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Report on the Session

(prepared by the Secretariat)

The President, Mr Berardino Libonati, opened the 84th session of the Governing Council on Monday 18 April 2005 at 9.30 am.

The President welcomed all participants (cf Appendix I) and pointed out that Mr Opertti Badán as well as Mr Bollweg, who was being represented by Mr Martens, had indicated that they were unable to attend the Council's session. The President gave a brief overview of the main issues to be discussed over the days to come

Item No. 1 on the Agenda – Adoption of the Agenda (C.D. (84) 1 rev.2)

The Council adopted the Provisional Agenda as proposed by the Secretariat (cf. Appendix II).

Item No. 2 on the Agenda – Annual Report (C.D. (84) 2)

*The Secretary-General gave a brief overview of the main events, in particular as regards the preparation of instruments and the promotion of UNIDROIT work, as well as the Organisation's representation in other fora. With respect to the Institute's activities in the field of legal assistance, he focused on the draft Uniform Act on Contract Law, based on the UNIDROIT Contract Principles, elaborated by Professor Marcel Fontaine and to be submitted to the Permanent Secretariat of the *Organisation pour l'harmonisation du droit des affaires en Afrique* (OHADA).*

With respect to the Institute's staff, the Secretary-General was delighted to report on the arrival of a new colleague seconded by the Government of the United Kingdom, Ms Alison McMillan. It was to be hoped that other Member States' Governments would follow the UK's example.

Item No. 3 on the Agenda – Appointment of the First and Second Vice-Presidents of the Governing Council (C.D. (84) 3)

At the suggestion of the President the Governing Council appointed Mr Arthur Hartkamp and Mr Lyou Byung-Hwa as First and Second Vice-Presidents until the 85th session.

Item No 4 on the Agenda – Implementation of the Strategic Plan (C.D. (84) 4)*(a) Background*

Introducing this item, the *Secretary-General* recalled the mandate the Secretariat had been given by the joint Brainstorming sessions, held by the Council and representatives of member States in 2002/3, and by the General Assembly at its 57th session in 2003. The Strategic Plan aimed at defining the Institute's identity and medium- and long-term objectives. He furthermore recalled the Council's and his personal views regarding the limits this kind of planning was capable of achieving as long as the financial bases of the Institute's work were not significantly improved and as long as the key issue of replacing the Deputy Secretary-General as the Organisation's chief administrator remained unsolved. Moreover, involving the Principal Research Officer in administrative routine had seriously undermined substantive progress with respect to a priority item on the Work Programme.

The most visible progress had been made with respect to the further development of the Institute's outreach resources (Strategic Objective N°2). Details would be discussed in the context of Items 13, 14, 15 and 16 of the agenda. By contrast, the scholarship programme and parts of the legal co-operation programme were, due to lack of financing, not evolving as dynamically as the Secretariat had hoped. The law reform seminar for the member States of the Southern African Development Community (SADC), planned in co-operation with the Hague Conference on Private International Law and UNCITRAL, had to be postponed. A response to the request by the Permanent Secretariat of the *Organisation pour l'Harmonisation en Afrique du Droit des Affaires* (OHADA) for UNIDROIT to co-ordinate the elaboration of another uniform act was still conditional on the identification of funds needed.

With respect to the improvement of communication between Secretariat and member States' Governments as well as among Governments and in particular Strategic Objective No.5 (an electronic "Governments' Forum"), informal consultations had led to the conclusion that Governments tended to prefer a slightly different set up consisting of, firstly, a restricted Government area for non-public documents and, secondly, ad-hoc platforms serving, for example, as virtual task forces, working groups, etc. An example for the latter was the Space Registry Task Force hosted, as agreed at the session of a Committee of Government Experts on the International Telecommunications Union's website. The restricted area for Governments would shortly be operational.

Notwithstanding significant investment in terms of time and – necessarily more modest – money the efforts to broaden the membership in particular in Asia, the Middle East and Africa (Strategic Objective No. 7) had not borne fruit so far. In all three regions the prospect to become involved in law making was as such apparently not sufficiently attractive. Unless the Organisation was able to offer sustained physical presence and assistance *in loco*, chances of success continued to be slim. In the case of the Middle East countries the non-availability of key documents in Arabic appeared to be an additional obstacle. Progress had been made in revitalising certain dormant member States in Latin America.

Due to lack of funding, exceedingly modest progress had been made regarding the up-grade of IT equipment, in house IT expertise as well as the introduction of new document management procedures (Strategic Objectives No. 9 and No.10).

The prospects and objectives set forth in paras 75 to 81 of the Strategic Plan had suffered a blow when the Finance Committee had felt unable to make commitments necessary for the opening of a competition for the position of a full time Deputy Secretary-General. If the budget for 2006 did not finally provide the urgently needed certainty in this regard any further improvement along the lines indicated in paras 78 and 79 would become unrealistic. On the other hand, the arrival of an additional officer funded from extra-budgetary contributions and assigned to the depositary functions under the Cape Town Convention as well as a one-year secondment of a senior officer by the Government of the United Kingdom, together with the longstanding secondment by the French Government, under its "volontaires internationaux" programme, of young lawyers for renewable 12-month periods, were signs of member Governments' affection to the Organisation's work. The Secretariat was preparing to systematically approach other Governments with a view to securing additional staff resources for the years to come.

(b) Discussion

Some members of the Council emphasised the inter-relationship between further pursuing the Strategic Objectives as outlined in the "Strategic Plan Horizon 2016" and agreed upon at the previous session, and the Triennial Work Programme 2006/2008 as well as the budget which were up for discussion at this session.

Mr Hogan wondered whether the reluctance on the part of certain Governments to accede to the Institute's Statute was primarily or even exclusively to be explained by the financial implications, i.e. their sense that the – modest – assessed contribution was not a good investment. He volunteered to provide an invitation to the Secretary-General to address the annual workshop of chief justices from African Commonwealth Member States to be held in Dublin.

Mr Gabriel was interested to hear more about which target Governments the Secretariat was currently speaking to seemed to see value in being actively involved in international law reform and which ones saw it more as a burden.

Mr Sen reiterated his view, voiced repeatedly over the years, that UNIDROIT's capability to provide sustained legal assistance to Governments and legislatures in developing countries was the key element of any meaningful membership drive in Asia and Africa. This arm of the Institute's activities needed to be strengthened and UNIDROIT, if possible in co-ordination with the other private-law formulating agencies, should continue to offer its advice wherever it might be as beneficial or more beneficial at lower cost than the advice offered by a myriad of private consultants.

Mr Elaraby concurred fully with the previous speaker's analysis and offered his personal as well as the Egyptian Government's assistance in staging a co-ordinated approach of key Governments in the Arabic-speaking world. He questioned whether the assessed membership contribution ought to be seriously considered the main reason for certain Government's lack of interest. Physical presence in the Middle East, good products and, if possible, translation of important instruments into Arabic were likely to be critical for any effort to broaden membership in the region.

Ms Trahan emphasised the importance of a strategic approach to this objective. In particular, the question of whether all regions in the world were equally important or whether scarce resources ought to be employed in targeting specifically identified countries needed to be answered. This was not only her personal but also the Canadian Government's position. Moreover, clear overall-priorities had to be established with respect to the whole range of the Institute's non-legislative activities.

The Secretary-General responded,

- to Mr Hogan that he would gratefully accept the invitation to speak to African chief justices;
- to Mr Gabriel that it was his impression that the desire to actively participate in the Institute's work seemed to largely depend on a Government's in-house capacities to process the results of such work for the purposes of domestic law reform (which, e.g., Singapore had but, e.g., Vietnam or Thailand not yet);
- to Mr Sen and Mr Elaraby that he shared their assessment and that he hoped that both Governments and, for example, the World Bank and the IMF could be persuaded to act more in concert with UNIDROIT, the Hague Conference and UNCITRAL;
- to Ms Trahan that, as regards broader representation, the Governments of South-east Asia were, indeed, clearly the Organisation's main targets; secondly, that certain Governments continued to use the call for priorities and a vague promise to more substantially support the Organisation's work if priorities were clear as a vehicle to reduce and ultimately eliminate the non-legislative activities considered integral part of UNIDROIT's identity by the majority of Governments and the Council.

More in general, the Secretary-General pointed out that Governments ought to evaluate both the resources put at the private-law Organisations' disposal and the tasks assigned to them in a broader perspective. In this connection, he wondered why the sister Organisations who had traditionally neither libraries to speak of nor scholarship programmes comparable to UNIDROIT's were in recent times able to significantly increase funding for both whereas UNIDROIT was asked in an only thinly veiled manner to cut back on anyway insufficient funding of the leading library of its kind. In a similar vein, one might ask whether UNCITRAL's professional staff over the past seven years almost tripled because that Organisation broadened its scope of activities.

The Secretary-General finally gratefully acknowledged the Council's support for the Secretariat's plans to closely link individual projects and the development of the Strategic Plan.

(c) Conclusions

The Council expressed its satisfaction with the way the Strategic Plan was gradually assuming the central role in the Secretariat's planning and encouraged the Secretariat to pursue that path.

