protocol and some technical aspects. A report might then be produced with a view to the Governing Council authorising the creation of a study group later that year.

38. *The Council authorised the Secretariat to continue its consultations with relevant sectors, including industry sectors, in relation to the proposed Protocol so as further to develop an understanding of the potential scope and advantages of the Protocol, and requested that the Secretariat report the outcome of its consultations to the following session of the Council.*

Item No. 5 on the agenda: International Interests in Mobile Equipment

(b) Preliminary Draft Protocol on Matters specific to Space Assets to the Cape Town Convention (C.D. (89) 4(b))

39. In introducing this item, Mr *Stanford* (Deputy Secretary-General), recalled the remarkable progress made by this project which, only a few years ago, had been in a state of limbo, awaiting completion of the intersessional work decided upon by the Committee of governmental experts at its second session, held in October 2004. The progress made over the preceding twelve months had, in large measure, been due to the sound basis for the resumption of the intergovernmental consultation process laid by the work accomplished by the Steering Committee in the period May 2008 – May 2009, the result of an unprecedented team effort between the Governments of the leading space-faring nations and representatives of the key players in the international commercial space, financial and insurance communities. An extraordinary contribution had also been made by the generosity of the American Foundation for International Uniform Law, the United Kingdom International Uniform Law Foundation and the German Space Agency, which had permitted the Secretariat to benefit from the sterling commitment and hard work of Mr Daniel Porras over the past two years.

40. Mr Stanford outlined the events since the last of the Steering Committee meetings held in Paris in May 2009 (preceded by a meeting of a Sub-committee to develop options for a solution on the public service issue) which had unanimously concluded that its work, as enshrined in an alternative version of the preliminary draft Space Protocol, provided a sound basis for the resumption of the intergovernmental consultation process. First of all, it had been necessary to complete the last assignment referred to intersessional work, the examination of certain key issues regarding the international registration system to be established under the future Protocol referred to a Sub-committee of the Committee of governmental experts. This meeting had been held in Rome in October 2009 and seen an important break-through on the issue of the identification criteria to be employed for the registration of space assets in the future International Registry. The real watershed had been the third session of the Committee of governmental experts held in Rome in December 2009. While the sound preparation represented by the Steering Committee's work had ensured an all-important element of continuity, there had been an important shift in the position of leading satellite operators; whereas hitherto this had been limited to essentially unsubstantiated criticism of the preliminary draft Protocol, in December 2009 four key member Governments had lined up against continuation of the project and called for an economic impact assessment report, as a result of pressure from the operators in question. Remarkable progress had, nevertheless, been made in securing endorsement of the proposals of the Steering Committee, on the basis of the alternative version, in particular on the vexed issue of public service and the extension of the Cape Town Convention as applied to space assets to cover debtor's rights, acknowledged as representing the real economic value of a satellite and, as such, the key element of space asset financing. Also, the support that the satellite operators in question claimed to have drummed up for their position had been seriously undermined when a number of the delegations attending the session pointed out that members of associations from their States listed as subscribing to the operators' point of view were either opposed to that view or had not, in fact, even been consulted. What had made the third session so special was the ringing endorsement given by the vast majority of the other States represented for continuation of the work, with a view to timeous completion of the project, independently of any economic impact assessment study, all the more so given the advanced stage reached by the project and the fact that all sectors of industry had been actively involved in its development from day one.

41. At its fourth session, held in Rome in May 2010, the Committee of governmental experts conducted a complete reading of the revised preliminary draft Protocol as prepared by the co-Chairmen of the Drafting Committee to implement the decisions taken by the Committee at its third session. This was all the more important as this was the first full reading of the text since the first

session of governmental experts, way back in 2003. This second reading indicated a very broad measure of consensus on virtually all issues. It was recognised that it would be appropriate for the Secretariat to consult industry on the technical feasibility of the identification criteria proposed by the Committee. Significantly, both a leading satellite operator and manufacturers represented at the session indicated their willingness to assist the Secretariat in this matter. Considerable progress was made in narrowing the difference of opinion between those delegations in favour of a public service exemption in respect of the exercise by creditors of the default remedies provided under the Convention as applied to space assets and those against any such exemption, notably through the formulation of a new concept-based approach, couched in two versions, both of which were felt to achieve the same goal, albeit in two different ways. Considerable progress also was realised in the narrowing of the conceptual differences on the issue of the treatment of components.

42. It was significant at the fourth session that none of the 37 Governments represented called into question the continuation of the project, even if one Government recommended that, until the problems raised by industry had been solved and an economic impact assessment made, it would not be in favour of the revised preliminary draft Protocol being transmitted to a diplomatic Conference. Of particular significance was the continuing high level of participation by Governments from all levels of development, on the one hand, and, on the other hand, the participation of the representative of one of the leading financial institutions in the commercial space financing field, who had consulted widely among the other financial institutions active in this field prior to the session, and representatives of one of the leading satellite operators that had previously adhered to the position of criticism voiced by other operators but which, on this occasion, indicated its interest in the future Protocol, recognised its potential usefulness for operators and signalled its willingness to contribute to its further development.

43. Mr Stanford specified that the Government of the Russian Federation had at the end of March indicated that it would not, after all, be in a position to host the diplomatic Conference. The Secretariat had, however, previously arranged a possible fall-back solution and negotiations were proceeding apace with a member of the Governing Council with a view to securing the agreement of that member's Government to host the planned Conference.

44. Mr *Marchisio* (Chairman of both the Committee of governmental experts and the Steering Committee), before spelling out the recommendations made by the fourth meeting of the Committee of governmental experts, reminded the Council that it had been the third (not the fourth) session of the Committee where the highest pitch of political concern had been reached. The fourth session had on the contrary proved very productive and led to remarkable results. A clear political will had been shown to continue and hopefully complete the work. Following the Committee's complete reading of the full text of the revised preliminary draft Protocol, and apart from some outstanding issues, a general consensus had emerged on the whole Protocol. The outstanding issues were of two kinds: (1) political issues such as the exemption on default remedies for public service reasons by a State that could impede the exercise of default remedies by the creditor, and (2) the issue of components – this point related to different parts of the Protocol since it was connected with the definition of a space asset, which was covered by the scope of the Protocol but also by the system of default remedies with regard to those components once and if accepted as parts of the definition of a space asset. The role of facilitator played by the UNIDROIT Secretariat had been highly instrumental to the results that had been achieved.

45. The recommendation adopted at the close of the meeting was in two parts, one referring to the need for a further session of the Committee of governmental experts and the other to the intersessional work to reach consensus on the key outstanding issues, those related to components and public service. It was important not to lose the momentum gained, and the accordingly Committee recommended convening a meeting (possibly in the Autumn) of its two informal working groups dealing with components and public service, respectively, with a view to producing a final

draft of the space Protocol in the first half of 2011 that should be considered as viable as possible. It would be important to this end to involve that segment of the industry that had expressed serious concerns with regard to the Protocol.

46. Mr *Voulgaris* and Mr *Hartkamp* having sought enlightenment as to the precise nature of the political problem involved and the actual chances of success of a fifth Committee meeting, the *Secretary-General* specified that the opposition voiced at the Committee of governmental experts' meeting in 2009 on behalf of the satellite operators had been formulated as an objection to the project as a whole, questioning its usefulness, the likelihood of its ever offering a positive economic value for the financing of satellite projects, the philosophy of the Protocol as an asset-based financing mechanism, and the commercial and financial viability of some of its provisions (in particular those that would have permitted Contracting States to object to the exercise of remedies by the lenders when the satellite in respect of which those remedies would be exercised provided public services declared by that State to be in the vital interest of the State). At the time, some Governments had endorsed the doubts as to the economic and commercial usefulness and viability of the project and asked for a pause. The balance between detractors and advocates of the project had, however, considerably changed since. This time round, only one delegation had suggested a pause to consider the economic assumptions of the project. As to why the operators had expressed the objection they had in the way they did, one theory was that their concern was one of substance, that the Protocol as it stood would be more harmful than useful in promoting financing. Another was that larger satellite operators having their own financing means for carrying out and developing their satellite projects did not need the type of financing provided under this instrument, and yet another reading was simply a lack of interest in opening up or facilitating financing for new market entrants in an industry characterised by a very high degree of concentration. It should be recalled, however, that the players in this market were not only the operators: there were also manufacturers and bankers, and end users of satellite services. These tended to have a slightly different interpretation of, and greater interest in the Protocol.

47. Ms *Sabo* brought up the issue of enforcement, which would need to be adequately addressed before countries like Canada could give their support to the Protocol, and for that continued intersessional work and a fifth session were the only answer.

48. Mr *Tricot* noted that the Space Protocol raised a general political issue that it behoved the Council as jurists to ponder. Satellite operators, moving as they did in a closed market entirely controlled by themselves, with financiers and customers doing their bidding, would by definition be opposed to the prospect of opening up the satellite market and admitting financiers, customers and intermediaries to make demands. He was in favour of a Protocol since it would foster greater ease of communication, but there was no denying that satellite operators had legitimate concerns.

49. Mr *Gabriel* supported the convening of a fifth governmental experts' meeting. The project had had a chequered history and suffered some delays, yet consensus now seemed to be within reach and it would be a pity to lose that momentum. Mr *Bollweg* concurred, stressing that although there were open questions mainly concerning the public service issue and, particularly, the problem of components and exercising default remedies in case of physically linked assets, solutions were definitely within reach. As to the political point made by Mr *Tricot* and the *Secretary-General*, it was a question of whether the Council wished to protect two or three monopolistic operators or whether it would like to open up the market for competition by other medium-sized or smaller operators and for industry players. He, for his part, supported the holding of a fifth governmental experts meeting and recommended some more intersessional work focused on the two legal points and dialogue with the dissenting operators.

50. Sir Roy *Goode*, as the instigator of the project, stressed the public service aspect of the problem, noting that the basic question was, on the one hand, how to ensure that creditors

exercising their remedies did not interrupt the continuance of services of public importance and, on the other hand, how, if restrictions were imposed, creditors could be given reasonable protection. Mr Tricot had already illustrated the nature of the competing interests. Operators wanted to look after themselves, but there were legitimate concerns that needed to be addressed. As to the prospect of success, a great deal of progress had been made and there was now a strong good will among delegations to resolve these problems.

51. Mr *Voulgaris* and Mr *Operti Badán* declared that they now supported going ahead with a fifth governmental experts meeting with a view to establishing whether the various positions were or were not well-founded and whether they represented the general interest. A diplomatic Conference might then be convened the following year. Mr *Elmer* felt the best way forward would be for the Committee of governmental experts to go ahead and decide on the basis of the progress it made whether the work should go ahead. Mr *Hartkamp* suggested that the Council authorise a fifth meeting of the Committee and that this should imply consent to a diplomatic Conference if the meeting were successful. If not, the decision as to what was to be done afterwards should be put before the Council at its next meeting.

52. Mr *Tricot* warned of the risk of a group of experts turning into a pressure group. The Council should beware of endorsing any situation in which another year might go by only to find that no progress had been made – a situation that would play into the operators' hands.

53. The *Secretary-General* summed up by placing on record that there had been a very strong expectation at the close of the fourth session of the Committee of governmental experts that one more session could achieve a final consensus and a workable text, if some more intersessional work were done beforehand by the informal working groups working on the two most thorny issues in the entire Protocol. He suggested that, along the lines proposed by Mr *Hartkamp*, the Council might wish to authorise a fifth session on the understanding that this would be the last, and that a draft Protocol would then be put before the Council at its next meeting in order for it to authorise the convening of a diplomatic Conference, and that this question would only be reconsidered by the Council if the fifth meeting were a failure.

54. Mr *Voulgaris* pointed out there was no time to lose since the proposed fifth meeting of governmental experts would be quite close to the Council's own next meeting, Mr *Gabriel* adding that no diplomatic Conference was going to happen within the year anyway. However, it ought to be borne in mind that the issues might continue to be contentious.

55. Mr *Hartkamp* agreed that the fifth meeting should be the last, successful or otherwise. Mr *Elmer* and Mr *Carbone* felt it was important that the Council emit a clear signal to the Committee of governmental experts that it confidently expected it to finalise its work and open the way to a diplomatic Conference. The *President* seconded this.

56. *The Council took note of the remarkable progress achieved over the previous year by the Committee of governmental experts for the preparation of a draft Protocol to the Cape Town Convention on Matters specific to Space Assets and authorised the convening by the Secretariat of a fifth session of that Committee to resolve the outstanding issues. Subject to the successful outcome of that session, the Council would expect to be able to authorise the holding of a diplomatic Conference for adoption of the resultant draft Protocol, at its 90th session, in 2011.*

Item No. 6 on the agenda: Transactions on transnational and connected capital markets

- (a) *UNIDROIT Convention on Substantive Rules regarding Intermediated Securities: Follow-up work and promotion* (C.D. (89) 5(a))

(b) *Principles and Rules Capable of Enhancing Trading in Securities in Emerging Markets*
(C.D. (89) 5(b))

57. The *Secretary-General* noted that in adopting the “Geneva Securities Convention” in October 2009 (the text of which had been authenticated by the President of the diplomatic Conference and published earlier in 2010), the diplomatic Conference had also adopted a number of resolutions on the *finalisation of the Official Commentary* and on efforts to be made to *promote ratification of the Convention*. Work on preparing the revised version of the Official Commentary was basically to reflect amendments made at the Geneva meeting, chiefly the provisions on insolvency and the inclusion in the final text of the Convention of reference to particular duties of intermediaries. That work was set to be completed within the deadlines.

58. As to *promotion* of the Convention, the relevant resolution was combined with the provision contemplated in the Convention for the amendment or revision of its text and had been the result of complex and delicate negotiations. The Convention itself had not been without some controversy, which was what had led to the convening of a second session of the diplomatic Conference and was reflected in a varying level of enthusiasm for promoting the Convention. The next step was to convene a first meeting of the Committee on Emerging Markets Follow-up and Implementation in the first week of September, in Rome, combined with a *two-day colloquium on securities law*.

59. The Secretary-General briefly outlined how that colloquium would be structured. The first day was to be devoted to issues relevant to the subject-matter covered by the Convention but not themselves covered by it; and to issues that had in the past featured in a list of issues to be addressed in a possible future legislative guide on securities trading in emerging markets – an item already included in the Work Programme. Panels would discuss these issues with the question of whether the subject-matter was something that UNIDROIT might formulate in a future instrument, or would lend itself to being treated, for example as a possible chapter in the legislative guide, in mind. The second day would deal more specifically with matters addressed by the Convention but not fully covered by it (*e.g.* the so-called functional approach to the legal nature of intermediated securities, which differed from country to country). The third day would no longer be a colloquium proper but a meeting only of the Committee on Emerging Markets and any member States of UNIDROIT interested in participating as observers, to review and comment on the so-called *accession kit* to the Geneva Securities Convention. On the basis of these discussions, the Committee would then have a first debate as to the feasibility of the project for a legislative guide on principles and rules capable of enhancing trading in securities and emerging markets and as to the subject-matter that it should address. That discussion might spill over into the fourth and last day of the Committee meeting, when advantage would also be taken of the expertise represented in the Committee and some of the delegations to have a discussion on netting if the Governing Council were to recommend including netting in the Work Programme.

