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REPORT

1. The *President* opened the session, welcoming all those present. Apologies had been received from Messrs Cachapuz de Medeiros and Lorenzetti. Mr Sen was represented by Mr Rajesh Kumar Agnihotri, while Mr Terada was represented by Mr Yasuhiko Kobayashi. H.E. Mr Juan Prieto, Ambassador of Colombia in Italy, and Mr Keith Heffern, Chairman of the Finance Committee, attended as observers.

2. In his opening address, the *President* recalled that this was the first time that representatives of member States that did not have any nationals appointed on the Council were attending the session as observers. Their presence was an excellent occasion for the presentation of the final version of the UNIDROIT Strategic Plan. At a time of tight budgets, it was imperative to have a clear vision of the challenges faced by UNIDROIT in the future and of the place which the Institute should occupy within the larger family of international Organisations. The revised Plan showed that it was able to adapt to new circumstances and re-define its own role in a changing world, guided by high standards of political sensitivity, substantive soundness and practical feasibility, all the while making the best use of the resources which the international community placed at its disposal. Among the various items on the agenda for the current session, three were substantive topics of particular significance. One such was the Protocol to the Convention on International Interests in Mobile Equipment on Matters specific to Space Assets, adopted at a diplomatic Conference in Berlin on 7 March 2012. This Protocol was an important addition to the highly successful series of instruments in the area of mobile equipment financing that had commenced with the adoption of the Cape Town Convention, one of the most imaginative and ground-breaking instruments ever conceived in the area of private law harmonisation. The *President* expressed the Institute's and his own personal gratitude to those involved in the project, and to the Government of Germany for having so generously agreed to convene and host the diplomatic Conference. A second important topic on the agenda was the final report of the Study Group on Draft Principles and rules on the netting of financial instruments, which after three highly productive meetings now sought the Council's authorisation for the Secretariat to convene a Committee of governmental experts to consider and finalise the Draft Principles. In the current nervous financial climate, it was more than ever important to raise investor confidence by enhancing their protection against their perceived risk of default. By increasing legal certainty and coherence in the international treatment of close-out netting, these UNIDROIT Draft Principles represented a modest, but timely and important contribution to international efforts towards financial market stability. Finally, a third important topic was the Secretariat's proposals for future work in the area of private law and agricultural development, which opened a window for UNIDROIT to contribute to the development goals pursued by the international community in the field of agricultural investments and production and would also permit synergies with other Rome-based inter-governmental Organisations.

Item 1 on the agenda: Adoption of the draft agenda (C.D. (91) 1 rev.)

3. *The Governing Council adopted the agenda as proposed in document C.D. (91) 1 rev.*

Item 2 on the agenda: Appointment of the First and Second Vice-Presidents (C.D. (91) 1 rev.)

4. *The Governing Council renewed Professor Arthur Hartkamp's appointment as First Vice-President of the Governing Council and Professor Lyou Byung-Hwa's appointment as Second Vice-President, in both cases as from the end of the 91st session to the end of the 92nd session of the Council.*

Item 3 on the agenda: Reports**(a) Annual Report 2011 (C.D. (91) 2)**

5. The *Secretary-General*, in introducing this item, referred to document C.D. 91(2) for detail. 2011 had been an intense year for the Secretariat both in terms of implementing the Work Programme and from an institutional management point of view. The re-classification of 16 member States in the UNIDROIT contributions chart had produced an increase in the resources available to the Institute, pending confirmation by some member States that they did not intend to raise objections to their re-classification. The adoption of the new Space Protocol despite initial industry criticism had been a major highlight, and the Secretary-General joined the President in thanking the German Government for its outstanding support and the impeccable organisation of the Conference. As to the netting project, two successful meetings had been held by the Study Group, which with its 27 members and observers was the largest such group ever put together for any UNIDROIT project, reflecting the need to cater for various possible interests as well as the high level of political interest and regulatory attention in this area. The draft which the group had produced was now deemed sufficiently mature for presentation to a committee of governmental experts, which it was expected might be able to finalise the text in two sessions in 2013.

6. As to possible future work on *private law and agriculture*, the November 2011 Colloquium organised on the subject that had brought together eminent experts from around world had produced some excellent ideas. The Secretary-General expressed his gratitude to the American Foundation for Uniform Law, which had helped make the event possible. A special meeting with industry representatives had been held back-to-back with the Colloquium to assess the potential usefulness and feasibility of a fourth Cape Town Protocol to deal with agricultural, construction and mining equipment. In this connection, a proposal had been received from the Centre for Economic Analysis of Law in the United States of America for that institution to prepare an economic impact study for such a protocol. Work on the International Registry to be set up under the Luxembourg Rail Protocol was nearing completion, the consultations with the selected bidder having entered the final stages. Once that work was complete, the Secretariat would concentrate on promoting the Protocol's early entry into force.

7. The preparation of *model provisions on State ownership of undiscovered cultural objects*, undertaken jointly by UNIDROIT and UNESCO, had proceeded apace and a booklet setting out the results was to be published in June 2012. A meeting of the States Parties to the 1995 Convention was scheduled for June 2012 in co-operation with UNESCO. In the framework of its exploratory work in the area of third party liability for global navigation satellite systems (GNSS) services, an informal meeting had been held on 11 November 2011 on risk management for GNSS malfunctioning, the results of which would be analysed, once the outcome of ongoing work by the European Commission was known, to decide whether a further meeting should be convened.

8. Meanwhile, the Secretariat continued to co-operate with other international Organisations. There had been two points of contact with the Hague Conference on Private International Law: one was the proposed principles on choice of law, a project in which UNIDROIT continued to participate, the other concerned the work on netting, which included aspects of private international law. There had been less contact with UNCITRAL recently, mainly because the respective Work Programmes did not include many topics of immediate relevance to each other. An important step, however, had been the inclusion of UNIDROIT's request for formal endorsement of the UNIDROIT Principles by UNCITRAL on the agenda of that Institution's plenary session in the summer of 2012.

9. As to the Institute's non-legislative activities, the Secretary-General noted the change in way in which the function of the UNILAW data base was conceived, but referred to the report on the Uniform Law Foundation and to Professor Putzeys' intervention for further detail. Negotiations were in hand with the Oxford University Press on the possibility of outsourcing the production and marketing of the Uniform Law Review whilst retaining in-house intellectual control and planning of its contents. Finally,

the sub-committee of the Permanent Committee had completed the selection procedure for a deputy Secretary-General and its nomination was now being submitted to the Council for approval. 65 applications had been received.

10. The *President of the General Assembly* welcomed those members of the General Assembly that were attending the Council session. He noted that the member States had expressed great interest in this year's deliberations, in particular as regarded the future work programme and the Strategic Plan.

11. *The Governing Council took note of the Secretary-General's report on the activity of the Institute during 2011.*

(b) *Report on the Uniform Law Foundation*

12. Professor Sir Roy Goode, member *ad honorem* of the Governing Council and President of the Uniform Law Foundation, referred to document BG(13) 3 Rev. prepared by the Uniform Law Foundation for full financial details of the Foundation's activities in 2011/2012. He recalled that the purpose of the three foundations (the Uniform Law Foundation, the American Foundation for Uniform International Uniform Law, and the UK Foundation for International Uniform Law) was to raise money to assist UNIDROIT in covering expenditure not (adequately) carried on the Institute's regular budget. Funds had thus far been supplied to put up scholarships, fund conferences and seminars, support the UNIDROIT Library, and pay the salary of an assistant to the Secretariat Officer in charge of the Space Protocol project. In 2011, the Uniform Law Foundation had contributed some € 41,000 to the Institute. The transfer of the UNILAW data base to the *Institut du droit international des transports* (IDIT) in Rouen (France), had, of course, been an important event from the Foundation's point of view, since the data base had hitherto been a major beneficiary of Foundation grants.

13. The most pressing problem continued to be that of securing donations, and here Sir Roy congratulated the President, who had been very successful in raising contributions from Italian law firms. Another issue was the tax position of the three foundations, which were set up in different jurisdictions. Organising conferences were another way of raising money – several such events had been held in the past and it was hoped might be again in the future. The Official Commentaries to the Cape Town Convention and its Protocols continued to produce revenue, in particular that on the Aircraft Protocol. Sir Roy was himself to prepare an Official Commentary on the new Space Protocol, hopefully in time for the next meeting of the Governing Council, and to update the Aircraft and Rail Commentaries. He appealed to the members of the Governing Council to help the Foundation by supplying details of prospective donors, and to help the Library, for example by donating copies of any recent monographs of their hand.

14. Finally, Sir Roy announced his imminent retirement as Chairman of the Uniform Law Foundation, whose Governing Board would be nominating a successor shortly, and he thanked all those at UNIDROIT with whom he had worked so closely and successfully over the years.

15. The *Secretary-General*, joined in this by Mr *Sánchez Cordero*, expressed his personal gratitude and that of the Secretariat to Sir Roy for his immense assistance to the Institute through the years. The Foundations had been instrumental in securing financial assistance, promoting the Institute's work, supporting its work on ongoing projects where no official funding had been available, and helping to fund meetings to develop ideas for new projects.

16. *The Governing Council took note of the report by the President of the Uniform Law Foundation, expressing its gratitude to him for his unstinting efforts to promote the work of the Institute, 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 4 on the agenda: Principles of International Commercial Contracts – publication and promotion of the 3rd edition (“UNIDROIT Principles 2010”) (C.D. (91) 3)

17. Mr *Bonell* (UNIDROIT Secretariat) introduced this item, referring to Doc. C.D. (91) 3) for detail. He briefly outlined the main developments in the previous year. Both the English and French language versions of the UNIDROIT Principles 2010 had been published by end-June 2011, immediately following their adoption by the Governing Council at its 90th session. The Secretariat’s intensive advertising campaign had yielded a large number of orders, with some 280 copies sold thus far in English and 23 in French, at a cost of € 100 each. The integral version of the UNIDROIT Principles 2010 was now also available in Italian, while Chinese, Russian and Spanish versions were being prepared. The black letter rules were available in German, Japanese, Portuguese, Russian and Spanish. The Uniform Law Review had devoted an entire issue (2011-3) to the UNIDROIT Principles 2010, with articles on the new topics and the use of the UNIDROIT Principles in international contract and arbitration practice in different regions of the world.

18. As to the promotion of the UNIDROIT Principles 2010, since their publication they had featured at several major events worldwide, and further events relating to the UNIDROIT Principles were in the pipeline. There had also been quite a number of requests from all over the world for permission to publish the black letter rules of the UNIDROIT Principles 2010 or a selection thereof in text books and other teaching materials. A significant contribution to the promotion of the UNIDROIT Principles 2010 would be its formal endorsement by the United Nations Commission on International Trade Law (UNCITRAL), as had been the case with the 2004 edition. A proposal for such endorsement had now been included on the agenda of the Commission’s annual session in July.

19. The use of the UNIDROIT Principles in practice continued to be monitored. The UNILEX database had been updated to include the text of the UNIDROIT Principles 2010 together with a list of relevant issues attached to each of the new provisions, and there was reason to believe that the ICC International Court of Arbitration would, in future, provide UNILEX with more information on recent ICC awards referring to the Principles.

20. Mr *Wallace* suggested that the Institute might undertake a modest project to prepare model clauses, with explanations, for incorporation into the contract or the general conditions, and providing information on how they might be most effectively used. This practical approach directed at practitioners that various Council members felt was now called for in order to move beyond academic acceptance of the Principles into the day-to-day world of contract drafting, was supported by Messrs *Bollweg*, *Deleanu*, *Gabriel*, *Govey*, *Sánchez Cordero* and Ms *Sabo*, with Mr *Deleanu* inquiring as to the general outline of such a study on model clauses.

21. Mr *Bonell* declared himself much encouraged by the support shown for the idea of his producing model clauses as an appendix to the Principles, but invited the Council to consider setting up a very small, five to six-member steering committee for the purpose. In that way, a preliminary study might be ready for discussion at the Council’s next session in 2013. The *Secretary-General* stated that the Secretariat would consider the methodology and how to move forward internally, but did not think this presented an immensely complex task and doubted that there would be any need for more than one session of a small study group.

22. Ms *Broka* stated that the Principles were now a permanent topic in judicial training in Latvia and that the first feedback had been very positive. The Latvian Supreme Court was beginning to refer to the Principles and this set a good precedent for the Latvian legal system. Mr *Bonell* saw this as yet another example of how the Principles were being used as a “restatement” for domestic law. Ms *Sabo* thought this would be a good idea also for the Canadian judiciary.

23. Mr *Opertti Badán* pointed out that although the Principles were based on the free will of the parties, not all systems accepted this principle in the courts. There was also the question of what were the limits of the Principles for arbitrators and courts and what would be the reference law. It

might be opportune to look at any lacunae the Principles might have in this light. In reply, Mr *Bonell* stated that the main problem arose when the Principles were referred to as the rules of law governing the contract, since not all jurisdictions admitted non-State law as the law governing the contract. In arbitration there was not much of a problem, but State courts remained adamant in this respect. As to limits, the Principles themselves contained mandatory provisions restricting the parties' freedom to modify their contract. As to external limits, which referred in general terms to concepts like *ordre public* or public policy, a distinction had to be made between situations where the Principles were incorporated into the contract – and there the limits would inevitably be the ordinary mandatory rules of the otherwise applicable domestic law – and where they were chosen as the rules of law governing the contract or made applicable to the substance of the dispute, for example in an arbitration proceeding. There, the limits would be narrower and might be found in the international *ordre public*, the so-called overriding mandatory rules.

24. Several speakers referred to promotional initiatives undertaken in their respective countries. Mr *Tricot* advocated a fully-fledged promotion policy for the Principles. The Principles were a comprehensive set of well-thought-out, concrete rules for the interpretation of contracts that had no ties with specific national systems. There was a need, in addition to the intellectual approach adopted by academia and the explicit reference made to the Principles by arbitrators, for a practical approach. He had agreed with the President of the French Bar and other parties to prepare a series of training and awareness-raising meetings to teach participants how to integrate the Principles into the contract by direct reference. Mr *Voulgaris* stated that there were plans to translate the black letter rules of the UNIDROIT Principles 2010 into Greek, an important development since the Principles were increasingly taught in universities. Mr *Govey* announced that the Federal Attorney General in Australia had released a discussion paper on the possibility of drafting a national contract law for the Federation and the drafters seemed set to bear the Principles in mind. Mr *Deleanu* referred to the new Civil Code in Romania, where the UNIDROIT Principles had had a considerable impact in the area of private law relationships in general. Mr *Sánchez Cordero* announced that the publication of the Spanish version of the UNIDROIT Principles 2010 was now imminent.

25. Ms *Bouza Vidal* briefly raised an issue that had arisen since the UNIDROIT Principles were first drafted, to wit, the advent of a draft EU regulation on European contract law which aimed to regulate contracts not only as between companies and consumers but also as between enterprises, especially small and medium-sized enterprises. Here, there was a risk of overlap with the Principles. She wondered whether the European Union might be prevailed upon to reduce the scope of the future regulation to consumer contracts. In reply, Mr *Bonell* pointed out that although the proposed regulation was still only at the drafting stage, it had already been the butt of a fair amount of criticism, and might never get off the ground. He stressed, moreover, that the draft related to sales contracts only, albeit enriched with substantive rules on general contract law. At all events, the broadening of its scope was proving highly controversial and it would probably make sense to limit it to consumer sales contracts. As to the new provisions on contract law in general, while the Principles had been one of the major sources of inspiration, the project was not nearly as ambitious and courageous as the Principles themselves.

26. Ms *Jametti Greiner* for her part announced that the Swiss delegation to UNCITRAL had submitted a "draft proposal concerning UNCITRAL work in the area of international contract law" inviting the UNCITRAL member States to discuss and assess the situation in practice in this area of the law. The proposal addressed questions such as the state of play with the Vienna Convention, its lacunae or shortcomings as well as those of other UNCITRAL instruments, whether the entire system should be overhauled and the scope of application widened. The document detailed different regional initiatives, with the UNIDROIT Principles featuring prominently, and invited member States to develop a strategy and define what work needed to be carried out in future. No details were given as to methodology or procedure. Ms *Jametti Greiner* expressed her profound belief that a binding instrument was needed for international contracts, and that the UNIDROIT Principles were the proper point of departure. This would be a huge task, and one in which UNIDROIT should be involved, but in

her view this was the proper way forward to help to move the Principles on from academy to commerce. She was making this announcement to the Governing Council strictly with a view to ensuring transparency, and to determine whether there was at least some initial interest on the part of UNIDROIT.

