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## **REPORT**

(prepared by the Secretariat)

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**[Note of the Secretariat:** The Report uses abbreviations and acronyms for UNIDROIT and other organisations' instruments, international organisations or other institutions. The list of such abbreviations and acronyms is to be found in APPENDIX III to this document.]

1. The President of the Institute, *Mr Alberto Mazzoni*, welcomed members of the Governing Council to the Council's 97<sup>th</sup> session. He extended a special welcome to the former Republic of Korea Ambassador his Excellency Mr Chang Dong Hee, who was representing Governing Council member Mr Byung-Hwa Lyou, and to Indonesian Ambassador Her Excellency Ms Esti Andayani, attending in her capacity as the Chair of the UNIDROIT General Assembly.

2. The President began with a special tribute to Mr José Angelo Estrella Faria, who after nine years serving UNIDROIT as Secretary-General, had resigned his post in July 2017 to return to his position at UNCITRAL in Vienna. Under Mr Estrella Faria's leadership, the Institute had advanced its core mission to deliver and implement high quality instruments, diversified its Work Programme, strengthened its relationships with partner organisations and modernised its internal operations. Mr Estrella Faria had made a significant contribution to UNIDROIT and he had left the Institute well-positioned to continue to perform its role as one of the world's leading international organisations in the fields of international commercial law and private international law. He expressed a personal note of gratitude to Mr Estrella Faria for his service and noted that he would always remain a friend of the Institute.

3. The President then expressed his personal thanks to the Secretary-General *ad interim*, Ms Anna Veneziano, for her hard work in leading the Institute over the past nine months. She had performed remarkably in ensuring that UNIDROIT's legislative, promotional and administrative goals continued to be met, whilst also managing her own substantial workload.

4. He noted that following Mr Estrella Faria's departure, the Council would be called upon to appoint a new Secretary-General. He would be delivering his report on the Permanent Committee's selection process during the special closed session in the afternoon. He stated that the Council would consider the progress of the Institute in the implementation of its triennial Work Programme for 2017 – 2019. While substantive progress had been made on many topics, he noted three projects which had made particularly large strides forward over the last 12 months.

5. Firstly, the Governing Council had the responsibility of reviewing the preliminary draft MAC Protocol approved by the second session of the Committee of Governmental Experts that had been held in Rome in October 2017, with a view to determining whether the Secretariat should convene a Diplomatic Conference for its adoption. Secondly, he mentioned the progress made on the joint project between UNIDROIT and the European Law Institute (ELI) to prepare European regional rules on Transnational Civil Procedure. Thirdly, rapid progress had also been made on the preparation of an international guidance document on agricultural land investment contracts. A Working Group comprising international experts and representatives from relevant international organisations had already met three times over the past 12 months to develop a draft instrument.

6. The Secretariat would provide thorough information on these projects and on the other substantive current projects, including the work to promote the ratification and implementation of existing UNIDROIT instruments, as well as on the non-legislative activities conducted on an ongoing basis, such as the services provided by the library, the UNIDROIT information resources and policy, and the institutional work done to keep UNIDROIT running smoothly. He concluded by informing the Council that, based on the Secretariat's proposal, and after an extensive review, the General Assembly had adopted a new compensation and social security scheme for staff members at its 76<sup>th</sup> session (Rome, 7 December 2017), which would improve UNIDROIT's long-term sustainability by enabling the organisation to continue to recruit high quality staff members in the future.

7. The President thanked the Council members for their service to the Institute and expressed his hope that the Council would have positive and fruitful deliberations. He then declared the session open.

**Item 1: Adoption of the annotated draft agenda (C.D. (97) 1 rev.2)**

8. The Governing Council adopted the agenda as proposed in document C.D. (97) 1 rev. 2.

**Item 2: Appointment of the First and Second Vice-Presidents of the Governing Council (C.D. (97) 1 rev.2)**

9. The Governing Council appointed Mr Arthur Hartkamp as First Vice-President of the Governing Council and Mr Sánchez Cordero as Second Vice-President, both of whom were to serve in these positions until the 98<sup>th</sup> session of the Council.

**Item 3: Reports****(a) Annual Report 2017 (C.D. (97) 2)**

10. The *Secretary-General a.i.*, Ms Anna Veneziano, welcomed the members of the Governing Council on behalf of the Secretariat. She thanked the President for his kind words and expressed her thanks to her colleagues of the Secretariat for their dedication and support during this transitional period.

11. She presented the Annual Report for 2017, the full presentation of which was made in the corresponding document. She would make special mention of the most important events that had taken place in 2017, mainly regarding legislative activities of the current Work Programme, but also in relation to one administrative matter that had been briefly referred to by the President.

12. What could be called the crowning achievement of 2017 had been the Council's adoption of the Legislative Guide on Intermediated Securities. The Legislative Guide was the continuation of Unidroit's work in the area of capital markets, particularly on the application of the Unidroit Convention on Substantive Rules for Intermediated Securities. The Guide aimed to assist Governments in their consideration of the Geneva Convention and its main objective was to provide, in addition to key principles and rules, a more accessible non-binding and more adaptable form of guidance to improve the legal framework for holding and transferring securities. Before being considered by the Council, the Legislative Guide had been recommended by adoption by the Committee on Emerging Markets Issues, Follow-Up and Implementation at its fourth meeting held in Beijing on 29-30 March, at the kind invitation of the China Securities Regulatory Commission, hosted jointly with the China Securities Depository and Clearing Corporation Ltd. On the first day, an open Colloquium had been held on the theme of "Enhancing and Ensuring Legal Certainty in Both Current and Future Holding Systems", and the Committee had reviewed the draft Legislative Guide, prepared by an informal group of experts chaired by Governing Council member, Mr Hideki Kanda, in detail on the second day. She expressed her thanks to Mr Kanda and, through him, to the whole informal group of experts for their outstanding contribution.