60. Ms *Bouza Vidal* announced that in the framework of its activities to promote the Geneva Securities Convention, Spain was preparing to translate it into Spanish as soon as the Official Commentary was ready. Ms *Jametti-Greiner* declared that the Swiss Government would be willing to invite a *follow-up and stocktaking* meeting in Geneva, no earlier than Autumn 2011, to give States time to study the accession kit and think about ratifying the instrument. There had also been a translation conference in Berne where Germany, Austria and Switzerland elaborated a first German text, which she requested the Secretariat to make available on the UNIDROIT internet website as soon as it had been completed. Mr *Voulgaris* and Ms *Sabo* congratulated Ms *Jametti-Greiner* and the Swiss Government on their tireless efforts to promote the Convention.

61. Mr *Tricot* requested his statement be reproduced *in extenso* as follows

“Forgive me if this takes some time, but please bear in mind that I said not a word on this issue last year, when the negotiations were still in progress. At that time, I felt it

behaved a member of the UNIDROIT Governing Council not to intervene in any way at that stage of the work. The negotiations were completed in Geneva on 9 October 2009 and I wish to add my own congratulations to Ms Jametti Greiner and to the Swiss Government for being a most attentive host and going out of its way to ensure the success of the UNIDROIT Convention on Substantive Rules for Intermediated Securities.

Now that the text has been adopted, however, we are free to speak.

Just to make sure that my words are not misinterpreted in any way, I wish to stress first of all that this Convention is an indispensable one. It is an instrument designed to promote and accompany the growth of financial activity, an instrument that has been lacking in international finance so far, and it is greatly to UNIDROIT's credit that it took initiative to start work on intermediated securities. As it happens, I did my own PhD on a related subject, securitisation, and since those days financiers, French financiers in particular, have opportunely proceeded to dematerialise securities, in particular company shares and bonds. Rather than filing paper copies, securities are now kept in immaterial, computerised form, and this has great advantages, both practical and financial. It is the best way of ensuring the fluidity of cross-border transactions by using the technical advantages of IT and reducing costs. Enlightened financiers have succeeded in guaranteeing the speed and safety of dematerialised securities for an account, i.e., of intermediated securities, whether they be assignments, pledges, sale and repurchase, usufruct or bare ownership.

Intermediated securities accounts have been the subject of debate, especially since there are several different systems in operation, some adhering to the common law, others to continental law. I for one warmly welcome the idea of combining the legal and technical finesse of these different systems and I certainly do not believe one system to be better than another, nor would I wish to impose the solutions of any one system to the exclusion of another. On the contrary, these systems should be used together, and indeed we are invited to do so by virtue of the European Human Rights Convention, the basic tenets of which are recognised and implemented in the United States. The twin objectives of legal security and foreseeability are recognised on both sides of the Atlantic, and it behoves us to ensure that intermediated securities evolve into efficient legal instruments that combine foreseeability and safety for their users. The Convention on intermediated securities is, without doubt, a must.

However, a major problem persists in terms of legal and financial security: we are here gathered as the Governing Council of UNIDROIT and we need to clarify UNIDROIT's position vis-à-vis this new instrument which we are being asked to promote. I agree that we must promote it, but I have one important reservation which I wish to explain to the Council. Indeed, I would go further, since the situation is a serious one: I wish my comments to be included in the minutes of this meeting since, much as happens in a company board meeting where one director, possibly a minority director, wishes to dissociate himself from what he regards as a bad move, I too, wish to state publicly where I believe we are about to make a wrong move.

What is this move?

The idea is to set up an intermediated securities account linking investors with a central depositary, which is thereby authorised to create derivative securities subscribed by an intermediary. What happens if these derivative securities circulate – which is what they are meant to do – and end up with another intermediary, then another, etc.? Can each subsequent intermediary use the securities, for example, as collateral and then freely transfer them to another intermediary, or will it be able to transfer the securities to another intermediary only if the intermediated securities' economic and monetary value has not already been used as back-up for another transaction? In this area, in fact, the two legal systems are diametrically opposed: the American system, which protects each intermediary's security entitlement, and the continental system, which protects the ownership right of the original investor. This Convention, even if it does not say so explicitly, gives full rein to the American system.

Let me explain this, briefly. Article 1(c) of the Convention describes a securities account as an account between two tiers of the intermediation chain; the person who maintains the account is also the account holder. In the continental system, on the other hand, an account opened between an investor and its intermediary is a securities account but it exists solely as between the investor and that intermediary. Following this description, Article 9 of the Convention states that the credit of securities to a securities account confers upon the account holder the right to receive and exercise any rights attached to the securities. But since there are as many account holders as there are intermediaries (Article 1(c) and (d)), Article 9 should be read in the plural and it must be assumed that all intermediaries - account holders - are fully entitled to receive and exercise any rights attached to the securities. All intermediaries – and I use the word “all” advisedly – are entitled to receive and exercise any of the rights attached to the securities since Article 11 does not require a credit of securities to an account to be offset by a debit from another account.

In this way, one intermediary follows another, and not a single corresponding debit or credit is made, whereas in the French, German, Spanish or Italian systems, whenever an account is debited, another account is credited; no account can be credited unless another account is debited. In other words, when securities are debited from the account of intermediary A, the account of intermediary B is credited, but intermediary A can no longer use the securities. If we look at Article 11(2), we find that this specifies that national law may not require any further steps to render effective the acquisition of intermediated securities against third parties, thus precluding any rule that would inhibit this general principle where securities can be moved from one intermediary to another without any corresponding debit or credit being made. Having thus rendered the system impenetrable as regards the rights of signatory States, Article 11(4) confirms that “a security interest, or a limited interest other than a security interest, in intermediated securities may be acquired and disposed of by debit and credit of securities to securities accounts”, while Article 11(5) provides that “nothing in this Convention limits the effectiveness of debits and credits to securities accounts which are effected on a net basis in relation to securities of the same description”.

Concretely, this means that, once intermediated securities have been created to represent the securities issued by the issuer, the more they circulate, the more derivatives are generated identical to the securities. If the securities are worth 100, the central depository issues derivatives worth 100 to which account holder A subscribes ; A then issues new derivatives from the same original securities, worth 100 ; B subscribes to them and itself creates new derivatives, subscribed to by C, then D..., and so on. In this way, where D is worth 100, C is worth the same, B holds on to its 100 et A holds on to its 100 ... in other words, A can engage in financial and credit transactions using these securities, B can do the same and so can C and D. Clearly, this covers the liquidity risk in full and it is no wonder that financiers are very keen on this type of situation. No cash flow problems for them!

However, this also means that with this system, UNIDROIT has created a money supply not of 100, but, in the example above, of 400 (100, plus 100, plus 100, plus 100). It is as though notes had been issued as a source of liquidity, which then circulate in the financial worlds as assets.

Three or four years ago, I would not have said anything, but this type of unbridled creation of money has already been “sold” to us through the mortgage system in the United States housing market and the securitisation of real estate debts. The technique may not be the same, but the result is identical. So what have we done ? We have used a building as security for a mortgage to a private individual. This person has borrowed the price of the building at a progressive interest rate. He was able to pay up the first two or three years, but at the end of the third or fourth year payments became too onerous. Under the mortgage system, this did not adversely affect the borrower since he would be relieved of his obligation, his debt, simply by vacating the premises, and would have nothing further to pay. In fact, the transaction would simply have given him a place to stay for some time. The bank for its part, having issued securities against this

debt, would have placed them in a portfolio as more or less “junk” debts – as they are called in the world of finance – and passed them on to other financial operators. More importantly, however, the whole operation would have started all over again: using the collateral for the same building, and taking advantage of very low inter-bank lending rates, a new borrower would have been housed in the same building, the bank would have issued new securities even more “junk” than the previous ones, transferred them to other operators, and waited for the new borrower to vacate the premises the better to be able to start all over again ... Such were the subprimes which pushed liquidity up exponentially the world over until the September 2008 crisis broke.

And now, here, today, we are faced with the same process of unbridled liquidity creation, not with respect to real estate, but to movables.

The money supply may be kept under control in two ways. One way is to give banks and financial institutions general notice that their outstanding debt must be kept within certain limits linked to the level of deposits or particular liabilities. The other option consists in linking a credit transaction – which creates money – to an asset, for example an asset given as security, which automatically limits the amount of money created. This is where the continental system of intermediated securities wins hands down: if a debt has been securitised, the debt can only be called in once, not twice, not three times, not four times, nor indeed eight times. It is self-limiting. In the UNIDROIT system, a completely different approach is taken. The debt which gave rise to the intermediated securities loses any link with the securities themselves: the securities can be used as a means of creating liquidity whenever they are transferred, from one intermediary to the next, and no further reference is made to the original debt. Each intermediary therefore can “create money” to its heart’s content, simply on the strength of the intermediated securities which, however, have long since exhausted their value. This is the system which UNIDROIT proposes to promote today. A system which, in another guise, has already created havoc in the world.

Certainly, we are not alone in welcoming a return to some financial rigour. Since the end of 2009, the mood has changed.

The loss of confidence has had a marked impact in an area close to that which we are discussing today. 580 billion CDOs (collateral debt obligations) were issued in 2007 worldwide, compared to 4.2 billion in 2009 (“L’Expansion” May 2010, p. 55). In the space of just two years, the use of such securities and techniques declined hundredfold.

We face a dilemma of conscience; I am not speaking here on behalf of the French Government which will do as it sees fit or at least as the European Union bids it do.

Relations between financial operators and Governments are becoming increasingly strained.

According to “Les Echos” (12-13 March 2010, p. 32), the Financial Service Authority (FSA) has just published a report complaining about the lack of transparency in the derivatives market that might adversely affect liquidity. This British regulator takes a cautious view of the supervision of derivatives and, in its annual report on the risks to the financial industry in 2010, stresses the possible dangers of excessive regulation in this area. According to the Financial Service Authority report, an ill-balanced transparency strategy could harm market liquidity. This is an old refrain in some parts of the financial world.

Yet the views of this non-governmental body, funded by the 29,000 financial corporations based in the United Kingdom, are not shared by continental and American regulators who, after the financial bubble linked to complex derivatives burst, agreed on the need for more regulation and more transparency in the derivatives market.

Of course, the derivatives and intermediated securities markets need to be harmonised, but that need should not cause us to create an inflationary instrument managed by intermediaries which will be all the more tempted to take advantage of the system since having taken their commission as intermediaries in a credit transaction secured by

intermediated securities they run no further risk, simply because the securities have been passed on to another intermediary. The problem is not one of priority among creditors. The problem is that this is a mechanism that will deprive the debt of the collateral interest attached to the securities; in attempting to enforce the interest, it will be found that there was one transaction, a credit line, initiated by intermediary A, another credit line based on the same debt and initiated by intermediary B, another credit line initiated by intermediary C, and yet another initiated by intermediary D, and no-one will get paid! This is how junk securities are created. The more intermediaries there are, the more credit is extended, but from one transaction to the next, the interest is stretched thin and eventually goes up in smoke.

Such "illusions" have killed interbank confidence for a long time to come. Since September 2008 and the subprime crisis, banks no longer extend credit among themselves. The financial sector currently only functions through the central banks which maintain an interbank link; even BNP eyes the Société Générale cautiously, and vice versa.

The Swiss Confederation adopted a law on intermediated securities in 2009 firmly espousing the American model, and "Geneva now attracts hedge funds" (L'Expansion, May 2010, p. 53), while the City "is in the grip of relocation" (ibid.). The French monthly, L'Expansion, explains that "scared off by the sudden regulatory passion of Prime Minister Gordon Brown and the European Commission, several London hedge funds have preferred to relocate to Switzerland so as to be able to speculate in peace. Under the regulatory arbitrage system – which allows banks to choose where they will operate from, with few or no legal constraints -, big names such as Blue Crest and Brevan Howard Asset Management are settling on the shores of Lake Geneva. Is Geneva to be the final stop before Singapore, where the biggest deals are being made?"

By contrast, matters have been moving in quite the opposite direction in America. By end-2009, the word "regulation" had been dropped from the American authorities' vocabulary; since early 2010, however, it has been back in force. Acting on the advice of Paul Volker, the presidential adviser for the economy, President Obama is preparing a plan prohibiting banks from speculating for their own account, limiting the banks' commitments to fifteen times their reserve capital, reducing the maximum market share of deposit banks, creating a savers' watchdog and forbidding banks to hold investment funds and hedge funds.

Did you know that when Wall Street took a 6% plunge in just minutes last Thursday, it was intermediated securities that were to blame? It was put out that the fault was a trader's, who said "a billion" instead of "a million", or who mistook a letter, but this was not true. It was the American intermediated securities market and a blunder in the HFT (high-frequency trading) systems that sparked the sudden panic. This should be a lesson and invite us to caution.

This is the background against which UNIDROIT must take position on the Convention on substantive rules for intermediated securities.

I support the promotion of this instrument, but I would ask the Council to take every precaution so as not to sanction a system that generates crises by creating junk securities. I propose that the Council do not commit itself to supporting such a mechanism. An institution must look after its image, and UNIDROIT must never be suspected of having encouraged the next financial crisis."

62. Ms *Jametti-Greiner* admitted to some perplexity as to Mr *Tricot's* reasoning. She found it hard to accept that more than 60 States would willingly agree to a system that automatically led to junk bonds and financial crisis. She also wondered how his proposals to engage in some promotion for the Convention could be reconciled with his apparent criticism of the text. For her part, she did not think it was up to the Council to decide whether to promote or not to promote, that decision having already been taken by the diplomatic Conference. The Council simply needed to decide whether to have a follow-up meeting in the autumn of 2011. Ms *Broka* supported Ms *Jametti-Greiner* in calling for

proper promotion, praising the Convention and recalling that when it was adopted, the financial crisis had already well and truly broken and no-one could have been unaware of it. Mr Govey stated that while he had not himself attended the diplomatic Conference, colleagues had spoken very highly of the work carried out there. Now that there was a Convention it needed to be promoted without delay. He supported the Secretary-General's proposal to go ahead as outlined. Mr Gabriel concurred, and expressed satisfaction that the Official Commentary was coming along well.

63. The *President* reminded the Council that this item had been included on the agenda purely for purposes of information and that there was no decision to be put to the vote.

64. *The Council took note of the progress made in the revision of the draft Official Commentary on the Geneva Securities Convention and of the proposals made by the Secretariat for its promotion.*

65. *The Council also took note of the steps envisaged by the Secretariat to develop a future legislative guide on principles and rules capable of enhancing trading in securities in emerging markets. In view of the overall workload of the Secretariat, including ongoing projects and projects proposed for the triennium 2011-2013, the Council decided that work on the legislative guide this project should be assigned a medium/low level of priority.*

Item No. 4 on the agenda: Principles of International Commercial Contracts: Consideration and adoption of additional Chapters (C.D. (89) 3)

66. In introducing this item, Mr Bonell indicated that the Working Group for the preparation of additional chapters to the Principles of International Commercial Contracts had completed its second reading of the new chapters on restitution, illegality, plurality of obligors and obligees and conditions. The respective drafts were now before the Council for comment and suggestions that would be submitted to the Working Group at its final reading at the end of May. He had prepared a report setting out the most important and/or controversial issues relating to each draft chapter together with a brief summary of the views expressed within the Working Group. An Appendix to that report further set out proposals for the placement of the new chapters and provisions in the new edition. He expressed his deep appreciation for the outstanding dedication and constructive attitude shown by the members and observers of the Working Group over the years. Since 2006 there had been four plenary sessions of the Working Group, while the drafting committee had met three times, and in this connection he thanked Professor Zimmermann and his colleagues at the Max Planck Institute in Hamburg for their generous hospitality in hosting these meetings.