27. In the lively debate that followed this announcement, Mr *Hartkamp* stated that if UNCITRAL were to undertake this enormous task, it would be of a magnitude comparable to the decision to revisit and expand the 1964 Convention relating to a Uniform Law on the International Sale of Goods. While a new international codification was not something to be afraid of, it was nevertheless a difficult and dangerous venture and one that would compel UNCITRAL to develop new working methods. It was here that UNIDROIT might come in – the Principles should not only be a point of departure for codifying contract law but should also be instrumental to the work being carried out. Even closer co-operation between the two Organisations than hitherto would be key to ensuring firm input on the part of UNIDROIT. Mr *Bollweg* shared Mr *Hartkamp*'s view that this would be a challenging and dangerous project. He feared a risk of overlap, much as had been the case with the European Commission's Proposal for a Regulation on a Common European Sales Law, and had some misgivings about possibly creating a competitive instrument. Mr *Operti Badán* warned that while under the Vienna Convention, parties were free to exclude the Convention in favour of the UNIDROIT Principles, any new Convention along the lines proposed would take precedence over the Principles. Mr *Gabriel* encouraged the Secretariat to step up its co-ordination with UNCITRAL since the Principles had a great deal to offer in this area. Ms *Sabo* stressed the need to avoid duplication of resources. Canada did not as yet have a firm position on the Swiss proposal, but she insisted that at all events, UNIDROIT should be involved and not just at the preparatory stage. Mr *Tricot*, as a practising lawyer, rather felt that the proliferation of model texts was becoming cumbersome rather than useful. It was time for concrete results and a practical approach, one that would show professionals how they could use the model contracts on offer. It was also moot whether it served any purpose to draft texts dedicated to a particular type of contract when the business reality was that international contracts generally incorporated different aspects such as sale, service, hire, etc. The UNIDROIT Principles nicely solved this difficulty by referring simply to "contracts".

28. The *Secretary-General* stated that if UNCITRAL were to pursue this, the Secretariat would be delighted to see the Principles as the basis for any work that needed to be done or to play whichever role the Member States of UNCITRAL saw fit to entrust to UNIDROIT, e.g., preparatory work, studies, and so forth. It should be recalled that all the UNIDROIT member States bar the Holy See were full members of the United Nations. It made sense therefore that if UNCITRAL took up work in an area already extensively covered by UNIDROIT, that work would be a development of these earlier efforts. Yet it was up to the UNCITRAL member States to define the work and establish appropriate terms of reference.

29. *The Governing Council took note of the wide range of activities undertaken by the Secretariat and in other fora to promote the UNIDROIT Principles 2010 since their adoption in 2011, and of the Secretariat's commitment to continue monitoring the use of the Principles worldwide. It also mandated the Secretariat to develop, with the assistance of experts, a few model clauses, followed by appropriate explanations, to assist parties in incorporating the Principles into the terms of their contract, or in choosing them expressly as the rules of law governing their contract.*

30. *The Governing Council further expressed satisfaction at the inclusion of the Institute's request for formal endorsement of the UNIDROIT Principles 2010 by the United Nations Commission on International Trade Law (UNCITRAL) on the agenda of that Organisation's 45th session, to be held in New York from 25 June to 6 July 2012.*

Item 5 on the agenda: International Interests in Mobile Equipment*(a) Report on the diplomatic Conference for the Adoption of a Protocol to the Cape Town Convention on Matters specific to Space Assets (C.D. (91) 4(a))*

31. The *Secretary-General* introduced this item, in the absence for health reasons of Mr Martin Stanford, who had been in charge of this project since its inception. He referred to document C.D. (91) 4(a), in particular for details of the issues at stake and a breakdown of the positions held at the diplomatic Conference in Berlin. He hailed the completion of this third Protocol to the Cape Town Convention after 10 years of work as a significant achievement, which rounded off the list of instruments originally contemplated by the Cape Town Convention itself. The road to the Space Protocol had not been an easy one, with a considerable setback in 2007 when some of the industry advisers withdrew their erstwhile support and some companies took up a hostile position. Also, this project had not benefited from the same level of practical support that had been so decisive for the success of the Aircraft Protocol. However, in the end the final outstanding issues (the treatment of public services and the provisions on limitation of remedies in respect of physically linked assets) had been settled at the diplomatic Conference (Berlin, 27 February to 9 March 2012), not least thanks to the positive, constructive attitude of countries that had initially been reserved in their views of the Protocol.

32. In addition to these substantive provisions, five resolutions had also been adopted at the diplomatic Conference: (1) mandating the Secretariat to set up a preparatory commission for the establishment of the international registry for space assets; (2) inviting the governing bodies of the International Telecommunications Union (ITU) to consider the matter of the ITU becoming Supervisory Authority upon or after the entry into force of the Protocol; (3) inviting the Supervisory Authority of the International Registry for space assets to ensure that, so far as practicable, any search of the International Registry relating to physically linked assets reveal all international interests registered against such assets, as also any rights assignments, acquisitions by subrogation and rights reassignments recorded as part of the registration of those assets; (4) encouraging all Contracting States, and international, national, as well as private financing institutions, to assist the developing Contracting States by providing them with reasonable discounts or rebates on any exposure rates or similar charges levied by such financing institutions; (5) requesting the Reporter to prepare an official commentary on the Protocol, in close co-operation with the Secretariat and in co-ordination with the Chairman of the Commission of the Whole, the Chairman of the Final Clauses Committee and the Chairman and members of the Drafting Committee. The *Secretary-General* expressed his appreciation to Sir Roy Goode who, in his capacity as rapporteur, had helped to clarify a number of technical questions raised by delegations during the process. He also thanked Professor Sergio Marchisio, who had been the representative of Italy to the Diplomatic Conference and Chairman of the Commission of the Whole.

33. It was now time to start thinking about promoting the new instrument and ensuring its early entry into force. ITU had already confirmed its interest in becoming the Registrar. A considerable number of emerging and developing countries had stressed the importance of the Protocol in helping this group of countries develop their space capabilities, and the Secretariat would be focusing on that target group in the early stages. While some industries remained hostile to the Protocol, there were some signs of a possible change of heart in the future. Laborious though the process might be, there was every reason for optimism as to the prospects for the new Protocol's eventual entry into force.

34. Mr *Gabriel* congratulated the Secretariat on the positive outcome of a decade's work and, seconded by the *President*, expressed his gratitude to Mr Martin Stanford for his untiring efforts to bring this about.

35. *The Governing Council took note of the positive outcome of the diplomatic Conference and authorised the Secretariat to take the steps necessary to promote the early entry into force of the*

Protocol, in particular among the emerging and developing States that stand most to benefit from it.

36. *The Governing Council took note of Resolution 2 of the diplomatic Conference, which invited the governing bodies of ITU to consider the matter of its becoming Supervisory Authority upon or after the entry into force of the Protocol and requested the Secretariat to liaise with the ITU Secretariat, as appropriate, and to provide the latter with any assistance or information it might require to assist the governing bodies of ITU in their deliberations.*

37. *The Governing Council invited the Secretariat to commence consultations with the President of the Conference as regards the composition of the Preparatory Commission, notably bearing in mind the desirability of ensuring geographical representation.*

(b) Implementation and status of the Cape Town Convention, Aircraft Protocol and Luxembourg Rail Protocol (C.D. (91) 4(b))

38. Mr Atwood (UNIDROIT Secretariat) referred the members of the Council to document C.D. (91) 4(b) for particulars, confining himself to highlighting some points warranting particular attention. As regarded the status of the Convention and its Protocols, he noted that strong progress had continued to be made over the previous year on the ratification of the Convention and the Aircraft Protocol, with 8 new Contracting States for the Convention, and 9 new Contracting States for the Aircraft Protocol. This meant that the Cape Town Convention and the Aircraft Protocol were now by far the most successful of UNIDROIT's treaty instruments. Nevertheless, there was still potential for further progress – particularly within the European Union – and the Secretariat would continue its work to promote and assist ratifications. It would also continue its efforts to bridge the gap between the number of Contracting States for the Convention and the Aircraft Protocol, which was due to the fact that not all States fully understood the need to ratify the Aircraft Protocol in order to reap its benefits.

39. The first ratification of the Luxembourg Rail Protocol had been received from the Government of the Grand Duchy of Luxembourg, which had played a key role in developing the Protocol, and was to be the host State for the future International Registry. Much work remained to be done, however, to raise the profile of the Luxembourg Protocol and to promote further ratifications. The relatively slow rate of ratification had been due to delays in establishing the international registry and low levels of awareness of the Protocol, even amongst rail operators and manufacturers.

40. Negotiations with SITA NV to operate the Rail Registry were well in hand: four meetings had been held and agreement had been reached on several outstanding issues. A new, revised proposal was about to be submitted and the Secretariat was confident that it would be accepted. The issue of the need to promote ratifications had been raised during the contract negotiations. With this in mind, the parties had agreed to establish a Ratifications Working Group – representing the Secretariats, the Rail Working Group and the International Registry – with a view to identifying and coordinating opportunities to maximise the promotion and ratification of the Rail Protocol. At all events, all was now in place for the contract negotiations to be wrapped up around the end of May 2012, with the contract ready to be signed by the summer.

41. In terms of promotion, a matter worth noting was the Cape Town Convention Academic Project, an initiative to be run jointly by the University of Washington in the United States and the Oxford University in the United Kingdom, with sponsorship by the Aviation Working Group, which would go a long way to help promote the profile of the Convention, its study and understanding. UNIDROIT had agreed that the projected database and academic journal would be undertaken under the joint auspices of UNIDROIT and the project. The database, in particular, was set to grow to be a very valuable resource, aspiring as it did to contain a complete, living documentary history of the Convention and Protocols with cutting-edge search, storage and retrieval software. The Secretariat would also be participating in the inaugural Cape Town Academic Conference, to be held in September 2012, which would be an excellent platform to promote the Convention and monitor

ongoing developments. Finally, a seminar had been convened in November 2011 to mark the 10th anniversary of the adoption of the Cape Town Convention. A forthcoming special edition of the *Uniform Law Review* would focus on this seminar and its findings.

42. Mr *Bollweg* welcomed the news that the Luxembourg Rail Protocol was now back on track and expressed confidence that a workable register would shortly be in place and that ratifications would then follow. He particularly thanked Sir Roy Goode for involving himself for a fourth time in writing an Official Commentary. Mr *van Loon* (Secretary General, the Hague Conference on Private International Law) inquired whether there was a specific policy in place in respect of registers. He noted that the prospective registrar for the Luxembourg Protocol was a private commercial entity, whereas that for the Space Protocol was an intergovernmental Organisation. In reply, the *Secretary-General* pointed out that all the registries for the Cape Town Protocols were private companies but that they acted under the supervision of an authority, possibly a governmental body.

43. Mr *Carbone* referred to the possibility of extending the Convention to ships, noting that the next meeting of the *Comité Maritime International* (CMI) was to be devoted to the issue of establishing a uniform law on the arrest of ships. Problems had arisen in that connection with regard to the recognition of decisions concerning the transfer of ships following their arrest, and this might therefore be the right moment for UNIDROIT to make a move. Mr *Bollweg* agreed. The *Secretary-General* referred to Agenda item 5(c), noting that the Secretariat was examining the matter and intended to report again to the Council at its 92nd session in 2013.

(c) *Preparation of other Protocols to the Cape Town Convention, in particular on matters specific to agricultural, mining and construction equipment (C.D. (91) 4(c))*

44. Mr *Atwood* (UNIDROIT Secretariat), referring for detail to document C.D. (91) 4(c), stated that the Secretariat had, in accordance with the Governing Council's decision at its 90th session to mandate the Secretariat to continue consultations on a possible fourth Protocol, convened a forum in November 2011 at which an excellent presentation had been made on industry perspectives – including some of the practical difficulties encountered in asset-based financing in various markets – from which it had emerged that the Protocol could potentially have a role in overcoming anomalies and comparative inconsistencies between jurisdictions, in relation to security interests in the relevant equipment. However, the clear message had been that it would be very difficult to assess the advantages without more specific information about the potential economic impacts and benefits. The Secretariat had since received an offer from the Center for Economic Analysis of Law to undertake an economic assessment of the proposed Protocol, and an agreement had now been reached for the Center to undertake this work, on a *pro bono* basis. The final version of the assessment was expected to be available later in 2012. An advance draft of the framework for the economic analysis had been circulated to members of the Council the previous week. The paper was as yet very preliminary, containing no detailed analysis in relation to the specific objects of mining, agriculture and construction equipment. The Center was currently consulting with industry representatives to obtain a better understanding of the barriers to asset-based financing of “mac” equipment, the extent of the problems and, crucially, whether there would be a role for a Protocol in addressing those problems. A first impression did suggest a potential role for such a Protocol, both because of the size of the relevant industry (larger than that for aircraft) and because the problems identified by the industry to date appeared capable of being addressed by a Protocol.

45. In the discussion that followed, Mr *Atwood*, in reply to a question by the *President*, confirmed that the analysis might also look at the cost of enforcing the security by the financing party. Generally speaking, a broad approach was being taken to examining all costs and barriers.

46. Ms *Sabo* postulated that the key question was whether the relevant mobile equipment was equipment that crossed borders, and whether it was financed internationally or domestically. If the Protocol were to apply to domestically financed equipment, this might undermine and duplicate efforts that had already been made in other Organisations to promote a general secured financing

regime in a domestic context. Mr *Atwood* agreed that this was indeed the missing piece and one that had been discussed at the forum: the Cape Town Convention focused on internationality and cross-border movement, which was where all the economic benefits came from. This did not by and large appear to be the case of high-value agricultural equipment – such equipment did cross borders but far less frequently than the equipment covered by the three existing Protocols – and it was a question of ascertaining the extent to which barriers to financing related to that much more limited international movement. The Cape Town system was not about setting up domestic securities regimes. Hard figures and research would be needed to compare the extent of domestic financing with international financing. Although it was true that much was done domestically, this was by no means comprehensive since businesses continued to run into barriers in domestic processes and a Protocol might offer some potential to expand the availability of finance. The *Secretary-General* added that the scope of a possible fourth protocol was an issue that had been much debated but had not yet been resolved. There would be no point having a protocol that substituted for appropriate domestic transaction regimes, since there were plenty of examples of existing international legislation on domestic financial transactions. It behoved the Institute to be selective as to the types of equipment that should be covered and it was important to gain reliable, empirical insight into the extent of cross-border movement of that equipment. The practicality of any new regime would have to be borne in mind, having regard to the structure of the registry system that covered only uniquely identifiable equipment.

47. Sir Roy *Goode* noted that a further point to be borne in mind was that the existing protocols all dealt with equipment of which only few types existed and that was uniquely identifiable. Agricultural equipment, on the other hand, presented a vast array. Unique identification and how to narrow down the scope were the most serious issues in identifying the scope of the prospective protocol. The internationality issue was more tricky since there was no definition of internationality. Mr *Bollweg* agreed with both Ms Sabo and Sir Roy, but added that the business involved was an export business, relating to the manufacture of agricultural equipment, the cross-border nature of which could not be placed in doubt. He hoped the economic impact study would look into the potential interest into such a protocol in other parts of the world, such as East Asia. The *President* referred to the important step the Institute stood poised to make by becoming involved in private law aspects of agriculture, and noted that it might become appropriate in that connection for international Organisations to turn to the problem of a legal regime for financing very important strategic equipment, such as that needed to modernise farming methods. Also, regional Organisations such as OHADA might benefit from the existence of such a Cape Town-type regime.

48. *The Governing Council took note, with appreciation, of the offer made by the Center for the Economic Analysis of Law to undertake an economic impact analysis of a possible fourth protocol and requested the Secretariat to develop further the scope and terms of reference for the study and the factors to be taken into account in the economic impact analysis.*

49. *The Governing Council requested the Secretariat to continue its consultation efforts with potentially interested industries.*

Item 6 on the agenda: Transactions on transnational and connected capital markets

(a) *Principles and Rules on the Netting of Financial Instruments (C.D. (91) 5(a))*

50. The *Secretary-General* introduced this item, referring to document C.D. (91) 5(a) for particulars, a summary of the deliberations of the Study Group and the background of participants in the Group. The Governing Council was being invited to approve the Secretariat' request to convene a committee of governmental experts to consider the draft proposal on principles and rules on the netting of financial instruments prepared by the Study Group set up following the Council's 89th session. Briefly tracing the history of the project, he recalled that the Council had first made a positive recommendation to include the topic on the Institute's Work Programme in 2008, on the basis of a proposal by the International Swaps and Derivatives Association (ISDA). That proposal had

subsequently been withdrawn from the agenda for the General Assembly meeting in the wake of the financial crisis in 2008, and a more in-depth study commissioned not emanating from representatives of an industry that had come under heavy fire and criticism for what at the time was perceived as a somewhat excessive level of risk-taking in financial markets. That new study had been prepared by a former staff member, Mr Philipp Paech, and on the basis of his text the Council had, at its 89th session, unanimously confirmed its interest in the topic and assigned it the highest priority. The General Assembly had done likewise later that same year. The Secretariat had accordingly set up a Study Group of leading experts, the largest ever convened by UNIDROIT, to ensure input from all major constituencies and stakeholders, primarily national and international supervisory bodies, but also academia, the legal profession and the financial industry. The Study Group met three times, twice in 2011 and once in 2012.

51. Referring to document (91) 5 (a) Add. 1 for the text of the proposed Principles, the Secretary-General then briefly commented on several of the draft Principles, recalling, first, that the form of principles had been chosen rather than a hard-law instrument because of the unanimous view of all the regulators that a hard-law instrument would be unlikely to attract a sufficient number of ratifications at this point in time. Moreover, netting was already the subject of various provisions of subsidiary legislation in Europe and further texts were on the drawing board at the European Commission. The main purpose of the Principles was simple: they set out to invite countries to pass legislation ensuring the enforceability of close-out netting provisions both in the event of, and prior to, insolvency. Close-out netting was widely regarded by the sector as one of the main instruments for mitigating market risk and reducing exposure to counterparty failure.