13. The Secretary-General a.i. noted that a second important project was the Fourth Protocol to the Cape Town Convention on International Interests in Mobile Equipment on Matters specific to Mining, Agricultural and Construction Equipment (the "MAC Protocol"). Work had proceeded apace within a Committee of Governmental Experts, which had met twice, with a high level of attendance by States and representatives. At the first session held on 20-24 March, the Committee of Governmental Experts had made strong progress in reviewing the preliminary draft text provided by the Study Group. This session had been followed by intense intersessional work, and particularly worthy of mention was the preparation of an economic impact analysis on the MAC Protocol by a

team of economists. This analysis was particularly important for the promotion both of the ongoing process of preparation of the draft Protocol and the success of the Protocol once adopted. At the conclusion of its second session, held on 2-6 October, the Committee of Governmental Experts had adopted the preliminary draft MAC Protocol and made a recommendation to the Unidroit Governing Council that a Diplomatic Conference be convened to conclude the MAC Protocol. The Council would therefore be called upon to consider the text of the preliminary draft MAC Protocol and, if it considered it sufficiently developed, request that a Diplomatic Conference be convened in 2019 to adopt the Protocol.

14. The Secretary-General *a.i.* referred to a third legislative project where significant progress had been made during 2017, i.e. the preparation of an international guidance document on agricultural land investment contracts, which was part of the "law and agricultural development" line of UNIDROIT's activities and was conducted in partnership with FAO and IFAD. The Working Group chaired by Governing Council member, Mr José Antonio Moreno Rodríguez, had held two meetings in 2017, on 3-5 May and 13-15 September, in addition to teleconferences and an informal meeting during the CFS 44th plenary session (Rome, 9-13 October 2017).

15. Among the current legislative projects, the Secretary-General *a.i.* referred to the preparation of Regional Rules of European civil procedure in cooperation with the European Law Institute (ELI), for which two meetings of the Steering Committee, Co-Reporters and members of the Working Groups had taken place in 2017: one in Rome on 5-7 April, and one in Vienna on 16-17 November. As regards activities in relation with existing instruments, the Secretariat had advanced its work to support the implementation of the Rail and Space Protocols, while intense promotion initiatives had been engaged regarding the 1995 UNIDROIT Convention on Stolen or Illegally exported Cultural Objects, and the UNIDROIT Principles of International Commercial Contracts.

16. The Secretary-General *a.i.* concluded by informing the Council that at its 76<sup>th</sup> session (Rome, 7 December 2017), the General Assembly had approved important reforms to the Institute's staff compensation, pension and social security schemes. This had concluded an extensive Finance Committee process, to ensure that these schemes would be fair, transparent and efficient, and these reforms were in the process of being implemented.

17. *The Secretary of UNCITRAL, Ms Anna Joubin-Bret*, thanked UNIDROIT for the invitation to participate in the 97<sup>th</sup> session of the Governing Council, the first that she had the privilege to attend since her appointment. She had very recently the pleasure of welcoming UNIDROIT's Secretary-General *a.i.*, as well as the Secretary-General of the Hague Conference on Private International Law, at the annual tripartite meeting of the three so-called "sister organisations" at the seat of UNCITRAL in Vienna. She very much looked forward to the many more meetings and opportunities to come for the three organisations to join forces and explore their synergies for joint projects and close cooperation. She noted that each organisation had its own identity in terms of membership, working methods and focus areas. Nevertheless, they shared the common goal of promoting the harmonisation and modernisation of commercial law worldwide.

18. She had listened carefully to the Secretary-General *a.i.*'s report on UNIDROIT activities in 2017, and was impressed by the high quality work accomplished by the organisation, which was another telling example of how much a small team of motivated and competent professionals can achieve under an able and engaged leadership. She was glad to note that UNCITRAL had participated and contributed in two ongoing meetings in the year 2017, namely the Legislative Guide on Intermediated Securities and the negotiation of the MAC Protocol. UNCITRAL was also interested in contributing to other ongoing projects, particularly the preparation of an international guidance document on agricultural land investment contracts. In this regard, she referred to UNCITRAL's challenging new project, which had attracted a high level of political attention, namely the consideration of a possible reform of the investor-state dispute settlement system. Although the discussion was essentially

focused on procedural aspects, the broad debate would inevitably bring various unresolved issues of substantive law to the forefront, which may call for the organisations' expertise in commercial contract law and cooperation. Another more obvious area of cooperation was the joint project of the preparation of a guidance document in the area of international commercial contract law with a focus on sales, regarding which UNCITRAL was prepared to give its best. She concluded by expressing her best wishes for a successful session.

19. *The representative of the Hague Conference, Mr Brody Warren*, expressed his thanks for the invitation to his organisation to attend the Governing Council session. As a fellow tripartite organisation, he echoed some of the comments made by the Secretary of UNCITRAL, and noted that his organisation was grateful for the opportunity to cooperate on several of the projects during 2017. On behalf of the Permanent Bureau of the Hague Conference and in particular Secretary General Christophe Bernasconi, he congratulated Ms Anna Veneziano for leading the Secretariat over the last few months and wished the Council fruitful deliberations at its present session.

20. *Mr Chang Dong Hee* introduced himself as a retired diplomat, representing Professor Lyou Byung-Hwa. He was honoured to attend this meeting, all the more so since he had spent one year at UNIDROIT when he was a young diplomat. He congratulated the Secretary-General a.i. for her excellent report on UNIDROIT activities on 2017 and wished the best success to the Governing Council session under the leadership of President Mazzoni.

21. During the session, a number of Council members, including *Ms Bariatti, Mr Erdem Mr Meier, Mr Tricot* and *Mr Sánchez Cordero* expressed their appreciation toward Mr José Angelo Estrella Faria, who had been an outstanding Secretary-General for UNIDROIT, thanking Ms Anna Veneziano for her excellent leadership as Secretary-General a.i. during the transition period, and congratulating her for the activities that had been developed during this year.

22. *The Council took note of the Secretary-General a.i. 's report on the activity of the Institute in 2017. The Council expressed its gratitude to Mr José Angelo Estrella Faria for his outstanding contribution to UNIDROIT as Secretary-General, and expressed its appreciation to Ms Anna Veneziano, Secretary-General a.i. for successfully leading the Secretariat during the transition period.*

#### **(b) Report of the UNIDROIT Foundation**

23. *The Vice-President of the UNIDROIT Foundation, Mr Don Wallace*, provided an oral report on the operations of the UNIDROIT Foundation. Mr Wallace noted that the UNIDROIT Foundation Board of Governors had held two meetings, on 26 April and 2 May respectively, and had developed a strategic plan. In developing its strategic plan, the Foundation had sought advice from a specialist consultant on a *pro-bono* basis. Mr Wallace noted that the Foundation's Economic Assessment of International Commercial Law Reform project had directly assisted the Institute's work on the MAC Protocol. He explained that the Foundation had raised majority of the funding for the MAC Protocol economic assessment under the auspices of the Economic Assessment project, which had been a costly endeavour. The Foundation also supported a number of research scholarships at UNIDROIT within the research scholarship programme, which continued to be a very valuable programme for both the beneficiaries and the organisation. He concluded by expressing special thanks to Sir Roy Goode for his very generous ongoing donation to the Foundation of the proceeds from the sales of the Official Commentary to the Cape Town Convention and its Protocols.