Item No. 5 on the Agenda – Principles of International Commercial Contracts
(C.D.(84) 5)

(a) Background

In introducing this item, the *Secretary-General* reported that by the end of 2004 three official language versions (English, French and Italian) of the new edition of the Contract Principles had been published and that the Spanish language version was under preparation; a Chinese integral version had also been published, and Farsi, Greek, Korean, Romanian, Russian, Slovak, Thai and Vietnamese translations were under preparation. He further informed the Council that the Secretary of UNCITRAL, Mr J. Sekolec, had suggested that UNIDROIT approach UNCITRAL with a view to having it formally endorse the Contract Principles at its plenary session in 2006. A similar procedure had been adopted in the past with respect to other soft law instruments such as INCOTERMS and the UCP prepared by the ICC, and an endorsement of the Principles by UNCITRAL could only further enhance their prestige and promote their use in practice. *Mr Bonell* recalled the series of seminars held world-wide since the publication of the 2004 edition of the Principles and reported that more than 800 copies of the English language version had already been sold and that most of the orders had been placed by law firms.

(b) *Discussion*

Mr Elmer wondered whether the Contract Principles should not be made better known also among governments of Member States.

On the contrary *Mr Soltysinski* stressed the importance of the promotion of the Contract Principles among practitioners; the more the Principles were used in practice, the better known they would become also to governments.

Both *Mr Zhang* and *Mr Sánchez Cordero* pointed out that in their respective governments had decided to use the Contract Principles as a source of inspiration for the modernisation of domestic contract law.

Mr Govey, while agreeing that in view of the special nature of the Contract Principles the most important thing was their widespread use in international contract and arbitration practice, wondered to what extent the Secretariat was monitoring actual use of the Principles in practice especially by courts and arbitral tribunals.

Mr Bonell recalled the UNILEX database which had been set up thanks to the financial support of Italian sponsors and was currently updated by volunteers. It presently contained some 96 court decisions and arbitral awards rendered world-wide and referring in one way or another to the Contract Principles, as well as copious bibliography. On his part, the *Secretary-General* pointed out that the Contract Principles were referred to as the governing law in a number of model contracts recently issued by the ICC.

(c) *Conclusions*

The Governing Council, after expressing its appreciation for the efforts made to promote the Contract Principles and monitor their use in practice, instructed the Secretariat to set up a new Working Group to continue work on the Principles. As to the topics to be dealt with by the new Working Group, they will be selected at the Council's forthcoming session on the understanding that there was already wide support for unwinding of failed contracts, plurality of debtors and creditors, illegality, conditions and termination of long-term contracts for cause.

Item No. 6 on the Agenda – ALI/UNIDROIT Principles of Transnational Civil Procedure
(C. D. (84) 6, Study LXXVI – Docs 6 and 13)

(a) *Background*

In introducing this item, the *Secretary-General* recalled that the Governing Council at its 83rd session had unanimously approved the draft subject to minor amendments in the light of the comments made by some of its members.

The final draft of the Principles of Transnational Civil Procedure had then been submitted to the Annual Meeting of the American Law Institute held in Washington, D.C. in May 2004 where it was unanimously approved subject to minor changes resulting from the discussion at the Meeting.

In November 2004, the Co-rapporteurs, G. Hazard Jr. and R. Stürner, assisted by A. Gidi (Secretary to the Joint ALI/UNIDROIT Working Group), had produced the reviewed and final version of the Principles of Transnational Civil Procedure. The French language version had been prepared by Ms F. Ferrand (Member of the Joint ALI/UNIDROIT Working Group). The ALI/UNIDROIT Principles of

Transnational Civil Procedure with the accompanying official comments were contained in UNIDROIT 2005 – Study LXXVI – Doc. 13.

The Rules of Transnational Civil Procedure, which constituted a Reporters' study only and as such were not submitted to the competent organs of UNIDROIT and the ALI for approval, appeared as an Annex to the Principles.

Both the Principles of Transnational Civil Procedure and the Rules of Transnational Civil Procedure were to be published in their integral version (black letter rules and comments) in a single volume by Cambridge University Press and would be distributed on a commercial basis by the publisher. UNIDROIT and the ALI were joint holders of the copyright.

ALI and UNIDROIT were considering how best to promote the Principles. As far as UNIDROIT was concerned an important initiative was the publication of a special issue of the Uniform Law Review devoted to the instrument. The issue would contain contributions by a number of experts from Africa, the Americas, Australia and Europe as well as the texts of the black letter rules and the comments of the Principles.

(b) Discussion and Conclusions

The Council took note with satisfaction of the Secretariat's efforts to prepare a publication of this most innovative instrument and urged that the Secretariat actively pursue its promotion.

Item No. 7 (a) on the Agenda – Convention on International Interests in Mobile Equipment and Protocol on Matters Specific to Aircraft Equipment (C.D. (84) 7 (a))

(a) Background

Mr Atwood (UNIDROIT Secretariat), in introducing this item, noted that since the preparation of C.D. (84) 7 (a) the Sultanate of Oman had acceded to the Convention and Protocol on 21 March 2006, and that the Protocol and the Convention as applied to aircraft objects would enter into force following the receipt of 2 further ratifications/accessions. He noted that cooperation with the International Civil Aviation Organization (ICAO) had been productive to date but that, as noted in paragraph 9 of C.D. (84) 7 (a), the ICAO Council had not yet formally accepted the role of Supervisory Authority.

(b) Discussion

Mr Gabriel stated that it would be extremely unfortunate if the ICAO Council did not accept the role of Supervisory Authority, and agreed with the recommendation in C.D. (84) 7 (a) that members of the Council should continue to use their good offices, particularly with the representatives of their countries on the ICAO Council, to ensure that the international registration system for aircraft objects is fully operational by the time of the entry into force of the Protocol.

Ms Trahan stated that two Canadian provinces had introduced implementing legislation and that it was hoped that Canada would soon be in a position to ratify the Convention and Protocol. She noted that when the Protocol entered into force, a press communiqué or other form of publicity should be distributed to mark that event.

The Secretary-General noted that the entry into force of the Convention and the ratification of the Convention and Protocol by the United States had been reported in the *Wall Street Journal* and the

Financial Times, and that it was possible that there might be an event in Dublin to mark the launch of the International Registry at the time of the entry into force of the Protocol.

Mr Sánchez Cordero noted that, as a direct result of the Secretary-General's visit to Mexico, the Mexican Government had created a commission to study the issue of Mexico's accession to the Convention and Protocol, and that the results of this commission were expected to be available by the end of 2005.

Mr Arat stated that Turkey had decided to ratify the Convention and Protocol and that, to that end, it was currently in the process of translating the Convention and Protocol.

(c) *Conclusion*

The Council took note, with satisfaction, of progress that had been made in the implementation of the Convention and Protocol, and in the development and implementation of the Institute's depositary functions.

Item No. 7 (b) on the Agenda – International interests in mobile equipment – preliminary draft Protocol to the Cape Town Convention on Matters specific to Railway Rolling Stock (C.D. (84) 7 (b))

a) *Background*

Ms Schneider (UNIDROIT Secretariat) recalled that, at its 83rd session, the Governing Council had taken note with satisfaction of the consensus that had been built around the preliminary draft Rail Protocol and had urged the broadening of this consensus through the organisation of regional seminars, as advocated by the Secretariats of UNIDROIT and the Intergovernmental Organisation for International Carriage by Rail (OTIF), with a view to enhancing awareness of the preliminary draft Rail Protocol.

Two regional seminars had already been organised. The first, aimed at the countries of Central and Eastern Europe, had been held in Warsaw on 15 and 16 April 2004 (see the Summary Report and the papers and presentations in document UNIDROIT 2004 Study LXXIIH – Doc. 15). The second, aimed at the Americas, had been held in Mexico City on 11 and 12 October 2004 (see the Summary Report and the papers and presentations in document UNIDROIT 2004 Study LXXIIH – Doc. 16). *Ms Schneider* thanked the Mexican authorities for their remarkable support in the organisation of this seminar, as well as the Mexican member of the Governing Council for his precious collaboration. The discussions that had followed the presentations had been most fruitful and had permitted participants better to understand the Cape Town Convention, the Aircraft Protocol and the preliminary draft Rail Protocol. The Secretariat was engaged in organising a third seminar aimed at the countries of Africa, which was due to be held in the coming months.

Ms Schneider thereafter reported that the Rail Registry Task Force, which had been set up by the Joint Committee of governmental experts at its first session, had met in Rome for the fourth time, from 22 to 24 February 2005. In accordance with its terms of reference, the Task Force had considered different questions, in particular the fiscal status of the Registrar, the legal status of the Supervisory Authority and its Secretariat (immunities, liability and insurance), the fee structure of the Registry and Regulations for the Registrar, as well as procedures for the Supervisory Authority. Representatives of the Drafting Committee had participated in the work of the Task Force and, at the proposal of the latter, certain provisions had been modified (UNIDROIT 2005 Study LXXIIH – Doc. 18 / OTIF/JGR/14). As it would not be possible for the Joint UNIDROIT/OTIF Committee of

governmental experts, which would not reconvene, to approve these amendments, they would be submitted to the Diplomatic Conference as the position of the Rail Registry Task Force member States.