52. Principle 1 gave a definition of the term 'close-out netting provision', which was a particular type of arrangement that was the result of a contract and that included arrangements to reduce mutual debts to a single net amount. The Principle 2 dealt with the eligibility of the parties, the general recommendation being that any legal entity should be allowed to enter into a netting agreement. Whether or not this should include individuals had been felt to be too sensitive a topic and had been referred to States to deal with as they saw fit. Principle 3 defined the eligible obligations that covered most of the traditional financial market instruments that had been the subject of close-out netting under master agreements. The analysis of these transactions proceeded from three considerations indicating why close-out netting was a particular type of arrangement that covered obligations sharing certain common features, and it was because of these common features that regulators believed that close-out netting should be enforceable. These were all transactions that were subject to very rapid changes in value and this meant that unless the parties were able to net, their risk exposure could be very large and, in the event of insolvency, they might be left with a very large book of potential liabilities open. This was why the ability to net was regarded as one of the main attributes of a sound system to contain systemic risk in financial markets. Principle 4 dealt with formal requirements for close-out netting in terms that broadly followed the language used in the 2002 EU Directive on Financial Collateral Arrangements (the EU Collateral Directive, the only text on this topic existing at international level and very widely implemented).

53. Principle 7 was in effect the main principle, dealing with the enforceability of close-out netting arrangements, which again echoed the language in the EU Collateral Directive (Article 7(1)). In sum, it recommended that parties should be allowed to close-out net and make the arrangement enforceable even in the event of insolvency proceedings, with some exceptions, such as fraud. Another was the matter of cherry-picking by the insolvency administrator in deciding which contracts to perform, which could result in unwinding the entire netting regime and expose the counterparty to unlimited and incalculable risk. Principle 8 addressed the question of a stay on contractual arrangements made under a close-out netting provision. In discussing the interplay between close-out netting and the resolution powers of regulators in respect of financial institutions, the Study Group, which included members of the Financial Stability Board who were well acquainted with the findings of the April 2001 Final Report of the Multidisciplinary Working Group on Enhanced Disclosure to the Basel Committee on Banking Supervision, had decided to await publication of the final report

of the Financial Stability Board in October 2011. The draft finalised by the Study Group in February 2012 took full account of the Board's recommendations on that point, which identified the legal framework for set-off and netting as one of the key attributes in promoting financial stability, but cautioned against hampering the effective implementation of resolution measures. Even though netting should generally be enforceable, a short stay should be allowed to enable regulators to take control and assess the situation of an ailing financial institution, for example to separate part of the assets and liabilities into a bridge bank. Principle 8 embodied the conclusions of the Financial Stability Board in the draft text, though without specifying a time frame.

54. Finally, there was the issue of conflict of laws. This had not been fully considered by the Study Group but would be part of the final package submitted to the committee of governmental experts. There had been some initial discussion at the first meeting of the Study Group to include a provision on choice-of-law clauses. Master agreements with close-out provisions invariably contained a choice-of-law clause. In practice, the law chosen tended to be the law of one of the leading financial markets in the world. The topic was ultimately set aside as too complex at the time. The Secretariat would submit to the Study Group a much milder Principle recognising that choice of law was not universally accepted (even though the Rome regulations in the European Union made it a given principle, as indeed did the U.S. restatement of law) and that it would be better simply to defer to the normally applicable law. The Comments could then explain what the practice was and why parties often chose a particular law. The draft had been submitted to a number of experts as well as the Secretary-General of the Hague Conference on Private International Law for preliminary comment, and would subsequently be sent on to the member States by e-mail, upon which the document would be completed and forwarded to the Committee of governmental experts, hopefully in the first week of October 2012.

55. Given its small scope and despite the complexity of the topic, it was expected that the Committee might consider and finalise the text in two five-day sessions some five to six months apart, so that the final product might be before the Council at its 92nd session for final approval and publication.

56. Mr Sołtysiński admitted to being rather in a quandary since his position as Chairman of the Study Group rather diverged from that of the Secretariat. His objections were threefold: (a) he did not think that the Principles reflected the deep divisions among legal scholars and economists about netting as an institution, to which the Group's report made no reference; (2) he felt them to be one-sided, representing as they did 90% of the view taken by the interested segment of the industry; (3) the Study Group had shied away from certain important issues, such as the issue of walk-away clauses and wait-and-see clauses, that in some jurisdictions had already been rejected as unfair and not permissible.

57. Principle 7, in particular, went too far in his view and ran counter to Articles 1.4 and 1.5 of UNIDROIT's very own Principles of International Commercial Contracts, which dealt with mandatory rules. The argument that similar language was used in other, recently adopted instruments such as the EU Financial Collateral Directive was not, he argued, convincing. It might be wise to recommend that Principle 7 should also refer to mandatory rules and to the principles and rules proposed in the netting regulation. As to the institution of netting itself, he recalled that there was a considerably body of opinion worldwide that did not look upon netting with any affection, some regarding it as one of the prime accelerators of the financial crisis. The UNIDROIT document should at least refer to the problems, admitting that there was indeed a conflict between bankruptcy law and netting. While it would be unrealistic to assume that the practice of netting could be stopped at once, it should be recognised that there were deep differences of opinion as to its consequences. Summing up, he expressed concern that the principle of equality of economic players was being trumped, with more privileges for the privileged, and that the principle of protection in civil law was less and less respected.

58. Mr Sołtysiński concluded by stating that, in his view, two key Draft Principles on close-out netting transactions (Principles No. 6 and 7.1) failed to give proper recognition to mandatory rules, thus suggesting limitation of regulatory powers of States aimed at protecting fair business practices and transparency requirements for the netting provisions and all contracts covered thereby. He also stressed that, in his view, the final report disregarded critical evaluations of close-out netting effects in recent legal and economic publications, in particular in the United States. The Governing Council took note of Mr Sołtysiński's views and requested him to prepare a summary of his comments, which should be presented by the UNIDROIT Secretariat to member States along with the report on the Governing Council's session.

59. All the speakers in the ensuing debate, including Mr *Sołtysiński* himself, agreed that a committee of governmental experts should be convened. Most also showed that Mr Sołtysiński's remarks had struck home. There was considerable discussion of the relative merits of soft vs hard law. Ms *Jametti Greiner* argued that while soft law might be "safer" from an international Organisation's point of view, the negotiation of hard law made a valuable contribution to the legal community. Moreover, if it was true that netting mitigated systemic risk, the rules should be binding. She accordingly felt that the expert committee should also take up the matter of the form the instrument would take, and that enough time should be taken to examine some of the points made by Mr Sołtysiński in depth, since there was no obligation to finalise the project the following year. These views were echoed by Mr *Govey*, although Mr *Gabriel*, while he confessed to concern, felt comforted that the regulators had been strongly represented on the Study Group. Mr *Bollweg*, although initially hesitant, was now persuaded that a soft law instrument was the answer, also because it was a much faster process. Ms *Sabo* agreed with Ms *Jametti Greiner* that the form of the document should be discussed by the expert committee, but felt that in this case, Principles seemed to be the better way forward. She took the view that two expert meetings should be sufficient to come up with a good-quality product. She urged a discussion by the Study Group of the Private International Law aspects of the process. She suggested that the Permanent Bureau of the Hague Conference might provide a preliminary, more general set of comments highlighting some of the issues that might arise. Mr *Voulgaris* felt that the door should not, at this stage, be closed to a hard-law instrument on at least some of the issues covered by the proposed Principles, in particular Principle 7. Mr *Carbone's* preference was for the soft law option, since the issues at stake were evidently so complex as to render sufficient ratifications highly unlikely. He argued, however, that the issue of conflict of laws should be left out of the equation. Likewise, he saw no quarrel with the UNIDROIT Principles of International Commercial Contracts since the proposed Principles did not prevent the application of overriding international mandatory rules but left it up to individual States and legal orders to take appropriate measures to adapt their own system to the proposed solutions. Mr *Mo* felt the key issue was the need to strike a balance between sometimes contrasting views, as had been evidenced in the current debate. In that sense, he shared the concerns expressed by Mr Sołtysiński. The soft law / hard law option should be carefully assessed. Mr *Tricot* for his part expressed satisfaction that the Study Group had thoroughly addressed the conflict of interests issue, and declared he would keep an open mind on the hard / soft law conundrum. He did wonder about the composition of the Committee of governmental experts, where he felt competence and independence should be twin objectives. He hoped that UNIDROIT would give recommendations to ensure a proper balance, for balanced results, while good, objective reasons should be given for any advantages that might be conferred on any one group. Mr *Aondoakaa* noted that since, of the eight Principles in hand, some were unproblematic and most of the criticism seemed to centre on Principle 7, rather than proceed to a general overhaul of the entire set, Principle 7 should be re-visited to accommodate the issue of equal treatment that had been alluded to.

60. The *President* came out in favour of the soft law option, not least because central banks and financial institutions would not co-operate if only hard-law instruments were on offer, preferring to rely on flexible rules and making the most of common values and rules. The main objective was to provide security for the markets, and this seemed impossible without netting.

61. Mr *Elmer* also stressed the problem of imbalance referred to by Mr Sołtysiński. He noted that the instruments which the draft sought to cover were often used for speculative purposes, which made them a political problem. It would accordingly be wise to work along the lines of principles, not hard law.

62. Mr *van Loon* (Secretary General, Hague Conference on International Private Law) picked up on the comments made by Ms Sabo. He recalled that the HCCH had expressed interest in the private international law aspects of the project and promised to assist. The HCCH Council of General Affairs had just recently expressed support for such assistance and included it in the recommendations and conclusions with its mandate to work with UNIDROIT on these questions. The question now was whether that assistance was to be on purely technical issues or extended to policy issues. The HCCH Secretariat had prepared informal comments on the UNIDROIT Secretariat's informal proposals, and it was now time to consider the next step. The issues at stake were familiar to the HCCH following its work on the law applicable to intermediated securities, but were here presented in a slightly different context. Special mandatory rules might become relevant for some of these issues, such as gambling or public policy concerns, restrictions of party autonomy, special concerns as to the relationship between the governing law and insolvency law. Then there were specific questions, such as the relationship between the law governing the master agreement. To the extent that these questions were of a technical nature, HCCH assistance would not raise much of a problem, but difficulties might arise with regard to the policy issues that had been identified and some of which might even be hidden in the proposals. For the Conference to move beyond the informal comments, it required further guidance from UNIDROIT as to what was expected of it. A different set of policy issues arose from the relationship between the Principles and existing national and regional laws, e.g., the EU directives which at times were ambiguous.

63. Responding to the various interventions, the *Secretary-General* expressed his appreciation to Mr Sołtysiński, stating that it was his very ability to provide a counterbalance within the Study Group, with its preponderance of pro-netting regulators, that had made him the ideal candidate to chair the Study Group. However, the Committee of governmental experts would have the final say. That committee would be appointed independently by the States and might include academics, banking regulators, private practitioners, security and exchange commissioners, and so on. The Secretariat's role was confined to servicing the group and inviting civil society and industry representatives to provide input as observers. Netting was widely admitted as deserving exceptional treatment in case of insolvency, and the timing and pace of the work had been carefully considered so as to take into account the effects of the crisis and the thinking that went into re-assessing certain key rules of financial markets by the regulators. The Secretary-General did agree that it might be preferable to be more explicit in the explanatory notes to the Principles, setting out the rationale and policy reasons for protecting netting as in Principle 7. As to the form of the instrument, the Secretary-General said he understood the sector generally not to be in favour of hard law. It had therefore been decided to opt for the soft law approach for the time being, yet leaving the door open to a hard law instrument should opinions evolve in this regard.

64. In response to the comments made by Mr Van Loon on conflict of laws, the Secretary-General agreed that this was a difficult issue from both a substantive and a procedural point of view. At this point, the text envisaged very general rules that simply said that the proper law of the contract governed formation, the eligibility of transactions for netting, and a few other aspects; the law applicable at the insolvency forum governed certain matters such as *actio pauliana*, fraud, and so on; where the law applicable to an underlying contract differed from the law applicable to the master netting agreement, the latter should prevail. No positive rule actually specifying the proper law of the netting contract was envisaged, since that was a private international law question. Once the Study Group had determined how much was needed and how far it could go, the Secretariat proposed again to approach the Hague Conference Permanent Bureau for advice. Whether that advice would be direct or filtered through a more formal process was, of course, a matter entirely for the Hague Conference to decide.

65. *The Governing Council took note of the progress made by the Study Group and endorsed the proposal to convene a Committee of governmental experts to consider and finalise the Draft Principles.*

(b) *UNIDROIT Convention on Substantive Rules regarding Intermediated Securities: follow-up work and promotion (C.D. (91) 5(b))*

(c) *Principles and Rules Capable of Enhancing Trading in Securities in Emerging Markets (C.D. (91) 5(c))*

66. Ms *Schneider* (UNIDROIT Secretariat) introduced these items, briefly summarising documents C.D. (91) 5(b) and (c). The promotion and follow-up of the Geneva Securities Convention were largely the work of the Committee on Emerging Markets Issues, Follow-Up and Implementation that had been set up by the diplomatic Conference and that would remain in place until the Convention entered into force, following which an assessment committee would take over. She noted that the status of implementation of the Convention had remained unchanged, no ratifications of accessions having yet been recorded. The English version of the Official Commentary had been published in April 2012 by the Oxford University Press and was being widely distributed. The French version had now also been completed (published by Schulthess (Switzerland), LGDJ (France), and Temis (Canada)), and was scheduled to become available in June 2012.

67. Several promotional seminars had been organised, including one in China in June 2011 at the initiative of Switzerland. The Emerging Markets Committee had met twice, once in Rome in 2010, and again in Rio de Janeiro in March 2012 at the invitation of the Brazilian Securities and Exchange Commission (CVM). Like the first meeting, the Rio seminar had been in two parts, a very well-attended colloquium and a Committee meeting to assess follow-up. Several States were found to be drafting relevant legislation that drew heavily on the 2009 Convention, while others indicated they were awaiting publication of the Official Commentary before deciding how to proceed. Some sought UNIDROIT's assistance to draft appropriate legislation. The EU Commission had been present at the meeting and had indicated that its own work in this area was progressing satisfactorily and that its proposals did not run counter to the Geneva Convention, rather, they should be regarded as a supplement thereto.

68. As to the proposed Legislative Guide to advise countries wishing to ratify how best to incorporate the provisions into their domestic law, few comments had thus far been received from member States as to the possible scope and content of such a Guide, which would serve as a checklist for prospective ratifying States. The overall impression, however, was one of general support for such a Guide. The committee had therefore decided to set up a smaller working group, chaired by Switzerland, that would work with the Secretariat to propose subjects for the Guide and develop them. The group was to report to the Emerging Markets Committee at its next meeting, which was expected to be held in early 2013, in an emerging country yet to be designated.

69. As to possible future work by UNIDROIT in the area of capital markets, it had been suggested that UNIDROIT might bring its expertise in the field of private law harmonisation to the subject of trust and examine how this institution might be used to improve the security of financial transactions. Support had also been expressed for the idea of turning the Geneva Securities Convention into an assessment standard and, in respect of future work, it had been suggested that the company law aspects mentioned in the Convention should be examined more closely, looking at, for example, voting rights or securitisation. Finally, the Secretariat had agreed in principle with the University of Luxembourg to launch a scientific co-operation project with a Centre of Financial Markets Law which would be established by the University of Luxembourg with the support of other interested parties in Luxembourg. It was envisaged that the Centre would play a role in promoting UNIDROIT's work in the field of Financial Markets Law.

70. Ms *Jametti Greiner* reiterated her country's strong support for the Geneva Convention. Legal certainty and hard rules were sorely needed in this area, and in token of its commitment to support the Institute in its promotional work, the Swiss Government was prepared to fund and organise a meeting in Geneva to ensure follow-up and bring the Convention to visibility. The seminar in China to which Ms Schneider had alluded had attracted an informed audience, and although no ratifications were as yet in sight, there had been encouraging indications of interest, nevertheless.

71. Ms *Sabo* expressed satisfaction that work on the Legislative Guide was progressing with a smaller working group looking at details. She expressed interest in the suggestion that thought might be given in a more distant future to the institution of the trust, particularly as she herself came from a jurisdiction that had both a common law and a civil law trust. She hoped this notion might re-surface in the future.

72. Mr *van Loon* (Secretary-General, Hague Conference on Private International Law) recalled that with the United States poised to seek Senate consent, the Hague Securities Convention was now about to come into force, and he suggested that the momentum gained in this exercise might be used to advance ratification of the Geneva Convention, as well. This was a typical example of an area where savings could be made by combining promotional efforts. As to trusts, he recalled that UNIDROIT had done seminal work in the 1950s whose depth and scope had proved tremendously useful as a basis for research on the Hague Trust Convention..