24. *The President* thanked Mr Wallace for his report.

25. *Mr Meier* expressed his appreciation for the support provided by the Foundation for the MAC Protocol economic impact analysis. Speaking from a Government's viewpoint, he noted that economic

assessments may be required as part of the review and ratification process of international instruments, and it was very useful when the sponsor organisation provided such a study, not least in view of the fact that they are very costly.

26. *Mr Kanda* referred to the economic impact analysis carried out in the context of the preparation of the MAC Protocol. He wondered whether UNIDROIT had a set policy or position in this regard, and what criteria applied in deciding to conduct such analysis for any particular project. He thought that economic impact studies were very important, but admittedly may not be necessary for all projects.

27. *The Secretary-General a.i.* replied that, like most other organisations, UNIDROIT applied no formal policy in this regard. An economic impact study had been conducted on the Cape Town Convention and its Aircraft Protocol after their adoption, which had shown such assessments would be useful already at the beginning of the preparation of another Protocol. While it was not possible to assess the economic impact of all projects, feasibility studies aimed at determining the overall expected benefits were useful, also in order to make sure that the resources of the organisation were well employed. In this connection, she referred to the project "Economic Assessment of International Commercial Law Reform" undertaken by the UNIDROIT Foundation in collaboration with the Oxford Commercial Law Centre at Harris Manchester College and the University of Washington, which focused on the economic assessment of instruments in the area of international commercial law, also as a stepping-stone for the development of other uniform law. She concluded by stating that the economic impact assessment of uniform law projects was an important issue regarding which further thoughts and inputs would be very welcome.

28. Regarding the issue of the financing of such economic assessment studies, the Secretary-General *a.i.* noted that in fact the cost implications of economic assessment studies was one reason why they were not commissioned for all UNIDROIT projects. The Secretariat had tried to secure external funding wherever possible, and this had proven to be much easier in the presence of an identified group of interested stakeholders willing to provide funding, which was not necessarily the case for all projects.

29. *The Council took note of the report by the Vice-President of the UNIDROIT Foundation, and thanked the Foundation for its continued support of the Institute.*

**Item 4: Report of the President on the conduct of the selection process of the Secretary-General and appointment of the new Secretary-General (C.D. (97) 3) (restricted)**

30. *The Council took note of the report of the President on the conduct of the selection process of the Secretary-General and appointed Mr Ignacio Tirado, currently Professor at the Universidad Autónoma of Madrid, as Secretary-General.*

**Item 5: International Interests in Mobile Equipment**

**(a) Implementation and status of the Luxembourg Rail Protocol and of the Space Protocol (C.D. (97) 4)**

31. *The Secretary-General a.i.* addressed the implementation and status of the Luxembourg Rail Protocol first. She stated that, as at 28 February 2018, the Protocol had been signed by seven States (France, Germany, Italy, Mozambique, Sweden, Switzerland and the United Kingdom) and ratified

by two States (Luxembourg and Gabon) and one contracting Regional Economic Integration Organisation (the European Union).

32. In terms of work undertaken by the Secretariat, the Ratification Task Force, established by the Rail Preparatory Commission and composed of the Co-Chairs of the Preparatory Commission, representatives of Luxembourg, the Rail Working Group, Regulis SA as designated Registrar and of SITA, as well as of OTIF and UNIDROIT, had met several times (mostly via teleconference, but also in person in Rome with participation of Ambassador Dühr of the Embassy of Luxembourg in Rome). It had organised several events during 2017 and the first months of 2018, which were detailed in the Secretariat document.

33. As regards promotion events, on 26 October 2017, a Seminar had been hosted by the Swedish Law Firm Hamilton in Stockholm, focusing on the key economic and strategic advantages of the Luxembourg Rail Protocol to the Cape Town Convention for the Swedish Rail Industry. On 22 November 2017, the Faculty of Law of Eötvös Lóránd University had organised a Conference on the Cape Town Convention and its Protocols in Budapest, with the support of the Ministry of Justice of Hungary and participation of UNIDROIT. The conference had also included a discussion on the Luxembourg Rail Protocol.

34. This activity had born its fruit. She was pleased to report that the Swedish Parliament had just approved the bill concerning the implementation of the Protocol and the deposit of the formal instrument of ratification was expected shortly. Work towards ratification was also underway in other countries, such as France.

35. Another important development regarded the publication of an economic assessment study. A study commissioned by the Rail Working Group and carried out by Oxera had been issued on 21 February 2018, with the aim of assessing the direct microeconomic benefits deriving from the Luxembourg Rail Protocol. The study, which had been conducted *pro bono* and based on data acquired by the Rail Working Group, showed that the Rail Protocol will save a group of 20 countries in Europe €19.4bn. A copy of this Report was attached to the Secretariat document as Annexe III.

36. As regards institutional developments in preparation of the entry into force of the Protocol, the Secretary-General *a.i.* reported that the Secretariat of the future Supervisory Authority, OTIF, had begun the formal process toward the approval of the documents which had been prepared and discussed within the Ratification Task Force. These included the draft regulations for the Registry, the draft regulations and rules of Procedures of the Supervisory Authority, as well as a timeline for implementation. This in view of a session of the Preparatory Commission, which was scheduled to take place in Rome in December 2018 around the date of the General Assembly.