67. Taking the controversial issues chapter by chapter, Mr Bonell turned first to the chapter on the *unwinding of failed contracts*, now renamed "*Restitution*", where the most important issue had been the structure of the rules on restitution, i.e. whether to have a separate chapter containing rules on restitution in general, or to have these rules placed in each of the chapters dealing with cases of failed contracts, avoidance, termination, illegality and conditions. The Working Group had eventually opted for the latter approach, arguing that it caused minimal disruption of the present structure of the Principles and was more user-friendly. Another issue had been the presentation of the rules on restitution in the context of contract termination, which was addressed in the present edition but not entirely satisfactorily, its origin being the CISG which laid down as a general rule restitution in the case of a contract to be performed once and only as an exception adding in a separate paragraph a special rule for contracts to be performed over a period of time – suggesting that in reality the first type of contract was the rule, and the second only the exception. The Working Group had decided to split the provision and to provide two separate articles, one for each type of contract.

68. Moving on to the sensitive chapter on *illegality*, Mr Bonell stated that the most controversial issue had been whether a distinction should be made between contracts contrary to fundamental

principles recognised worldwide, and contracts that “merely” infringed mandatory statutory rules. The Working Group had initially favoured the two-tier approach, but at its last session in June 2009 several members had expressed concern about the envisaged category of absolute illegality basically on the grounds that the very notion of fundamental principles recognised the world over was too vague and there might be a risk of introducing too much uncertainty and possibly prompting parties to enter into unnecessary litigation. It was finally decided to drop the first category of illegal contracts and to focus on contracts infringing mandatory rules applicable according to the present Article 1.4, but to re-draft the comments to that Article so as to make clear that the reference in the black letter rules to mandatory rules applicable according to the relevant rules of private international law were to be understood in a broad sense, covering also not only the written statutory provisions but also principles of public policy of the relevant domestic law. A third issue in the context of illegality concerned restitution, i.e. whether restitution should be possible under certain circumstances, even in the case of illegal contracts, and if so, what these conditions should be, was ultimately resolved in a way that departed from the traditional solutions adopted at comparative level which essentially decreed that where there was an illegal contract, no restitution should be granted, not even to a party that might not have known of the violation of the relevant principles and rules.

69. On the subject of *plurality of obligors and/or obligees*, the question of terminology had been quite important. As to the merits, one issue had proved very controversial, i.e. the effects of the release of one of the obligors by the obligee or settlement with one of the obligors and the obligee with respect to the other co-obligors. The Working Group had decided not to differentiate but to have a single rule covering both cases. Another tricky issue had been the impact of court decisions concerning the liability of one of the obligors: again, comparative analysis threw up a variety of solutions, but the Working Group had eventually opted for the minority solution (in force, among others, in the Italian civil courts). A further issue concerned the rights of a co-obligor having paid part of its joint and several obligation: here the question had been to identify that party's security rights with respect to the obligee. The Working Group had agreed on a solution which some of the common law members had initially had some difficulty with but had finally come round to.

70. While the chapter on *conditions* was fairly succinct, it had been felt necessary to add important clarifications in the comments to the black letter rules. For example, while the rules were intended only to cover contractual conditions agreed by the parties, there was one exception where the parties incorporated such legal conditions in their contract (e.g., public permission requirements, export licensing, etc.). Likewise, the comments would also address, in an open-minded manner not common in statutory language, an issue which in some jurisdictions was expressly dealt with in the Codes, i.e. cases of conditions that appeared to depend entirely on the will of one of the parties, where the question arose of whether or not these were still to be considered conditions *stricto sensu*. And very importantly, the comments were to include a special paragraph on “closing”, reflecting the increasingly widespread phenomenon whereby parties to complex transactions included a provision on conditions for closure of their contract.

71. Winding up, Mr Bonell indicated that the proposals for the proper placement of the new chapters and/or provisions set out in the Appendix to the report had not yet been discussed by the Working Group as a whole, and any comments or suggestions by the Governing Council would be highly appreciated. What was important was that the new provisions should not cause undue disruption of the present lay-out of the Principles, its numbering and structure, in order to avoid future confusion among the different editions.

72. Before opening the debate, the *Secretary-General* wished to place on record his personal gratitude as Secretary-General to Mr Bonell for having unexpectedly taken up the task of drafting one of the new chapters himself, stepping in to replace the original rapporteur. The Working Group on the new chapters of the Principles was due to meet later in May in order to finalise the new chapters, taking account of any comments and suggestions that the Governing Council might wish to make,

and ample time had been set aside for this debate. Some fine-tuning was still needed on the commentary to ensure uniformity of terminology and style, but publication of the 2010 edition of the Principles should follow in 2011.

73. In the wide-ranging debate that followed, all the speakers congratulated Mr Bonell and the Working Group on their work to revise one of UNIDROIT'S best-known products. Mr Govey pointed out that the Principles had made an outstanding contribution both to facilitating international commerce and to enhancing the Institute's reputation. Mr *Voulgaris* hailed the Principles' approach as pragmatic and proposing the best solutions that the main legal systems had to offer, as was amply illustrated by the new chapters particularly on restitution and conditions, where the former tended towards common law answers, with the latter redressing the balance on the civil law side.

74. Mr *Carbone*, referring to the new chapter on illegality and the new comment to Article 1.4 on mandatory rules, pointed out that they addressed one of the most important aspects of the Principles, i.e., the relationship between the Principles and mandatory rules enacted by States. The new comments to Article 1.4 made it very clear that in this respect, a distinction should be made between arbitral proceedings and proceedings before domestic courts. While in the former case, the Principles could be applied directly, i.e., as *lex contractus*, and as such encountered only the limit of the *lois d'application nécessaire*, in the latter case the Principles must respect also the ordinary mandatory rules of the otherwise applicable law. He felt that the problem should be explored further and wondered whether the Institute could envisage a special symposium on this.

75. A number of practical suggestions were made. Referring to the structure of the text, Mr *Tricot* suggested that the numbering and sub-division of the articles at times seemed excessive and might create confusion, and he recommended tightening the terminology in both the English and French versions. He also suggested fine-tuning the text on an ongoing basis in the future. Mr *Hartkamp* agreed that it might be best to change the order of existing chapters as little as possible. Thus, Chapter 9 might be placed at the at the end (since plurality of debtors and creditors had no fixed place in civil law codes anyway), so that Chapters 10 and 11 would not need to be re-numbered. Mr *Deleanu* felt that a reference to "closing" in the chapter on formation of contract would be most appropriate, and hoped that this would be drafted in a flexible manner.

76. In reply, Mr *Bonell* indicated that all the stylistic and systematic suggestions made by the Governing Council would be duly considered by the Working Group at its May meeting. He welcomed Mr *Tricot*'s idea for an ongoing drafting revision process and Mr *Carbone*'s suggestion for a special seminar, which he hoped the Secretariat might consider. It was essential that the new edition be properly promoted not only by the Secretariat but by the Council as well. Reaching out to potential users was particularly important for soft law instruments, and a seminar was one way of launching this new product.

77. The *Secretary-General* picked up on the possibility raised by Mr *Tricot* of simplifying the structure of some provisions, which he stated would be looked into at the very latest when a fourth edition was placed on the drawing board. The existing sub-divisions were usually there simply to facilitate reference to the text in the commentary, but he was aware from experience of the pitfalls of plurilingual drafting. Turning to the issue of *promotion*, the Secretary-General agreed on the need for a concerted effort in promoting the Principles, and assured the Council that thought was already being given to the next step in this regard. He referred in this respect to the seminar in which he had participated in 2009 at the invitation of new member State, Indonesia, dealing with international contract law matters aimed at legal advisers in State-owned enterprises in Indonesia. This meeting had also been attended by a representative of UNCITRAL to enable the Principles and the CISG to be presented together. Contacts had been established with other Organisations with particular expertise and funding to organise training courses for lawyers in developing countries, to explore the possibility of training models of that type. In this connection, there was scope for reaching out to, and devising

appropriate areas of co-operation and joint information activities with, other international Organisations whose mandate was germane to that of UNIDROIT.

78. Mr *Bollweg* having inquired as to whether there were any gaps left to be considered in the area of international commercial contracts, in particular as regarded long-term contracts and their termination, Mr *Bonell* replied that a break should now be observed to permit this new edition to be properly promoted. As the *Secretary-General* pointed out, this did not mean that the Secretariat was under any pressure to stop the project; the Working Group had simply felt that it needed more time to consider the complex issue of termination for just cause and other aspects of long-term contracts more thoroughly and that it should not hold up the rest of the project when it was so near to completion. The third edition did include several provisions specifically devoted to issues arising in the context of long-term contracts, but there remained other questions of which termination for just cause was both one of the most important and the most controversial. The Working Group had already had an opportunity to look at this item on the basis of a preparatory study prepared by Professor Dessemontet and had agreed that, other conditions and requirements permitting, it might be taken up and explored further. Finally, Mr *Bonell* stated that Mr *Voulgaris'* suggestion that a seminar as proposed by Mr *Carbone* might ideally involve commercial practitioners as well as practising lawyers would be borne in mind.

79. Mr *Bonell* briefly commented on some of the points brought up by Mr *Mo*, who had however agreed to submit these to the Working Group in writing, dealing with such issues as contributory negligence, the criteria set forth in Article 1 of the Chapter on illegality, and the terminology used with regard to conditions.

80. Ms *Bouza Vidal* expressed some concern as to the extent of the restriction on application of the Principles as expressed in Article 1.4, which she felt rendered the Principles too subordinate to national binding law. Mr *Bonell* welcomed her point on the prevalence of mandatory rules as added support for the idea of focusing in forthcoming events on specific points such as the relationship between mandatory rules and the UNIDROIT Principles. He referred to the comments to Article 1.4, which suggested that it might well be possible, particularly in the context of international arbitration, for the parties or arbitrators to apply the Principles as the *lex contractus*; generally speaking, it would be fair to say that only international mandatory rules of this or that country would prevail.

81. Mr *Operti Badán* cautioned that these were general principles, not a legislative code, and that too much detail and too frequent modifications might confuse those required to apply them. Mr *Bonell* agreed that there might be a risk of seeming to overdo things with successive editions, but impressed upon the Governing Council the importance, in promoting the Principles, of making clear that the successive editions were not at all a revision of the previous content. Basically, with not even a single significant exception, they were merely an enlargement of previous editions: something added, not revised.

82. Ms *Sabo* noted that this seemed to be the first time that there was explicit regional representation in the Council, and that it might be appropriate for each region represented to take up the challenge of finding ways to organise promotional colloquia in the respective regions, even though, with publication of the new edition of the Principles scheduled for 2011, time was short.

83. Mr *Sánchez Cordero* stressed the importance of co-ordinating the different language versions of the Principles with the new edition.

84. *The Council, taking note of the advanced stage of the work on the new edition of the Principles of International Commercial Contracts, expressed its appreciation to the Working Group and to its Chairman for their extraordinary achievement, and approved in substance the proposed new draft chapters. While postponing formal approval of the 2010 edition of the Principles to its next session,*

the Council expressed the hope that the new edition would be given the widest publicity by, among others, the organisation of events aimed at promoting it in the various regions of the world.

Item No. 8 on the agenda: Triennial Work Programme of the Organisation (C.D. (89) 7)

Item 8(a) on the agenda: Possible Future Work on Third Party Liability for Global Navigation Satellite Systems (GNSS) Services (C.D. (89) 7 Add. 1)

85. Ms *Zanobetti* (Deputy Secretary-General), introduced this item, recalling that this topic had first been placed before the Council in 2006. The Secretariat memorandum (doc. C.D.(89)7 Add. 1) merely set out some elements to assist in assessing whether the topic should be included in the Institute's Work Programme and offered no specific proposals, these having been ably addressed in the three documents authored by Messrs Bollweg, Carbone and Gabriel previously submitted to the Council. The issue was a classical one— third party liability and damages – but applied to an entirely new area that appeared particularly suited for regulation at an international level.

86. Third party liability was a complex matter where an element of internationality was involved, and this was why most hazardous human activities were governed by uniform instruments; for that and many other reasons a specific instrument dealing GNSS appeared highly desirable. GNSS, due to the interoperability of its components, was global by nature, hence a regional entity would be less suited to the task, while the variety of applications meant that a sectoral Organisation such as, for example, ICAO or the International Maritime Organisation was less well equipped than UNIDROIT in this area. As for the number of States that might be interested in the project, while it was true that the technology was now put in place by only a relatively small number of States, firstly this was less true when ground augmentations were concerned, and secondly, users were, on the contrary, spread across the globe: the projects for Africa – AFRER, Latin America – LATINO, and many others showed that GNSS could be particularly useful in countries with poor infrastructures. A lack of clarity as to the legal discipline could only hamper its development and undermine its diffusion.

87. If the project, which was bound to give great visibility to the Institute, were to be included in the Work Programme, the next step could be to consult member States and institutions that had already dealt with the topic, and to create a small group of experts to polish up the studies that UNIDROIT already had and to build consensus around the project.

88. In the ensuing discussion, opinions were clearly divided on this issue. Among those who expressed support for the project, Ms *Broka* pointed out that GNSS was clearly destined to rule daily life in the future. so that it was vital that liability issues be addressed as soon as possible. Mr *Tricot* concurred, stating that although military in origin, the current system had since been opened up to civil uses and the number of global systems was growing, affecting more and more areas of day-to-day life. Liability issues also arose in connection with free-of-charge services. Operators, users, annex interests and the legal profession needed to know what the basic rules were. Mr *Gabriel* stressed the importance of delineating the scope of the project, specifying the type of liability (third party vs direct liability) and whether it would address liability or the limitation of liability, and defining the scope (universal or regional). He took the view that UNIDROIT might usefully work on such a project if the scope were more regional. He endorsed the idea of setting up a formal or informal study group to assess the options. Disagreeing with the view expressed by others that the issue would be adequately covered by the European Union's GALILEO system, Mr *Carbone* argued that the issue reached well beyond GALILEO to encompass all satellite systems exploited for civil or commercial purposes, including those being developed in India, Russia and other countries. Whatever its origin, GNSS could cause major damage in the event of malfunction, giving great actuality to the liability question. The civil uses of these new techniques were a tool in assisting developing countries, but

this must be underpinned by a specific, secure regime. An international Convention was needed, and he agreed with Mr Gabriel on the advisability of setting up a study group tasked with sounding out the various Governments interested in this project as well as the different international Organisations that had already got involved with this topic and with delimiting the scope of a possible Convention. He added that a limitation of liability should be compatible with the insurance market and be backed up by a State-led second tier of distributions of the damage risk. The Italian Government had already expressed interest in this subject. Mr *Elmer* for his part recalled that the EU member States had no competence of their own in this matter and would not be able to enter into any discussions on their own behalf, not even during the standstill period before the projected EU regulation was passed. If only for that reason it might be wise for UNIDROIT to wait and see how matters shaped up in Europe. While the Secretariat study raised interesting problems, it did not offer any choices, *e.g.* as regards the type of liability that the project would address. A study group would, however, need a frame of reference. He accordingly felt that the best way forward at this point was that indicated by Mr Gabriel, *i.e.* to have the item on the agenda and to try to examine possible ways of moving on, perhaps informally as proposed by the Secretary-General.