73. Mr *Sorieul* (Director, International Trade Law Division, UNCITRAL) recalled that UNCITRAL had tentatively included work in the field of non-intermediated securities on its work programme in 2007 but had since held back to see what UNIDROIT might wish to accomplish in this field. The *Secretary-General* replied that at the moment, the priority was to build on the rocks of the Geneva Securities Convention, and prepare the Declarations Memorandum and the Accession Kit. There was nothing to hold UNCITRAL back if it wished to go ahead with this topic, provided it was clear what was meant by non-intermediated securities. From the point of view of the Geneva Convention, non-intermediated securities were securities that were not capable of being held in a securities account, *i.e.*, securities not traded on the securities markets or securities issued in physical form, or other types of securities. This was also why the Emerging Markets Committee, in discussing this, had concluded there was no reason to deal with those types of security since they were completely outside the scope of the Geneva Convention. The Secretary-General took the opportunity to specify that the proposed and much less ambitious Legislative Guide would simply present to States the options available to them for treating matters which the Convention assumed were the object of some level of legislation or regulation in the implementing country. The Guide would deal only with those issues where the Convention referred to non-convention law, be narrative in form, and describe the options, relative advantages and disadvantages in a balanced and neutral form, without trying to promote any one single way of filling the gaps of the Convention. The Governing Council was being invited to express an opinion on the continuation of the somewhat *ad hoc* and *sui generis* body that was the Emerging Markets Committee which, in the normal run of things, would have ceased existing at the end of the Geneva diplomatic Conference. Its members, all Government-appointed, were all experienced representatives of Stock Exchanges or securities regulators who found the Committee meetings extremely useful. Any text they might develop would of course be submitted to the Council for review and approval. They formed an interesting think-tank for the future of the Convention.

74. Ms *Sabo* saw no objection to the Emerging Markets Committee continuing its work. She inquired whether the Governing Council would be consulted and asked to approve the Guide when they had finished with it. The *Secretary-General* confirmed that this was the working assumption.

75. *The Governing Council took note of the follow-up and promotion activities relating to the Geneva Securities Convention, as well as of the measures proposed to prepare a future Legislative Guide containing principles and rules capable of enhancing trading in emerging financial markets. The Council welcomed the proposal to develop first a document setting out the options available for*

regulating those areas of the law which, although related to the 2009 Geneva Securities Convention, were not directly or wholly addressed by this instrument.

Item 7 on the agenda: Third Party Liability for Global Navigation Satellite Systems (GNSS) Services (C.D. (91) 6)

76. Ms *Peters* (UNIDROIT Secretariat) introduced this item, referring to Doc. C.D. (90) 6 for detail. Further to the Governing Council's decision at its 90th session in 2011 to mandate the Secretariat to continue consultations with representatives of interested Governments, international Organisations, industry and other stakeholders with a view to ascertaining the level of potential support for the GNSS project, defining its possible scope and clarifying its essential features, a third informal meeting had been organised on "Risk Management In GNSS Malfunctioning" (Rome, 11 November 2011), which had been universally considered to be balanced and well attended. The air and maritime industries had been represented (but not road industries), as had been insurers and trade associations (IATA and the International Chamber of Shipping, and a number of intergovernmental Organisations including the ITU (but not the ICAO). No clear-cut majority view had emerged from the meeting. In sum, part of industry, particularly those sectors that had well-established practices, such as maritime insurance, saw no immediate need for an international instrument; other industry representatives felt that the issue was being considered only from the narrow perspective of particular industries; while yet another group preferred to wait and see. Some practising lawyers pointed to potential difficulties with the future interoperability, as did some representatives of academia, while some questioned the rationale for any work in this area. However, no one had said that UNIDROIT should stop examining legal issues related to third party liability for GNSS malfunctioning; on the contrary, discussion had been felt to be a good thing, even for cross-fertilisation of the developing domestic environment (this view was expressed by both the Russian and the Chinese representatives). The expected EU Commission impact assessment (first semester of 2012) might, it was felt by many, provide useful input for further discussion.

77. The Secretariat had been represented at the Munich Satellite Navigation Summit 2012 on "GNSS and Security" in March 2012. Although primarily aimed at engineers, not lawyers, that meeting had permitted the work so far conducted at UNIDROIT to be explained to participants, and had offered sometimes startling insights into the increasing number of uses to which GNSS services were being put, for example in "precision agriculture".

78. For a complete picture permitting a final decision as to whether work at UNIDROIT should be taken a stage further, industry sectors not hitherto canvassed should be sounded out, such as the road sector, agriculture, financial services, but also Location Based Services (LBS). For this, a further consultation might be carried out, first and foremost with representatives of the sectors not represented at the November 2011 meeting, in the light of the results of the impact assessment currently being conducted by the European Commission were to be taken into account.

79. In the discussion that followed, Ms *Sandby-Thomas* wondered why, with the European Union, the United States, Russian and China all forging ahead in this area, parties should feel bound by anything the Institute might do in this area. Mr *Govey* concurred that with the current system working well in practice and global systems operating, there did not seem to be much point in changing the liability regime internationally. Ms *Broka*, although she had been in favour of doing work in this area the previous year, now felt it would be prudent to await the outcome of the aviation summit that was to discuss issues of performance-based navigation later in 2012. Of those in favour of dropping the subject from the Work Programme altogether, Mr *Hartkamp* nevertheless saw no harm in the Secretariat continuing to monitor developments, while Ms *Sabo* urged the Institute to use its resources for more promising work. The *Secretary-General* pointed out, however, that continuing to monitor the subject and reporting to the Council the following year would not entail any large commitment of resources. He also noted that countries outside Europe had shown some interest,

even if they were not committed as to the system to be deployed. Industry might be more attracted if there were any real prospect for an improvement in insurability.

80. *The Governing Council mandated the Secretariat to continue monitoring current developments, in particular the results of studies currently undertaken by the European Union, and gauging potential interest in such an instrument while maintaining the project's low priority status.*

Item 8 on the agenda: Model Law on Leasing: follow-up and promotion

81. The *Secretary-General* introduced this item, referring to the Annual Report (document C.D. (91) 2 for detail). Several countries had already implemented the Model Law or used it for law reform purposes; an Official Commentary had been published; unofficial versions of the Model Law now existed in Arabic, Chinese, Russian and Spanish, as well as an unofficial version in Russian of the Official Commentary. The Swiss Secretariat of State for Economic Affairs had indicated its agreement to support the Institute, mainly by funding promotional seminars for the Model Law around the world, and discussions had been held with the Indonesian Ministry of Foreign Affairs to organise a follow-up seminar. The International Finance Corporation had expressed interest in sponsoring such events in the countries of the Common Market for Eastern and Southern Africa (COMESA), and a proposal had been received for the University of Oxford to stage an event in Oxford. Last but not least, the Uniform Law Review had devoted a double issue (2011-1/2) to the topic of leasing.

82. *The Governing Council took note of the progress recorded by the Secretariat over the past year in promoting the UNIDROIT Model Law on Leasing by means, in particular, of a varied programme of seminars.*

Item No. 9 on the agenda: International Protection of Cultural Property (C.D. (91) 7)

(a) *UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects – Implementation, status and promotion*

83. Ms *Schneider* (UNIDROIT Secretariat) introduced this item, referring to document C.D. (91) 7 and the Secretary-General's annual report (document C.D. (91) 2) for detail and statistics on the status of the Convention. She recalled that the 1995 UNIDROIT Convention was promoted essentially in partnership with other Organisations, primarily with UNESCO, but also with other partners including the Istituto Italo-Latino Americano, the United Nations Office on drugs and crime (UNODC), the European Union, Interpol, and the International Council of Museums (ICOM). Ratifications and accessions often followed meetings or workshops on illicit trafficking or on the Convention itself. Such meetings had been held over the past year in, among others, Namibia (which had been important in triggering the interest of prospective African States Parties), Bahrain and Uruguay. The Secretariat had been able to participate in these meetings thanks to the generosity of the various organisers, in particular UNESCO. The Governing Council had, at its 90th session, agreed to convene a follow-up committee, in accordance with Article 20 of the Convention, to review the practical operation of the Convention. This meeting had now been convened for 19 June 2012 at UNESCO Headquarters, on the occasion of other related UNESCO meetings (2nd meeting of States Parties to the 1970 UNESCO Convention and 18th session of the Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in case of Illicit Appropriation). A questionnaire had been sent out together with invitations to all the member States both of UNIDROIT and UNESCO, as well as the Signatory States and States Parties to the 1995 Convention. There were to be three sessions, one explaining why UNESCO had asked UNIDROIT to work with it in this area and how international restitution worked outside the Convention framework, and assessing the Convention mechanisms from a regional point of view; another session on why it was important for States to work with non-governmental Organisations such as museum associations, archaeologists, groups, etc. in resisting the anti-Convention merchant lobby; and finally, a round table to discuss the

impact of the UNIDROIT Convention on national legislation, good practice codes, case law, as well as on international instruments such as the EU Directive, which took its cue from UNIDROIT Convention especially as regarded the limitation periods for claims for restitution.

84. *The Governing Council took note of the efforts deployed by the Secretariat to promote the 1995 UNIDROIT Convention.*

(b) Publication and promotion of the UNESCO/UNIDROIT Model Legislative Provisions on State Ownership of Undiscovered Cultural Objects

85. In introducing this item, Ms *Schneider* (UNIDROIT Secretariat) again referred to document C.D. 91 7). Work on the model legislative provisions had been conducted together with UNESCO and had been prompted by the need to assist those States lacking appropriate legislation in establishing ownership of cultural objects located in their sub-soil. The model provisions had been submitted to UNESCO in 2011 and UNIDROIT member States had been consulted by electronic means. The document had been neither adopted nor ratified, but both Organisations had taken note of its completion and, in a joint letter from the UNESCO General Director and the UNIDROIT Secretary-General, placed the model legislative provisions at States' disposal to apply if and as they wished.

86. Mr *Sánchez Cordero* expressed his gratitude to the Secretariat for its guidance and assistance in bringing these guidelines about. The working method adopted by the two participating Organisations had proved extremely successful. The use of technical language devoid of ideological overtones was a practical means of making international instruments more effective. He announced that Mexico would be taking part in the meeting of the follow-up committee in June, and that it would be organising a symposium in March 2013 on the globalisation of cultural heritage protection, which he invited all Governing Council members to attend. The symposium was intended as a brainstorming session to produce specific proposals with a view to UNIDROIT and UNESCO undertaking more projects in this important field.

87. Ms *Sabo* hailed the project as an excellent example of effective collaboration but stated that Canada would not, for internal reasons, be responding to the questionnaire sent out in advance of the follow-up committee meeting, although it would be represented at the June meeting in Paris. As to the model legislative provisions, although these were judged excellent and potentially very useful in some situations, the legislative authority for cultural property in Canada lay with the provinces and territories, not with the federal Government. Canadian Heritage had, however, transmitted the text of the model provisions to the provinces and territories. Mr *Király* stressed that the practical operation of the 1995 UNIDROIT Convention was still a priority for Hungary, and it was hoped that the model legislative provisions would give new impetus to this important instrument. There were plans to organise an international seminar on its application in Budapest the following year. Mr *Mo* inquired whether the definition of undiscovered cultural objects extended to objects located beneath the ocean as well, to which Ms *Schneider* replied that the 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage specifically dealt with these issues but that the model legislative provisions did not, confining themselves to territorial waters. There was no overlap between the two.

88. *The Governing Council took note of the state of advancement of the work and Council members undertook to assist in promoting and disseminating the Model Provisions among the national legislative bodies in the States in their region.*

Item 10 on the agenda: Private Law and Development (C.D. (91) 8)

- (a) *Report on the Colloquium "Promoting Investment in Agricultural Production: Private Law Aspects" (Rome, 8-10 November 2011) (C.D. (91) 8(a))*
- (b) *Possible future work on private law aspects of agricultural financing (C.D. (91) 8(b))*

89. Ms *Mestre* (UNIDROIT Secretariat) introduced this item, referring to document C.D. (91) 8(a) for detail, reminding the Council members that background for the highly complex issues involved was also to be found in the special issue of the Uniform Law Review (2012-1/2), which reproduced the Acts of the Colloquium on "Promoting Investment in Agriculture: Private Law Aspects" that had been held under UNIDROIT auspices in Rome from 8-10 November 2011. Briefly, what was at stake was identifying where UNIDROIT might best bring its private law expertise to bear on the issue of agricultural financing, particularly, but not exclusively, in the developing world, at a time of pressing need to improve global food security. The matter had first been broached in a set of preliminary documents submitted by the Secretariat in 2009, and two Rome-based United Nations agencies (the Food and Agriculture Organization (FAO) and the International Fund for Agricultural Development (IFAD)), had been approached, both of which played a key role in rural development and financing. Organised with a view to identifying the private law aspects that UNIDROIT might tackle in this area, the November 2011 colloquium in Rome had sought the views of high-level experts on five subjects, in the full knowledge that these were only the tip of the iceberg, and that none of them existed in isolation but were generally intertwined. These five subjects were title to land; investment contracts in agricultural land; legal structure and operation of farmers' organisations; collaborative strategies, with particular emphasis on contract farming; and finance for agricultural production.

90. In light of these discussions and the insight they had offered into where and how UNIDROIT might become implicated, the Secretariat proposed that the Institute approach this entirely novel field from an angle with which it was thoroughly familiar, that of contracts, possibly in the form of a legal guide. Preliminary soundings with the FAO and IFAD had confirmed these Organisations' potential interest in becoming involved in the work, which would aim at developing a detailed legal instrument, presented in a balanced manner and taking care not to overlap with the work of other Organisations, and intended to improve the legal framework in general, to assist in drafting contracts (be they collective or standard), and to provide recommendations and guidelines for legislative reform so as to encourage States to pass legislation aimed at protecting farmers. At some later stage, the Institute might contemplate also doing work on one or another of the other topics addressed at the Colloquium (e.g., investment contracts in agricultural land), not least in view of the possible preparation of a fourth Protocol to the Cape Town Convention and in light of the relevance of existing UNIDROIT instruments such as those on leasing, factoring, franchising, etc.

91. Mr *Blaise Kuemlangan* (Chief Development Service, FAO) welcomed his Organisation's collaboration with UNIDROIT and other agencies in the field of food security. Much had been achieved by the FAO in this respect, but gaps remained and progress was still slow in some areas, in particular where the private law interface was concerned. The FAO had attended the November colloquium with great interest, food security definitely being an issue also for the private sector. The FAO was already looking at best practices in the area of contract farming and assisting member countries in developing their own regulatory frameworks, but such frameworks could only go so far, not being capable of intervening in private transactions. That was why a UNIDROIT project in this important field would go a long way to ensuring that ethics and best practice were promoted not only in the public law sphere, but also in the private law arena.

92. Ms *Carmen Bullon* (Legal Officer, Development Law Service, FAO) took up the narrative at this point, addressing the technical aspects of contract farming, the approach taken by the FAO and how it saw its collaboration with UNIDROIT moving along. The FAO's Department of Agribusiness had been working for over 20 years to strengthen the position of small farmers in their contractual relations, thus strengthening food security and the capacity of smallholders to participate in the different value

chains. In attempting to gain a better understanding of the private-law-related issues involved in these contractual relations, the FAO Legal Office had analysed the international regulatory framework so as to establish what was a contract, how to strengthen the legal capacities of smallholders, what were their contractual rights, and what was the national legislation governing contracts, and had sought to determine how Governments could improve their relevant legislation, since that varied widely, most countries having no specific contract farming legislation. The FAO did not have the capacity to enter into the legal aspects of these issues that UNIDROIT had, and was accordingly extremely interested in UNIDROIT's expert input and collaboration in this highly important area of work.

93. Mr *Rutzel Martha* (General Counsel and Director of Legal Affairs, International Fund for Agricultural Development (IFAD)) recalled that his Organisation aimed to provide loan finance to its member States for the purpose of developing agriculture. It had early on come to realise the need to target its efforts and now focused on smallholder agriculture in rural areas with a view to integrating the smallholder into the value chain. The Organisation had sought to develop a market perspective on this issue, so as to facilitate smallholders' access to finance, but since this was an area where its knowledge was limited, it was looking to Organisations such as UNIDROIT for assistance. There were two main issues involved: the inhibitions of market players to provide finance to smallholders, and the possibility of empowering smallholder farmers. UNIDROIT expertise could help IFAD in designing better projects.

94. The *Secretary-General* expressed his gratitude to the FAO and IFAD for their interest in working with UNIDROIT on these matters. It had been manifest from the outset that there was a clear potential synergy between private law and agricultural development, and the way in which investment in agriculture could facilitate the integration of smallholders into the value chain. Several policy issues were involved in terms of food security and the design of policy measures to promote smallholder entrepreneurship. While many of these issues went beyond the Institute's expertise and mandate, UNIDROIT intended to use its private law expertise and working methods to test common solutions for a tool for use by the specialist Organisations in assessing to what extent a particular contract or value chain was helping to integrate smallholders and whether the solutions adopted were working or not. This was the value-added that UNIDROIT felt it had to offer. The basic premise was that UNIDROIT would not deal with the policy issues addressed by the proper bodies, but that its work would be informed by those policies. The project would start along traditional UNIDROIT lines, with a core group of renowned experts in certain aspects of contract law (e.g., contract chains, distribution contracts, contracts specifically dealing with agriculture), but involving also representatives of the policy-making partner Organisations and other potentially interested bodies such as the World Food Programme and International Development Law Organisation (IDLO), lawyers, inhouse counsel (advising agri-business companies or the farmer cooperatives). If the Council agreed, a first meeting could be held later in 2012.