37. Regarding the Space Protocol, the Secretary-General *a.i.* stated that, although no signatures or ratifications were to be reported, the Preparatory Commission and the Secretariat had been active in promoting its implementation. In particular, the Preparatory Commission had held its fifth Session of at the seat of UNIDROIT on 6 December 2017 and had discussed the progress in the appointment of a Supervisory Authority in view of the next plenipotentiary assembly meeting of ITU, the selection of the Registrar, as well as a series of future promotional events for 2018. Its members had agreed to constitute a sub-group to reassess industry participation for the promotion and development of the Space Protocol. The primary purpose of this sub-group was to reach out to members of the industry and ascertain if they would be willing to lend their support towards the Space Protocol and, if so, invite them to participate in a relaunched Space Working Group. A first teleconference of this Group had taken place in April and had been very fruitful.

38. *Mr Bollweg* thanked the Secretariat and in particular the Secretary-General *a.i.* for the efforts of promotion of the Luxembourg Rail Protocol and Space Protocol. Regarding the Space Protocol, he

noted that the ITU would hold its plenipotentiary conference in autumn 2018. He recalled that in the past ITU had expressed interest in taking over the functions of Supervisory Authority for the international registry on space assets, and this issue would be on the agenda of the Conference. Together with the UNIDROIT Secretariat, the German Government had started preparing its position and would deliver a working paper in order to support the decision, which was very important for the success of the whole Protocol. He wanted to inform Council members about this process, and ask them to get in contact with the persons responsible for ITU matters in their Governments to be able to garner support of their Government for a positive decision in this respect. The *Secretary-General a.i.* thanked Mr Bollweg for raising this issue, and confirmed that the Secretariat would seek the support from different circles including the members of the Preparatory Commission.

39. *Mr Kiraly* welcomed the reported developments regarding the Rail and Space Protocols. He saw the economic assessment regarding the Rail Protocol as a being very important and persuasive to support the promotion of the instrument. In reply to Mr Kiraly's suggestion that the economic assessment study be made publicly accessible on the UNIDROIT website, the *Secretary-General a.i.* noted this would in fact be done, but that it was already available on the Rail Working Group website, which was linked to the relevant UNIDROIT webpage.

40. *Mr Moreno Rodríguez* thanked the Secretariat, and was happy to inform that in Paraguay the Senate would consider the ratification instrument of the Cape Town Convention in the near future, after the instrument was submitted to Congress by the Executive Power. He mentioned that the research done at UNIDROIT by Mr Weldon Black, currently Vice-Minister of Justice, had been instrumental in the progress of the ratification process. Likewise, Mr Ivan Filartiga, another former UNIDROIT scholar, had been very active in raising awareness regarding the MAC Protocol. These developments were illustrative of the particular relevance of the UNIDROIT scholarship and internship programmes.

41. *Ms Pauknerová* stated that the Czech Republic's interest in the Cape Town Convention regarded primarily the Rail Protocol. She wondered whether other States were presently considering ratification besides Sweden, France and Paraguay. In her reply, the *Secretary-General a.i.* indicated that although she was not able to provide details, the Secretariat was aware of ongoing consultations in different States. The Secretariat thought that it would be beneficial to organise events tailored for specific countries or groups of countries focused on the Protocol for which there is particular interest, but also promoting the other Protocols.

42. *Ms Shi* recalled that the Chinese Government had been positively considering ratification of the Rail Protocol. In fact, some activities had taken place in the past years regarding the Cape Convention and the various Protocols and this was indicated in the Secretariat document. She was not able to report when ratification would actually take place but she would do her best to promote the instruments. The *Secretary-General a.i.* noted that her report focused on the events that had taken place since the last Council session, but she was very grateful to Ms Shi for recalling the major event that had been held in Beijing, organised with Ms Shi's assistance, where the MAC and the Rail Protocol had been discussed, as well as other UNIDROIT instruments. The Secretariat was aware that a group headed by Prof. Gao was considering the Rail Protocol, which gave a positive signal of the interest of China toward this Protocol.

43. *The Council took note of the developments in relation to the implementation of the Luxembourg Rail Protocol and the Space Protocol, and it encouraged the Secretariat to continue its promotion efforts.*

**(b) Preliminary draft Protocol to the Cape Town Convention on Matters Specific to Mining, Agricultural and Construction Equipment**  
(C.D. (97) 5)

44. *Mr William Brydie-Watson (UNIDROIT Secretariat)* introduced the topic. He noted that, as foreshadowed by the President and the Secretary-General *a.i.*, the Governing Council had the important duty of deciding whether a Diplomatic Conference should be convened to adopt the future fourth Protocol to the Convention on International Interests in Mobile Equipment on Matters specific to Mining, Agricultural and Construction Equipment (the “MAC Protocol”).

45. To assist the Council in its deliberations, he explained that the Secretariat wished to brief the Governing Council on three key issues (i) the substantive content and legal policy underpinnings of the preliminary draft MAC Protocol, including changes made at the 2<sup>nd</sup> session of the Committee of Governmental Experts (CGE2, Rome, 2 – 6 October 2017), (ii) public and private sector support for the project, including the development of the MAC Protocol economic impact assessment and (iii) details related to the possible future Diplomatic Conference and the Secretariat’s MAC Protocol strategic plan for 2018.

46. First, Mr Brydie-Watson explained that the majority of the 33 articles in the preliminary draft MAC Protocol were consistent with their corresponding articles in previous Protocols to the Cape Town Convention. To illustrate the point, he highlighted that the articles governing the establishment, regulation and supervision of the International Registry, creditor default, insolvency remedies and choice of law were consistent with the rules in previous Protocols. He noted that the major differences in the MAC Protocol were (i) the use of lists of Harmonized System codes in the annexes to limit the application of the Protocol to certain types of MAC equipment and (ii) the Article VII provision regulating the relationship between an international interest in MAC equipment and an interest arising out of immovable property law. Both of these rules had been developed by the Study Group and endorsed by the Committee, with minor improvements. Mr Brydie-Watson then explained the substantive changes made at CGE2, with a particular focus on the new opt-in rule in Article XII that had been proposed by the MAC Working Group. He stated that Article XII would allow Contracting States with well-functioning inventory financing laws to protect their existing arrangements. He also explained that the Harmonized System codes in the three annexes had been amended to reflect the 2017 version of the Harmonized System, which meant that while the scope of the Protocol had not been expanded, there were now 42 rather than 36 codes in the annexes. He clarified that certain legal issues did remain open, such as the wording of Article VII Alternative A, the drafting of Article XXXIII and the role of administrative authorities in assisting creditors to exercise their remedies under the Protocol. He noted that as the majority of legal issues had been resolved, at the end of its second session the Committee had approved the preliminary draft text and made a recommendation to the Governing Council that it was sufficiently developed to warrant the convening of a Diplomatic Conference.