The meeting of the Rail Registry Task Force had been preceded by a “*Cape Town Registry Workshop*” held on 21 February, in the course of which Mr Jeffrey Wool, Special Adviser on International Equipment Financing, had introduced and explained the solutions that had been adopted for the Aircraft Protocol as regards the registration system and the persons present had had the opportunity to discuss the opportuneness for retaining some of them for the future Rail and Space Protocols.

Lastly, the UNIDROIT and OTIF Secretariats had continued their efforts towards the realisation of the diplomatic Conference. To this end, so as to simplify the procedure and seeing the consensus that had been established around the text, they hoped the Governing Council would give its formal consent to the transmission of the text of the preliminary draft Protocol to a diplomatic Conference for adoption before a firm offer from a country to organise it had actually been received.

(b) *Conclusions*

The Governing Council took note with satisfaction of the holding of the regional seminars and the “Cape Town Registry Workshop”, expressed its pleasure at the probable holding of a regional seminar in Africa and noted the efforts of the UNIDROIT and OTIF Secretariats to organise the diplomatic Conference. The Council further formally authorised the submission of the text of the preliminary draft Rail Protocol to a diplomatic Conference as and when a State offered to convene it.

Item No. 7 (c) on the Agenda – Preliminary draft Protocol on Matters specific to Space Assets to the Cape Town Convention (C.D. (84) 7 (c))

(a) *Background*

The Deputy Secretary-General a.i. stressed the efforts that the Secretariat had continued to make in seeking to advance the development of a draft Protocol to the Cape Town Convention on Matters specific to Space Assets, in particular through the organisation of another regional colloquium for representatives of Government and industry, this time in the Asia/Pacific region, and a meeting for satellite operators, designed to show them the advantages they could expect to derive from adoption of a Space Protocol, as well as participation in the project of the Organisation for Economic Co-operation and Development (OECD) on the role of public and private actors in the commercialisation of space and the development of space infrastructure in the years ahead.

These efforts, though, involved especial problems, inherent, first, in the achieving of a commercially viable instrument in a field that had for so long been the exclusive preserve of Government players and, secondly, in the consequent need to assure the UNIDROIT Committee of governmental experts of expert advice in the field of commercial space financing, a service which had hitherto been provided by the Space Working Group (SWG) and its co-ordinator, Mr Peter Nesgos, most recently as part of a public/private partnership with the Governments participating in the aforementioned Committee.

A fundamental element of the problem resided in the fact that asset-based financing was not yet being used that often in the context of commercial space financing. And this made the cost of such financing even more prohibitively expensive than the inherent technical risks involved in space activity alone would justify. However, for the developing world to have access to the services that

space technology permitted required the costs of these transactions to be brought down. This was where asset-based financing came in: where financiers had redress against the asset in the event of default by the debtor, they could lower costs.

Ideally, the financiers and operators currently involved in commercial space financing should see for themselves the scale and scope of these benefits. But the select group of financiers and operators active in this field did not seem that worried about reducing costs in the way envisaged by the future Space Protocol: the bankers still got their profit margins and the operators were not troubled by rival start-up companies. It was against this background that the Secretariat was battling to endow the SWG with the financial support that would enable that body to respond to the multiple key assignments that it had been asked to carry out in time for the following session of the Committee of governmental experts. Without such support, Mr Nesgos had signalled that the SWG could not justify continuing its efforts.

In large measure thanks to the authoritative support of Mr Carbone - for whose support he expressed the Secretariat's gratitude - the Secretariat had managed to secure Alenia Spazio and Telespazio's joint sponsorship of the SWG towards the end of 2004. BNP Paribas had renewed its sponsorship for another year. The Secretariat was meanwhile working on a number of other possible sponsors. But this all took a tremendous amount of time and effort and, given the uncertainty, not to mention the time he had to spend in discharging his other functions as Deputy Secretary-General *a.i.*, he had concluded that the only course of action open to the Secretariat in the circumstances was to postpone the following session of the Committee of governmental experts until October 2005.

Meanwhile, a sort of progress was being made on other related aspects of the project. For instance, after the most recent session of the Legal Subcommittee of the United Nations Committee on the Peaceful Uses of Outer Space, held in Vienna the previous week and the week before, it looked fairly certain that the U.N. would not, after all, be acting as Supervisory Authority of the international registration system under the future Protocol. It therefore became important to identify an alternative Supervisory Authority as soon as possible. And, fortunately, there was no shortage of other candidates.

Notwithstanding the uncertainty surrounding the future of the SWG as one approached a second reading of the preliminary draft Space Protocol at intergovernmental level it was necessary also to start thinking about the member State that would host the future diplomatic Conference. It would be important to secure the backing of a significant player on the basis of the consensus that was likely ultimately to emerge from the Committee of governmental experts.

Finally, he reiterated his request of previous years that Council members assist the Secretariat in identifying parties in their countries willing to invest in this project, as very much a public/private partnership. He hoped that there would be Council members able and willing to emulate the role played by Mr Carbone in securing industry support.

(b) Conclusions

The Governing Council took note of the progress achieved by the Committee of governmental experts at its second session and of the success of the regional colloquium held in the Asia-Pacific region as of the special meeting arranged for satellite operators.

The Governing Council took note also of the extreme urgency of endowing the SWG with the resources needed to secure its continuing existence, at a time when its contribution was fundamental to the prosecution of the intergovernmental consultation process. In this context, the

Governing Council noted with appreciation the key role played by Mr Carbone in securing the agreement of two leading Italian players in the commercial space industry to become sponsoring members of the SWG and took cognisance of the Secretariat's call for Council members to lend their support in identifying other potential sponsoring members in their countries.

Item No. 8 on the Agenda – Preliminary draft Convention on Harmonised substantive Rules Regarding Securities held with an Intermediary (C.D. (84) 8, Study LXXVIII – Docs 18 and 19)

(a) Background

Mr Paech (UNIDROIT Secretariat), in introducing this item, reported on the final stages of the work of the Study Group and gave an overview of both the text of the preliminary draft Convention and the Explanatory Notes. Both documents had been submitted to the Council before Christmas and the Council had authorised the convening of a Committee of governmental experts. The invitation had gone out and the first session of that Committee was to be held from 9 to 20 May 2005.

(b) Conclusion

The Governing Council expressed its satisfaction with both the accelerated speed at which this most important project advanced and the excellent quality of the preliminary draft Convention.

Item No. 9 on the Agenda – Uniform Rules applicable to Transport

(a) Background

Introducing this item on the agenda, *Ms Peters (UNIDROIT Secretariat)* recalled that although the title of the project was broad for historic reasons, it concerned the establishment of a protocol to the *Convention on Contracts for the International Carriage of Goods by Road (CMR)* introducing the possibility to use electronic consignment notes. Work was underway in the United Nations Economic Commission for Europe, which had requested the collaboration of UNIDROIT, the organisation where work on the CMR had initiated. Mindful of the great expertise of Mr Jacques Putzeys, at the time member of the Governing Council, the Governing Council had requested him to represent the organisation. Mr Putzeys had participated in the meetings of the Working Party on Road Transport of the Inland Transport Committee of the ECE which had been entrusted with the preparation of a draft Protocol. He had prepared a draft himself, which, with the approval of the Governing Council, had been submitted to the Working Party. The representative of Germany in the Working Party had however felt that the solution proposed, that of "functional equivalence", was not sufficient, and that a more detailed review of the CMR was necessary. At its session of 2003, the Working Party had therefore requested the Secretariat to send a questionnaire to member States to ask them to state their preferences as to whether the approach proposed by UNIDROIT or that proposed by Germany should be adopted.

At the October 2004 meeting of the Working Party the Secretariat presented the replies received to the questionnaire. These had revealed a clear majority (16 countries) in favour of the UNIDROIT proposal as against those in favour of the German proposal (2 countries).

The representative of Germany had requested consideration of this issue to be deferred in order to observe how practice in the sphere of electronic consignment notes developed before defining the bases for a system using the data compiled.

Several countries had on the contrary stressed that it was urgent not to delay further the finalisation of the text of the additional protocol. The representative of the International Road Transport Union (IRU) had supported the position of these countries, considering that the UNIDROIT approach based on functional equivalence was more pragmatic.

Following the discussion, the Working Party had decided to request UNIDROIT to prepare a revised and expanded version of its initial draft and had requested the Secretariat to send the new text to the Contracting Parties sufficiently in advance to enable them to comment before the next meeting of the Working Party. The aim was to complete the text of the new additional protocol by the ninety-ninth session of Working Party in October 2005. This request had been transmitted to the Secretary-General of UNIDROIT, who in turn had transmitted it to Mr Putzeys. Mr Putzeys was currently working on the revised text.

(b) Conclusion

The Council took note of developments in the preparation of a Protocol to the 1956 Geneva Convention on Contracts for the International Carriage of Goods by Road.

Item No. 10 on the Agenda – The Uniform Law Foundation (C.D. (84) 10)

(a) Background

Sir Roy Goode, President of the Uniform Law Foundation, introduced this item on the Agenda. He recalled that the Foundation had been created as a Dutch Foundation in 1996, to fund activities that the Institute was not in a position to fund, or not able to fund wholly. The priorities were first and foremost the uniform law data base, the library and scholarships.