89. Others opposed UNIDROIT taking up this issue. Mr *Bollweg* warned that taking on the matter of liability for damage suffered by third parties caused by satellite malfunctions was a formidable legal challenge. Firstly, with the European Union set to commence GALILEO operations in 2013, there would hardly be enough time for UNIDROIT to draft a Convention and secure sufficient ratifications in time. Secondly, the only operational commercial navigation system covered would be GALILEO since other systems were military. Thirdly, an international Convention covering only one operational entity would be highly unique, as would an international Convention to cover a regional navigation system, and it remained to be seen if and when other commercial systems might start to compete with GALILEO. Fourthly, the European Commission was in the process of preparing a third party liability regulation in this area for 2011. He doubted whether there was a case for UNIDROIT to become involved at this point. Ms *Sabo* shared Mr *Bollweg*'s views. GNSS came in many forms, including free-of-charge services as in Canada, and it would be very difficult to determine levels of liability. A Convention would require a distinction to be made between damages beyond the control of operators. This was a complex project which she was not sure if UNIDROIT was the best placed to take on. From the Canadian perspective, it would not make sense to jeopardise free-of-charge services as currently provided by the US by adopting a liability regime that would turn this into a service-for-cost, not to mention the fact that this looked set to become a regional issue when GALILEO came into operation, not a global one. Ms *Moss* indicated that the Government of the United Kingdom would not wish UNIDROIT to take up this issue, for the same reasons as those expounded by Mr *Bollweg*. Mr *Sánchez Cordero* likewise agreed with Mr *Bollweg* that this was an area where European authorities should be left to draw up the rules. Like some other speakers, he was not at all certain that UNIDROIT was the right kind of institution for this.

90. Other members took a more neutral stand. Ms *Jametti-Greiner* confined herself to stressing that UNIDROIT needed a workable Programme, urging the Council not to lose sight of what it was realistic for UNIDROIT to achieve. She suggested deferring discussion on the feasibility of the topic until all the other projects for inclusion in the Work Programme had been thoroughly discussed. Mr *Hartkamp* agreed with Ms *Jametti-Greiner* that it would be best to defer a decision on this topic until all the subjects for inclusion in the Work Programme had been discussed. He inquired whether the Secretariat had had an opportunity yet to sound out the relatively small number of Governments involved, as had been suggested by the Council the previous year. (The *Secretary-General* later replied that this had not yet been possible.) Mr *Opertti Badán* queried whether this was a strictly private law area. An international agreement was an inter-State matter. If it purported to address the responsibility of States, it would be very difficult to bring about. Mr *Deleanu* supported the suggestions made by the Secretary-General and Mr *Hartkamp* for an informal consultation interested parties, especially the EU authorities.

91. The *Secretary-General* suggested that if the Council were to seek broader input on this topic from a broader circle than the Governing Council itself, there might be a case for it to draw from its ranks a study group to engage in informal exchanges with other Organisations that had been or were currently engaged on work in this area, including also providers, users and insurers, in order to discuss gaps and trace possible solutions that could be provided by an international instrument. On the “global vs regional” issue, he recalled that the UNIDROIT statute did mandate the Institute to promote the harmonisation and unification of the law of States or groups of States, so that a regional element to its work was not excluded. A case in point was the CMR: a convention on road transport was by its very nature essentially of regional import only. Hence another possibility that might be explored in the course of such informal consultations was how a regional regime would interplay with regimes outside the region (mostly consumers of services). To obviate the need for a further injection of resources, such a meeting might be combined with the meetings yet to be held in connection with the Space Protocol. This might also provide an open avenue for consultation with that industry which, although not identical, reached out to a circle of regulatory authorities and ministries very similar to that under discussion.

92. Taking up several of the points raised, Ms *Zanobetti* stressed that at this point in time, the way forward was completely open. She drew attention to the conclusions included in the Secretariat memorandum as inserts. She agreed that the issue of free-of-charge service was a difficult one that had purposely not been mentioned in the final document. Yet without a uniform regime forum shopping was a very real risk. As to the scope of the future project, technology itself would help in narrowing down the scope of a future instrument in that different types of satellites posed different liability problems. As to the regional vs global dimension of the problem, she pointed out that G.N.S.S. was one system made up of different constellations that were interoperable, and was global in scope. While it was true that a convention was a public, inter-State matter, the UNIDROIT project would only focus on third-party liability even where services were provided by public entities. She referred in this respect to the Warsaw Convention and the fact that many airlines were public entities offering private services. Finally, she stressed that the project would only be looking at system malfunction, not to bad usage. She indicated that the Secretariat document did not offer choices since it had not been mandated to do so.

93. Mr *Bollweg* specified that the European Commission intended to address the problem of cross-EU-border signals causing damage outside the European Community by concluding bilateral agreements with non-member States. Referring to the call for a two-tier system combining insurable liability of the operator with a measure of State liability beyond that, he doubted that any State would ratify an international Convention which put State liability on the ratifying State. Mr *Carbone* recalled, however, that examples of such two-tier systems existed, notably in the Convention CLC in the maritime sector as well as in the nuclear conventions.

94. Summing up, the *Secretary-General* saw three clear views represented on the Council. The first reflected a strong persuasion about the usefulness of the project and, holding that there was no obstacle for it to do so, advocated that UNIDROIT should at least look at the issue. A second view denied all of these assumptions. The third was the middle view that it would be a pity for such a potentially important issue to be wholly discarded by UNIDROIT. He accordingly proposed that the topic be included in the Work Programme and that the Secretariat be mandated to organise consultations with a broader spectrum of participants, including the EU Commission, ICAO, satellite operators and insurers and individual Governments that expressed an interest (as, for example, the Russian Federation already had) with a view to clarifying the issues and further identifying the scope. From a practical point of view, such consultations might be held in parallel with the meetings related to the future Space Protocol, where experts in the field would be on hand.

95. Mr *Gabriel* voiced his full support for the Secretary-General's proposal, adding that the United States would not be happy to see the project disappear at this time. Mr *Bollweg* likewise indicated that this was a wise proposal and a compromise he could live with.

96. *The Council took note of the memorandum prepared by the Secretariat on the subject of possible future work on third party liability for Global Navigation Satellite System (G.N.S.S.) services and, confirming the interest of the subject, recommended its inclusion in the triennial Work Programme of the Institute. The Council invited the Secretariat to conduct informal consultations with the Governments and other Organisations concerned, with a view to ascertaining the feasibility of the project. In view of the overall workload of the Secretariat, including ongoing projects and projects proposed for the triennium 2011-2013, the Council decided that this project should be assigned a medium/low level of priority.*

Item 8(b) on the agenda: Proposal for an instrument on the Netting of Financial Instruments (C.D. (89) 7 Add. 2)

97. The *Secretary-General* introduced this topic, recalling that, together with that of Principles and Rules Capable of Enhancing Trading in Securities in Emerging Markets, it had been high on the agenda as a future topic for the Work Programme for some time already, having been approved by the Governing Council in 2008. Its actual inclusion in the Work Programme had been deferred pending finalisation of the Geneva Securities Convention and completion of related work. At the Council's 88th session in 2009, the Council had had before it a study prepared by the International Swaps and Derivatives Association (ISDA), and two types of concern had been raised in the discussion, one relating to the level of political support for the project, the other regarding its scope. The Council had opted for another year's pause and requested another study to be submitted. This new study was now before the members. Initial soundings had evidenced potential interest in the topic on the part of the EC Commission and the European Central Bank, while banking federations and other representatives of the financial sector had also expressed great interest in developing an international framework capable of ensuring the enforceability of netting arrangements. The Bretton Woods institutions, on the other hand, had been somewhat more cautious. The new document which the Council was now being invited to assess looked at the matter from a more neutral perspective than the previous study and presented the issues in a more balanced fashion. In a nutshell, it showed that netting had become even more important in the aftermath of the financial crisis for its role in reducing systemic risk, but stressed the need not to underestimate the intricacies of such a project, which involved a wide range of players, not only multilateral financial institutions but also central banks and networks of securities regulators, etc. It would be important, for example, to seek the contribution and co-operation of the Hague Conference on Private International Law on issues of private international law related to this project, from a very early stage. This was a highly topical issue that would form a natural continuation of the Institute's work on securities law. The *Secretary-General* drew the attention of the Council to the items submitted in writing by Mr Solsytinski, who argued that since the powers of regulatory agencies and insolvency laws applicable to banks and other financial institutions were currently the subject of intensive negotiations and legislative initiatives both at the EU level and in the United States, the time might not be ripe for an international instrument. He nevertheless recommended a two-step programme of work for the Institute in this area, focusing, first, on a further study of selected private law aspects of netting and then, in a second step, to elaborate a binding instrument with a view to reconciling the impact of regulatory powers and insolvency laws to ensure enforceability of netting contracts.

98. Broad support was expressed for this project round the table. Ms *Sabo* indicated that although Canadian law now covered 90% of what was proposed in the Secretariat's paper, there was nonetheless great interest in having an international instrument of the kind described, and she unreservedly supported going ahead with this project. Mr *Bollweg* agreed that netting was an important tool in reducing the risks for banks in cases of insolvency, and therefore highly topical in the current financial and political climate. It was precisely because netting was not accepted everywhere and because requirements differed from State to State that some degree of harmonisation was required. The German Government and German industry were very much in

favour of an international instrument on netting, and would award such a project the highest priority. He informed the Council that the Federal Association of German banks had officially decided to support UNIDROIT'S undertaking a netting project and to make funds available to pay for a lawyer specialised in the law of commerce or financial markets so as to be able to start work without delay. The idea was to free up to 200,000 euro for a two-year period starting in early 2011.

99. Ms *Bouza Vidal* stated that the Spanish Government likewise attached great importance to the project and would contribute to it if other Governments came in as well. Ms *Broka*, Ms *Jametti-Greiner* and Messrs *Sánchez Cordero*, *Gabriel* and *Tricot* all pledged their support and echoed calls for the project to be given top priority. Ms *Broka* drew attention to the importance of a uniform terminology in this area, while Ms *Jametti-Greiner* stressed the need for close co-operation with the Hague Conference on Private International Law, as referred to by the Secretary-General. Mr *Gabriel* noted that both the United States Government and the financial markets industry there were favourable to the project. Mr *Tricot* stressed the need for central banks and professional circles to be involved in the work, if only because of the insolvency law implications. Ms *Moss*, though the United Kingdom Treasury Department was supportive of further work, warned that the impact on existing insolvency law arrangements must be taken into consideration.

100. Mr *van Loon* (Secretary General, Hague Conference on Private International Law), who was attending as an observer, referred to the calls that had been made for UNIDROIT to work closely with his Organisation on the private international aspect of this project, and assured the Council that the Hague Conference would be delighted in principle to place its know-how and expertise in this area at UNIDROIT'S disposal.

101. *The Council took note of the memorandum prepared by the Secretariat on the subject of possible future work on the netting of financial instruments and confirmed the great practical and economic interest of the subject. The Council took note, with satisfaction, of the likelihood of extra-statutory financial support becoming available for this project. The Council strongly recommended to the General Assembly the inclusion of this project in the Work Programme and the allocation of sufficient resources in order for it to be carried out as a matter of high priority.*

Item 8(c) on the agenda: Proposal for a Model Law on the Protection of Cultural Property (C.D. (89) 7 Add. 3)

102. In introducing this item, Ms *Schneider* (UNIDROIT Secretariat) briefly recalled the history of this proposal and the objectives it pursued, as set out in document C.D. (89) 7 Add. 3. She specified that the meeting of the newly established UNESCO/UNIDROIT Expert Committee, which had originally been scheduled to take place in April 2010, had had to be postponed to September 2010. This was not really a new item on the Institute's agenda, but related rather to the ongoing promotion of the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects. Currently, UNESCO provided substantial assistance in promoting the UNIDROIT instrument and for the time being no financial implications UNIDROIT attached to this item. This was important also in light of the stagnating number of ratifications and the growing radicalisation of States of origin of cultural objects, particularly in South America. However, she referred the Council members to the subject of promotion of UNIDROIT instruments in general which would be discussed in the framework of the Strategic Plan.

103. In the discussion that followed, Mr *Sánchez Cordero* stressed that the Latin American countries took the 1995 UNIDROIT Convention very seriously. Mexico had decided to set up a working group to systematise cultural property law in the region. What was needed was not a revision of either the UNESCO or the UNIDROIT Conventions, but to make them more efficient. A model law dealing with State ownership of archaeological items would be an important tool in the fight against international

trafficking in cultural objects. The Mexican Bar stood poised to do all it could to ensure the success of this project.

104. Mr *Voulgaris* pointed out it was not enough to have a Convention or uniform law regulating the substantive aspects of the return of cultural property, but that international rules of procedure were also needed. These could perfectly well be included in a model law. Ms *Jametti-Greiner* seconded this, and also agreed with Mr Sánchez Cordero that no revision of existing conventions was needed. Switzerland had still not ratified the UNIDROIT Convention, concentrating instead on the UNESCO instrument. It had, however, introduced procedures to facilitate the return of cultural objects. She noted the Secretariat's cautious approach, geared to ensuring more accessions.

105. Ms *Bouza Vidal* having inquired whether the projected model law would address the issue of State ownership of deep sea objects, Mr *Sánchez Cordero* replied that a UNESCO Convention on aquatic property already existed. Mr *Opertti Badán* pointed out in this connection that a distinction must be made between cultural property and nautical wrecks. He referred to the La Paz Treaties applicable in Uruguay that applied to any object resting in territorial waters.

106. Mr *Govey* indicated that Australia was still considering adoption of Convention, and expressed support for the work carried out by the Secretariat in this area.

107. Mr *Tricot* noted that, if the major concepts of a Convention needed redefining or specifying with the passage of time, usually a revision of the existing text would be called for. However, since UNESCO was recommending the model law approach, he was inclined to follow and support the action proposed.

108. The *Secretary-General* pointed out that, as Ms Schneider had rightly indicated, this was not a new project – UNIDROIT would simply continue its promotional activities and place its experience and expertise at UNESCO's disposal for work to be carried out under UNESCO auspices. If, however, there were to be further developments during the lifetime of the Institute's Work Programme 2011-2013, the Secretariat would consult the Governing Council as appropriate.