47. Second, Mr Brydie-Watson noted that the MAC Protocol project continued to enjoy high levels of support from both the public and private sectors. He noted that the public sector support was reflected by the 126 representatives from 51 Governments that had registered to attend CGE2, which was higher than the 48 Governments that had attended CGE1. He emphasised that CGE2 was one of the most highly attended Committee of Governmental Expert meetings in the history of the Institute. He then explained that private sector input into the project continued to be channelled through the MAC Working Group, which had made major contributions in relation to the creation of the new Article XII inventory rule and in providing financing for the MAC Protocol economic assessment.

48. He recalled that during CGE1, several participating States had suggested that a revised *ex ante* economic impact assessment should be conducted for the MAC Protocol. As a result, the

Committee had requested that the Secretariat commission such an economic assessment. The Secretariat had conducted a competitive closed tender process to select an independent entity to undertake the economic impact assessment and had subsequently commissioned *Warwick Economics and Associates* to carry out the project. He noted that the economic assessment project was administered by the UNIDROIT Foundation as part of its economic assessment of international commercial law reform project. He reported that a preliminary draft economic assessment had been presented at CGE2 and that the economists were working to finish the full economic assessment. He noted that the preliminary assessment had indicated that the future MAC Protocol would have a beneficial impact of USD 32–48 billion annually for developing countries and USD 36–60 billion for developed countries.

49. Third, Mr Brydie-Watson noted that, should the Governing Council approve the convening of a Diplomatic Conference, it was anticipated that it would be held over a two week period between May and October 2019. He noted that the exact host State had not yet been determined but the Secretariat was engaged in discussions with a number of States that had expressed an interest in hosting the Diplomatic Conference. He emphasised that a review of the Institute's recent successful treaty instruments indicated that treaties with high attendance and signatures at the Diplomatic Conference were likely to have quicker entry into force and higher levels of overall ratification. On this basis, he noted that despite their being few legal issues left open, the Secretariat believed it was preferable to have a longer period until the Diplomatic Conference to allow the Secretariat and MAC Working Group to engage as many States as possible.

50. Finally, he noted that the Secretariat had prepared an 18 month Strategic Plan in preparation for the proposed future Diplomatic Conference which had five major objectives: (i) the preparation of high quality analysis on both the MAC Protocol and the relevant HS System codes to resolve outstanding issues through broadly acceptable solutions; (ii) the promotion of the project globally through bilateral, regional and multilateral fora involving both the public and private sectors; (iii) the finalisation of arrangements with the host State and efficient organisation of logistical arrangements well in advance of the Diplomatic Conference; (iv) the identification of an entity willing to perform the Supervisory Authority role and (v) the provision of assistance in the preparation of the Official Commentary.

51. *Mr Sánchez Cordero* mentioned that a productive workshop had been held in Mexico in March 2018 with a panel on the Cape Town Convention and its various Protocols. In particular, with regard to the Aircraft Protocol, he reported that consideration was now being given to changing Mexico's declaration under Article XI from insolvency remedy Alternative B to Alternative A, which was more "creditor friendly". He was hopeful that he would be able to report on positive developments in Mexico regarding the implementation of the other Protocols in the future.

52. *Mr Moreno Rodríguez* referred to promotion activities in Paraguay, where a major regional event on the Cape Town Convention and its various Protocols including the MAC Protocol had been scheduled, co-organised by CEDEP, the Ministry of Justice and the National Law Center of the Americas. He noted that the UNIDROIT Secretariat was providing assistance in the organisation of the event, with speakers from Brazil, Colombia, Chile, Costa Rica, Guatemala, Mexico, Paraguay, Spain and the United States of America, as well as the World Bank Group.

53. *Mr Bollweg, Ms Broka, Ms Bouza Vidal, Mr Leinonen, Mr Moreno Rodríguez, Ms Sandby-Thomas, Mr Sandoval Bernal, Ms Shi, Mr Schnabel, Mr Vrelis and Mr Wilkins* expressed their satisfaction with the progress that had been made on the project and warmly congratulated the UNIDROIT Secretariat for its outstanding work over a relatively short period of time. They noted that the text was in good shape, with excellent progress made by the Committee of Governmental Experts, and were encouraged by the high level of interest and participation from Governments

during the negotiation process. They considered that the draft was ripe for being submitted to a Diplomatic Conference for adoption.

54. *Mr Schnabel* noted that from a development perspective, the Protocol had the potential to be the most important instrument that any private law organisation had produced in terms of impact on food security, infrastructure and economic development. He suggested that holding the Diplomatic Conference at a date in the earlier range indicated by the Secretariat would be preferred if possible, with a view to keeping the momentum while ensuring that States would have enough time to prepare. He encouraged further work in the interim toward the identification of the Supervisory Authority, which had proven to be a challenging and important issue for other Protocols to the Cape Town Convention. He further encouraged the Secretariat to continue engaging with interested organisations such as the World Bank Group.

55. *Mr Bollweg* noted with great pleasure that the few States (in particular Germany and the United States of America) who had initially strongly supported the project had now been joined by many other States and had also received the support of the industry, which indicated that UNIDROIT had taken the right decision in preparing the fourth Protocol to the Cape Town Convention. He expressed a deep gratitude to the Secretariat members, in particular the former Secretary-General, who had chaired the work of the Study Group and Legal Officer, Mr Brydie-Watson. He was confident that the questions that remained unresolved did not seem very complex and could be resolved during intersessional work or the Diplomatic Conference itself.

56. Replying to *Ms Bouza Vidal*, who asked how the Protocol would be applied in respect of States willing to adopt it only for one specific category of equipment, the *Secretary-General a.i.* indicated that States could in fact make a declaration in this regard at the time of ratification.

57. *Mr Leinonen* said that it would be very useful for Council members to have information regarding the host State for the Diplomatic Conference as soon as practicable.