Since the 2004 meetings of the Governing Council and the Board of the Foundation, a brochure had been prepared illustrating the Foundation and UNIDROIT.

The Foundation was labouring under certain constraints, as its status for tax purposes might be questioned in the Netherlands if it engaged in activities such as the publishing of books or the holding of conferences likely to produce a surplus. Furthermore, there were difficulties for potential donors from a number of countries to obtain tax benefits if they made donations to a foreign foundation. Two parallel foundations were therefore being set up, one in the United Kingdom ("The UK Foundation for International Uniform Law"), the other in the United States ("The American Foundation for International Uniform Law"), by Freshfields Bruckhaus Deringer and Perkins Coie respectively, who had agreed to do this on a *pro bono* basis. He expressed the appreciation of the Board for this generous contribution. Seminars were being planned for the launching of the foundations, one in London and one in Washington. Furthermore, development groups were being set up to assist the Board. Eventually, the assistance of a professional fund raiser would be required, but funds were needed to hire a fund raiser.

As Council members were aware, a first fund-raising event had been planned for the day following the end of the Governing Council meeting, in Budapest under the auspices of H.E. Ferenc Mádl, President of the Hungarian Republic, who was a former member of the Governing Council. The holding of this event had however had to be postponed, and it was hoped that it might take place after the expiry of the term of office of President Mádl, when he would be freer to engage in or to promote fund-raising activities.

Under the auspices of the Foundation a first publication had been issued, namely a small volume on "Contract Practices Under The Cape Town Convention", prepared by the Legal Advisory Panel of

the Aviation Working Group. The Aviation Working Group had decided to donate proceeds of the sales of this volume exceeding production costs to the Foundation.

Sir Roy concluded asking for the assistance of members of the Council to contact persons of influence in their countries to promote the Foundation and its work.

(b) Discussion

Ms Trahan requested clarifications as to the independence of the two new foundations and the law firms that were assisting them and, furthermore, whether having three foundations did not risk there being a loss of credibility. *Mr Lyou* wondered how the foundation system could be managed, with one foundation in London and the other in the US.

Sir Roy indicated that each of the new foundations would operate within its own geographic area, whereas the Dutch foundation was the international foundation which would cover the other areas. As regarded the independence of the foundations, the firms acted *pro bono*, and had no influence on what was actually done. The offices were embryonic, the members of the law firms who were involved in the foundations using their office or home address as address for the foundations. Once the foundations took off, administrative backup would have to be envisaged.

Mr Hartkamp added that the Netherlands had been selected as the seat of the Foundation as foundations were exempt from taxation in the Netherlands, and as at the time the role of the Foundation had been seen as merely that of channelling funds to UNIDROIT. If the Foundation began to engage in activities such as the sale of booklets, the status of the Foundation might change and it might therefore become subject to tax.

Mr Widmer suggested that the meeting of the Board of Governors of the Foundation might be held before the meeting of the Governing Council, so as to permit the Council to receive a report also on the meeting of the Board.

(c) Conclusion

The Council noted developments aimed at making the Uniform Law Foundation operative.

Item No. 11 on the Agenda – Status of Implementation and Promotion of UNIDROIT Conventions (C.D. (84) 11)

Since the last session of the Governing Council, the Secretariat has continued to use its best efforts to promote UNIDROIT Conventions, whether by making presentations at conferences or by penning articles (see, in particular, for each subject on the Work Programme, the Annual Report for 2004).

Subsequently to the entry into force of the 2001 Cape Town Convention on International Interests in Mobile Equipment on 1 April 2004, the Cape Town Convention and the Protocol thereto on Matters specific to Aircraft Equipment were ratified by the United States of America on 28 October 2004. There are 28 signatories to the Cape Town Convention, which has no longer been open to signature since its entry into force. The Convention will enter into force for the United States of America on 1 February 2005 but only as regards a category of objects to which a Protocol applies. Three other instruments of ratification or accession are needed for the Aircraft Protocol to enter into force.

The 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects entered into force for Guatemala on 1 March 2004. Cyprus, Slovenia and Gabon acceded to the Convention on 2 March, 8 April and 12 May 2004 respectively. Accordingly, the Convention entered into force for Cyprus on 1 September 2004, for Slovenia on 1 October 2004 and for Gabon on 1 November 2004 respectively. There are thus currently 24 Contracting States to the Convention. A certain number of countries are at a more or less advanced stage in their consideration of the case for ratifying or acceding to the 1995 Convention. The Secretariat is often called in these consultations.

At the 83rd session of the Governing Council, the Secretariat indicated its desire to organise a conference in Spring 2005 to mark the tenth anniversary of the opening to signature of the Convention, subject, however, to the possibility of finding both the necessary time and funding. Neither, unfortunately, has been forthcoming. The Secretariat has not truly given up the idea but, with the heavy burden of other work and the absence of any budgetary funding, it is looking at the possibility of other solutions, including the sending out to States of an evaluation questionnaire on the application of the Convention (real cases that have arisen and possible problems) - the answers to which could, for example, serve as the basis for a follow-up committee session - the increased participation of the Secretariat in conferences organised by other bodies or the commissioning of articles for publication in the Uniform Law Review.

Item No. 12 on the Agenda – Legal Co-operation Programme (C.D. (84) 12, Study LXV Scholarships Impl. 16 – Etude LXV/L - Doc. 2)

(a) Background

Mr Widmer briefly reported on the meeting of the scholarships Sub-committee, the Secretariat's report on the past year, the candidatures submitted for the year to come and the selection criteria adopted. The Sub-committee had identified candidates to whom scholarships should be granted and had given the Secretariat instructions as to how it was to proceed should the available amount permit to grant additional scholarship. The report of the Sub-committee is reproduced as Appendix III of this Report.

(b) Conclusions

The Council took note with satisfaction of the activities as reported, thanked in particular the Government of Korea for its continuing support and reiterated its view that the Scholarship programme was a core element of the Institute's efforts to promote its instruments and to reach out to developing countries and transition economies.

Item No. 13 on the Agenda – Uniform Law Review/ *Revue de droit uniforme* and other publications (C.D. (84) 13)

The *Secretary-General* summarised the document submitted to the Council emphasising the decision to place the co-ordination of all questions related to publications in the hands of one staff member, Ms Mestre.

*The Council took note, with satisfaction, of the dynamic development that in particular the Uniform Law Review/ *Revue de droit uniforme* was undergoing as well as of the sales figures and the efforts made to produce further non-official language versions of the UNIDROIT Principles of International Commercial Contracts.*

Item No. 14 on the Agenda – The UNIDROIT Web Site and UNIDROIT Depository Libraries
(C.D. (84) 14)

Ms Howarth (UNIDROIT Secretariat), in introducing this item, summarised the document that the members of the Council had before them.

The Council took note, with satisfaction, of the ongoing efforts on the part of the Secretariat to disseminate knowledge about the Institute and its work at low cost, i.e. without employing, for the time being, expensive software and service providers.

Item No. 15 on the Agenda – The Uniform Law Data Base (C.D. (84) 15)

(a) Background

Introducing this item on the Agenda, *Ms Peters* (UNIDROIT Secretariat) referred to the written report submitted to the Council. She added that the text of the *2001 Cape Town Convention on International Interests in Mobile Equipment* had been inserted in the data base, although it was not yet visible to the public. The Aircraft Protocol would be inserted shortly.

Ms Peters indicated that a major difficulty was the writing of case summaries. She appealed to members of the Council from CMR Contracting States for assistance, a number of whom might have students who would be able to assist the Institute in this matter. The countries concerned were Austria, Denmark, Germany, Greece, the Netherlands, Spain, Switzerland and the United Kingdom. *Mr Carbone* and *Mr Soltysinski* had already indicated that they would assist.

(b) Conclusions

The Council took note of developments in the setting up of a data base on Uniform Law and of the request of the Secretariat for assistance in the preparation of summaries for cases to be inserted in the data base.

Item No. 16 on the Agenda – Situation of the Library (C.D. (84) 16)

Ms Bettina Maxion (Law Librarian), in introducing this item, summarised the document that the Council had before it, up-dating the information provided therein in particular with respect to further progress made with respect to the on-line presentation of the catalogue and additional book donations received in the meantime.

The Council noted, with satisfaction, the outstanding efforts Ms Maxion was making so as to maintain the worldwide reputation of the UNIDROIT Library notwithstanding ever scarcer funding.

Item No. 17 on the Agenda – Appointment of correspondents of the Institute
(C.D. (84) 17 and Add.)

(a) Background

The *Secretary-General* requested that the Council, notwithstanding the Secretariat's previous indications on the subject of the appointment of new correspondents, appoint *Mr Ignacio García Pujol*, proposed by the Government of Chile, as a correspondent of the Institute.

He reported in detail on the utterly unsatisfactory response that the Secretariat received from correspondents both in the case of routine communications and, in preparation for this session, in relation to the drawing up of a new Work Programme. Only ten correspondents had reacted at all and only two of them had submitted serious suggestions.

(b) Discussion

Mr Widmer indicated that, in his view, the identification and selection criteria for correspondents needed to be reviewed. In particular, young and enthusiastic scholars and practitioners ought to be preferred over established and overburdened celebrities.