95. Before opening the discussion, the *President* stressed that private law played an indispensable supplementary role to public law in the field of contracts. Public law might issue prohibitions and regulate certain unacceptable aspects of contractual practice, but could not effectively improve the nitty-gritty of contract practice. This was the domain of private law. The discussion that followed evidenced widespread enthusiasm for the way in which the Secretariat had filtered down what had started out as a "vague, rather amorphous general project on food security" to come up with a highly "do-able" project (in the words of Mr *Gabriel*). Messrs *Gabriel*, *Operti Badan*, *Tricot* and *Hartkamp*, Ms *Sabo* and Ms *Broka*, all approved the choice of contract farming for a first project, and welcomed the prospect of coordinating the work with the partner Organisations. Mr *Voulgaris* saw an appropriate legal framework as indispensable to improving food security in a world characterised by a wholesale drift from the land. Mr *Gabriel* added that it was important to see whether a possible fourth Protocol to the Cape Town Convention might fit into this project, and how the Institute's prior achievements, e.g., on leasing and factoring, could be integrated into it. The other possible subjects

for research mentioned in the Secretariat memorandum should be held in reserve for possible future reference.

96. *The Governing Council took note of the Report on the Colloquium held in Rome on 8-10 November 2011 on "Promoting Investment in Agricultural Production: Private Law Aspects".*

97. *The Governing Council authorised the Secretariat to proceed to the establishment of a Study Group for the preparation of an international guidance document to contract farming arrangements – its first meeting to be held before the end of 2012 – and to invite FAO, IFAD and other interested international Organisations to participate in its work.*

98. *The Governing Council authorised the Secretariat to pursue – resources permitting – its consultations and preliminary work with a view to the possible preparation, in the future, of an international guidance document on land investment contracts, taking account, in particular, of the UNIDROIT Principles of International Commercial Contracts.*

99. *The Governing Council further authorised the Secretariat to monitor – resources permitting – developments at the international and national level in respect of reform and modernisation of land tenure regimes; and to take note of possible future projects in respect of the legal structure of agricultural enterprises and of an international guidance document to agricultural financing, with a decision to be taken at a later date, in light of the work which will by then have been carried out by UNIDROIT in the field of agriculture.*

100. *The Governing Council further mandated the Secretariat to promote – resources permitting – those UNIDROIT instruments in the area of finance that are of particular relevance to agricultural financing, in particular the UNIDROIT Conventions on International Financial Leasing and on International Factoring, as well as the UNIDROIT Model Law on Leasing.*

Item 11 on the agenda: Legal Co-operation Programme

101. Ms *Mestre* (UNIDROIT Secretariat) introduced this agenda item, for which no document had been prepared, the situation having remained essentially unchanged since the Council's previous session. The developing countries continued to be a main focus of the Programme. Efforts were being made to launch new initiatives in partnership with other Organisations. She briefly sketched the Institute's modest scholarships programme, which had been set in place twenty years previously, and which was largely funded by outside donors.

102. Mr *Opertti Badán*, in his capacity as Chairman of the Scholarships Sub-committee, stressed the importance of the scholarships programme as an efficient tool to promote UNIDROIT and its work. The sub-committee had noted the allocation made by Chapter 11 of the Institute's general budget in 2011, expressed its gratitude to the scheme's donors (the Netherlands, the Republic of Korea, the UK Foundation for International Uniform and Transnational Law), and confirmed the renewal in 2012 of the scholarship that was traditionally funded by the Governing Council. He hoped that the scheme might be developed further on the basis of the Institute's Strategic Plan, and called on Council members to support the Secretariat in its search for new funding.

103. Mr *Gabriel* wondered how many of the 35 applications that had been received for the period under consideration had resulted in the award of a grant, while Ms *Sandby-Thomas* inquired as to the criteria used in selecting beneficiaries, in particular whether the geographical spread had been broad enough. Ms *Mestre* generally referred the Council members to the detailed report that had been submitted, but indicated that roughly 12-15 grants were actually awarded each year. As to the geographical distribution, much depended on the preferences expressed by the donors themselves, which were a priority criterion in deciding the grants. The applicant's research programme was likewise important, since this needed to dovetail with the Institute's Work Programme. For example,

the new netting project might attract funding from banking circles. It was the Scholarships Subcommittee's task to supervise the scheme's implementation from year to year. Submissions were checked and general guidelines handed down for the coming year. The Secretariat had a broad mandate to select applicants in accordance with the selection criteria laid down by the Governing Council. Mr *Opertti Badán* added that it was important to separate objective criteria from the actual selection process, in order to arrive at balanced and fair solutions.

104. *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. Members of the Council and the Secretary-General decided to renew their personal contribution to the programme with a view to funding one research grant in 2013.*

Item 12 on the agenda: Correspondents (C.D. (91) 9)

105. Ms *Schneider* (UNIDROIT Secretariat) introduced this item, referring to document C.D. (91) 9) for detail. She recalled that the Governing Council's deliberations in recent years had been closely linked to the discussions on the Strategic Plan. Several attempts had been made to re-vitalise the network of correspondents at a time when information technology was increasingly rendering the institution of UNIDROIT correspondent redundant. Several options were before the Council: (1) to refer the procedure for the possible reappointment of the correspondents for a further year; (2) to freeze the mandates until further notice; (3) to renew the mandates automatically for three years. The Secretariat had deferred proposing new appointments pending a discussion in the Governing Council on the future of the system. Most correspondents' mandates had now again run out, and pressure of work had prevented the Secretariat from following its usual procedure of asking correspondents whether they wished to be confirmed in their position. The Secretariat was, however, proposing to nominate two new correspondents in recognition of their contribution to UNIDROIT's work. A new category of "institutional" correspondents had been created in 2011 and the Secretariat was proposing to nominate the *Max-Planck-Institut für ausländisches und internationales Privatrecht*.

106. Mr *Govey* stated that in his view, correspondents were potentially very important for UNIDROIT and the system should be maintained in some way or another. He advocated that mandates be extended for another year pending a thorough review. Mr *Wallace* agreed, but felt the position of correspondent should be a working one, not a mere honour. One of the correspondents' main tasks should be to make UNIDROIT better known all round, rather than for just one or two of its more resounding achievements (such as the UNIDROIT Principles and the Cape Town Convention) and then only in certain circles. The Institute was entitled to some form of commitment on the part of its correspondents, and the proposed appointment of the Max Planck Institute was a step in the right direction. Ms *Sabo* concurred. Mr *Gabriel* recalled that a committee of Council members had been put together some five years previously that had submitted proposals that had been unanimously agreed. One such was the requirement that there should be (renewable) term appointments. He advocated regularly asking correspondents whether they wished to continue as such and to regard a failure to respond as tacit agreement to discontinue. Messrs *Bollweg* and *Lyou* and Ms *Sandby-Thomas* seconded this, the latter adding that it was vital to define the purpose of being a (working) correspondent. She also suggested appointing a chief correspondent to take some of the workload involved in maintaining the correspondents network off the Secretariat's shoulders. Mr *Tricot* agreed with Mr *Gabriel* that the discussion went back some time and that there was clearly a problem taking appropriate steps to achieve what seemed to be the general aim of creating a network of active correspondents. While the list of correspondents probably did need to be thinned out, he suggested the Institute concentrate on the more active names on the list and using these as the nucleus of a new system, without formally dispensing with the services of eminent elders.

107. The *President* suggested that a small committee be set up to reconsider the matter and report to the Council the following year. He also proposed that institutional donors be given the option of becoming institutional correspondents.

108. *The Governing Council appointed Professor Bénédicte Fauvarque-Cosson, Professor of Law, Université Panthéon-Assas Paris II and Professor Reinhard Zimmermann, Professor of Law and Director at the Max-Planck-Institut für ausländisches und internationales Privatrecht, Hamburg as correspondents of the Institute.*

109. *The Council also appointed the Max-Planck-Institut für ausländisches und internationales Privatrecht of Hamburg as institutional correspondent.*

110. *The Council established a small committee to reconsider ways of revitalising the correspondents system and to report back to the Council at its next session.*

Item 13 on the agenda: The Library (C.D. (91) 10)

111. The *Secretary-General* introduced this item, referring to document C.D. (91) 10 for particulars. He recalled that the Governing Council had discussed the Library extensively in the context of the Strategic Plan at its 90th session. One issue that had been discussed was the type of library that the Institute was held by its Statute to maintain. It was clear that a specific strategy was needed that clearly defined what the Library *could* be and do for the Institute, rather than what it *should* be. Investment was the Library's lifeblood, yet the Library was usually the first victim of budget cuts, as had happened the previous year. Some relief had come from two sources, one being the President, who had succeeded in raising funds from private law firms in Italy, the other the Board of the Uniform Law Foundation, which agreed to earmark any surplus in its accounts relevant to the Institute for the Library. However, much more was needed to maintain a Library of this type. A meeting of head librarians had been held in Rome to assess synergies and acquisition policies, among other things, and more such meetings were being planned. It should also be borne in mind that the Library was a crucial tool for the Institute's scholarships programme.

112. An important development had been the expertise carried out by the Director of the Library of the Max Planck Institute of Foreign Private and Private International Law in Hamburg in March 2012. The general tenor of his report was that the Library should sharpen the focus of its acquisition policy, fine-tuning it to the UNIDROIT Work Programme. It should not aim at being a universal comparative law Library – comparative law should be supportive of UNIDROIT's current activities but no more. He had advocated focusing on the main Western European languages in selecting materials to be purchased. The Library was proposing to add some more online data base subscriptions, but it was difficult to find data bases offering sufficient coverage in French, German and Spanish. While the Library's resources could clearly not be increased overnight, the collection should be brought up to date with the most important works and the gaps that had built up in recent years filled. For that alone, some 100,000 – 200,000 euros would have to be found. Even a refocused library would need a regular purchase budget in the order of 160,000 euros a year. None of this was achievable in the short or even medium term, and other sources of supplementary funding would have to be located, through the Uniform Law Foundation, fund-raising, etc. To some extent, the Secretariat might aim at re-allocating resources from other parts of the budget (*e.g.*, from the resources freed if the Review were to be published by the Oxford University Press).

113. In the discussion that followed, the *President* pledged to continue his own efforts to raise funds for the Library. He stressed the importance of conveying to the outside world the image of a modern institution that kept pace with the spirit of the times. He also advocated seeking closer cooperation links with other cultural institutions, such as major universities. He regretted the need to reduce the number of languages covered in the Library and suggested asking the countries (or publishers) whose languages were being phased out to continue providing subscriptions free of charge, so as not to interrupt the Library's collections. Ms *Sabo* agreed, and asked whether in addition to budget constraints, the Library also had space problems. She suggested bringing in the depositary libraries and the UNIDROIT correspondents to provide copies of books and monographs. Mr *Elmer* regretted the language cuts but acknowledged its rationale. He felt it was at least worth trying to persuade national

bodies to provide UNIDROIT with important periodicals, but he feared these were now mostly online. He suggested that arrangements could perhaps be made with other Libraries to borrow materials. Ms *Sandby-Thomas* welcomed the prospect of a more focused library strategy. She also supported the President's point about the Institute's image and suggested this might be discussed at the next Council session.

114. The *Secretary-General* noted that the expert report had found the Library's main backlog to be for treatises and monographs in recent editions, and that the Library should be focusing on these in the immediate term. Borrowing books from other libraries, particularly if they were physically distant, was very difficult, but the Library had been successful in expanding inter-library loans for articles with the help of scanning. As to Ms Sabo's point, the strategy had always been to obtain as many exchanges as possible, essentially through the medium of the *Uniform Law Review*, but now that the *Review* was about to be outsourced to the Oxford University Press and fewer copies would be available for exchange purposes, the Library was culling its exchange list with a view to removing periodicals dealing mostly with topics not immediately relevant to the Institute. The Library did have space problems, as well as a problem of inadequate conditions for the proper preservation of holdings against humidity. Some collections that were also found in other Rome-based libraries might be moved elsewhere.

115. *The Governing Council took note of the progress made by the Secretariat, in particular the steps to be taken in light of an expertise carried out by the Max-Planck Institute taken to optimise available resources and re-vamp the Library's acquisition and collection strategy.*

Item 14 on the agenda: UNIDROIT information resources and policy (C.D. (91) 11)

116. Ms *Peters* (UNIDROIT Secretariat) introduced this item, referring to document C.D. (91) 11 for particulars, with one small addition: the royalties from HeinOnline for 2011, which had not been available at the time the document had gone to press, had amounted to \$ 3,708.65.

117. The documents on the different means of information had been merged into a single text. This was because the Secretariat was elaborating a coordinated information policy, with the different means of providing information being coordinated in a manner they had not been hitherto but maintaining the distinct role of each. Ms *Peters* gave a brief overview of the salient points relating to each of the four components in turn.

(a) Uniform Law Review / Revue de droit uniforme and other publications

118. The question of editing the *Uniform Law Review* – described by one former Secretary-General as the "business card" of the Organisation – had been a major consideration in negotiations with the Oxford University Press which had offered to take over the production and distribution of the journal. Production would include editing the articles in both English and French – an important consideration. A draft contract – more flexible than the OUP standard contract – was now being considered. The positive points were that OUP would take over editing and invoicing, and use their resources for marketing, and the Institute would retain quite a large number of complimentary copies of the *Review* for exchange and other purposes. However, the OUP was a commercial enterprise as opposed to UNIDROIT, and UNIDROIT would be committed to submitting all materials in time for the OUP publication plans.

119. As to the other publications, and referring Council members to the Annual Report (document C.D. (91) 2), Ms *Peters* specifically mentioned the *UNIDROIT Principles*; an agreement between UNIDROIT, UNCITRAL and the Hague Conference to publish a volume on *the instruments prepared by the three Organisations on security interests*; a second agreement between the OUP and UNIDROIT to include the *Official Commentary to the 2009 Convention on Intermediate Securities* in the OUP catalogue; the proposed discontinuation of publication of the *UNIDROIT Proceedings and Papers* and

the collection of the documents on CD-ROM; the preparation by Professor Sir Roy Goode of an *Official Commentary to the Cape Town Convention and Space Protocol* as well as updated versions of the Official Commentaries of the Convention and the Aircraft and Rail Protocols; and finally, the proposed publication of information booklets with individual UNIDROIT instruments.

120. *The Governing Council took note of the progress made in respect of the Uniform Law Review and other publications. It noted the Secretariat's ongoing negotiations with the Oxford University Press for the production and distribution of the Review from 2013 onwards.*

(b) *The UNIDROIT Web Site and Depository Libraries for UNIDROIT documentation*

121. The most important and effective means of providing information was without doubt the website. Its present structure was fundamentally the same as when the site was first created in the 1990s. The time had now come to pass to newer technology and elaborate a new site that was able to incorporate features not previously compatible, such as the website proper and a simplified database.

122. As to the Depository Libraries (listed on the website and in document 11), these libraries did not receive all UNIDROIT materials (for example, only 31 out of 52 received the Uniform Law Review). Furthermore, in a digital age, when all documents were posted on the website, the utility of a Depository Library was questionable. The cost of maintaining the collections might not be excessive, but clearly their utility must be estimated and might in actual fact be more political than practical.

123. *The Governing Council took note of the progress made in expanding the UNIDROIT web site and confirmed its importance as a valuable means of disseminating and promoting UNIDROIT's activities.*

(c) *The Uniform Law Data Base (C.D. (91) 11 Add. – CMR)*

124. Turning to the UNILAW database, Ms Peters indicated that an agreement had been concluded with the *Institut du droit international des transports* (IDIT) under which IDIT took over the section of the UNILAW database dealing with the CMR, including the case law and the bibliography, with a view to hosting the section on their website. The details of those negotiations were to be found in document 11 Add., submitted by Professor Putzeys. As a consequence of the work that needed to be done on the database before transferring the CMR to the IDIT site, work on the database section on the CMR stopped at the end of 2011. The other sections required little maintenance and were updated as required. A new website was being planned which would include such database features as were supported by the software.

125. Mr Putzeys gave a brief account of the mission he had been given by the Governing Council to negotiate the transfer of the CMR content of the UNILAW data base to the *Institut du droit international des transports* (IDIT). He recalled that UNIDROIT had been one of the prime movers behind the CMR and other transport Conventions. While it was disappointing that staffing and cost considerations had compelled the Institute to discontinue work on the data base, IDIT was an excellent successor that had the resources and know-how to develop the data base and make it work. A central issue in the negotiations had been UNIDROIT's firm insistence on the key principle that consultation of the data base continue to be "free of fee". Another important point on which assurances were given was the need to guarantee and monitor the quality of the information provided.

126. Mr Deleanu, Mr Voulgaris, Ms Sandby-Thomas and Ms Sabo hailed the prospect of outsourcing the Uniform Law Review to the Oxford University Press and expressed satisfaction that the Review was to remain bilingual. Mr Deleanu inquired whether the Review was indexed in the American Web of Science system. As to the depository libraries, Mr Tricot, Ms Sabo and Mr Gabriel recommended maintaining the system, the latter inquiring only what was provided to the libraries, since most materials were now available online. Mr Voulgaris asked about possible links in the UNIDROIT website

to other sites. Mr *Tricot* commented that although it was difficult to find French publishers willing to distribute the UNIDROIT Principles if they did not print them themselves, the search for such a publisher would continue. He stressed the importance of keeping the cover of the volume identical, whoever the printer.