58. Regarding the expected economic impact of the MAC Protocol, *Ms Broka* indicated that she was very impressed by the figures shown by the economic assessment, which referred to amounts of billions of dollars' worth of business transactions potentially covered by the future Protocol. *Mr Wilkins* noted that while the economic impact study relating to the Rail Protocol was very powerful, the economic assessment presented for the Preliminary Draft MAC Protocol admittedly showed impressive figures but seemed in need of further refinement, in particular regarding the discussion on the methodology and the articulation of economic benefits for stakeholders. A more sophisticated analysis would be more convincing for interested Governments to sign the Protocol at the Diplomatic Conference.

59. *Mr Brydie-Watson* agreed that the preliminary study relied on a number of assumptions which were yet to be fully tested. Regarding numbers however, the Secretariat was confident that the range was accurate, *i.e.* just short of one hundred billion USD. He noted that the projections in the preliminary assessment were more moderate estimates than those contained in earlier economic assessments and that the new assessment had not yet fully accounted for certain aspects such as the potential positive economic impact in relation to leasing or on creditor's rights in insolvency situations. He concluded by stressing that the Secretariat had been concerned with choosing fully independent, highly reliable experts, and had appointed one of the most senior economists in charge of regulatory impact statements for the UK Government to undertake the study.

60. *Ms Sandby-Thomas* stated that Mr Ken Warwick had a high reputation and could be fully trusted in delivering an accurate and unbiased economic assessment.

61. *Mr Sandoval Bernal* stressed that the MAC Protocol had been raising a high level of interest in Colombia in particular in the academic circles with many debates taking place in private and public universities, and within the Government itself. He emphasised the importance of the Protocol not only for developed but also developing countries.

62. *Mr Moreno Rodríguez* and *Ms Shi* enquired about the coordination with UNCITRAL, not only as regards UNCITRAL's work in relation to secured transactions, but also on insolvency law issues.

63. *Mr Brydie-Watson* indicated that UNIDROIT had worked in close coordination with UNCITRAL in view of UNCITRAL's important role in the promotion of domestic secured transactions reforms through numerous uniform law instruments. He noted that UNIDROIT and UNCITRAL continued to coordinate effectively to avoid unnecessary overlap between the Cape Town and the instruments developed by UNCITRAL. He reported that UNCITRAL had attended all sessions of the MAC Protocol Study Group and the Committee of Governmental Experts and many governmental experts had participated in both fora which had also assisted in avoiding undue overlap.

64. The *Secretary-General a.i.* reported that the first "Secured Transactions Coordination Conference: Advancing global reforms" had taken place in Philadelphia at the University of Pennsylvania Law School in February 2017. She noted that it had been attended by representatives from a number of organisations including UNIDROIT, which had been very useful to ensure adequate coordination between harmonisation efforts in the secured transactions field but also in related areas, such as insolvency, as mentioned by Ms Shi. She concluded by noting that a second Conference would be held in autumn 2018.

65. *The Council approved the preliminary draft MAC Protocol established by the Committee of Governmental Experts at the second session of the Committee held in October 2017, and authorised the Secretariat to submit the draft Protocol to a Diplomatic Conference for adoption, in 2019, at a venue to be settled subsequently.*

**(c) Preparation of other Protocols to the Cape Town Convention: "Ships and maritime transport equipment" and "Renewable energy equipment" (C.D. (97) 18)**

66. *Mr Brydie-Watson (UNIDROIT Secretariat)* introduced the topic. He noted that as recommended by the Governing Council at its 95<sup>th</sup> session (Rome, 18-20 May 2016) and adopted by the General Assembly at its 75<sup>th</sup> session (Rome, 1 December 2016), the UNIDROIT Work Programme included the possible preparation of addition Protocols to the Cape Town Convention with respect to (i) ships and maritime transport equipment and (ii) renewable energy equipment, as low priority projects. He noted that, as consistent with the low level of priority assigned, the Secretariat had continued to conduct research on the viability of the two projects, in order to report back for substantively to the Governing Council at the end of the triennial work period in 2019.

67. As lead officer on the possible Protocol on ships and maritime transport equipment, Mr Neale Bergman had monitored developments over the preceding 12 months, with a particular focus on the Comité Maritime International's proposal for possible future work on cross-border issues related to the judicial sale of ships. It was noted that the CMI's proposal had not yet been substantively adopted by an instrument-making body, but had been the subject of a colloquium in Malta on 27 February 2018. It was explained that such an instrument would be unlikely to overlap significantly with the possible Maritime Protocol, however the Secretariat would continue to closely monitor the project to avoid any potential friction.

68. In his capacity as lead officer on the possible Protocol on renewable energy equipment, Mr Brydie-Watson noted that the Secretariat had continued to undertake research on the feasibility of extending the Cape Town Convention to cover renewable energy equipment. He noted that, following the Paris Agreement's entry into force in November 2016, there were a range of international initiatives aimed at increasing the availability of finance for renewable energy generation projects, especially in developing countries. He explained that the Secretariat's research was focused on determining whether the expansion of the Cape Town Convention system to renewable energy generation equipment was an appropriate vehicle for increasing the availability of renewable energy financing internationally.

69. *The Governing Council noted the Secretariat's report on the preparation of other Protocols to the Cape Town Convention on ships and maritime transport equipment and renewable energy equipment.*

**Item 6: Transactions on Transnational and Connected Capital Markets: the UNIDROIT Legislative Guide on Intermediated Securities (C.D. (97) 6)**

70. *Mr Neale Bergman (UNIDROIT Secretariat)* introduced the topic and stated that he would present recent developments regarding the UNIDROIT Legislative Guide on Intermediated Securities, which had been reviewed and adopted by the Governing Council at its 96<sup>th</sup> session (Rome, 10-12 May 2017). He referred to Secretariat document C.D. (97) 6 which set out the background on the Guide's development and adoption and an update regarding the Guide's preparation, publication and promotion since its adoption. He noted that he would refrain from going through the Guide's background in great detail, which was available in the document and had been discussed at length at Council's last session, instead focusing first on the Guide's place within UNIDROIT's work on transactions on transnational and connected capital markets and second on updating the Council about recent developments since the Guide's adoption.

71. As an initial matter, because Professor Kanda was unable to attend last year's session, he wished to take the opportunity to thank him personally for his leadership of the informal group of experts, which prepared and reviewed the Guide. He likewise renewed his gratitude to all of the members of the informal group of experts, as well as to the representatives of interested Organisations and stakeholders.