109. *The Council reiterated its keen interest in pursuing collaboration with UNESCO, in the context of promotion of the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, with a view to the preparation of model legislative provisions defining the State's ownership of cultural objects, in particular the archaeological heritage. The Council agreed to redefine at its following session, as required, the means to be employed for this purpose.*

Item 8(d) (i) on the agenda: Possible Future Work in the Area of Private Law and Development - Private law aspects in the area of Private Law and Development (C.D. (89) 7 Add. 4)

110. The *Secretary-General* introduced this item, which tied in with discussion item 5(c). He recalled that the Council had, at its previous session, agreed that it might be opportune for the Institute to open up a new line of work specifically devoted to the interplay between private law and economic and social development, and had mandated the Secretariat to do some preliminary research in the area of agricultural investment and production as well as in the area of legal aspects of social businesses. That latter aspect would be discussed later in the meeting. The Secretariat's main motivations had been to explore a long-term line of activity that would permit the Organisation to create and develop further synergies with other Rome-based Organisations and take the Institute into a little-explored area of its mandate not related to international commercial financing or international commercial transactions (the only exception to this so far having been the 1995 cultural property Convention). The interplay between private law and agricultural development/investment

offered an opportunity to explore a part of the Institute's mandate that did not overlap with the mandate of any other Organisation and was unique to UNIDROIT.

111. The Secretariat memorandum simply presented the issues and looked at them from two angles: *foreign direct investment* and the *domestic legal framework* needed to promote investment in agricultural production. The first of these did involve delicate policy issues for which UNIDROIT was probably not the most appropriate forum although even here, it might be invited by other Organisations (World Bank, FAO, UNCTAD) to make available its expertise on private law issues. The Governing Council might wish to give the Secretariat a mandate to be open to consultations of that nature. The second angle, on the other hand, was where the link between the topic discussed previously and this broader area was the most visible, to the extent that a protocol to the Cape Town Convention might facilitate mobilising financing for purchase of agricultural equipment – and that by itself would be a contribution to improving the legal framework for agricultural investment. But looking beyond that particular question, there would be several other aspects of private law, in particular business law, that ideally should be in place to help a country create a workable agricultural market, promote investment and enhance legal certainty for investment in agricultural production, be it domestic or foreign investment. Without being overly ambitious, if it were to be decided to organise consultations regarding a relevant protocol to the Cape Town Convention, that might be done within the context of a broader discussion on other legal issues on private law aspects of agricultural development. The Secretariat's main proposal and suggestion to the Governing Council was to include this item in the Work Programme as one of the projects on which the Institute would be working, whether in the short or the longer term, bearing in mind two criteria: (a) considerations of private law that did not overlap with the mandates of other Organisations and (b) having a line of work in which the Institute could explore synergies with other Organisations based in Rome.

112. Wide-ranging support was expressed for this proposal in the discussion that followed. Mr *Gabriel* welcomed the Secretariat's recommendation, adding that technical expertise that the the Institute might bring to such project would be invaluable. Mr *Voulgaris* agreed with the substantive aspect, relating to financing as such, which to his knowledge was not dealt with by any existing text. Ms *Sabo* agreed with Mr Gabriel that this was a project of prime importance. She supported the Secretary-General's suggestion but warned that there would be budgetary implications which would no doubt be discussed later in the meeting. Mr *Harmathy* echoed these feelings, and fully supported the proposal to authorise the Secretariat to continue its preliminary research and to organise an international conference. Ms *Broka* likewise called for continuing research and study on this project. Mr *Lorenzetti* expressed strong support for the project, welcoming the idea of opening up a new line of work for the Institute. Mr *Carbone* for his part drew attention to the importance and relevance of the capital market regulation.

113. Mr *Tricot* also added his support, but felt that some clarification was needed as to the difference in approach outlined the previous year and that of the current Secretariat memorandum. Initially, the focus had seemed to be on how to improve legal security in respect of the right to farm agricultural property, whereas this time round, it appeared to be on private law aspects of direct foreign investment and on the modernisation of private law rules relating to investment, agricultural production and the availability of investment capital for the agricultural sector. He felt that these aspects of the project and the issue of social enterprises, which was to be discussed later in the meeting, were so intimately linked that he had difficulty distinguishing between them. Mr *Voulgaris* supported the views expressed by Mr Tricot.

114. In reply, the *Secretary-General* agreed that the focus of the current document was slightly different from that of the previous year. The earlier paper had been a very general one, whereas the new document looked at the issue from the angle of finance and of foreign direct investment. While recognising the similarity of philosophy between what the Institute intended to achieve in this area and what the other project was expected to do, he would not at this point exclude that if the Institute

were to work in the area it might, at a certain point, be dealing with issues such as the ideal legal structure for an agricultural enterprise to meet the expectations of investors in agricultural production. Several other Organisations were looking into these aspects and the Institute would have to be certain that it had a meaningful contribution to make that would not simply repeat or conflict with that other work.

115. Mr *Tricot* thanked the Secretary-General for his explanation, and stressed that the financing angle was an excellent approach for UNIDROIT to adopt, one in which it had gained expertise and that would set it apart from others active in the field. Yet the challenge was for UNIDROIT not to become “trapped” in these financing aspects but, as an organisation of jurists, to seek equilibria between financial imperatives and other interests.

116. *The Council took note, with great interest, of the memorandum prepared by the Secretariat on the subject of possible future work on private law aspects of agricultural financing and agreed to recommend its inclusion in the Work Programme. In view of the overall workload of the Secretariat, including ongoing projects and projects proposed for the triennium 2011-2013, the Council decided that this project should be assigned a low level of priority.*

Item 8(d)(ii) on the agenda: Guidelines for a legal framework for social enterprises (or for a certain type of social enterprise) (C.D. (89) 7 Add. 5)

117. Ms *Mestre* (UNIDROIT Secretariat) introduced this item, referring for detail to document *C.D. (89) 7 Add. 5*. She recalled that the Council had been seized at its previous session of a proposal submitted by the International Development Law Association (IDLO) to explore, together with UNIDROIT, the possibility of a joint project between the two Organisations for the preparation of a legal framework for social enterprises, which had in recent years proved highly successful in achieving their dual social and entrepreneurial objective. The proposal also highlighted the difficulties experienced by such enterprises in functioning within the legal frameworks currently available. The legal forms for social enterprises differed from country to country: they might take the form of associations, foundations, not-for-profit organisations, charities, non-governmental organisations, or other such appellations. They were sometimes eligible for tax exemptions, and their scope for carrying out commercial activities tended to be subject to restrictions. Co-operatives took up an intermediate position between social enterprises and commercial enterprises, in that they pursued an economic activity for the benefit of their members and were governed by principles such as mutual assistance and solidarity as well as economic survival. However, the recognition and promotion of enterprises combining social ends with economic activity was growing in many countries. The legal regimen for third sector entities with a primarily social object was being modernised, giving such entities access to income from commercial activities, usually accompanied by a change in fiscal status. Several countries had already adopted special frameworks for social enterprises or particular forms of social enterprise. Some countries had taken a differentiate approach, particularly in Europe but also in the United States. For example, countries such as Italy, France and Portugal, as well as the Province of Quebec in Canada, favoured the co-operative form with a social object, including co-operatives that worked for the benefit of others as well as their members. Others had taken as their starting-point the company structure (for example, the United Kingdom with its Community Interest Company, first created in 2004 and which had been remarkably successful), the “social purpose company” in Belgium, or the “low profit limited liability company” (L3C) in the United States. Yet others had preferred a neutral approach, such as Italy, whose functional recognition was embodied in the 2006 Decree Law on Social Enterprise.

118. Commonly encountered problems included the definition of notions such as “social object” and “entrepreneurial activities”, the question of capital structure and return on capital, with the principle of non-distribution – or limited distribution – of surpluses, the inalienability of the company’s equity,

in particular in the event of its dissolution, and its use for the purpose of the social object; the allocation of decision-making powers and the means of protection against the taking of control in a way inconsistent with the social object; broad representation of stakeholders and their participation in the decision-making bodies; the duties to provide members, stakeholders and third parties with information; and the mechanisms for internal and external control designed to ensure the observance of the social object and operational principles.

119. The proposal to elaborate an international legal framework for social enterprises in general, or the (alternative or complementary) proposal to focus on a particular type of social enterprise – for example, Social Business – was intended to promote the development of social enterprises by offering legal certainty and foreseeability for all stakeholders; to provide guidelines for national lawmakers in those countries that did not already have an appropriate legal regimen for such enterprises or to accommodate an additional type of enterprise with specific characteristics. It might also look into the matter of international recognition of this type of enterprise – for investment reasons, for example – by making it easier for social enterprises to engage in transnational operations or to operate in partnership with similar entities in other countries. The Secretariat had drawn up a timetable for the work, which might initially be entrusted to a steering committee tasked with fine-tuning the objectives and content of the project and suggesting the form which the prospective instrument or instruments might take.

120. Mr *McInerney* (Director of Research, International Development Law Organization) noted that a project such as that now being envisaged, offering a standard or model for the developing countries to refer to in developing laws in the area of social business, could have real value for the developing world. A variety of different laws had been elaborated, but the subject-matters were complex, ranging from traditional company law matters to issues concerning bankruptcy, how to account for in-kind contributions of volunteers, tax issues, which had not been dealt with in any formal manner. An ancillary benefit would be that such a project would facilitate the development of communities of practice among the different social business practitioners, in particular a community of specialist lawyers such as already existed in the traditional area of company law.

121. Ms *Hubbard* (Manager of Microfinance Program, International Development Law Organization) gave a brief synopsis of the work done by IDLO in the field of micro-credit and micro-finance and financial inclusion over the past five years, which had primarily focused on trying to develop a very large global network and dialogue which touched upon the issue of how the commercial legal framework impacted the provision of financial services to the poor. It had found the industry very much lacking in legal practitioners who understood the methodologies of getting financial services to the poor as well as the motivation and business structure of these entities. In a nutshell, the regulators were not talking to the regulated and the regulated parties were very small, grassroots organisations which did not necessarily have the money or the knowledge to adhere to the regulations that were in place. IDLO had tried to unite these groups and create some synergies, by means of series of regional trainings, policy dialogues with lawmakers and regulators, publications. This had resulted in a network of about 350 legal practitioners, regulators and micro-finance practitioners who all continued to dialogue and share information about the practical applications of the law in this area. The original micro-credit industry had evolved from being a simple financial loan facility to one offering an array of services including health, education and social welfare. IDLO welcomed the opportunity of working with UNIDROIT to create a research project that actually led to practical implications and change in countries and assisted this group of practitioners who were becoming dissatisfied with the actual legal framework of choices.

122. General support was expressed for this project and for the prospect of working with IDLO in the discussion that followed. Ms *Sabo* pointed out that while the Secretariat document approached the issue from the regulators' perspective, it would be helpful if information could be provided that would allow those forming a business to make an informed choice about which model was most

appropriate (i.e., legislative guidance balanced by guidance for users. She noted that tax policy was apparently a difficult issue and one of the challenges would be to strike an appropriate balance between providing guidance at a sufficient level of detail to be useful. Mr *Terada* agreed, adding that this was a complex issue and any project would take time to complete. Mr *Govey* stressed that the potential partnership with IDLO was an especially valuable part of the exercise. Mr *Tricot* had no hesitation in asserting that this was an excellent project in all respects.

123. The *Secretary-General* noted that the review of proposals for future work had now been completed. Priority levels had to be assigned in the light of resources available, of the level of interest shown in the various projects by the Council, and of the funds available. As regards the social business project, the assumptions were set out in the Secretariat document, with IDLO to undertake external fundraising to cover the cost of expert group meetings and other project-related costs. He expressed the Institute's appreciation of IDLO's interest in the project and confirmed that if the project moved ahead, UNIDROIT would regard this co-operation as a full partnership throughout the work.

124. *The Council took note of the preliminary study prepared by the Secretariat, recognising the definite interest of the subject, while stressing its complexity, in view of the fact that the field in question was strongly marked by particular national characteristics. After hearing the explanations provided by the representatives of the International Development Law Organization (IDLO), it indicated its satisfaction at the prospect of possible collaboration with that Organisation, which had agreed to seek funding for this purpose from interested donors. On that basis, the Council agreed to recommend the inclusion of this project in the Work Programme for the triennium 2011-2013, with a medium/low level of priority.*

Item 8(e) on the agenda: Proposal to establish a UNIDROIT Centre for e-research (C.D. (89) 7 Add. 6)

125. Mr *Voulgaris* introduced this item, which was intended to maximise the use of the Institute's rich resources for legal training. These resources were widely used by outsiders for a variety of purposes, ranging from simple consultation to legislative reform in the users' home countries, or as a basis for legal writings. The grant scholars who came to the Institute were selected as part of the legal co-operation programme, other scholars came at their own expense. An e-research centre could help to attract a much wider audience by using electronic means of doing research, tapping into the Library resources from all over the world. Appropriate software could be made to measure. This facility might also be of assistance in drafting future UNIDROIT instruments.

126. The general mood in the discussion that followed was that this was essentially a good idea for which however there were unlikely to be sufficient resources available in the foreseeable future. Mr *Deleanu* noted that the proposal fitted in with technical progress and the Council's own views as to the need for the Institute's to focus more on the practical aspects of its work. Issues such as intellectual property rights might have to be resolved. Mr *Lyou* took the view that at least a feasibility study might be undertaken at this point. Ms *Sabo* felt that both funding and staffing for such a project were out of the question for the time being, but noted that to some extent, e-research was already taking place on an informal basis thanks to the Library's progress in matters technological. Mr *Tricot* wondered whether the Library's Alep 500 system might not be used as a support for an e-research project, and pointed out that access need not necessarily be free of charge. Mr *Bollweg* struck a more critical note, taking the view that this proposal went in exactly the opposite direction from that advocated for the UNIDROIT uniform law data base. One purported to extend e-research, the other to reduce it. He felt these two items should be discussed in tandem, but speaking as the representative of a Government, doubted that this was the time to move ahead with such a project.

127. The *Secretary-General* noted that this issue might be broached during the imminent discussion on the Library. He pointed out, however, that as it was, the Institute could barely manage to carry out the non-legislative part of its mandate with what little resources were at its disposal – even the scholarships programme relied to some extent on the personal generosity of Governing Council members. It would be difficult at this stage to embark on such a project in a way that would not endanger existing activities. The Secretariat was interested in ways of making the Library more widely available, but the Council might wish to focus on what might be done to improve the pool of existing activities.

128. In reply, Mr *Voulgaris* stressed that his idea had been only to suggest a feasibility study, in due course, which he would be happy to produce in co-operation with others that might be interested, and anyway, the financial outlay for such a project would be less than that for the scholarships programme. As to the uniform law data base and paying access thereto, he saw no contradiction between it and an e-research project for selected scholars and candidates that might be free of charge.