Several members of the Council recommended that the Secretary-General write a brief letter to all correspondents who had not recently replied to the Secretariat's communications pointing out that the Secretariat would assume agreement with their being erased from the list if they did, again, not respond to this letter.

(c) Conclusion

It was so decided.

**Item No. 18 on the Agenda – Preparation of the draft Budget for the 2006 financial year
(C.D. (84) 18)**

(a) Background

The Deputy Secretary-General a.i. indicated that, in preparing first estimates of expenditure and receipts for the 2006 financial year, the Secretariat had had to wrestle with two constraints, the continuing insistence by the Institute's financial organs on adherence to zero budgetary growth and the continuing high level of arrears accumulated by certain member States in the settlement of their annual statutory contributions. At the same time the previous year arrears had stood at approximately 330,000 Euros. While there were distinct improvements in the situation of certain defaulting member States, arrears had in the meantime risen to approximately 350,000 Euros. Taken together, these factors left the Secretariat with ever less room for manoeuvre in its budgetary planning and in the long-term risked strangling the Institute's very ability to carry out its work programme in timeous fashion.

These problems had been highlighted over the previous two years as the Secretariat had sought - unsuccessfully - to raise the funding needed to enable the Governing Council to appoint a new Deputy Secretary-General on the basis of the open competition that the Council had advocated the previous year. The answer given by the Institute's financial organs in 2004, in the context of the process for the approval of the Budget for 2005, was a resounding no: member States were not prepared to find the necessary funds - amounting to a 12% increase in the contributions of Category I member States, for example - that would be needed to permit the potential taking on of a new Category A6 professional member of staff. The representative of one Category I member State, moreover, cautioned against overestimating the chances of the necessary funds being forthcoming under the Budget for 2006 either.

This explained why, in the Secretariat's first estimates for 2006, it had had to be extremely prudent. It had notably had to refrain from presenting member States with a bill that would underwrite the cost of an open competition as envisaged by the Council. The Secretariat would have had to ask member States for an increase of between 3.82% and 5.45% over 2005 in order to fund such an open competition.

In these circumstances, the Secretariat had contained the proposed increase in total expenditure under the draft Budget for 2006 to some 2.42%, to be financed by an increase in the contributions of member States other than Italy of 1.25%. The fact that the Secretariat had been able to contain an anticipated increase in expenditure of 2.42% to an increase of only 1.25% in the amount of member States' contributions was due to a judicious mix of savings and increased receipts under certain headings of the first estimates for 2006, together with the arrears that it was reasonably optimistic about seeing settled in the months ahead.

The proposed increase in expenditure requested for 2006 was mainly made up of an amount of 57,000 Euros by way of salaries and allowances of staff members. This proposed increase was founded on the statement made by the Secretary-General to the Finance Committee in 2004 when he indicated that the Secretariat would need a new Category A1 (Step 1) officer to take over those functions previously exercised by such member of staff as might be asked to act as Acting Deputy Secretary-General.

In effect, the increase requested for 2006 would not do more than enable the Governing Council to appoint a replacement Deputy Secretary-General from within the ranks of the Secretariat and to recruit a new Category A1 (Step 1) officer.

In that the proposed increase exceeded zero budgetary growth, it met with opposition from some quarters in the Sub-committee of the Finance Committee. On the one hand, the Secretariat was reminded that it was intolerable for member States settling their contributions on time in effect to have to subsidise those with longstanding arrears. On the other, it was reminded that all member States the percentage contribution of which to the U.N. Budget had gone up had likewise to be reclassified in the UNIDROIT contributions chart, regardless of individual difficulties. At the same time, the Secretariat was invited to prioritise existing resources rather than ask for new resources. However, it was worth noting that the member State normally most insistent on strict adherence to zero budgetary growth indicated that, exceptionally, in recognition of the good value for money represented by his Government's membership of the Institute, it would not raise objections. Another member even indicated his Government's willingness to provide the additional funding needed to finance an open competition.

He believed that it was significant that the representative of one member Government had even questioned the Secretariat's need for the additional new officer, on the basis that member Governments had already provided additional funding for the appointment of a new junior officer under the 2005 Budget, even though that funding had ended up being used for quite different purposes, with the agreement of the Institute's financial organs, following the secondment of a civil servant from the Government of the United Kingdom for 2005.

He saw the fact that the representative of that Government saw fit to raise such a question as meaning that it was unlikely that member Governments would be prepared to look favourably upon another request for a new junior officer should the Governing Council decide not to fill the post of Deputy Secretary-General on the basis postulated under the first estimates for 2006.

(b) Discussion

Mr Inglese announced his Government's offer of a £ 50,000 donation towards the cost of an open competition for the post of Deputy Secretary-General. His Government was grateful for the achievements being realised in difficult circumstances. Whilst it welcomed the work being done by the Secretariat to reduce the arrears owed by member States, it urged the Secretariat to continue working towards the further reduction of these arrears.

Mr Cuesta (Chairman of the Finance Committee) indicated that, while the main conclusion of the recent session of the Sub-committee of the Finance Committee was that the majority of members were not opposed to an increase of 1.25% in the contributions of member States other than Italy under the draft Budget for 2006, three major contributors to the Institute's budget had signalled the need to observe the principle of zero budgetary growth and one of these had even flagged the possibility of calling for a vote on the Budget. Only one member, moreover, had been willing to provide additional funding for the post of Deputy Secretary-General. The Sub-committee had noted that the arrears owed by member States had increased since 2004 and urged the Secretariat to pursue defaulting States. It had also noted the shortfall in member States' contributions due to the fact that not all member States whose percentage contributions to the United Nations had risen under the contributions chart of that Organisation for the 2004/2006 triennium had been correspondingly reclassified in the contributions chart of the Institute. It had been agreed that all budgetary documents should in future also show what would be the situation were all member States paying the contributions that they should, on the basis of the current United Nations contributions chart. It was also agreed that in preparing the Institute's Work Programme the Secretariat should aim to set priorities among the various items as regards the Institute's financial resources.

Ms Trahan noted that one of the Organisation's main problems arose out of the need to increase budgetary expenditure in line with the increases in salaries and allowances approved by the Co-ordinated Organisations. She noted that the draft Budget for 2006 envisaged an increase of 4.3% under this heading and wondered how this could be squared with a proposed increase of only 1.25% in the contributions of member States other than Italy for 2006.

Mr Cuesta noted that his Government had traditionally taken a flexible approach to the interpretation of zero budgetary growth. He suggested that it would probably be necessary to introduce the principle of prioritisation in the Institute's activities, as had been requested on a number of occasions by the representative of Canada on the Finance Committee and the Sub-committee thereof.

The Deputy Secretary-General a.i., responding to the question raised by Ms Trahan, noted that the reason why an increase of 4.3% under the salaries and allowances scales approved by the Co-ordinated Organisations did not translate into a similar increase in expenditure under the draft Budget of the Institute for 2006 resulted in part from the judicious mix of savings and increased receipts under certain headings that he had already referred to and in part from the fact that the Institute did not apply the increases approved by the Co-ordinated Organisations in full and, what is more, implemented them only as from 1 July (as opposed to 1 January) of each financial year.

Mr Govey, while recognising the value of the work done by the Secretariat, acknowledged the need for it to redouble its efforts with a view to the recovering of arrears. He submitted that, if the Secretariat was successful in its request for a 1.25% increase in budgetary expenditure for 2006 and could thereby both fill the post of Deputy Secretary-General and gain a new junior officer, this would be a rather more positive solution than would otherwise have been imaginable. The Council's deliberations on the Work Programme for the 2006/2008 triennium had shown how easy it would have been to find even more subjects to work on but that it was necessary to be ruthless in prioritising work. At the same time, he congratulated the Secretariat on its success in obtaining additional resources. He expressed himself to be in favour of filling the post of Deputy Secretary-General from within the ranks of the Secretariat and permitting the Secretariat to gain a new junior officer.

(c) *Conclusions*

The Governing Council took note of the Secretariat's estimates for receipts and expenditure for the 2006 financial year and of the reactions of the Sub-committee of the Finance Committee thereto.

The Governing Council further took note with appreciation of the offer by the Government of the United Kingdom of a donation of £ 50,000 toward the cost of an open competition to fill the post of Deputy Secretary-General.

Item No. 19 on the Agenda – Appointment of a Deputy Secretary-General

The members of the Permanent Committee reported on an in-depth discussion of all relevant implications of accepting the United Kingdom's offer to make an extra-budgetary contribution and to hold an open competition for the selection of a Deputy Secretary-General.

The plenary of the Council weighed the arguments in favour and against proceeding to holding such a competition and concluded that, taking into consideration both risks and opportunities, the Institute should accept the United Kingdom's generous offer and organise an open international competition under the guidance and responsibility of a Sub-committee of the Permanent Committee that would report back to the Council.

It was so decided.

Item No. 20 on the Agenda – Preparation of the Work Programme for the 2006/2008 triennium (C.D. (84) 19 rev.2).