72. Regarding the Guide's place within UNIDROIT's work on capital markets, he recalled that the Guide was the third instrument resulting from that work, which had sought to promote legal certainty and sustainable growth in this very significant area of economic activity. The Guide was intended to complement and promote the first instrument – the UNIDROIT Convention on Substantive Rules for Intermediated Securities, which had been adopted at the final session of the diplomatic Conference to adopt a Convention on Substantive Rules regarding Intermediated Securities in Geneva in 2009 – by summarising the Convention's key principles and rules and by offering guidance on choices to be made and matters to be addressed or clarified in establishing an intermediated securities holding system or evaluating an existing one. The Guide also complemented and promoted the second instrument – the UNIDROIT Principles on the Operation of Close-Out Netting Provisions, which were adopted by the UNIDROIT Governing Council at its 92<sup>nd</sup> session (Rome, 8-10 May 2013) – by offering guidance consistent with those Principles and incorporating references to them.

73. Regarding recent developments, he mentioned that, following the Guide's adoption and editing work by the Secretariat, the Guide had been published online and in print, and launched at an event held immediately after the General Assembly's 76<sup>th</sup> session (Rome, 7 December 2017). That event celebrated and promoted the Guide and consisted of presentations by two members of

the informal experts group. First, Mr Francisco J. Garcimartín Alférez, Chair Professor of Private International Law, University of Madrid, provided an overview of the Guide and its relationship to the Geneva Securities Convention. Second, Ms Maria Chiara Malaguti, Full Professor of International Law, Catholic University of the Sacred Heart, discussed the importance of promotion and implementation of the Guide and its potential benefits for States. Judging by the participants' comments and questions, both presentations had been very well received, and printed copies of the Guide had been distributed to all participants, including member State representatives.

74. He then pointed out that, at the time of the launch event, the Guide had been available in English and French. Shortly thereafter, it had also become available in Chinese and Spanish. With respect to the various languages, he expressed his gratitude to Ms Frédérique Mestre (UNIDROIT Secretariat), who had prepared the French version in cooperation with Professor Luc Thévenoz of the University of Geneva; the translation team at the China Securities Depository and Clearing Corporation, which had prepared the Chinese version; and Mr Jesús García Aparicio, an attorney at the law firm of Cuatrecasas in Madrid, who had prepared the Spanish version in cooperation with the aforementioned Professor Garcimartin. Having the Guide available in Chinese, English, French and Spanish was obviously quite important for its promotion and use across the world, and it was hoped that it would be translated into additional languages in the coming years.

75. The Secretariat had taken various other steps to promote the Guide further, two of which he intended to highlight. First, the Secretariat had made significant supplementary resources available on UNIDROIT's webpage for the Guide. Such resources included reports and documents from the Guide's development and, consistent with the informal group of experts' recommendation, (a) model examples of legislative or regulatory texts or related descriptions, which were keyed to the paragraph number to which they related; and (b) bibliographic references, which were organised alphabetically by the entity or individual authors, with indications for those sources that were expressly referenced in the Guide. Second, the Secretariat had sought to promote the Guide at various events and in different fora, including the European Commission's expert group on conflict of laws regarding securities and claims; the "Intermediation and Beyond" project undertaken by the Commercial Law Centre at Harris Manchester College, University of Oxford; the Queen Mary-UNIDROIT Institute of Translational Commercial Law's recent conference on "Development Finance in Emerging Markets: Challenges, Innovations and Results"; and the American Society of International Law's Annual Meeting. A full list of these events and fora was found on pages 5 and 6 of the Secretariat document. Further to that list, he noted that Professor Charles Mooney, Professor of Law at the University of Pennsylvania and member of the informal experts group, had kindly delivered the presentation at the American Society of International Law's Annual Meeting (Washington, 5 April 2018) and that, in addition, Dr Marek Dubovec, Executive Director of the National Law Center for Inter-American Free Trade, had delivered a presentation on the Guide at a workshop (Mexico City, 23 March 2018), in partnership with the Mexican Ministry of the Economy and the National Law Center.

76. In conclusion, Mr Bergman noted that, subject to the views of the Governing Council and the newly-appointed Secretary-General, the Secretariat intended to continue its efforts to support, in a cost-effective manner, the promotion and implementation of the Guide and its fellow capital markets instruments.

77. *Mr Kanda* thanked the Secretariat and in particular Mr Bergman for the completion of the Legislative Guide and expressed support for the continuation of promotion activities. He wished to make three comments in relation to recent developments in information technologies and their potential relevance to UNIDROIT's capital markets instruments. First, the new blockchain technology could in the future dramatically change the landscape, in this area and others, such as with respect to registries under the Cape Town system. He believed that the core approach and the basic rules of UNIDROIT's instruments would remain valid, but he recommended that UNIDROIT monitor blockchain technology developments in the area of capital markets because they might change the centralised

holding system of securities in the future. Second, in the broader field of the financial sector, he noted that digital currencies were expanding, raising not only regulatory but also private law issues, such as their legal nature. Third, initial coin offerings (ICOs), were becoming an increasingly popular financing mechanism, even more than initial public offerings (IPOs), and ICOs might affect the asset-based financing area including, perhaps, investments in land. Finally, a broader comment was with respect to contracts, an area that was central in UNIDROIT work. He noted that in the future, so-called “smart contracts” (i.e. computer programmes) would have even greater importance in the context of the development of artificial intelligence. This topic would be discussed later on in the context of the corresponding item on the Council’s agenda for the session, but he believed that UNIDROIT should be aware of developments in new technologies, that the expertise acquired through its former work could contribute to the discussion and that UNIDROIT should continue to take a leadership role in the harmonisation of private law aspects of these new phenomena.

78. *The Secretary-General a.i.* reported that Aviareto, the Registrar of the International Registry for aircraft objects pursuant to Article 17(2) of the Convention on International Interests in Mobile Equipment, had informed that it was indeed studying the application of blockchain technology to the operation of the Registry.