129. *The Council took note with great interest of the proposal to create a UNIDROIT e-Research Centre but decided that, in view of the current lack of necessary human and financial resources, it would not be possible to implement the proposal at this moment in time.*

Item No. 9 on the agenda: Uniform Law Review / Revue de droit uniforme and other publications (C.D. (89) 12)

130. Ms *Zanobetti* (Deputy Secretary-General) introduced this item, stating that the Secretariat memorandum focused exclusively on new developments since the previous Council session as well as on prospects for the near future. In 2009, a new Editorial Board had been put together for the Review, but the overall product represented a joint effort of all the Institute's staff. The Review was a vehicle for the Organisation to promote knowledge of the work done worldwide to prepare rules of law, and of its own work in particular. Volume XIV, published in 2009, was a perfect example. As to production and distribution of the Review, a new agreement with the recently-privatised Italian Post Office had resulted in a significant cut in mailing costs. Negotiations were underway with new printers which, if successful, would mean a significant cut in production costs. She also recalled that an electronic version of the Review was accessible online, with free access to the table of contents and leading articles. A password was needed for full consultation, which was available to members of the Governing Council and member Governments. The question of exploiting the online version on a commercial basis was still on the table.

131. Turning to the Institute's other publications, Ms *Zanobetti* indicated that the Secretariat was due to finalise the English and French versions of the third edition of the UNIDROIT Principles of International Commercial Contracts in the second half of 2010, and was planning to negotiate their translation into other languages. The Secretariat would also be undertaking the preparation of the French version of the revised Official Commentary of the Cape Town Convention and its Aircraft Protocol, the English original of which, prepared by Professor Sir Roy Goode, had been published in June 2008. The volume containing the texts of the ALI/UNIDROIT Principles of Transnational Civil Procedure and the ALI Rules of Transnational Civil Procedure, both with comments, published in English by the Cambridge University Press, was now being translated into other languages. In addition to the English and French texts of these Principles, translations into Chinese, German, Japanese and Turkish were accessible on the UNIDROIT website. A Persian version had been published in 2008, with Russian and Spanish translations to follow shortly. The Secretariat had also prepared the English and French versions of the Official Commentary to the Model Law on Leasing, which were scheduled for publication in the course of 2010. Translations into other languages were being envisaged. As soon as the Official Commentary to the Geneva Securities Convention had been approved in accordance with the procedure agreed by the diplomatic Conference to adopt the

Convention, the Secretariat would see to its finalisation in English and French with a view to its publication. The Secretariat was planning to publish a series of booklets on individual UNIDROIT instruments which would be used for promotional purposes. These, it hoped, might be paid for out of the money saved on printing the Uniform Law Review. Finally, the UNIDROIT Acts and Proceedings 1997-2009 had been published by the Secretariat on CD-ROM and distributed free of charge to the Depository Libraries for UNIDROIT documentation in the member States as well as to the members of the Governing Council.

132. *The Council took note of the progress made in respect of the Uniform Law Review and other publications.*

133. *The Council confirmed the medium/high level of priority to be assigned to the publications programme of the Secretariat.*

Item No. 10 on the agenda: The Library (C.D. (89) 11)

134. Ms *Zanobetti* (Deputy Secretary-General) introduced this item, indicating that the Secretariat memorandum, which illustrated the activity of the Library and the services it offered in 2009 as well as proposals for the coming years, had been drafted in collaboration with the Librarian. In 2009 and early 2010, the Library premises had been affected by major works undertaken by the Italian Government, first for a new fire protection system, then for the renovation of the main reading room and the entrance hall. Despite the considerable discomfort this had generated for staff and Library users, the Library had continued to function fully. She recalled that the Library was used both by occasional visitors and by research scholars and independent researchers who spent periods of between two and six months in the Library, but that it was first and foremost at the disposal of UNIDROIT staff members and experts of the Institute. It was accordingly vital that the Library hold the necessary books and periodicals dealing with the subject-matter of ongoing projects, also in light of the adoption of the new Work Programme and new projects. In this connection, she indicated that the Library stock (currently roughly 244,000 volumes) had, due to the scarcity of financial resources, increased by only 718 new titles in 2009, of which 471 bought, 207 received as gifts and 40 as part of exchange agreements with the Uniform Law Review. The Library had received a total of 253 periodicals, of which (in 2009) 111 bought, 12 received as gifts and 130 as part of exchanges with the Uniform Law Review. In 2009, UNIDROIT had been able to activate 10 new exchange agreements.

135. The Secretariat memorandum outlined several proposals aimed at improving the services offered by the Library. This included a programme of external loans first sampled in 2009 and which could be enhanced by joining a much wider library network if certain requirements were met; ways of improving the electronic resources and databases; and, looking to 2010 and beyond, the reclassification of collections and the possible enhancement of the catalogue.

136. As to the Library premises, as soon as the major refurbishing work now underway had been finished, some of the available space would have to be re-organised. The renovated main reading room would have a multiple function, as a reading room but also as a meeting room for conferences, seminars, working group meetings and the like. The room was being fitted out with interpreter's booths. The Secretariat was also still seeking appropriate solutions for the problem of damp in the basement where books could no longer be stored.

137. *The Council took note of the progress made in respect of the Library and thanked the staff for its co-operation during the renovation work carried out on the reading room and the entrance area. It also took note of the activities of the Library and of the proposals made for the improvement of the services that it provided, notwithstanding the limitations imposed by the scarcity of budgetary resources.*

138. *The Council confirmed the high priority to be assigned to the maintenance and expansion of the Library and the services it provides.*

Item No. 11 on the agenda: The UNIDROIT Web Site and Depository Libraries for UNIDROIT documentation (C.D. (89) 13)

139. Ms *Howarth* (UNIDROIT Secretariat) referred to the memorandum prepared by the Secretariat on this item. She specified that the UNIDROIT website now offered public access to all UNIDROIT documents, studies and reports of the various working groups and committees of governmental experts on items on the Work Programme since 1997, as well as all the pre-1997 preparatory work leading up to the adoption of the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects and the Cape Town Convention on International Interests In Mobile Equipment. All the Governing Council and General Assembly documents since 2005 had likewise been posted on the website with access by password restricted to members of the Governing Council and member State Governments. The titles of all UNIDROIT studies prepared since the foundation of the Institute were now listed on the website, with links to the relevant texts where an electronic version was available, which could be accessed chronologically and by subject. Ms *Howarth* noted that the website was increasingly being used as a “billboard” at diplomatic Conferences and governmental experts meetings in that documents were posted on the website as they were produced. This, and the fact that Governing Council and General Assembly documents were now circulated by e-mail, with the related documents placed on the website, had turned the latter into an important functional tool for the efficient preparation and presentation of documents that enabled significant cuts to be made in paper consumption. Finally, she recalled that the current year’s CD Rom covering the period 1997-2009 had been distributed to the Governing Council members and to the Depository Libraries, of which there were now 51 in 45 member States, the latest addition to the list being Japan.

140. Several Council members expressed their appreciation of the work being done on this most useful vehicle for the Institute’s communication with the outside world. Mr *Voulgaris* wondered whether there was still any point in producing a CD Rom every year, while Mr *Sánchez Cordero* inquired whether there was any record of the number of people who consulted the website and if so, what the geographical breakdown of these “hits” might be. In reply, Ms *Howarth* agreed that preparing the CD Rom was time-consuming, and some Depository Libraries were already placing the material on line themselves and had no further need of the CD Rom. The Council might indeed wish to consider phasing this particular initiative out. As to access records, in the period 10 April – 10 May 2010, there had been 9565 visits (approximately 318 a day) mostly in Italy, the United States, the United Kingdom and Europe, but with more or less all countries represented to a greater or lesser extent.

141. The *Secretary-General* asked to have placed on record his gratitude to the Library staff for their forbearance during the renovation work, and to Ms *Zanobetti* for her efficient liaison work in that connection. He also expressed his gratitude to Ms *Howarth* for her resourceful co-operation in improving the website on an on-going basis.

142. *The Council took note of the progress made in respect of the UNIDROIT web site and the Depository Libraries for UNIDROIT documentation.*

143. *The Council confirmed the medium level of priority to be assigned to these activities.*

Item No. 18 on the agenda: Re-appointment of the Deputy Secretaries-General and report of the Permanent Committee

144. Mr *Hartkamp* informed the Council that the Permanent Committee, since its 110th session, in 2009, had held extensive discussions on ways of streamlining the Institute's staffing structure, as requested by the Governing Council at its 88th session (UNIDROIT 2009 – C.D. (88) 17, para. 223). The Permanent Committee had given particular consideration to the question of the allocation of senior management functions.

145. As regards the Deputy Secretary-General position held by Mr M. J. Stanford, the Permanent Committee recommended the retention of his services to look over the finalisation of the draft Space Protocol and its adoption at a diplomatic Conference expected to be convened in the second quarter of 2011. For that purpose, it had been agreed with Mr Stanford that, after the expiry of his current contract, on 31 December 2010, he would retire and would receive a reduced monthly compensation for a period of one year.

146. As regards the second Deputy Secretary-General position, the Permanent Committee noted, with regret, that the Government of the United Kingdom had announced the discontinuation of the extra-statutory contribution it had paid since 2006 toward the funding of one post of Deputy Secretary-General. The Permanent Committee also noted that even after the retirement of Mr Stanford, the funding for Professor Zanobetti's post could not be easily accommodated under the budget without an increase in member States' contributions. Moreover, the Permanent Committee felt that the reasons that had led the Governing Council, in 2005, on the basis of the offer of that extra-statutory contribution, to authorise the selection and recruitment of a deputy Secretary-General primarily responsible for administrative and financial matters no longer existed. For all those reasons, the Permanent Committee had come to the conclusion that it had no other option than to recommend to the Governing Council that Professor Zanobetti's contract should be allowed to expire on 31 December 2010 and that her current tasks should be re-assigned to other staff members at least until such time as the financial conditions were given for the recruitment of a Deputy Secretary-General against a revised job description to be established by the Governing Council in 2011.

(a) Re-appointment of the Deputy Secretaries-General

147. Messrs *Voulgaris, Tricot, Lyou* and *Carbone* noted the contribution made by Professor Zanobetti to the Institute in the past five years and expressed the wish that a solution could be found to retain her services, even if under a different contract arrangement and with another functional title.

148. Ms *Broka* and Mr *Harmathy* expressed sympathy for that suggestion, but were both ready to accept the assessment and the recommendations by the Permanent Committee. Ms Broka pointed out that the actual matter under discussion was not the qualities or the performance of an individual staff member, but the desirable functions for a position in the Secretariat, which was a policy decision for the Council to make.

149. Ms *Sabo* expressed her full support for the recommendations by the Permanent Committee. The needs of the organisation had changed since the selection process for the deputy Secretary-General position, and the Council should consider both the current financial constraints, as well as the long-term needs of the organisation. Mr *Govey* concurred, noting that the time had come for UNIDROIT to revert to the long-standing practice of only appointing one deputy Secretary-General. The second position had been created under particular circumstances and conceived to attract a set of skills for which the Council had perceived a particular need within the Secretariat at that time. Those needs had since changed and the skills required for the position should be revised accordingly. Ms *Moss* agreed, pointing out that the Government of the United Kingdom, having come essentially to the same conclusion, had decided to discontinue its extra-statutory contribution already in 2009.

150. Mmes *Jametti Greiner* and *Bouza Vidal*, as well as Messrs *Elmer*, *Lorenzetti*, *Bollweg*, *Sánchez Cordero*, *Gabriel*, *Operti Badán*, and *Terada* expressed their agreement with the recommendations of the Permanent Committee.

151. Mr *Tricot* indicated that he did not object to the recommendation by the Permanent Committee, but he would invite the Council to go a step further and consider whether it was at all necessary for UNIDROIT to appoint a deputy to the Secretary-General. He reminded the Council of the cuts in expenditure that had been introduced in many countries and urged UNIDROIT to be prepared to introduce a leaner management structure. In the brief discussion that ensued, Mmes *Broka* and *Bouza Vidal*, as well as Mr *Bollweg*, insisted on the need for UNIDROIT to have a deputy Secretary-General, whereas Mr *Elmer* suggested that the matter might be worthwhile considering further.

152. The *President* noted that the Governing Council, by ample majority, had endorsed the recommendations by the Permanent Committee. In response to the comment made by Mr *Tricot*, he pointed out that the possibility of abolishing the position of deputy Secretary-General altogether, which would require an amendment to the UNIDROIT Statute, was not currently under debate, even though the Council was free to discuss it again in the future.

153. Mr *Carbone* stressed that he did not object to the President's summary, but would like to place on record his hope, shared with other members of the Council, that the Permanent Committee could consider the possibility of alternative working arrangements for retaining the services of Professor A. Zanobetti on one or more specific topics of interest for UNIDROIT, within the limits of the budgetary constraints.

154. The *President* took note of that proposal, to which no objection was raised, and referred it to the Permanent Committee for its consideration.

155. The *Governing Council* accepted the recommendation of the Permanent Committee to re-appoint Mr *Martin J. Stanford* as Deputy Secretary-General for the period from 1 January through 31 December 2011.

156. *The Council* noted that the extra-budgetary contribution generously made by the Government of the United Kingdom towards the funding of the second position of Deputy Secretary-General would end on 31 December 2010 and that the General Assembly was unlikely to agree, under the current international financial climate, to an increase in the contributions of member States to compensate for that shortfall in the Institute's income. *The Council* decided, with regret, that it had no other option than to accept the recommendation of the Permanent Committee that the contract of Professor *Alessandra Zanobetti* should be allowed to expire without being renewed. *The Council* expressed its appreciation and gratitude to Professor *Zanobetti* for her contribution to the work of the Institute in the past four years.

(b) *Report of the Permanent Committee on personnel matters*

157. Mr *Hartkamp* informed the Council that the Permanent Committee saw a need to improve the management of the human resources of UNIDROIT, and to better align the staffing table, the work programme and the funding for the Institute's activities. The Committee was also of the view that the long-term sustainability and health of the organisation required UNIDROIT to make all possible efforts to rejuvenate its staffing structure and to attract new talents. However, those were complex matters that related to the conditions of service of the staff, and the attractiveness of work with UNIDROIT, including the compensation and social security package offered by the Institute. On a number of matters, the Secretary-General needed to consult the staff. The Committee would hope to be able to submit concrete proposals to the Governing Council at its next session, in 2011. One innovation which the Committee would like, already at this stage, to recommend was to amend Article 39 of

the Regulations so as to allow the temporary recruitment of young professional staff members at Category B, rather than Category A, of the Institute's salary scale.

158. Mmes *Broka* and *Sabo* as well as Messrs *Bollweg*, *Gabriel*, *Harmathy*, *Lorenzetti* and *Sánchez Cordero* welcomed the consideration by the Permanent Committee of alternatives for enabling the Institute to hire young lawyers and stressed the importance for any organisation to continuously look for fresh new talent, while valuing in-house experience and institutional memory. They supported the proposed amendment to the Regulations. Mr *Voulgaris*, too, saw no inconvenient in that proposal.

159. Mr *Tricot* wondered whether the Permanent Committee contemplated a change to the general rule that all professional staff should be classified in Category A of the Unidroit salary scale. He also asked whether staff members could be promoted from Category B to Category A.

160. In response, the *Secretary-General* observed that, while promotions from Category B to Category A were not frequent, he was aware of at least one such movement in the past. He pointed out, however, that the creation of "junior professional" positions classified in Category B, which also been introduced in other organisations such as the Hague Conference on Private International Law, was not intended as a means for permanent staff recruitment, but merely to reduce the cost of hiring recently graduated lawyers for temporary work on specific projects.