In introducing this item, the *Secretary-General* proposed that, in view of the Institute's weak financial foundations and Governments' ever more urgent calls for clear priorities, the Work Programme be established, monitored and carried out in application of six criteria:

- (1) Focus on the Organisation's specific strengths – Maintaining and sharpening its profile;
- (2) Avoiding overlap, duplication and competition with work carried out in other Organisations;
- (3) Healthy balance between responding to needs of developed and developing economies;
- (4) Healthy balance of strict intergovernmental and primarily academic work;
- (5) Financial accountability, including, where appropriate and feasible,
- (6) Shorter gestation periods.

The criterion "focus/clear profile", in his view, was to be the basic entry test as set out in the Strategic Plan (Strategic Objectives Nos 1 and 6, cf. also paras 92-93 Strategic Plan): only what UNIDROIT could do better than others ought to be considered as the Organisation was too small to engage in work which sister Organisations, e.g. UNCITRAL, with close to 200% more professional staff and without burden such as budget autonomy and in-house document translation, could do as well or better. UNIDROIT was clearly better placed where the flexibility of rules and procedure, in particular the freedom to choose the experts and to organise the working process, was of the essence. It was, for example, generally acknowledged that neither the UNIDROIT Principles of International Commercial Contracts nor the Principles of Transnational Civil Procedure nor the Cape Town Convention nor the draft Convention on Intermediated Securities could have been developed in any other forum. Conversely, routine commercial transactions such as most specific types of contract were being adequately taken care of in a less "elitist" institutional framework.

The Secretary-General then reported on the outcome of the usual formal consultations with member States' Governments and the Institute's Correspondents. Eleven out of 59 Governments had replied, three of them acknowledging the receipt of the Secretariat's Note Verbale only. For details, cf. Appendix IV. Ten out of the 175 correspondents had replied. For details, cf. Appendix V.

A Sub-committee of the Council was set up to consider the proposed Work Programme as set forth in document C.D. (84) 19 rev.2 and the comments submitted by Governments and Correspondents as summarised in Appendices IV and V. The meeting was attended by the following members of the Council: Ms Trahan, Messrs Adensamer, Arat, Boggiano, Carbone, Elmer, Gabriel, Govey, Harmathy, Hogan, Hosokawa, Inglese, Komarov, Lyou, Mertens in representation of Mr Bollweg, Sánchez Cordero, Sen, Soltysinski, Sturlese, Verdera, Voulgaris, Widmer and Zhang. The meeting was chaired by Mr Hartkamp, First Vice President of the Council.

All members of the Council who took the floor agreed that the still outstanding two equipment-specific protocols (on railway rolling stock and space assets) to the Cape Town Convention as well as the completion of the work on intermediated securities had to be accorded utmost priority. A number of speakers agreed with *Mr Sen's* supporting those Governments who had indicated that item 2 of the capital-markets related work (trading in securities in emerging markets, probably in the form of a legislative guide) as well as preliminary research on a forth equipment-specific protocol to the Cape Town Convention (on agricultural, construction and mining equipment) ought to be given priority status. Mr *Inglese* expressed doubts with respect to two of the problem areas listed in paragraph 23 of document C.D. (84) 19 re.2 as they appeared to be primarily regulatory in nature. The members of the Council agreed that at least one of the two outstanding Cape Town protocols – most likely the Protocol on Matters specific to Railway Rolling Stock – needed to be adopted by a diplomatic Conference before significant resources could be devoted to the proposed protocol on agricultural equipment.

It was so decided.

With respect to the question which additional chapters to the Principles of International Commercial ought to be given priority, the Council - Messrs *Boggiano, Carbone, Elmer, Gabriel, Harmathy, Inglese, Komarov, Soltysinski, Sturlese, Verdera* and *Zhang* and *Ms Trahan* having taken the floor – concluded that, in view of the general selection criteria, the following five topics listed in paragraph 18 of document C.D. (84) 19 rev.2 should be recommended to the new Working Group and the General Assembly: *unwinding of failed contracts, illegality, plurality of debtors and creditors, conditions and termination of long-tem contracts for cause*. Proposals to turn the Working Group's attention also to certain specific types of contract did not find support. At the request of *Ms Trahan*, the Council asked *Mr Bonell*, to prepare, for the next session, a paper on the issue of how best to deal with topic of "ethics in international contracts".

The Council, moreover, decided that the new Working Group should be made up according to established criteria and that it should follow the working methods adopted by the groups that had prepared the 1994 and the 2004 editions. The Co-ordinator of the Working Group was asked to conduct further preliminary research and o report back to the Council at its 85th session. Only at that point in time would a precise circumscription of the topics to be treated be possible.

The Council furthermore decided that the offer submitted by Mr Ron DeKoven, London (UK), a Correspondent of UNIDROIT, to fund work on a model law on leasing should be accepted on the understanding, however, that no additional resources could be devoted to that project by the Institute.

At the request of Mr Carbone and the Italian Government, the Council asked the Secretary-General to explore to what extent UNIDROIT could continue to be involved in work on multimodal transport be it directly be it in co-operation with other intergovernmental Organisations.

Finally, the Council decided that the projects on the “reserve list” for the previous triennium, i.e. items 7-11 as listed in Annex I of document C.D. (84) 19 rev.2, are to be deleted from the Work Programme.

With respect to the non-legislative activities connected with the unification of law the Council decided to continue the programme of legal co-operation for developing countries and transition economies consisting of, firstly, the research scholarship programme and, secondly and subject to the availability of extra-budgetary funding, legal assistance related to specific areas of law reform.

The Council furthermore decided to devote the necessary resources to the Institute's publications, first and foremost the Uniform Law Review/Revue de droit uniforme.

Lastly, the Council instructed the Secretariat to continue working on the data base on uniform law (UNILAW).

The Work Programme for the 2006/2008 triennium in its entirety as approved by the Council and to be submitted to the General Assembly, for adoption, is shown in Appendix VI.

Item No. 21 on the Agenda - Revision of the Regulations concerning the election of the Governing Council (C.D.(84) 20)

(a) Background

*The Deputy Secretary-General a.i. recalled that at the last elections to the Council all three African candidates had been defeated. This was particularly disastrous, given, first, the Institute's serious under representation in Africa - it had only four African member States - and secondly, the fact that the instruments prepared by the Institute tended to be of greatest benefit to those developing countries without the legal infrastructure necessary to attract foreign investment. At its 58th session, the General Assembly had accordingly taken up the suggestion made by the Governing Council at its previous session that Article 7 of the Institute's Regulations should be looked at anew with a view to ensuring minimum representation of all the important geographic regions of the world on the Council. It had set up an *ad hoc* Committee of the General Assembly, which had met in Rome on 28 February 2005, under the chairmanship of H.E. Mr J.F. Cogan, Ambassador of Ireland in Italy. The meeting had been attended by a geographically representative cross-section of the Institute's membership.*

*With the exception of the view expressed by one member State in favour of raising more general issues concerning the composition of the Council and the membership of the Institute, the feeling of the *ad hoc* Committee was that it should concentrate on resolving the specific issue referred to it by the General Assembly, namely how best to amend Article 7 of the Regulations so as to ensure the election in future of at least one member of the Governing Council from Africa. The Committee in effect considered that to go beyond that would be tantamount to *ultra vires*.*

*The *ad hoc* Committee looked at this problem in two steps. First, it looked at the question of the minimum number of members that should sit on the Governing Council for each geographic region of the world. Secondly, it looked at the most appropriate manner in which to divide the Institute's membership into such regions.*

On the first question, there was consensus that, depending on the number of regions into which the Institute's membership was divided, the candidate receiving the highest number of votes from each region should be automatically elected, even if the number of votes cast for that candidate would not otherwise have sufficed to elect him or her, with the remaining seats being distributed on the basis of the existing system, that is an absolute majority of the votes cast. Each region would thus be assured of at least one seat on the Governing Council.

On the second question, a considerable majority of opinion swung behind dividing the Institute's membership into four regions, Africa, the Americas, the Asia-Pacific region and Europe. There was, however, minority support for dividing the Institute's membership into five regions. This sector of opinion was essentially concerned to ensure recognition of the distinct legal culture of the countries of Latin America and the Caribbean and not to see their identity subsumed under an Americas grouping. It was worth noting that, on the other hand, the representative of a North American member State expressed himself against employing what he saw as the discredited and outdated Western Europe and Other Countries grouping. In general, moreover, the Committee recommended that the proposed four-region formula should be subject to periodic review so as to reflect possible changes in the Institute's membership that might justify increasing the number of regions.

The *ad hoc* Committee agreed to take the South African representative's proposal as the basis for the amendment of Article 7 on the first point, namely on the minimum number of members to be elected per region. The Secretariat was asked to prepare a draft on this point.

The proposal for the amendment of Article 7 on the minimum number of members to be elected per region was made up of two paragraphs, paragraph 5 and paragraph 5 *bis*. The reason for casting this proposal in two paragraphs had to do with the fact that the General Assembly would, in certain cases, be called upon to elect members of other bodies, namely, under Article 7 *bis* (2) of the Statute, members of the Administrative Tribunal. Paragraph 5 was basically the existing Article 7(5) of the Regulations, with the simple addition of the words "other than appointments to the Governing Council", to indicate that this paragraph should in future be applied only in the case of elections other than elections to the Council. Paragraph 5 *bis*, on the other hand, departed from the current wording of Article 7(5) in that it was stated to apply only in the case of elections to the Governing Council and provided that the first so many seats corresponding to the number of regions ultimately chosen were to be reserved for the candidates having received the highest number of votes from each such region, with the remaining seats being filled by those of the other candidates having secured an absolute majority of votes.