127. The *Secretary-General* recalled that the Institute's information policy had been repeatedly discussed by the Governing Council, also in the broader context of the Strategic Plan. The financial report contained in the document before the Council showed that the cost of publications clearly outstripped any revenue therefrom. The Secretariat had been seeking to separate publications on the instruments produced by the Institute from the Uniform Law Review, which was not the result of a process of political negotiation as the instruments were and for which it was feasible to involve a commercial operation such as the Oxford University Press. If the OUP took over, the net revenue from the journal for the Institute would be reduced, but this would be offset by savings on the cost of production which might be used for other activities. The main thing was that UNIDROIT would retain intellectual control. The UNIDROIT Principles were an entirely different matter, being an instrument adopted by the Council, and it was important that the Institute retain full control in this area. Here, income was not the prime consideration.

128. Replying to the various questions put by speakers, the Secretary-General stated that basically, the libraries got what they asked for: only the Review, the Acts and Proceedings, the CD-Rom, or all. As to the provision of web links, the Secretariat's first move in re-structuring the data base had been to move away from ambitious and unrealistic full coverage of all existing uniform law instruments and instead to offer a gateway to uniform law, providing a collection of links in the web site to instruments not elaborated by the Institute.

129. Mr *Sánchez Cordero* expressed his gratitude to Professor Putzeys for his dedication to the cause, as did the *Secretary-General*, who thanked Professor Putzeys for his unfailing commitment to the Uniform Law Foundation and the CMR data base, and for his essential role in guiding the transition of the data base to IDIT with a view to continuing the dissemination of information on case law and the CMR. This kind of strategic partnership was a model to be followed in other areas.

130. *The Governing Council took note of the report on the transfer of the CMR section of the UNILAW Data Base to the Institut du droit international des transports (IDIT). It expressed its gratitude to Professor Jacques Putzeys for bringing the relevant negotiations to a successful conclusion. The Council took note of the steps that will be taken by the Secretariat to merge the UNILAW website with the main UNIDROIT web site and shut down the separate UNILAW web site.*

Item 15 on the agenda: Strategic Plan (C.D. (91) 12)

131. The *Secretary-General* recalled that the substantive discussion of the Strategic Plan had taken place at the previous Council session in 2011 and that the document now before the Council (C.D. (91) 12) consisted of the text discussed at that session, as revised by the Secretariat on the basis of the discussions. Rather than return to a debate on individual topics, members of the Council were now being invited to confirm that the document was in conformity with the decisions taken at their 2011 session, so that it might be submitted to the General Assembly for approval in December 2012. That document would be the broad strategic plan for the years to come, and while it went without saying that potential topics for the Work Programme and other activities must be vetted to see that they fit in with the Strategic Plan, the document was intended also to forestall the need to re-open the discussion on the Strategic Plan year after year.

132. Ms *Sandby-Thomas* agreed that the document reflected the general tenure of the previous year's discussion, but that it gave little tangible direction in terms of an actual plan. What was needed was some concrete indications not just as to what the objectives were but also how they were to be realistically achieved. Ms *Sabo* concurred, stressing that individual items on the Work Programme

must now be assessed in light of the relevant objectives stated in the Strategic Plan. Much along the same lines, Mr *Operti Badán* called for the document to be used as a guide for future work.

133. Mr *Gabriel* noted that the document now before the Council very properly integrated the Strategic Plan as submitted the previous year and the discussion on the report of the sub-committee set up several years previously that had taken place at the Council's 2011 session. As to synthesising that document and moving forward, the most sensible plan would be to direct the Secretariat or better still, another committee to bring the Strategic Plan itself to a different level and to "operationalise" it (in Ms *Sabo's* words), rather than attempt to achieve this at the current session. These views were echoed by Ms *Sabo*, Mr *Govey* (who suggested the Secretariat come up with what he referred to as a corporate plan to give life to the items in the Strategic Plan, to be discussed at the start of the following year's Council session), Ms *Broka* (who suggested the document be reviewed no more than once every two or three years), Mr *Sołtysiński*, Mr *Hartkamp*, and Mr *Operti Badán*.

134. The *President* declared that document C.D. (91) 12 had been approved by consensus, as it stood, and closed the discussion. The possibility of forming a small committee to stimulate the Secretariat's operational decisions should be kept in mind, or the Council members might be invited to make relevant proposals during the year.

135. *The Governing Council took note, with appreciation, of the revised version of the Strategic Plan prepared by the Secretariat at the request of the Council at its 90th session in 2011, and authorised its submission to the General Assembly*

Item 16 on the agenda: Preliminary discussion regarding the future Work Programme for the triennial period 2014 – 2016 (C.D. (91) 1 rev.)

136. The *Secretary-General* referred to document C.D. (90) 17 for detailed information. He recalled that the current Work Programme extended through the year 2013. The practice was that proposals and suggestions for the next Work Programme would be gathered and member States and correspondents consulted in the course of 2012, the resulting document to be submitted to the Governing Council for recommendation and subsequent adoption by the General Assembly in 2013. The Council were invited at the current session to engage in a very preliminary, informal exchange of views, bearing in mind the items on the current Work Programme that had in the meantime been completed.

137. Opening the preliminary discussion on the Institute's next Work Programme, the *President* stated that since the budget did not permit the Institute to undertake all it would like to do, thought should be given to how to make UNIDROIT more actively present in the programmes of other institutions, such as universities, which had the resources to forge a fruitful partnership, while UNIDROIT had the prestige, know-how, contacts, and products. This idea was taken upmet with approval by Ms *Jametti Greiner* (who referred to her earlier announcement of a Swiss initiative to promote a binding instrument for international contracts in the framework of UNCITRAL, which she felt was as an perfect example of such collaboration), Mr *Sołtysiński* and Ms *Sabo*.

138. Mr *Hartkamp* inquired as to the feasibility of adding new topics to the Work Programme, since some ongoing projects had not yet been finalised and resources were tight, and in reply, the *Secretary-General* recalled that the Work Programme and the Strategic Plan were two different documents. The former was triennial and set out the topics on which the Institute was to work, and was comprised of a legislative and an ongoing, non-legislative component. The documents provided by the Secretariat on each project provided information as to the extent to which the resources allocated were in conformity with the level of priority set for each project. It would not be difficult to extend that monitoring exercise to check each activity for its conformity with the Strategic Plan objectives. As to the new Work Programme, the Strategic Plan advocated a selective approach and great care in choosing new topics. The new items that had been proposed since 2008 had been

intended to fit the three feasibility criteria set out in Strategic Objectives 3 and 4. Of the topics on the current Work Programme, which was to expire in 2014, the third edition of the UNIDROIT Principles, the Space Protocol to the Cape Town Convention and the Model Legislative Provisions for cultural property had been completed; work on the netting project and the prospective Legislative Guide on enhancing trading in securities in emerging markets was likely to be completed by the second half of 2013 or in early 2014. The economic impact assessment for a further Cape Town Protocol should be ready by the end of 2012, and no work in that direction would start before the autumn of 2013, at the earliest. The Secretariat's projected study on the possible extension of the Cape Town system to ships would be done in-house; work on third party liability for GNSS services had low priority and was hanging fire pending the EU Commission study referred to earlier; in the area of private law and development, a project focusing on contract farming might produce first results no earlier than 2014. On the non-legislative front, items such as promotion of instruments, etc., depended heavily on the level of available resources. There would be less in-house work on publications; the data base had now been radically reformed, changed and reduced in scope, while work on the web site and the depositary libraries would remain unchanged. In conclusion, while there was some capacity for the inclusion of new work, the first priority should be to finalise the work on netting and to get the contract farming project off the ground. One new topic might be accommodated, at least at the research stage.

139. The *President* warned that the Work Programme was not a straitjacket. The accurate, but traditional approach outlined by the Secretary-General left room for novel ventures such as the institutional-type partnerships to which the President himself had referred earlier in the discussion. Some examples of possible areas for research in the coming year were transfer of title, forms of cooperation between classic contracts and forms of business organisations, and distribution contracts. Mr *Hartkamp* expressed cautious interest in the idea of tackling what was after all a central subject of private law, transfer of title, but he advocated first gauging developments in the European context where various aspects of property law, among which transfer of title, were even now being looked at. As a subject, it was perhaps somewhat out of tune with the general thrust of topics selected by the Institute over the past years. Mr *Voulgaris* likewise expressed interest in the contractual impact of transfer of title, and in distribution contracts, also in connection with franchising contracts.

140. The *Secretary-General*, recalling that the Governing Council had already agreed to work on producing model clauses for the UNIDROIT Principles, noted that the CISG was silent on the subject of transfer of title, and that UNCITRAL might ask UNIDROIT to produce a report to inform its own deliberations. He was reluctant to see the Institute working on domain names (which were a matter of e-commerce, and that was a subject best left to UNCITRAL expertise) and IP rights, where there was a link to the UNCITRAL legislative guide on secured transactions, so there was as risk of conflict and duplication. The *President* pointed out that all international instruments seemed to avoid addressing issues of title, and that there was no risk of duplication in that respect. Ownership of movable objects was a sticky subject, and UNIDROIT was best placed to take the lead in this field.

141. Ms *Sabo* felt the Council now had a general idea of how much room there was on the Work Programme for new topics. She suggested that members come back with fleshed-out ideas measured against the Strategic Plan criteria, with some definition, indications as to whether UNIDROIT was in a position to do the work, and whether the work was needed and likely to be successful. This would produce a good discussion and allow the Council to choose judiciously and perhaps even place some topics on a reserve list. Ms *Sandby-Thomas* returned to the issue of modernising the Institute's image, and other aspects of the Strategic Plan besides actual feasibility criteria that needed to be taken into account when selecting new topics. The *Secretary-General* stated that Ms Sandby-Thomas' remarks would be taken into account and that all aspects would be addressed.

142. *The Governing Council assessed the capability of the Institute's Work Programme to accommodate new topics, and agreed that individual members of the Council would formulate*

suggestions for new topics, appropriately measured against the objectives of the Strategic Plan, for discussion at its 92nd session in 2013.

Item 17 on the agenda: Preparation of the draft budget for the 2013 financial year (C.D. (91) 13)

143. The *Secretary-General* introduced this item, referring to document C.D. (91) 13 for detail. The overall level of projected expenditure and receipts was roughly the same as for 2012, except in one important respect, that of the automatic carryover of any unspent balance at the end of the year. Any such balance would be earmarked for a particular use by authorisation of the Finance Committee after the closing of the accounts for the relevant financial year. The Library was potentially the major beneficiary of that re-allocation, but a certain amount might also be used to help defray the travel costs of Secretariat staff and governmental experts. The perceived shortfall in income in 2011 had been due to different levels of payment discipline in the member States, and although the arrears situation had improved over time it had not been altogether resolved, and new problems were arising in the wake of the sovereign debt crisis. Another issue was the Italian contribution. A supplementary payment had been made in 2010 to offset the decrease in the host State's contributions decided several years previously, but this had not been repeated in 2011. The Secretariat was pursuing the matter with the Italian authorities. All in all, it was unlikely that there would be any surplus at the end of the year 2012. However, no increases in member States' contributions were being proposed for 2013, and the overall level of expenditure was expected to be somewhat lower. The re-classification of member States in the Institute's contributions chart had resulted in 16 member States agreeing to be moved up. That re-classification was not yet 100% complete, with two Eurozone countries having indicated they could not accept any increase this year, and another member State still undecided. All in all, the income side of the budget was not 100% predictable. The reduction made in the first estimate for the 2013 budget concerned Chapters 2 and 3 (which dealt with salaries, allowances and social security contributions and represented the largest fixed costs for the Institute), partly because new retirements were in the offing.

144. Ms *Sabo* welcomed the Secretariat's estimates and in particular the deletion of the estimation of an end-of-year surplus, and she looked forward to a solution to the issue of the Italian contribution, which rendered the Institute's budgetary process rather unpredictable. She wondered whether the proposed increase in the budget allocation to cover the expected larger number of meetings would suffice. In reply, the *Secretary-General* indicated that the number of meetings in 2013 would depend on the assessment made of the aggregate of the Institute's projects. The one-week meeting of intergovernmental experts for the netting project was the main projected event and would cost roughly 20,000 euro, which would leave a comfortable 60,000 euro on the budget to cover two-three study group meetings in 2013. That should suffice unless the Committee of governmental experts failed to complete its work in time. Ms *Sandby-Thomas* wondered whether institutional correspondents might be involved in providing premises for UNIDROIT meetings, and herself offered meeting facilities in London, seating up to 120. The *Secretary-General* indicated that the number of people involved in a governmental expert meeting (which included supporting staff, besides the actual participants in the meeting) was such as to make a venue outside Rome problematic and even in Rome, was too high to contemplate any venue other than the FAO facilities.

145. *The Governing Council took note of the Secretariat's first estimates of receipts and expenditure for 2013. It commended the Secretariat for the improvements made in the financial management of the Institute and expressed its appreciation of the efforts made by the Secretary-General to correct the imbalance between fixed costs and project-related costs by re-allocating resources in the UNIDROIT budget without requesting increases in assessed contributions.*

Item 18 on the agenda: Appointment of the Deputy Secretary General (C.D. (91) 1 rev.)

146. The Secretary-General introduced this item, referring to document C.D. (91) 14 for details of the selection procedure. Further to a decision taken by the Governing Council at its 90th session in 2011, an open international competition had been organised to select a deputy Secretary-General, and 65 applications had been received from all continents, 32 of which showed *prima facie* the required qualifications. Of these, 19 candidates were retained for further consideration in that they showed at least 10 years' experience. Eight applicants were short-listed and interviewed in April 2012. As a result of that procedure, the President was now nominating Professor Anna Veneziano for the position.

147. *The Council commended the Permanent Committee and the Secretary-General for having organised and carried out a highly competitive and transparent selection process. The Council approved the President's nomination, on behalf of the Permanent Committee, of Professor Anna Veneziano, Director of Department of Private Law, Law Faculty, University of Teramo (Italy), noting her outstanding qualifications, and appointed her Deputy Secretary-General of UNIDROIT in accordance with Article 8 of the Statute.*

Item 19 on the agenda: Date and venue of the 92nd session of the Governing Council
(C.D. (91) 1 rev.)

148. *The Governing Council agreed that its future sessions should start on Wednesdays, rather than Mondays, and that its 92nd session would be held from 8 to 10 May 2013 in Rome.*

APPENDIX I
ANNEXE I

LIST OF PARTICIPANTS /
LISTE DES PARTICIPANTS

(Rome, 7 – 9 May 2012 / *Rome, 7 – 9 mai 2012*)

MEMBERS OF THE GOVERNING COUNCIL
MEMBRES DU CONSEIL DE DIRECTION

Mr Alberto MAZZONI	President of UNIDROIT / <i>Président d'UNIDROIT</i>
Mr Rajesh Kumar AGNIHOTRI	First Secretary (Information and Culture) Embassy of India in Italy Rome <i>Representing Mr Biswanath B. Sen</i>
Mr 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 Justice Lecturer Riga (Latvia)
Mr Sergio CARBONE	Professor of Law at the University of Genoa Studio Carbone Genova (Italy)
Monsieur Sergiu DELEANU	Maître de Conférences Faculté de droit de l'Université "Babes Bolyai" Cluj-Napoca (Roumanie)
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 of the Australian Government Solicitor Barton ACT 2600 (Australia)
Mr Arthur Severijn HARTKAMP	former Procureur-Général at the Supreme Court of The Netherlands; Professor of European Private Law Radboud University, Nijmegen Den Haag (The Netherlands)
Mme Monique JAMETTI GREINER	Vice-directrice Office fédéral de la justice Berne (Suisse)
Mr Miklós KIRÁLY	Professor of Law Dean of the Faculty of Law Eötvös Loránd University Budapest (Hungary) <i>Representing Mr Attila Harmathy</i>
Mr Yasuhiko KOBAYASHI	Counsellor Civil Affairs Bureau Ministry of Justice Tokyo (Japan) <i>Representing Mr Itsuro Terada</i>
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)
Mr Didier OPERTTI BADAN	former Ambassador; former Minister of Foreign Affairs; Legal Adviser; Professor of International Law Montevideo (Uruguay)
Ms Kathryn SABO	General Counsel /Avocate générale International Private Law Section /Section du droit privé international Department of Justice Canada / Ministère de la Justice Ottawa, Ontario (Canada)

Mr Jorge SÁNCHEZ CORDERO	Director of the Mexican Center of Uniform Law Professor Notary public Mexico City (Mexico)
Ms Rachel SANDBY-THOMAS	Solicitor and Director-General Legal Services Group Department of Business, Innovation and Skills London (United Kingdom)
Mr Stanisław SOŁTYSIŃSKI	Professor of Law A. Mickiewicz University, Poznan; Sołtysiński Kawecki & Szlezak Warsaw (Poland)
Monsieur Daniel TRICOT	Arbitre et médiateur en affaires (Soc. DTAM) Professeur honoraire des Universités de droit Président honoraire de la Chambre commerciale, financière et économique de la cour de Cassation Paris (France)
Monsieur Ioannis VOULGARIS	Professeur émérite de droit international privé et de droit comparé à l'Université Demokritos de Thrace (Grèce)

OBSERVERS / OBSERVATEURS:

Ms Carmen BULLON	Legal Officer Development Law Service (LEGN) Food and Agriculture Organization (FAO) Rome (Italy)
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>
Mr Keith HEFFERN	Alternate Permanent Representative U.S. Mission to the United Nations Agencies in Rome Chairman of the Finance Committee / <i>Président de la Commission des Finances</i> Rome (Italy)
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M. Jacques PUTZEYS	Professeur émérite Université Catholique de Louvain Brussels (Belgium) <i>Membre ad honorem du Conseil de direction</i>
Mr Renaud SORIEUL	Director International Trade Law Division United Nations Commission on International Trade Law (UNCITRAL) Vienna (Austria)
Mr Hans VAN LOON	Secretary-General Hague Conference on Private International Law The Hague (The Netherlands)
Mr Don WALLACE, Jr	Professor International Law Institute Washington (United States of America)
Mr Christopher WILKINSON	General Counsel International Development Law Organization (IDLO) Rome

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BULGARIA / <i>BULGARIE</i>	Mrs Ana PASKALEVA Second Secretary Embassy of Bulgaria in Italy
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CROATIA / <i>CROATIE</i>	Ms Marija KAPITANOVIĆ Counsellor Embassy of Croatia in Italy

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LUXEMBOURG	M. Michel GRETHEN Premier Secrétaire Ambassade du Luxembourg en Italie
PARAGUAY	Ms Lorena PATIÑO Second Secretary Embassy of Paraguay in Italy
PORTUGAL	Ms Rita LOURENÇO Embassy of Portugal in Italy
RUSSIAN FEDERATION / <i>FEDERATION DE RUSSIE</i>	Mr Evgeny EGOROV Legal Adviser Trade Representation of the Russian Federation in Italy
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SLOVENIA / SLOVENIE

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International Co-operation Service
Ministry of Justice and Public Administration
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Ambassador of Sweden in Italy
Embassy of Sweden in Italy

Mr Tobias AXERUP
First Secretary
Embassy of Sweden in Italy

VENEZUELA

Mr Luis ALVAREZ
Minister Counsellor
Embassy of the Bolivarian Republic of Venezuela in
Italy

UNIDROIT

Mr José Angelo ESTRELLA FARIA
Mr Michael Joachim BONELL
Ms Frédérique MESTRE
Ms Lena PETERS
Ms Marina SCHNEIDER
Mr John ATWOOD
Mr Daniel PORRAS
Ms Annick MOITEAUX
Mr Ole BÖGER
Ms Bettina MAXION

Secretary-General / *Secrétaire Général*
Consultant
Senior Officer / *Fonctionnaire principale*
Senior Officer / *Fonctionnaire principale*
Senior Officer / *Fonctionnaire principale*
Senior Officer / *Fonctionnaire principal*
Associate Officer / *Fonctionnaire associé*
Assistant Officer / *Fonctionnaire associé*
Associate Officer / *Fonctionnaire associé*
Librarian / *Bibliothécaire*

APPENDIX II**REVISED AGENDA**

1. Adoption of the annotated draft agenda (C.D. (91) 1 rev.)
2. Appointment of the First and Second Vice-Presidents of the Governing Council (C.D. (91) 1 rev.)
3. Reports
 - (a) Annual Report 2011 by the Secretary-General (C.D. (91) 2)
 - (b) Report on the Uniform Law Foundation
4. Principles of International Commercial Contracts: publication and promotion of the 3rd edition ("UNIDROIT Principles 2010") (C.D. (91) 3)
5. International Interests in Mobile Equipment
 - (a) Report on the diplomatic Conference for the Adoption of a Protocol to the Cape Town Convention on Matters specific to Space Assets (C.D. (91) 4(a))
 - (b) Implementation and status of the Cape Town Convention, Aircraft Protocol and Luxembourg Protocol (C.D. (91) 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. (91) 4(c))
6. Transactions on Transnational and Connected Capital Markets
 - (a) Principles and Rules on the Netting of Financial Instruments (C.D. (91) 5 (a))
 - (b) UNIDROIT Convention on Substantive Rules for Intermediated Securities: Follow-up work and promotion (C.D. (91) 5(b))
 - (c) Principles and Rules Capable of Enhancing Trading in Securities in Emerging Markets (C.D. (91) 5(c))
7. Third Party Liability for Global Navigation Satellite System (GNSS) Services (C.D. (91) 6):
 - (a) Report on the informal meeting "Risk Management in GNSS Malfunctioning (Rome, 11 November 2011)"
 - (b) Possible future work in the area of third party liability for GNSS services
8. UNIDROIT Model Law on Leasing – Follow-up and promotion
9. International Protection of Cultural Property (C.D. (91) 7)
 - (a) UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects – implementation, status and promotion

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- (b) Publication and promotion of the UNESCO/UNIDROIT Model Legislative Provisions on State Ownership of Undiscovered Cultural Objects
10. Private Law and Development
 - (a) Report on the Colloquium “Promoting Investment in Agricultural Production: Private Law Aspects” (Rome, 8-10 November 2011) (C.D. (91) 8(a))
 - (b) Possible future work on private law aspects of agricultural financing (C.D. (91) 8(b))
 11. Legal Co-operation Programme
 12. Correspondents (C.D. (91) 9)
 13. Library (C.D. (91) 10)
 14. UNIDROIT information resources and policy (C.D. (91) 11)
 - (a) Uniform Law Review/ *Revue de droit uniforme* and other publications
 - (b) The UNIDROIT Web Site and Depository Libraries for UNIDROIT documentation
 - (c) The Uniform Law Data Base
 15. Strategic Plan (C.D. (91) 12)
 16. Preliminary discussion regarding the future Work Programme for the triennial period 2014 – 2016 (C.D. (91) 1)
 17. Preparation of the draft budget for the 2013 financial year (C.D. (91) 13)
 18. Appointment of the Deputy Secretary General (C.D. (91) 1 rev.)
 19. Date and venue of the 92nd session of the Governing Council (C.D. (91) 1)
 20. Any other business

ANNOTATIONS

Item No. 2 – Appointment of the First and Second Vice-Presidents of the Governing Council

1. Since 1977, the Governing Council has at its annual session elected a First and a Second Vice-President who, in accordance with Article 11 of the Regulations of the Institute, hold office until the following session. At present, the post of First Vice-President is occupied by the *doyen* of the Council and that of Second Vice-President by one of the most senior Council members, the latter on the basis of the criterion of rotation since 1994.

Item No. 16 – Preliminary discussion regarding the future Work Programme for the triennial period 2014 – 2016

2. Pursuant to Article 11(2) of the Statute of UNIDROIT, the Governing Council draws up the Work Programme of the Institute and makes a proposal to the General Assembly which is then called to approve it (Article 5(3) of the Statute). The Governing Council, which will be called to make such a proposal at its 92nd session in 2013, might wish to have a preliminary discussion this year on the current and future subjects to insert to the Work Programme for the triennial period 2014 - 2016. See the Work Programme 2011 – 2013 hereafter.

Item No. 18 – Appointment of the Deputy Secretary-General

3. At its 90th session, the Council agreed that, subject to the outcome of the then ongoing reclassification of member States in the Institute's contributions chart, the Secretariat should take the necessary steps to organise, later in the year, an open international competition for the selection of a Deputy Secretary-General under the guidance and responsibility of a Sub-committee of the Permanent Committee that would report back to the Council for final approval. The Secretariat deemed it prudent to await the approval of the budget for the year 2012 by the General Assembly before proceeding with the selection process. The budget for the year 2012, which contemplates full funding for one position of Deputy Secretary-General was approved on 1 December 2011. A vacancy announcement for that position was published on 19 December 2011. The deadline for submission of applications is 12 March 2012. At its 91st session, the Council will consider the report of the Sub-committee of the Permanent Committee on the selection process, for final approval.

Item No. 19 – Date and venue of the 92nd session of the Governing Council

4. Following the tradition of holding Council sessions in April or May, starting on a Monday and avoiding weeks that include public holidays, the Governing Council may wish to consider holding its 92nd session in the week starting 8 April 2013, in the week starting 15 April 2013, or in the week starting 29 April 2013. Alternatively, the Governing Council may wish to start the session on Tuesday, which would allow Council members to travel on Monday, rather than during the weekend.

UNIDROIT Work Programme for the triennial period 2011 – 2013

(adopted by the UNIDROIT General Assembly at its 67th session – 1 December 2010)

A. LEGISLATIVE ACTIVITIES

1. Principles of International Commercial Contracts (UPICC) – 3rd edition ***
2. Preliminary Draft Space Protocol to the Cape Town Convention ***
3. Transactions on Transnational and Connected Capital Markets
 - (a) Preparation of an instrument on the Netting of Financial Instruments ***
 - (b) Legislative Guide on Principles and Rules capable of enhancing trading in securities in emerging markets **/*
4. Preparation of other Protocols to the Cape Town Convention, in particular on matters specific to agricultural, mining and construction equipment **/*
5. Third Party Liability for Global Navigation Satellite System (GNSS) Services **/*
6. Model Provisions on the Protection of Cultural Property *
7. Private law and development
 - (a) Private law aspects of agricultural financing *
 - (b) Legal aspects of social business **/*

B. IMPLEMENTATION AND PROMOTION OF UNIDROIT INSTRUMENTS – LEGAL CO-OPERATION ***

1. Depository Functions
2. Promotion of UNIDROIT instruments
3. Legal co-operation

C. NON-LEGISLATIVE ACTIVITIES

1. UNIDROIT Library ***
2. Publications ***/**
3. Website and Depository Libraries **
4. UNILAW Database **

***	High priority
***/**	Medium/high priority
**/*	Medium/low priority
*	Low priority

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

Tuesday 8 May 2012, 6.00 p.m.

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

The following documents were submitted to the Sub-Committee in addition to the Report on the Implementation of the Programme in 2011: *Study LXV – Scholarships exec. 23 rev.:*

- An updated table setting out funding details for 2012;
- The work, conclusions and research reports of the beneficiaries of the programme in the period January 2011 – April 2012 (available for reference only);
- Applications received by the Secretariat for 2012-2013 (available for reference only).

The Sub-Committee reiterated the important role played by the Scholarships Programme not only in the context of legal co-operation but also as an efficient tool to promote UNIDROIT and its work, building a network of knowledge in a large number of countries.

The Sub-Committee took note with satisfaction of the implementation of the Programme by the Secretariat in 2011 as well as of the research reports submitted by the beneficiaries of the Programme during this period.

As to the financial resources available for 2011, 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 2011 – in particular the Government of the Netherlands, the Government of the Republic of Korea, the *UK Foundation for International Uniform Law* and Transnational Law and Business University TLBU – and confirmed the renewal of the “Governing Council members scholarship 2012”, to the extent of the individual grants that would be forthcoming.

The Sub-committee formulated the wish that the Programme be further developed on the basis of a strategic approach; it invited the Governing Council to support the Secretariat in its fund raising efforts, and it invited also Governing Council members to seek support from their Governments and funding institutions in their home countries with a view to strengthening the Programme resources.

The Sub-Committee noted that the Secretariat had received 35 applications for the year 2012-2013 and noted the particular relevance of a number of applications with regard to the subjects presently on the current Work Programme, and as for the past years, it agreed to give the Secretary-General a broad mandate to implement the Programme in 2012.

Selection criteria endorsed by the Governing Council at its 90th session:

- (a) preference to be given to applicants conducting research on topics relevant to the activities of UNIDROIT, i.e. items on, or connected with, the current work programme, past achievements and possible future areas of work;
- (b) preference to be given to graduate or post-graduate level applicants;
- (c) the widest possible geographical variety to be sought as to applicants' countries of origin;
- (d) preference to be given to applicants whose research project is likely to have the greatest practical impact;
- (e) preference to be given to applicants with sufficient linguistic ability to use the Library resources to best advantage.

APPENDIX IV

Warsaw: May 7, 2012

Professor Dr. S. Sołtysiński
Professor of Law
Member of Codification
Commission of Civil Law, Poland

**Draft Principles and Rules
on the Netting of Financial Instruments
(Report of the Chairman of the Group)**

1. As Chairman of the Study Group on the Netting of Financial Instruments set up by the UNIDROIT Secretariat in late 2010 (the Study Group), I would like to report to the Governing Council that at the end of its third session held on 7-9 February 2012, the Study Group concluded its works and decided to submit a set of Draft Principles and Rules to the Governing Council for further considerations. Whilst the Memorandum of the Secretariat and the Draft Principles prepared by Mr Philipp Paech, member of the Study Group, describe the legal nature of the close-out netting and explain the proposed principles, I take this opportunity to summarize the key aspects of the discussions, in particular, the points which arose differences of opinion, and those substantive issues which, in my opinion, require further analysis.
2. The Governing Council may recall that the original proposal for a convention on netting was submitted to UNIDROIT in 2008 by the International Swaps and Derivatives Association (ISDA) but the General Assembly decided to postpone the adoption of the project following the bankruptcy of Lehman Brothers and the financial crisis. When the Governing Council reconsidered the project again at its 88th session (2009), some members raised concerns regarding the proposal. We have decided to set up a study group at our 89th session in May 2010. A new comprehensive study prepared by Dr Philipp Paech reported that netting had become even more important in the aftermath of the financial crisis and is strongly supported by banks and other financial institutions as an instrument mitigating systemic risk. The Governing Council recommended the inclusion of the project in the UNIDROIT Work Programme taking into account, *inter alia*, the offer of financial support by the Association of German Banks. The Study Group adopted the approach suggested by Dr Paech, namely, starting with a draft of a non-binding instrument on the enforceability of the netting, coupled with rules on conflict of laws and supervisory authorities powers affecting netting.
3. The works conducted by the Study Group have demonstrated the need not to underestimate the inherent intricacies of the project.¹ The current version of the Draft Principles and Rules were adopted during our works and further elaborated by Dr Paech after the last session of the Study Group.² The Principles and Rules are accompanied by detailed comments. The Draft does not cover the conflict of laws rules. A representative of the Hague Convention participated only in the first session of the Study Group but efforts to agree on a set of private international law principles applicable to close-out netting provisions have not been fully successful so far. It is my understanding that the Hague

¹ The difficulties were also stressed by Mr Paech's study.

² See Item No. 6 on the agenda. Addendum to C.D. (91) 5 (c).

Conference and UNIDROIT may cooperate in this field in future but, as of today, our draft Principles and Rules are devoid of private international law rules.

4. The text proposed by the Study Group and further elaborated by Mr Paech consists of eight principles and accompanying comments.
 - (a) Principle 1 defines “Close-out netting” in a functional way in order to encompass different contractual provisions which achieve a functionally identical result. It comprises contractual provisions covering a cluster of contracts and provides that all non-performed contracts covered by a netting provision cease to be treated separately. Upon the occurrence of a defined default event, which may affect only one contract, the aggregate value of all obligations is calculated, so as to result in a single payment. Thus, upon such default the debtor owes a net payment to the net creditor (i.e. the party which is “in the money”). The proposed definition does not encompass statutory netting provisions and multilateral netting transactions.
 - (b) Principle 2 defines “eligible party”. In principle, it does not cover natural persons but provides that signatory states may decide otherwise. National legislators shall determine whether the Principles are compatible with the consumer protection policies. In my opinion, the examples of “eligible party” under Principle 2 (a) and (b) are broad enough to cover the interests of individuals conducting business activity without setting up a company or partnership. They may simply set up a one-person limited liability company if they wish to benefit from netting. During the deliberations of the Study Group representatives of the banks and ISDA opted for the broadest definition of “eligible party”, including natural persons and non-for profit organizations (e.g. churches). Representatives of financial market regulators opted for a narrower definition in order to avoid conflict with consumer protection laws. As a result, the less encompassing definition was adopted leaving the final decision to States.
 - (c) Principle 3 contains a broad definition of “eligible obligations”. Derivatives and repos are on top of the list of qualified obligations under subsections (a) and (b). They encompass, *inter alia*, contracts for the sale, purchase or delivery of any fungible commodity or any other contract under the relevant law. Thus, the definition is much wider in scope than definitions of eligible obligations adopted so far by many national laws on netting. Representatives of banks and ISDA argued that loans and deposits should be also eligible for netting transactions. Arguments *pro* and *contra* are duly reflected in the comments.³
 - (d) Principles 4-6 on formal requirements for close-out netting provisions deal with form requirements, use of standardized terms and reporting obligations. They provide that the statutory formalities other than “in writing” requirements and the duty to use standardized contracts would hamper enforceability of netting provisions in a cross-jurisdictional context. Whilst Principle No. 4 and 5 are well justified, Principle No. 6 may not receive approval in several jurisdictions. It proclaims that a failure to comply with a reporting duty “*should not affect the creation, validity, enforceability, effectiveness against third parties or admissibility in evidence of the contracts and the close-out netting provision*”. I agree that the sanction of invalidity would be inappropriate, but the exclusion of all possible sanctions of enforceability and effectiveness against third parties of not only the netting provisions but also all contracts covered thereby raises serious doubts. For instance, a sanction of ineffectiveness of certain high risk derivative instruments, until they are reported, may undermine an effective supervision of the market by the regulatory authorities. Furthermore, requirements of reporting and/or disclosure of such contracts, including those

³ C.D. (91) 5 (c) Add. 1, pp. 14-15.