161. The *President* noted that no objections had been raised to the proposed amendment to Article 39, paragraphs 1 and 3 of the Regulations for the purpose of authorising the recruitment of junior professional staff for category B positions.

162. Mr *Hartkamp* proceeded to inform the Council that the Permanent Committee had agreed to renew the contracts of three staff members whose contracts were expiring by the end of 2010, as well as to recommend the re-appointment of the Treasurer, whose term was also expiring in 2010. In the light of Article 39, paragraph 2, of the Regulations, which required the General Assembly, in connection with the approval of the triennial Work Programme, to "approve the list of positions drawn up by the Governing Council on proposal by the Secretary-General, concerning the budgetary posts in each category", those contracts would be extended for a three-year period.

163. Mr *Elmer* enquired about past practice concerning the duration of contracts of staff members. Mmes *Sabo*, and *Bouza Vidal* as well as Mr *Lorenzetti* expressed a preference for extending current contracts under the same conditions, while applying a three-year limit only to new contracts. Ms *Broka* generally concurred, but pointed out that most UNIDROIT projects last longer than three years. Mr *Tricot* expressed a preference for a system in which staff members would have a probationary period of three years, at the end of which their contracts would either be allowed to expire, or would be extended for a period of five years. In the interest of ensuring constant renewal of human resources, he believed that all contracts should be subject to a maximum duration of eight years. He would therefore favour amending the regulations to eliminate any possible legal obstacle.

164. Messrs *Bollweg*, *Govey* and *Gabriel* stressed that the decisions and recommendations by the Permanent Committee helped to ensure consistency between work programme, budget cycles and the duration of contracts, and were not conceived as an avenue for terminating the employment of long-serving staff members, but simply as a management tool allowing for the periodic adjustment of functions and job descriptions to match the changing needs of the organisation, as reflected in the work programme. Ms *Jametti Greiner* and Mr *Sánchez Cordero* agreed.

165. The *President* noted that the Permanent Committee was the competent organ for the appointment of staff other than the Secretary-General and his deputies. It was also for the Permanent Committee to decide on the duration of individual contracts, within the limits set in the Regulations. However, the Council was free to consider and propose to the General Assembly an

extension of those limits, in the context of a broader review of personnel policies and rules. Of course, any such future change could benefit existing contacts.

166. *The Council approved the recommendation of the Permanent Committee for the re-appointment of Mr Paolo Aversa as Treasurer for a period of three years beginning 1 January 2011, and took note of the report of the Permanent Committee on the review of the personnel structure of the Secretariat.*

Item No. 16 on the agenda: Preparation of the draft budget for the 2011 financial year C.D. (89) 15)

167. The *Secretary-General* pointed out that the draft budget for the financial year 2011, as it appeared in document (C.D. (89) 15), contemplated the same level of expenditure as for the financial year 2010. It contemplated, however, an increase in contributions for member states other than Italy that, together with an expected increase in revenues from sales of publications, should set off the loss of the extra-statutory contribution by the United Kingdom for funding one deputy secretary-general position. He informed the Council that at the last session of the Finance Committee the representatives of Canada, France, Germany and the United Kingdom had stated that they could not support an increase in contributions for the year 2011.

168. *The Council generally approved the draft budget for the 2011 financial year, but requested the Secretariat to refrain from envisaging an increase in the contributions of member States other than Italy. The Council further requested the Secretariat to achieve the necessary balance in 2011 by reducing its expenditure under Chapters 2 (Salaries and allowances) and 3 (Social security charges) of the draft budget.*

Item No. 12 on the agenda: Strategic Plan (C.D. (89) 16)

169. The *Secretary-General* introduced this item, referring to the Secretariat memorandum for an extensive historical background to the Institute's Strategic Plan, the concept of which went back in time to the 75th anniversary of the foundation of UNIDROIT and to the 81st session of the Governing Council in 2002. The document now before the Council was the Secretary-General's response to the Council's request, at its 88th session in 2009, to draft a new Strategic Plan, in consultation with the member States, in the light of the interim evaluation of the Plan submitted at that session, and at this stage it reflected his own personal views for a strategy that were neither complete nor intended to be extensive. The Council was being invited, not to approve the document as such, but to set up an informal working group of the Council to look into the matter further and then to develop a Strategic Plan on the basis of a sufficient level of consultation.

170. By way of a preface to his introduction, the Secretary-General stressed that the entire exercise was based on the assumption that the member States wished the Organisation to continue as an independent body devoted to the type of work it was mandated to do; there were however, challenges to be faced both to that independence itself and as to how to preserve it both vis-à-vis private sector interests, vis-à-vis the collectivity of member States, and vis-à-vis other independent Organisations. The resources at the Institute's disposal were stretched to and beyond the limit, with only 15% of the budget available for the work for which it was known: its instruments, its Library, its publications, the remainder to meet the Institute's fixed costs. UNIDROIT had a particular disadvantage compared to other Organisations in that it had a very small meeting and conference budget, a point that should be taken into account when it came to setting priorities among projects on the Work Programme, since it affected both the speed at which the Organisation could work and the volume of that work. Hence it was fundamentally important that the Organisation focus firmly on activities that it could do better than other Organisations. The idea of supplementing its resources with private

funding was largely illusory and might possibly compromise its independence if industry sponsors, for example, came into play.

171. Moving to individual elements of the report which he felt needed to be looked into further when a strategy for the Organisation was being developed, the Secretary-General turned, first, to the Institute's *legislative activities*, proposing three criteria for the Council to consider when approving legislative work. One was the need to concentrate on areas where the Institute's small size and flexibility or its special relations with the academic world rendered it a more efficient or a more suitable body for preparing an instrument than other bodies. The UNIDROIT Principles and the Cape Town Conventions were, each in their own way, very telling examples of this category. Secondly, there were areas of the law so sophisticated and complex as to be not suitable for formal discussions in bodies such as the United Nations. Thirdly, there were areas of the law not within any one else's mandate, such as the 1995 Cultural Property Convention, the old Wills Convention, and some aspects of private law and development, such as the social business initiative discussed by the Council at this session. Any other areas might be best deferred to other Organisations.

172. In terms of the Organisation's *non-legislative activities*, there was a need, generally, for more follow-up and implementation work, although the available budget of 5,000 euro left little scope for manoeuvre. A useful approach might be to consider at the conceptual stage of a project which partners might be better placed to promote certain instruments (such as in the case of IDLO and the social business initiative, or the Cape Town instruments where aviation industry representatives had become involved without expecting UNIDROIT necessarily to endorse their point of view). More might also be done if member States were to agree to develop joint promotion packages with the Hague Conference on Private International Law or UNCITRAL.

173. Going on to the Institute's *technical co-operation programme* (and its offshoot, the scholarships programme), its *Library* and the *uniform law data base*, the Secretary-General noted that the Library was an activity mandated by the Statute and as such should be supported even though the level of resources currently available to it had stripped it of its status as a prime research library. The quality of the Library also affected the scholarships programme, with which it had a symbiotic relationship. With more voluntary donations to the scheme, the programme might expand to up to 30 scholars. As to *technical assistance*, which was important as a form of promoting the Institute's work particularly in the developing world, where UNIDROIT was hoping to expand its membership, again, it would be unrealistic to expect that assistance to grow to the level envisaged in 2003. The budget simply did not allow the Secretariat to do more than wait and see, not reaching out but reacting to demand. On a more optimistic note, he pointed out that the Institute's depositary function for some of its instruments also had some positive fall-out from the promotional standpoint. As to the uniform law data base, the relevant Secretariat memorandum (C.D. (89) 14) advocated downsizing the data base to match its resources, and the Secretariat was well on its way to establishing a realistic project with achievable objectives.

174. Turning to the matter of *membership*, the Secretary-General noted that while efforts must continue to be made to expand beyond the current membership figure of 63 States, here again, realism must be the order of the day in assessing what the Institute was likely to achieve and which countries were the most likely candidates, notably in terms of whether they could afford to be members. Generally, however, it behoved the Institute not to sell an illusion, and reason dictated that the Institute focus on the larger countries in other regions outside Europe, and even within Europe (*e.g.*, some countries of the C.I.S.). There was some scope for expansion in the Asia-Pacific region, following the accession of Indonesia (*e.g.* Malaysia, Thailand, Singapore, New Zealand), as well as in the larger countries in Africa (Algeria, Kenya), and possibly in some key countries in the Middle East. He stressed the importance of engaging countries not represented on the Governing Council in the Institute's decision-making process.

175. The Secretary-General's report was given a warm reception by Messrs *Harmathy, Voulgaris, Gabriel, Bollweg, Govey, Opertti Badán, Sánchez Cordero* and *Tricot*, Chief *Michael Kaase Aondoakaa*, Ms *Broka* and Ms *Sabo*, who all praised it for its realistic approach, its accurate diagnosis of the state of the Institute, and its cautiously innovative tone, and endorsed the idea of setting up a small working group to consider the matter further. A number of further suggestions were made. Mr *Harmathy* recommended that the Institute give thought, at some time in the future, to possible work on construction contracts, an area of great practical importance that stood in need of legal harmonisation. Mr *Gabriel* argued that the truly important aspect of the Institute's continued independence and its resistance to pressure from outside interests should be given more prominence in the paper. Mr *Bollweg* mooted the possibility of the Governing Council meetings of 2011 and 2012 being extended by one day so as to enable a joint discussion of the issues in light of the work done by a smaller working group. Ms *Broka* felt that such a working group would need to take stock of where the Institute was headed and the best way of getting there. Mr *Govey* made three specific points, stressing, first, that there was perhaps a persistent tendency to underestimate the importance of promotional work, lack of resources notwithstanding; secondly, that the issue of co-operation with other Organisations was critical; and thirdly, that something needed to be done to revitalise the UNIDROIT Correspondents network. Chief *Michael Kaase Aondoakaa* stressed that the African nations as a group laid great store by the Institute as a repository of knowledge. He recalled that the African Union States had purposely got together to appoint himself as their joint representative in the UNIDROIT Governing Council. Africa was looking for expertise in various areas of the law. In particular, technical assistance in contract negotiation was a key area for African States, since the phenomenon of corruption was closely tied to poor contract negotiation. Mr *Opertti Badán* drew special attention to the Secretary-General's comments on the role of UNIDROIT and on its "market", which were basic, but essential elements in establishing a line of conduct in the era of globalisation, two key elements of which were integration and legal harmonisation. Since globalisation "had neither legal nor political governance", there might be a role for UNIDROIT there. Ms *Sabo* stressed that the Organisation needed a Strategic Plan that was many things, but above all should be responsive to the needs of its member States. It should also never lose sight of the fundamental truth that improved funding was the key to achieving its multiple objectives. Mr *Sánchez Cordero* urged his fellow Council members to submit written proposals to the Secretary-General on how further to enrich the document, and to keep an open mind as to where UNIDROIT expertise could be most beneficial to the international community. Mr *Tricot* particularly welcomed the comparison made in the document with the competitor Organisations and its spot-on assessment of the Institute's strengths and weaknesses.

176. *The Council took note, with appreciation, of the memorandum containing the suggestions of the Secretary-General to update or redefine the Organisation's strategic objectives and agreed to establish an informal working group to examine the various matters and options outlined in that document with a view to the preparation of a draft new Strategic Plan to be submitted to the Council for consideration at its 90th session, in 2011. The following members of the Council volunteered to participate in the work of the informal working group: Chief Michael Kaase Aondoaka, Ms Baiba Broka, Mr Sergio Carbone, Mr Henry D. Gabriel, Mr Didier Opertti Badán, Ms Kathryn Sabo and Mr Daniel Tricot.*

Item No. 13 on the agenda: Implementation and promotion of UNIDROIT instruments other than Cape Town instruments (C.D. (89) 8)

177. Ms *Schneider* (UNIDROIT Secretariat) introduced this item, referring for details as to the status and adoption of UNIDROIT instruments to the Secretariat memorandum. She reminded the Council that the status of UNIDROIT instruments was kept permanently up to date on the Institute's website. As to the Institute's promotional strategy, this was addressed in the framework of the Strategic Plan. The only outstanding issue was that of the priority level to be accorded.

178. *The Council took note of the information given and decided to include its discussion of the implementation of a global promotional strategy for UNIDROIT instruments in the work of the Working Group on the Strategic Plan established by the Council in the course of this session.*

179. *In view of the overall workload of the Secretariat and the limited resources available for the promotion of UNIDROIT instruments, the Council recognised, with regret, that, in principle, these activities could only be assigned a low level of priority for the purpose of time allocation within the Secretariat.*

Item No. 14 on the agenda: Correspondents (and C.D. (89) 10 Add.)

180. Ms *Schneider* (UNIDROIT Secretariat) recalled that the role of UNIDROIT correspondents had been extensively discussed at the Council's 88th session, and as with promotion, this was also dealt with in the document on the Strategic Plan. Document C.D. (89) 10) merely set out some elements to be taken into account in the ongoing reflection on the function of correspondents, their appointment, geographical distribution and the duration of their mandate.

181. Mr *Tricot* spoke to the proposal by the French Ministry of Justice to appoint a new correspondent, Professor Camille Jauffret-Spinosi, who had been actively involved in the Institute's work for many years. Mr *Voulgaris* and Mr *Sánchez Cordero* seconded this proposal.

182. *The Governing Council appointed Mme Camille Jauffret-Spinosi as correspondent of the Institute and referred the discussion on the functions of correspondents, the length of their mandate, their geographical distribution and ways to breathe new life into the existing network to the Working Group on the Strategic Plan established by the Council in the course of this session.*

Item No. 15 on the agenda: Legal Co-operation Programme (C.D. (89) 9)

183. Ms *Mestre* (UNIDROIT Secretariat), who introduced this item, recalled that this was another of the Institute's legislative activities that had been addressed in the framework of the Strategic Plan. There had been no new developments specific to this area except as regarded the UNIDROIT Scholarships Programme. Details of the Programme were to be found in document C.D. (89) 9, together with an implementation report. The Scholarships Committee had met, as was its wont, in the course of the current Council session and a report had been issued and included in the Council's working papers. The Programme continued to operate within an extremely meagre budget, and in this connection the Secretariat expressed its gratitude to the Governing Council which had adopted the custom of sponsoring a Council scholarship in support of the scheme.

184. *The Council took note of the information supplied by the Secretariat, in particular in respect of the research scholarships programme, and expressed its gratitude to the scheme's donors. The members of the Council moreover decided to renew their personal contribution to the programme with a view to funding one research grant in 2010.*

185. *In view of the overall workload of the Secretariat and the limited resources available for the scholarship programme, the Council decided that, in principle, these activities could only be assigned a low level of priority for the purpose of time allocation within the Secretariat.*

Item No. 16 on the agenda: The Uniform Law Data Base (C.D. (89) 14)

186. Introducing this item on the agenda, Ms *Peters* (UNIDROIT Secretariat) stated that major modifications had been made to the UNILAW database in the past year. Firstly, the Council had at its

88th session in 2009 endorsed a proposal first made to the Board of Governors of the Uniform Law Foundation to add links to sites with uniform law instruments. With the help of an extern, the Uniform Resource Locator (URL) of uniform law instruments had been retrieved. The websites identified were all free of charge, bearing in mind that many of those most requiring information on uniform law instruments were people from developing countries who might have difficulty in paying the fees charged by commercial databases. Links to 362 instruments had been inserted in the database. Each instrument was linked to sites containing the text of the instrument, the status of ratifications, bibliography and cases (as available). The reason why the information was divided into four categories was that often more sites than one must be consulted to retrieve the information.