One of the most significant points made during the meeting of the *ad hoc* Committee was the importance of not allowing this process indirectly to politicise the nature of the Institute. The Secretariat and the Chairman of the Committee believed that the surest way of avoiding such a denouement was to keep the changes to the absolute minimum, and thus to concentrate on the special problem that had led to the setting up of the Committee in the first place.

The Secretariat invited Council members to express their opinion on the proposals for the amendment of Article 7(5) made by the *ad hoc* Committee. Following the Council session it would be for the General Assembly, at its 59th session, to be held in Rome on 1 December 2005, to decide on these proposals, in the light of any comments made by the Council.

The Secretariat had been asked by the Committee also to seek the Council's advice on another element of Article 7. One representative attending the Committee's meeting proposed that Article 7(4) of the Regulations should be either deleted or amended. This paragraph dealt with the situation where, for instance, in an election to the Governing Council, there was a tie for the 25th

seat. At the moment, Article 7(4) provided simply that the older candidate won in such a case. The representative who took up the matter during the Committee's work proposed that it should either be deleted or replaced by a rule providing, in the case of a tie, for a further ballot between the two parties involved in the tie.

(b) Discussion

Mr Elaraby indicated his support for the proposed amendments to Article 7(5). He saw an inconsistency between these and Article 7(4) and, therefore, supported the latter's deletion.

Mr Widmer favoured the proposed amendments to Article 7(5). He wondered, however, whether it might not be possible to improve them by providing for a minimum of two persons to be elected for each geographic region. Moreover, he did not believe that the criterion of geographic regions was perhaps the most suitable in the case of the Institute, suggesting that that of legal families might provide a better criterion in that specific case. He agreed that the rule embodied in Article 7(4) was contradictory with the purport of the proposed amendments to Article 7(5) and, accordingly, supported its deletion.

Mr Voulgaris also favoured employing the criterion of legal families rather than that of geographic regions and supported *Mr Widmer's* proposal for Article 7(5) to be amended in such a way as to ensure the election of at least two members per legal family.

Mr Sánchez Cordero noted the distinctness that attached to Latin America as a region, in particular since the establishment of new free trade zones there, especially Mercosur. He stressed the importance of ensuring separate representation for distinct regions and, accordingly, for ensuring separate regions for Latin America and North America.

Mr Lyou indicated that he agreed in principle with the idea of dividing up membership of the Council according to geographic regions. He noted, however, the disparity between this criterion and that of population, recalling that two-thirds of the world's population were in Asia. The proposed solution, therefore, fell short of ensuring true representativeness of the world on the Council.

Mr Hosokawa, whilst indicating that his position differed from that of his Government, took the view that it was important to ensure the representation of each of the world's geographic regions on the Council for the sake of the development of the Institute as a truly world-wide body and supported the division of the Institute's membership for the purpose of elections to the Council into four regions. He considered that this was essential in order to ensure at least one seat for the most vulnerable region of the Institute's membership, to wit Africa, and that this solution was the one least detrimental to the principle of individual merit as the normal basis for election to the Council.

Mr Elmer saw the problem needing to be fixed as being strictly limited in proportion, namely the absence of an African member on the Council. The object of the exercise was not to change the whole composition of the Council nor to change the Council's representativeness of the whole world. He urged the taking of a cautious approach and not changing more than was strictly necessary to achieve the objective that had been identified.

Mr Hogan saw the suggestion for guaranteeing the election of one Council member from each geographic region as being the only realistic solution for the time being, in particular given that such a large proportion of the Institute's membership was concentrated in certain parts of the world only. It might be possible in future to go further, for instance, by guaranteeing the election of two members per region and changing the regions to be employed for this purpose. But this was

unrealistic at the moment. It was necessary to see the amendments proposed as a first step. He favoured the replacement of the rule enshrined in Article 7(4) by one providing for the holding of a run-off ballot for the last seat.

Mr Soltysinski concurred as to the need to go for a minimalist solution. It was necessary to respect the terms of reference of the *ad hoc* Committee. He also supported the proposal for either deleting or replacing Article 7(4).

Ms Trahan agreed that it was essential to restrict the scope of any amendment to Article 7 to the purpose sought, namely to redress the injustice brought about by the absence of an entire continent from membership of the Council. The proposed amendments, to her mind, corrected satisfactorily the shortcoming that they were designed to overcome. She did not believe that it was possible to have an equitable representation on the Council of all legal systems. She agreed with Mr Widmer that the proposed amendments were capable of being improved on but suggested that such further improvements should be reserved for future consideration. Finally, she agreed as to the need to modify Article 7(4), which should provide that in the event of a tie for the last seat a further ballot should be held between the two candidates involved in the tie.

Mr Hartkamp, while noting that the Council's opinion on this matter was, of course, subject to that of the General Assembly, agreed with Mr Hosokawa, as to the appropriateness of both the proposed amendments to Article 7(5) and that to Article 7(4).

Mr Gabriel supported the conclusions reached by the *ad hoc* Committee. He submitted nevertheless that part of the problem lay in the need to attract new member States.

Mr Zhang also supported the conclusions reached by the *ad hoc* Committee as a necessarily modest first step. At the same time, he was of the view that it was important for the Institute to seek a more world-wide membership and he did not doubt that the Council's representativeness at a world-wide level was to be seen as a necessary ingredient of such a process. It was indeed to be regretted that there was no Council member from Africa but this was also true of the under-representation of Arab legal systems, for instance. Ultimately, he believed that it would be desirable for each region to have at least two or three Council members. He noted that the membership of the United Nations Commission on International Trade Law (UNCITRAL) was divided into seven regions and he submitted that this made that Organisation's work more fruitful.

Mr Martens also stressed that the procedure underway was for the limited purpose of finding a solution to the specific problem raised by the failure of any African candidate to secure election at the previous elections to the Council. It was essential to approach the overall issue involved one step at a time. Therefore, it was not appropriate to go beyond the specific problem that had arisen on this occasion: other aspects of the issue could be dealt with at a later stage. He approved the solutions proposed by the *ad hoc* Committee.

Mr Komarov too supported the amendments proposed by the *ad hoc* Committee, which he saw as helping the Institute to ensure a more adequate representation of the different regions on the Council.

Mr Bedeir (President of the General Assembly) saw the conclusions reached by the *ad hoc* Committee as meeting the basic objective sought by the General Assembly on this point, namely as ensuring a minimum representation of all the geographic regions included among the Institute's membership on the Governing Council. He recalled that the solutions proposed were, moreover, intended to be subject to periodic review, as circumstances changed. He noted that Council

members were generally agreed as to the acceptability of the amendments proposed and saw them as being, therefore, ready to be transmitted to the General Assembly for approval.

The Deputy Secretary-General a.i., summing up, noted that Council members had, broadly speaking, endorsed the recommendations of the ad hoc Committee for amending Article 7 of the Regulations.

(c) Conclusions

The Governing Council agreed that the ad hoc Committee was right to see its terms of reference as being strictly limited to the seeking of a solution to the specific problem referred to it, namely the failure of any African candidate to secure election to the Council at the 57th session of the General Assembly, held in Rome on 28 November 2003.

The Council accordingly endorsed the recommendations of the ad hoc Committee for the amendment of Article 7(5) of the Regulations of the Institute.

It further agreed that Article 7(4) of the same Regulations should be deleted and replaced by a rule providing for the holding of a further ballot in the event of a tie for the 25th seat on the Council.

**Item No. 22 on the Agenda – Date and place of the 85th session of the Governing Council
(C.D. (84) 21)**

It was decided that the 85th session was to be held from 8 to 10 May 2006.