applicable to close-out netting provisions, **promote transparency and protect legitimate interests of third parties** (e.g. general creditors and customers of parties to close-out netting provisions). General creditors should be able to verify whether its current or future commercial counter-party is subject to a netting arrangement because it means that the transaction is substantially exempt from equal treatment of creditors in the event of bankruptcy. Moreover, a netting provision may be concluded in breach of an earlier contract. Representatives of banks and ISDA, and even some market regulators argued that any disclosure requirements would be inconsistent with the principle of speedy conclusion of financial transactions which are often made by phone and recorded. In my opinion, “the deal done – bonus paid” cannon of the current banking practice, does not justify our recommendation that States should not introduce, for instance, a requirement of electronic reporting of high risk contracts in a trade repository as a precondition of not their validity but only enforceability or effectiveness against third parties. The role of transparency was stressed by Professor Kanda of Tokyo University during the last session of the Study Group. It is worth stressing that the sweeping exemption proposed in **Principle 6 covers not only the netting provision but all contracts covered by a close-out netting provision**. In my opinion, “no-formalities, deal done canon” is dangerous not only to third parties but also to the financial institutions. The myth of effective internal supervision by banks has been seriously undermined not only during the financial crisis but also more recently.⁴

- (e) Principle No. 7 provides that *“the law should ensure that the close-out netting provision is enforceable in accordance with its terms, before and after the commencement of an insolvency proceeding in relation to one of the parties. Without the generality of the foregoing – a) the law should not impose enforcement requirements beyond those specified in the close-out netting provision itself.”* In the opinion of the relevant industry and ISDA representatives, who actively participated in the Study Group, this is the most important principle. However, it raises difficult policy questions and serious doubts. In light of its plain language interpretation, Principle No. 7 provides that the only function of the State authorities legislators is to enforce close-out netting arrangements in accordance with their terms. In other words, the States should refrain from imposing any enforcement requirements or mandatory rules in this field. Such radical limitations of State legislative powers go too far. In fact, comments to Principle No. 7 materially qualify the textual interpretation of the proposed rule explaining that *„close-out netting is not shielded against every rule of commercial or insolvency law”*.⁵ Other comments also state that “close-out netting provisions would never be allowed to trump certain other fundamental rules, for instance, those relating to misrepresentation, fraud, or *actio Pauliana*⁶. To avoid the wrong impression that States should abdicate their legislative powers to ISDA and grant unrestricted freedom of contract to parties to close-out netting arrangements, I propose that Principle No. 7 (i.e. the first sentence and subsection a)) should simply declare that *“the law (i.e. the relevant or applicable law) should ensure that a close-out netting provision is enforceable in accordance with its terms, the Principles and Rules and the applicable mandatory public policy rules.”*

⁴ Following the lessons of affairs of Nick Nelson of Barings, Herome Kerviel of Société Generale, Kweku Adoboli of UBS, JP Morgan lost more than 2 billion USD due to improper supervision of high risk transactions which resulted in the fall of the value of the bank’s shares last week. So far, JP Morgan was viewed as a unique bank whose internal monitoring was almost perfect.

⁵ UNIDROIT – C.D. (91) 5(c) Add. 1, p.19.

⁶ *Ib. id.* P. 19-20.

It is worth mentioning that key restatements of *lex mercatoria* and the law of contracts stress the principle of freedom of contract but also contain an important qualification that the **autonomy of the parties is limited by the public policy mandatory laws and the parties may exclude or modify the application of the soft law principles, except as otherwise provided therein.**⁷

Principle 7 is not well balanced. It emphasizes the freedom of contract principle, as proposed by ISDA but it does not encompass any rule aimed at protecting public interest or limiting practices which are basically unfair and have been held unenforceable in leading jurisdictions. For instance, several members of the Study Group argued that the Principles should address the issue of walk-away clauses.⁸ A *walk-away clause* provides that the net payment is payable only to the non-defaulting party and no payment at all should be paid to the bankrupt estate, even if the defaulter is a net creditor. Such a drastically unequal treatment of parties would be permissible under Principle 7 but it is held unenforceable, for instance, according to § 210 (c) (8) (F) of the Dodd-Frank Act and E.U. Directive 2000/12/EC of March 2000. Similarly, the majority of the Study Group has dropped the issue of limiting a non-defaulting party's indefinite "*power to wait and see*". Certain netting agreements grant the net creditor the right to withhold payments upon the default of its counterparty while at the same time not allowing the defaulting party to terminate the contract. The Study Group envisaged to provide a time limit for exercising such right, but finally dropped the issue because we could not agree on the length of the limitation period. However, the final report does not even mention this important issue.

- (f) Principle 8 declares that Principle 7 is without prejudice to any legal rule that provides the competent authorities with the powers in respect of financial institutions to stay contractual acceleration or termination rights under a close-out netting provision. This is a fully justified exception. It acknowledges the priority of the powers of competent financial authorities over the principle granting special status to a party "*in the money*" under a netting contract. The above mentioned solution is in line with the recommendations of the Financial Stability Board of October 2011.

5. Whilst the works of the Study Group have achieved a meaningful progress, I am of the opinion that the justification of the underlying rationale for the proposed Principles and Rules on the Netting of Financial Instruments⁹ is not fully satisfactory. It correctly summarizes the advantages of netting for financial institutions and arguments in favor of the special treatment of the close-out netting. However, **arguments of critics of exempting parties to such transactions from insolvency disciplines have not been mentioned at all.** Recently, several legal and economic studies criticized "*super priorities*" granted to financial institutions in bankruptcy laws of several jurisdictions, whereby parties trading derivatives, repurchase agreements and other financial arrangements are treated much more favorably than other business actors, in particular, business firms of the so-called "real economy". Indeed, the arguments of critics are serious, and should not be disregarded by UNIDROIT. Those critical opinions may be summarized as follows:

- (i) Undermining of market discipline

By treating netting transactions involving mainly derivatives and repurchase agreements much more favorably than other transactions, policy makers have contributed to the financial crisis because the said bankruptcy superiorities have undermined market discipline

⁷ See, for instance, Art. 1.4 and 1.5 of the UNIDROIT PRINCIPLES.

⁸ See, Doc. 4, p. 13.

⁹ UNIDROIT 2012, C.D. (91) 5 (c), pp. 4-6.

of banks and other financial institutions.¹⁰ Special treatment of swaps and repos dampened of monitoring incentives of A.I.G., Lehman, Bear Stearns and other financial institutions. Such policies distorted debtors' financing decisions making traditional secured loans much less attractive than those applicable to privileged derivatives that require much less securitization. This effect of "safe harbours" is well documented on the basis of Bear Stearns and Lehman financing practices, especially at the cusp of the 2008 crisis.¹¹ A recent economic study describes the consequences of the privileged status of the credit default swaps analyzing the A.I.G. practices:

"It seems with the benefit of hindsight that their incentive to sell a large quantity of such swaps (as in the model) to collect premiums upfront and get paid salaries and bonuses based on these premiums. The result was a highly levered but of the economy, that is, the likelihood of default of A.I.G. (...)".¹²

A leading U.S. expert on insolvency law, comments:

"When Bear failed, a quarter of its capital came from the repo market via short term, often overnight borrowings, amounting to eight times in capital at risk (...). When A.I.G. failed, its excessive credit default derivatives exposure destabilized it further (...). Without the Code's priorities, they would have had reason to worry earlier about A.I.G.'s potential precariousness and potential to fail to make good on its derivatives obligations".

(ii) Conflict with the reorganization purpose of bankruptcy law

The privileges offered to netting contracts creditors consist in exempting them from bankruptcy law discipline: They are not subject to such insolvency law rules as prohibitions of set-offs, they do not need to return payment received from the insolvent party within a statutory period (e.g. 90 days prior to bankruptcy under U.S. Bankruptcy Code), they are not subject to the administrator's "cherry picking" (i.e. a decision to perform or avoid a given contract), etc. As a result, such special-treatment of netting disrupts the reorganization-based nature of bankruptcy rules. The scope of those privileges is illustrated by our Principle 7 (c) which contains a non-exhaustive list of exemptions to be granted to close-out netting parties.¹³

The criticism of "cherry picking" powers of the bankruptcy administrator by ISDA is shared by Mr Paech in his final report.¹⁴ Whilst treatment of a cluster of contracts covered by a netting agreement as a unity seems to be justified, it is worth mentioning that the proposals advocated by ISDA amount to a "mega-cherry picking" benefit to be assured *ex ante* by law and soft-law principles in favour of the beneficiaries of the close-out netting contracts.

¹⁰ See, for instance, M.J. Roe, *The Derivative Market's Payments Priorities as Financial Crisis Accelerator*, *Stanford Law Review* (2011), 63, at 539-547; Partnoy & Skeel, in Partnoy, Frank & David A. Skeel, 2007; *The Promise and Perils of Credit Derivatives*, *University of Cincinnati Law Review* 75, p. 1049.

¹¹ D. Skeel, T. Jackson, *Transaction Consistency and the New Finance in Bankruptcy* (2011), at <http://ssrn.com/abstract-1773631> pp. 3-18; M. Roe, *The Derivatives*, pp. 560-564.

¹² V. Acharya, A. Bisin, *Counterparty Risk externality: Centralized versus Over_the_Counter Markets*, March 2011, available at: <http://ssrn.com/abstract=1788187>.

¹³ Roe M., *Derivatives Markets in American Bankruptcy* (2012), mroe&law.harvard.edu. p. 1-2.

¹⁴ UNIDROIT 2012, CD (91) 5(a) Add., pp. 20-22.

(iii) Unequal treatment of creditors

Third, critics argue that the privileges granted to the netting eligible parties not only amount to an unequal treatment of other creditors but offer special status to short-term and high risk financing arrangements at the expense of parties to less risky and longer term transactions. Indeed, we should not leave this question unanswered given the fact that, for instance, our Principle 3 also lists derivatives and repos on top of the list of “eligible obligations”. UNIDROIT should carefully consider extending its support to the apparent departure from the principle of equal treatment of parties to commercial transactions and substituting it by the principle of special treatment of mainly financial institutions that are “too big to fail”. If they deserve to be granted such “superpriorities” due to the systemic risk, this proposition should be supported by solid economic and public policy arguments. We should not close our eyes and disregard arguments to the contrary. Recent economic studies criticize the „safe harbours” granted to qualified financial contracts (QFCs) in bankruptcy law and, to some extent, also in the Dodd-Frank Act. They stress that the reduction of a systemic risk in one segment of the market “*is replaced by another form of systemic risk involving fire sales of QFCs and liquidity funding spirals.*”¹⁵ According to the same study, an equally strong argument against the safe harbours offered to money markets and derivatives markets is that it creates regulatory arbitrage pushing parties “*toward designing complex products that can help shift assets from the banking to the trading book, which are then financed using short-term repos in the shadow banking system away from the monitoring of regulators and at substantially lower capital requirements. The effective outcome is tremendous liquidity in repo markets in good times, with systemic stress and fragility when products are anticipated to experience losses.*”¹⁶

(iv) Shifting the risk to other creditors

Forth, critics maintain that the safe harbours offered by legislators to derivatives and repo players transfer their risks to the remaining creditors. This criticism is based upon an economic theory developed by Modigliani and Miller, who have developed an argument that public policies aimed at mitigating financial risks should take into account their effects on an **economy as a whole** and should avoid shifting risks from shoulder to shoulder. Furthermore, some economists argue that the safe harbours offered to derivatives and repos substantially contributed to the debacle of Lehman, Bear Stearns and A.J.G.¹⁷ Another recent economic study on derivative markets and netting demonstrates that “*Netting merely redistributes wealth among a defaulter’s creditors, and this redistribution does not necessarily enhance welfare.*”¹⁸ We should also not overlook that several economists argue that welfare benefits of derivatives markets are speculative because of their high costs and systemic tail risk: “*The social costs of future financial crises will continue to be correlated with the high rents in the market.*”¹⁹

¹⁵ V. Acharya, B. Adler, M. Richardson and N. Roubini, in: V. Acharya, T. Cooley, M. Richardson, J. Walter, Regulating Wall Street. The Dodd Frank Act and the New Architecture of Global Finance, Wiley 2011, p. 229.

¹⁶ *Ib. id.*, at 230-231.

¹⁷ Taylor J. (2009), The Financial Crisis and the Policy Responses: An Empirical Analysis of What Went Wrong, National Bureau of Economic Research, Working Paper, No. w 14 631, www.nber.org/papers/w.14631.] Skeel D.A. (2009), Bankruptcy Boundary Games, Brooklyn Journal of Corporate Finance and Commercial Law, vol. 4, pp. 1-22; Stulz R.M. (2010), Credit Default Swaps and the Credit Crisis, Journal of Economic Perspectives, vol. 24, No. 1. pp. 73-92. Similar arguments against superpriorities in bankruptcy law were made much earlier by T. Bebchuk and J. Fried, The Uneasy Case for the Priority of Secured Claims in Bankruptcy, Yale Law Journal, vol. 105, No. 4, pp. 857-934.

¹⁸ C. Pirrong, University of Houston (2009), <http://srn.com/abstract=1340660>.

¹⁹ M. Singh, Making OTC Derivatives Safe – A Fresh Look, 201, IMF Paper, WP//11/66, p. 17.

Other authors point out that the rapid growth of the derivatives and repo transactions that followed the establishment of the generous “safe harbours” is uncorrelated with the slow expansion of the so-called real economy.²⁰

I have summarized the arguments of the critics of special treatment of netting for the following reasons:

First, my proposal made during the last session of the Study Group to discuss the arguments of the critics in the UNIDROIT report was adopted without any opposition but Dr. Paech’s final report fails to even mention the ongoing discussion and presents arguments the safe harbours to close-out netting strengthening. Whilst the report constitutes a comprehensive analysis of the contractual aspects of netting it avoids the controversial policy issues.

Second, the draft of the Principles and Rules was elaborated at the request of ISDA and financed by banks. It is a product of a **netting friendly group**. The Secretary General has also invited several market regulators but subject to a few exceptions, their views were largely identical with those of banks and ISDA. The Governing Council has a duty to critically analyze the end product and the counter-arguments of its critics before sending it to the Member States for adoption.

Third, I have not been persuaded that netting requires more privileges and States should focus their attention on enforcing the terms and conditions of the contract and refrain from promulgating rules aimed at reporting such high risk transactions as a requirement of their effectiveness against third parties.

Our draft Principles and Rules constitute yet another example of a material departure from the principle of equal treatment of business actors and enfranchising the stronger parties. The proponents of the Principles and Rules have not proved that the arrogated new privileges are justified by systemic policy reasons. I admit that I largely share the criticism of the privileges granted to close-out netting. The recent ISDA proposals illustrate the trend aimed at diluting the real banking reforms and legitimize a sort of enfranchisement of their clients without even considering the opposing views. Hence, embracing the ISDA views without a thorough confrontation of the conflicting opinions seems to be questionable.

I am convinced that limitation of “safe harbours” to netting, and assuring their transparency is not only to the benefit of the third parties (i.e. general creditors representing the “real” economy) but also to the banking sector.²¹

To sum up, I am of the opinion that the Study Group has made a significant progress and the soft law approach is justified.

However, I submit to the Governing Council the following proposals.

- (i) The UNIDROIT Governing Council should review the text of the Principles and Rules, in particular Principles No. 6 and 7.

²⁰ See, the illustration presented by M. Roe, encl. No. 1 to this memorandum.

²¹ I agree with Nigel Lawson, the UK’s Chancellor of the Exchequer (1983-1989), that capitalism works for better than any other system because „the marketplace keeps greed, folly and incompetence in check. When this is lacking, when business are considered too big, too important, or too interconnected to fail, this crucial discipline disappears, and disaster is almost inevitable“. In: Forget Fred and Focus on the real banking scandal, Financial Times, February 6, 2012.

- (ii) If the Governing Council would endorse the proposal for convening a Committee of Governmental Experts to finalize the Draft Principles and Rules, it should recommend that the final report should also present arguments of critics of the scope of “safe harbours” granted to netting, and explain why these arguments have been disregarded. The governmental experts should be recommended to commission a study to be prepared by a team of independent economists and lawyers with a view to analyze the conflicting views on systemic implications of the current regimes of close-out netting and the proposed strengthening thereof. A team of such experts should not be financed by financial institutions. The criticism of the generous safe harbours by professors of Ivy League universities (e.g. Harvard and Pennsylvania) and top economists (e.g. Dr N. Roubini, one of the few experts whose early warnings of the coming financial crisis were disregarded at the beginning of this decade) deserves a thorough and objective analysis.
- (iii) The final report should also mention two difficult and unresolved issues that require further investigation, namely, the law governing the netting provisions to which the Principles frequently refer and the growing conflict between rules on netting and the traditional insolvency regimes. The conflict between parties to netting arrangements that benefit from preferential treatment and the remaining creditors in case of insolvency is real and cannot be avoided by way of promulgation of soft law or a convention.²²

²² Mr Paech’s argument that there is no conflict with equal treatment of creditors in bankruptcy law is rather surprising (UNIDROIT 2012, C.D. (91) 5 (c), Add. 1, April 2012, at 23). It is contrary to Principle 7 and his own correct statement that “*netting offers special treatment of the non-defaulting party in relation to the insolvent’s general creditors*” *Ib. id.*, p.10.