187. At the end of September 2009, the Secretary-General had decided that to avoid dispersion of resources the full treatment of instruments should be reserved for instruments prepared by UNIDROIT or on the basis of work carried out by UNIDROIT (such as the CMR). This meant not dealing with carriage by air and carriage by sea. The time between October 2009 and the 2010 session of the Council was to be devoted mainly to recuperating the back-log of case summaries prepared for the CMR in previous years by interns and other contacts. That back-log had now been almost completely eliminated, with only some 30 French cases still to be inserted.

188. In response to the Council's request at its 88th session to monitor the use made of the database, an electronic monitoring system had been put in place and been operational since July 2009. The findings indicated that there was interest, albeit less than there would be once the existence of UNILAW had been made public and publicised with, above all, universities. This had thus far not been done, as the Secretary-General had felt that the Council should be the first to see the modified website of the database.

189. Ms Peters stressed the importance of the database from the point of view of the unification of law, as it promoted uniform law in practice. It was in fact the third stage in the unification process, the first being the actual preparation of the instruments, the second their promotion and the third their uniform application. She also gave a presentation of both the website of the database itself and the site with statistics on the utilisation of the website.

190. Appreciation was expressed round the table for the work accomplished. Mr *Hartkamp* underscored the relevance of this work for the Institute, while Mr *Voulgaris* stressed that it might be useful in due course to see how this project could be made to pay. Ms *Sabo* wondered whether ways might be found to expand the number of summaries available in both languages, English and French.

191. *The Council took note, with appreciation, of the efforts made by the Secretariat to re-dimension the objectives of the Uniform Law Data Base. The Council approved, in particular, the decision to reserve the full treatment of instruments to instruments prepared by UNIDROIT, or on the basis of work carried out by this Organisation, and that treatment of instruments prepared by other Organisations should be limited to the provision of links to websites that published their texts and status of implementation. On that basis, the Council agreed to assign medium level of priority to the Uniform Law Data Base.*

192. Turning to the relative priority levels for the various projects, the *Secretary-General* recalled the criteria set out in paragraph 10 of document C.D. (89) 7 for this purpose. Taking the amount of time spent by the staff on project delivery as a guideline, "high priority" indicated at least 70%; "medium priority" meant no more than 50%; and "low priority" stood for no more than 25%. On that basis, and in light of the Council's deliberations, he suggested that the Council might wish to set the following priorities for its ongoing work:

- UNIDROIT Principles – high for the remainder of the work
- Space Protocol: high for the remainder of the work
- Depositary functions for the Cape Town instruments: high (ongoing)

- Publications: high in budget terms; medium to low in staffing terms
- Scholarships: high in budget terms, low in staffing terms
- Database: medium

and for the new topics on the Work Programme:

- Social business: medium to low depending on IDLO's commitment on funding
- Netting: high
- All others: between low and medium-low for the time being.

193. *It was so agreed.*

Item No. 17 on the agenda: Date and venue of the 90th session of the Governing Council (C.D. (89) 1)

194. *The Governing Council agreed that its 90th session would be held from 9 to 11 May 2011 in Rome.*

Item No. 18 on the agenda: Any other business

195. Mr *Sánchez Cordero* issued a personal invitation to all members of the Governing Council, ahead of the official invitations, on behalf of the Committee that was organising the bicentennial celebrations of Mexico's independence, to an event scheduled for 20-21 September 2010 devoted to "Codification and Legal Training in Latin America".

196. In a brief closing address, Mr *Hartkamp*, speaking as the longest-serving member of the Governing Council, wished to place on record his personal gratitude and that of the Governing Council to the outgoing deputy Secretary-General, Ms *Zanobetti*, for her dedication and hard work in keeping the Institute's administrative house in order when it was needed. He also congratulated the Council on having taken the decisions that were needed to "rejuvenate" the Institute Strategic Plan and set in firmly on the road to the future.

APPENDIX I
ANNEXE I**LIST OF PARTICIPANTS /**
LISTE DES PARTICIPANTS

(Rome, 10 – 12 May 2010 / *Rome, 10 – 12 mai 2010*)

MEMBERS OF THE GOVERNING COUNCIL
MEMBRES DU CONSEIL DE DIRECTION

Mr Berardino LIBONATI	President of UNIDROIT / <i>Président d'UNIDROIT</i>
Chief Michael Kaase AONDOAKAA	former Attorney-General of the Federation and Minister of Justice Abuja (Nigeria)
Mr Hans-Georg BOLLWEG	Head of Division Federal Ministry of Justice Berlin (Germany)
Ms Núria BOUZA VIDAL	Professor of Law Pompeu Fabra University School of Law Law Department Barcelona (Spain)
Ms Baiba BROKA	Legal Adviser Ministry of Transport Lecturer Riga (Latvia)
Mr Antonio Paulo CACHAPUZ DE MEDEIROS	Consultor Jurídico Ministério das Relações Exteriores Explanada dos Ministérios Brasilia, DF (Brazil)
Mr Sergio CARBONE	Professor of Law at the University of Genoa Studio Carbone Genova (Italy)

Monsieur Sergiu DELEANU	Maitre de Conférences à la Faculté de droit de l'Université "Babes Bolyai" Cluj-Napoca (Romania)
Mr Michael B. ELMER	Judge, Vice-President Danish Maritime and Commercial Court Copenhagen (Denmark)
Mr Henry D. GABRIEL	Visiting Professor of Law School of Law Elon University Greensboro, North Carolina (United States of America)
Mr Ian GOVEY	Chief Executive Officer Australian Government Solicitor Barton ACT 2600 (Australia)
Mr Attila HARMATHY	Former Judge, Constitutional Court Emeritus Professor of Law Faculty of Law Budapest (Hungary)
Mr Arthur Severijn HARTKAMP	former Procureur-Général at the Supreme Court of The Netherlands; Professor of European Private Law Den Haag (The Netherlands)
Mme Monique JAMETTI GREINER	Vice-directrice Office fédéral de la justice Berne (Suisse)
Mr Ricardo Luis LORENZETTI	Chief Justice Supreme Court of Justice Buenos Aires (Argentina)
Mr Byung-Hwa LYOU	President and Professor of Law TLBU Graduate School of Law Seoul (Republic of Korea)
Mr MO John Shijian	Dean Faculty of International Law China University of Political Science and Law (CUPL) Beijing (People's Republic of China)

Ms Sally MOSS	Head Legislation and International Policy Legal Services Group Department of Business, Innovation and Skills London (United Kingdom) <i>representing Ms Rachel Sandby-Thomas</i>
Mr Didier OPERTTI BADAN	former Ambassador; former Minister of Foreign Affairs; Legal Adviser; Professor of International Law Montevideo (Uruguay)
Ms Kathryn SABO	General Counsel International Private Law Section Department of Justice Canada Ottawa, Ontario (Canada)
Mr Jorge SÁNCHEZ CORDERO	Director of the Mexican Center of Uniform Law Professor Notary public Mexico City (Mexico)
Mr Itsuro TERADA	Judge and President Hiroshima High Court Hiroshima (Japan)
Monsieur Daniel TRICOT	Professeur affilié à l'European School of Management; Arbitre et médiateur en affaires Paris (France)
Monsieur Ioannis VOULGARIS	Professeur émérite de droit international privé et de droit comparé à l'Université Demokritos de Thrace, Avocat à Athènes Athènes (Grèce)

OBSERVERS / OBSERVATEURS:

Sir Roy GOODE	Emeritus Professor of Law University of Oxford Honorary member of the Council and President of the Uniform Law Foundation / <i>Membre honoraire du Conseil et Président de la Fondation de droit uniforme</i>
Ms Jami HUBBARD	Senior Legal Office Microfinance Program International Development Law Organization (IDLO)

Ms Manuela LEIMGRUBER	First Secretary Embassy of Switzerland in Italy Rome (Italy) Chairman of the Finance Committee / <i>Président de la Commission des Finances</i>
Ms Joanne KING	Second Secretary Embassy of Ireland in Italy <i>Representing H.E. Mr Patrick Hennessy, Ambassador of Ireland in Italy</i> Chairman of the General Assembly / <i>Président de l'Assemblée Générale</i>
Mr Jonathan J.C. MA	Research Fellow of Centre for Trade Remedies of China University of Political Science and Law Beijing (People's Republic of China)
Mr Thomas McINERNEY	Director of Research Policy and Strategic Initiatives International Development Law Organization (IDLO)
Mr Renaud SORIEUL	Secretary UNCITRAL Vienna International Centre Vienna (Austria)
Mr Hans VAN LOON	Secretary-General Hague Conference on Private International Law The Hague (The Netherlands)

UNIDROIT

Mr José Angelo ESTRELLA FARIA	Secretary-General / <i>Secrétaire Général</i>
Mr Martin STANFORD	Deputy Secretary-General / <i>Secrétaire Général Adjoint</i>
Ms Alessandra ZANOBETTI	Deputy Secretary-General / <i>Secrétaire Général Adjoint</i>
Mr Michael Joachim BONELL	Consultant
Ms Frédérique MESTRE	Senior Officer / <i>Fonctionnaire principale</i>
Ms Lena PETERS	Senior Officer / <i>Fonctionnaire principale</i>
Ms Marina SCHNEIDER	Senior Officer / <i>Fonctionnaire principale</i>
Ms Paula HOWARTH	Senior-drafter / <i>Traductrice-rédactrice</i>
Mr John ATWOOD	Senior Officer / <i>Fonctionnaire principal</i>
Ms Bettina MAXION	Librarian / <i>Bibliothécaire</i>
Mr Daniel PORRAS	Associate Officer / <i>Fonctionnaire associé</i>

APPENDIX II**AGENDA**

1. Adoption of the agenda (C.D. (89) 1)
2. Appointment of the First and Second Vice-Presidents of the Governing Council (C.D. (89) 1)
3. Reports
 - (a) Annual Report 2009 by the Secretary-General (C.D. (89) 2)
 - (b) Report on the Uniform Law Foundation
4. Principles of International Commercial Contracts: Consideration and adoption of additional Chapters (C.D. (89) 3)
5. International Interests in Mobile Equipment
 - (a) Implementation and status of the Cape Town Convention, Aircraft Protocol and Luxembourg Protocol (C.D. (89) 4(a))
 - (b) Preliminary draft Protocol to the Cape Town Convention on Matters specific to Space Assets (C.D. (89) 4(b))
 - (c) Preparation of other Protocols to the Cape Town Convention, in particular on matters specific to agricultural, mining and construction equipment (C.D. (89) 4(c))
6. Transactions on transnational and connected capital markets
 - (a) UNIDROIT Convention on Substantive Rules for Intermediated Securities: Follow-up work and promotion (C.D. (89) 5(a))
 - (b) Principles and Rules Capable of Enhancing Trading in Securities in Emerging Markets (C.D. (89) 5(b))
7. Model law on Leasing: Follow-up work and promotion (C.D. (89) 6)
8. Triennial Work Programme of the Organisation (2009-2011) (C.D. (89) 7)
 - (a) Possible Future Work on Third Party Liability for Global Navigation Satellite System (GNSS) Services (C.D. (89) 7 Add. 1)
 - (b) Proposal for an instrument on the Netting of Financial Instruments (C.D. (89) 7 Add. 2)
 - (c) Proposal for a Model Law on the Protection of Cultural Property (C.D. (89) 7 Add. 3)
 - (d) Possible Future Work in the Area of Private Law and Development
 - (i) Private law aspects of agricultural financing (C.D. (89) 7 Add. 4)
 - (ii) Guidelines for a legal framework for social enterprises (or for a certain type of social enterprise) (C.D. (89) 7 Add. 5)
 - (e) Proposal to establish a UNIDROIT Centre for e-research (C.D. (89) 7 Add. 6)

9. Implementation and promotion of UNIDROIT instruments other than Cape Town instruments (C.D. (89) 8)
10. Legal Co-operation Programme (C.D. (89) 9)
11. Correspondents (C.D. (89) 10 and C.D. (89) 10 Add.)
12. Library (C.D. (89) 11)
13. Uniform Law Review/ *Revue de droit uniforme* and other publications (C.D. (89) 12)
14. The UNIDROIT Web Site and Depository Libraries for UNIDROIT documentation (C.D. (89) 13)
15. The Uniform Law Data Base (C.D. (89) 14)
16. Preparation of the draft budget for the 2011 financial year (C.D. (89) 15)
17. Strategic Plan (C.D. (89) 16)
18. Re-appointment of the Deputy Secretaries-General and report of the Permanent Committee
19. Date and venue of the 90th session of the Governing Council
20. Any other business

APPENDIX III**Report on the meeting of the *Scholarships Sub-Committee* of the Governing Council**

Monday 10 May 2010, 6.00 p.m.

The Scholarships Sub-Committee was made up of Ms Bouza Vidal, Ms Jametti-Greiner, Messrs Lyou, Mo, and Opertti as well as Ms Mestre and Ms Zanobetti from the Secretariat. Mr Opertti chaired the meeting.

The following documents were submitted to the Sub-Committee in addition to Council document (C.D. (89) 9 (“Legal Co-operation Programme”):

- The Report on the Implementation of the Programme in 2009 : Study LXV – Scholarships exec. 21 rev.;
- An updated table setting out funding details for 2010;
- The work, conclusions and research reports of the beneficiaries of the programme in the period January 2009 – March 2010 (available for reference only);
- Applications received by the Secretariat for 2010-2011 (available for reference only).

As usual, the Sub-Committee recalled the important role played by the Scholarships Programme not only in the context of legal co-operation but also as a tool to promote UNIDROIT and its work. It took note with satisfaction of the implementation of the Programme by the Secretariat in 2009 as well as of the research reports submitted by the beneficiaries of the Programme during this period.

As to the financial resources available for 2010, the Sub-Committee noted the available allocation under Chapter XI of the general budget and expressed its gratitude to the donors to the Programme for the year 2009, i.e. the UK Foundation for Uniform Law, the Government of the Republic of Korea, the UNIDROIT Secretary-General and the members of the Governing Council. It noted with regret that this funding was largely insufficient with respect to the large number of applications received and the research capacities of the library, and formulated the wish that the Programme be further developed.

The Sub-Committee noted that the Secretariat had received 29 applications for the year 2010-2011. It decided to reaffirm the usual selection criteria (i.e. the conditions stipulated by the donors, the general guidelines laid down by the Scholarships Sub-Committee in April 1999 *) and formulated a number of suggestions. As in the past, it agreed to give the Secretary-General a broad mandate to implement the Programme in 2009.

Cf. Study LXV – Scholarships Implem. 21, note 2.