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

(Rome, 18 - 20 April 2005 / Rome, 18 – 20 avril 2005)

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MEMBRES DU CONSEIL DE DIRECTION**

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Mr John ATWOOD	Research Officer / <i>Chargé de recherches</i>
Ms Bettina MAXION	Law librarian / <i>Bibliothécaire</i>

APPENDIX II

AGENDA

1. Adoption of the agenda (C.D. (84) 1 rev. 2)
2. Annual Report 2004 (C.D. (84) 2)
3. Appointment of the First and Second Vice-Presidents of the Governing Council (C.D. (84) 3)
4. Implementation of the Strategic Plan (C.D. (84) 4)
5. Principles of international commercial contracts (C.D. (84) 5 rev.)
6. Principles of transnational civil procedure (C.D. (84) 6, Study LXXVI – Doc. 13)
7. International interests in mobile equipment:
 - (a) Cape Town Convention and Aircraft Protocol (C.D. (84) 7(a))
 - (b) Preliminary draft Protocol to the Cape Town Convention on Matters specific to Railway Rolling Stock (C.D. (84) 7(b))
 - (c) Preliminary draft Protocol to the Cape Town Convention on Matters specific to Space Assets (C.D. (84) 7(c), C.G.E./Space Pr./2/Report)
8. Transactions on transnational and connected capital markets (C.D. (84) 8, Study LXXVIII - Docs 18 and 19)
9. Uniform rules applicable to transport
10. The Uniform Law Foundation (C.D. (84) 10)
11. Status of implementation and promotion of UNIDROIT Conventions (C.D. (84) 11)
12. Legal co-operation programme (C.D. (84) 12, Study LXV - Scholarships Impl. 16, Etude LXV/L - Doc. 2)
13. Uniform Law Review/*Revue de droit uniforme* and other publications (C.D. (84) 13)
14. The UNIDROIT Web Site and UNIDROIT Depository Libraries (C.D. (84) 14)
15. The Uniform Law Data Base (C.D. (84) 15)
16. Situation of the Library (C.D. (84) 16, A.G. (58) 8, Appendix II)
17. Appointment of correspondents of the Institute (C.D. (84) 17 and Add.)
18. Preparation of the draft budget for the 2006 financial year (C.D. (84) 18, F.C./S.C. (103) 2)
19. Appointment of a Deputy Secretary-General
20. Preparation of the Work Programme for the 2006/2008 triennium (C.D.(84) 19 rev. 2)
21. Revision of the Regulations concerning the election of the Governing Council (C.D. (84) 20, A.G./A.H.C. Doc. 5, Regulations of the Institute)
22. Date and place of the 85th session of the Governing Council (C.D. (84) 21)
23. Any other business.

APPENDIX III**REPORT OF THE MEETING OF THE *SCHOLARSHIPS SUB-COMMITTEE***

Monday 18 April 2005, 3 pm

The Scholarships Sub-committee was made up of Messrs Komarov, Lyou, Sen, Verdera y Tuells, Widmer and Zhang Yuqing as well as Mr Kronke and Ms Mestre of the Secretariat. The meeting was chaired by Mr Widmer.

The following documents were submitted to the sub-committee in addition to Council document (C.D. (84) 12):

- The Report on the Implementation of the Programme in 2004: Study LXV – Scholarships exec. 16, and an update listing the beneficiaries of the Programme from January 2004 to June 2005
- An updated table setting out funding details for 2004 and 2005;
- The work, conclusions and research reports of the beneficiaries of the programme in the period January 2004 – April 2005 (for consultation)
- Applications received by the Secretariat for the year 2005-2006 (for consultation)

The Secretariat briefly reported on the implementation of the Programme since the last session of the Governing Council and stressed its role not only in the context of legal co-operation but also as a tool to promote UNIDROIT and its work. It noted the particularly high level of researchers hosted this year, all of which had made optimum use of the opportunity offered them.

As to funding, the Sub-committee expressed its gratitude for the support extended by the Governments of the Republic of Korea and the People's Republic of China, and noted the modest but essential contribution made by the General Budget of the Institute. It expressed its satisfaction at the Spanish Government's announcement that it intended to sponsor the Programme from 2006 onward by funding four research scholarships, and noted the Secretariat's efforts to ensure that the best use was made of the resources at its disposal and to encourage the beneficiaries to identify external sources of finance.

As to the applications received by the Secretariat for the coming year, the sub-committee took note of the large number of applications (53, from 20 countries). It agreed to mandate the Secretary-General to establish an order of precedence in accordance with the usual selection criteria (i.e., the conditions stipulated by donors, the general guidelines laid down by the Scholarships Sub-Committee in April 1999 – see below –, the "strategic" objective of forging closer links with certain member States or with potential new member States).

Special mention was made of the possibility of granting scholarships to staff members of regional or sub-regional organisation, or to earmark some scholarships for projects involving the translation of UNIDROIT instruments into other languages.

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[General criteria established by the Scholarships Sub-committee in April 1999 :

- (a) preference to be given to applicants conducting research on topics relevant to the activities of UNIDROIT (past achievements, items on the current work programme, private law in the broadest sense);
- (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 with research projects likely to have maximum practical impact;
- (e) preference to be given to applicants possessing sufficient linguistic ability to use the bibliographical materials to best advantage.]

APPENDIX IV

Comments on Work Programme 2006-2008 submitted by Governments

	Cape Town 2 nd , 3 rd Prot	Cape Town 4 th Prot	Contract P.	Capital Markets Item 2 Emerging Markets	ML Leasing	Other
Australia	+	+	+	+		
Brazil	+	+	+	+		
Canada*						
Germany	+	+	+	+		
India**						
Italy	+		+	+		Multimodal Transport
Sweden	+	+	+	+		
United States	+	+	+	+	+	

11 Governments replied, three of them acknowledging receipt of Note Verbale only.

* Canada encourages choice on basis of the following criteria: International interest? (item on agenda of other org's?; existing instruments?; improvement or modernization of law in different regions of the world?; within scope of UNIDROIT/other org.?; of interest of particular state, group of states, industry?; balance between projects for developed and developing countries?; momentum for project?) - Costs and benefits: (what resources required for successful outcome?; how much time until completion?; does interest for project exceed its costs?; do benefits outweigh costs?)

** Indian Gov't expressed its general views. Details to be submitted by Dr Sen.

APPENDIX V

Comments submitted by Correspondents

Cape Town 2 nd , 3 rd Prot	Cape Town 4 th Prot	Contract P.	Capital Market Item 2 Emerging Markets	ML Leasing	Other
1	1	8***	2	3	Transport 1 Research into changes needed to make conv. more effective 1 Company law 1

10 Correspondents replied.

*** consumer contracts (1); accountancy contracts (1); arbitration agreements (1); avoid areas not typically soft law (1); unfair contract terms (1); post contractual effects (1); further chapters and improvement of existing chapters.

APPENDIX VI

DRAFT WORK PROGRAMME FOR THE TRIENNIUM 2006/2008

*as drawn up by the Governing Council at its 84th session
(Rome, 18/20 April 2005)*

**PART I: PREPARATION OF UNIFORM LAW INSTRUMENTS AND EXERCISING OF
DEPOSITARY FUNCTIONS IN RESPECT THEREOF**

1. ***International interests in mobile equipment*** - Cape Town Convention and related Protocols

* (a) *Convention on International Interests in Mobile Equipment (Cape Town, 16 November 2001) and Protocol thereto on Matters specific to Aircraft Equipment (Cape Town, 16 November 2001)* - exercising of depositary functions, in particular in relation to the International Registry for aircraft objects and the Supervisory Authority of that Registry;

* (b) *Draft Protocol to the Cape Town Convention on Matters specific to Railway Rolling Stock* - organisation of a regional seminar for Africa and of a diplomatic Conference of adoption by mid-2006;

* (c) *Preliminary draft Protocol to the Cape Town Convention on Matters specific to Space Assets* - completion of a draft Protocol capable of being laid, as soon as possible, before a diplomatic Conference of adoption; and

(d) *Future Protocol to the Cape Town Convention on agricultural, construction and mining equipment* - subject to the case for such work being confirmed in a preliminary study, that should also examine the possibility of including industrial and civil works equipment within the scope of the project.

*2. ***Principles of International Commercial Contracts*** - with work following the same lines as hitherto, with the Secretariat being invited to consider the membership of the Working Group and also who might usefully be invited to participate as observers and with wide support being expressed for work focussing on, first, unwinding of failed contracts, secondly, illegality, thirdly, plurality of debtors and creditors, fourthly, conditions (that is suspensive conditions or conditions precedent and resolute conditions or conditions subsequent) and, fifthly, suretyship and guarantees but with more detailed proposals being due to be laid by the Secretariat before the Governing Council at its 85th session, as soon as possible after which the reconvened Working Group should hold its first session.

3. ***Capital markets***

* (a) *Preliminary draft Convention on harmonised substantive rules regarding intermediated securities* - completion of a draft Convention capable of being laid, as soon as possible, before a diplomatic Conference of adoption; and

* (b) *Emerging markets* - decentralised preparation of an instrument, probably to take the form of a legislative guide.

4. **Model law on leasing** - subject to the availability of external support, with it being noted that, thanks to the efforts of Mr Ronald DeKoven, a UNIDROIT correspondent, such external support is indeed forthcoming.

5. **Multimodal transport** - with, given UNIDROIT's longstanding involvement in the drafting of transport law instruments, consideration being given to the possibility of working in co-operation with the relevant international Organisations.

PART II: ACTIVITIES CONNECTED WITH THE UNIFICATION OF LAW

1. **Programme of legal co-operation** - for developing countries and countries in economic transition

(a) *Research scholarships programme* and

(b) *Assistance in legal drafting* - in particular, co-operation with the Organisation for the Harmonisation of Business Law in Africa (O.H.A.D.A.) for the preparation of a draft Uniform Act on Contracts.

2. **Promotion of UNIDROIT activities and instruments** - in particular the Institute's web site.

3. **UNIDROIT publications** - in particular

(a) *Uniform Law Review/Revue de droit uniforme*;

(b) *Digest of Legal Activities of International Organizations and other Institutions*;

(c) *UNIDROIT Proceedings and Papers* and

(d) *Acts and Proceedings of the diplomatic Conference at which the Cape Town Convention and the Aircraft Protocol were opened to signature.*

4. **Data base on uniform law (UNILAW)**

* Priority topic