79. *Mr Tricot* reiterated his great satisfaction regarding the Legislative Guide, first of all with respect to the explanations provided under paragraphs 11 to 18 of the Guide, which addressed an issue he had raised on several occasions during the preparatory work. He recalled how resorting to non-intermediated and unregistered securities, which were used by predatory financial operators in the United States, had caused the sub-prime crisis in 2007 and 2008, and then noted that the United States of America had sanctioned such operators as opposed to Europe and France in particular. The Legislative Guide also explained – under paragraphs 15 and subsequent commentary – how technological progress and the dematerialisation of securities posed an obstacle to such distortions. In particular, blockchain technology allowed for the verification of whether a security was effectively guaranteed by an underlying right. Given the colossal amounts involved in the transactions in financial markets, it was very important to ensure the security and transparency represented by the intermediated securities holding systems supported by UNIDROIT’s instruments, and he commended UNIDROIT for having clarified the situation.

80. Returning to a consideration that he had raised during a previous session of the Council, Mr Tricot noted that the preparatory work to the Geneva Convention on securities had seen the participation of several members of the Council. Whereas he found the participation of one or two members of the Council in the committees of experts useful and desirable to ensure a connection to the Council itself, he warned against greater representation, which might lead to confusion and latent conflicts of interest and, even in certain contexts such as the work on the Geneva Convention, could threaten the credibility of the Organisation itself.

81. *The Secretary of UNCITRAL* congratulated UNIDROIT for the Legislative Guide, particularly for the clarity of the text and charts, which made the instrument accessible as well to the general public and not just to specialists. She pointed out UNCITRAL had just finished a “check-list” for cloud computing contracts, which were essentially adhesion contracts. It was quite an unusual type of product for UNCITRAL, which consisted of an online user-friendly tool. She thought it was an interesting format from which UNIDROIT could draw inspiration.

82. *The representative of the Hague Conference* also expressed congratulations to the experts of the informal group and its chairman Mr Kanda, as well as to the Secretariat, for the finalisation and publication of the Legislative Guide. He noted that the Guide dealt with a very complex area of law, giving comprehensive guidance while distilling to the essentials and proving to be both useful and of interest as demonstrated by the various linguistic translations already available. He mentioned that, from the perspective of his Organisation, this instrument was particularly timely because the

Hague Securities Convention had entered into force just the year before and, although there were only three contracting parties at this stage, a number of countries had expressed interest. He concluded by suggesting that UNIDROIT and the Hague Conference might consider ways to coordinate and pool resources regarding the promotion and implementation of their instruments in the area of intermediated securities.

83. *The Council took note of the progress with respect to the preparation, publication and promotion of the UNIDROIT Legislative Guide on Intermediated Securities.*

## **Item 7: Private Law and Agricultural Development**

### **(a) Follow-up activities and promotion of the UNIDROIT/FAO/IFAD Legal Guide on Contract Farming (C.D. (97) 7(a))**

84. *Ms Frédérique Mestre (UNIDROIT Secretariat)* introduced the topic by recalling that the UNIDROIT/FAO/IFAD Legal Guide on Contract Farming had been adopted by the Governing Council at its 94<sup>th</sup> session (Rome, 6-8 May 2015). In the Secretariat's view, the Legal Guide deserved a special mention in the context of the present session of the Governing Council on account of its pioneering nature, as an instrument which opened a new line of work in UNIDROIT's activity – i.e., the interplay of private law and agricultural development. With this first initiative, UNIDROIT brought its private law expertise in the area of food security and economic and social development, engaging in fruitful partnerships with specialised organisations in the field, primarily the Rome-based United Nations agencies, i.e., FAO and IFAD. As would be reported in the presentation to follow, the Legal Guide had provided a key reference during the work of preparation of a guidance document on agricultural land investment contracts, both under the methodological perspective and as regards substantive issues of contract law.

85. Ms Mestre briefly illustrated the promotion initiatives that had taken place over the last year regarding the Legal Guide and were reported in the Secretariat's document. She stressed that promotion was particularly important in two respects. Firstly, as a soft law instrument, its effective use was based on voluntary application and this presupposed raising awareness on the existence of the document and its content. Secondly, the Guide addressed transactions that are typically of a domestic nature, particularly relevant in developing countries, and reaching out to interested stakeholders was certainly a challenge, in particular for UNIDROIT. In this context, the work lead by FAO in the context of a two-year implementation programme financed by IFAD was of the utmost importance and deserved to be particularly praised. As regarded UNIDROIT's efforts, she reported that a "Forum" had succeeded the "Community of Practice" on Legal Aspects of Contract Farming, within which various projects were being developed, including conferences and translations of the Legal Guide in Portuguese and in Chinese.

86. *The President* stated that he considered this line of UNIDROIT's activities as particularly important and deserving of strong support, also thanks to the cooperation of the specialised United Nations agencies.

87. *Ms Carmen Bullon, a representative of FAO*, expressed FAO's keen appreciation to UNIDROIT for the intense collaboration established during the preparation of the Legal Guide and now for its implementation. She introduced the products that had been developed or were soon be available, including a summary of the Legal Guide together with "briefs" for regulators and for farmers, a study on the regulatory framework for contract farming, and model contract templates that had been prepared by IISD. For all these products, she acknowledged the very strong support provided by UNIDROIT in their preparation.

88. *Ms Margaret Vidar, a representative of FAO*, expressed FAO's keen appreciation of the FAO/UNIDROIT partnership in the preparation of legal guidance for agricultural land investment contracts. The joint expertise between the organisations had proven very fruitful and FAO was hopeful that a very useful instrument would be ready in one year's time.

89. *Ms Pauknerová* expressed her appreciation for the work on this matter. She indicated that the Czech Republic had translated the Legal Guide into Czech and had organised a seminar for lawyers that had attracted great interest from stakeholders.

90. *Mr Schnabel* stressed the importance of the ongoing cooperation between UNIDROIT and FAO and IFAD in the area of agriculture. Referring to the earlier discussion regarding the promotion and assessment of an international instrument's success. He wondered which criteria could be used to assess whether or not a soft law instrument such as the Legal Guide was in fact as useful and influential as it was hoped, and if their identification could assist future choices of topics and instruments.

91. *The Secretary-General a.i.* agreed that this was a very relevant question. In her view, one important element was the interest expressed by other international organisations that had sought UNIDROIT's private law expertise, which were also active in the implementation of the instrument. In general, an *ex post* assessment would be easier than an *ex ante* analysis, relating for example to the influence on domestic legislation and on contract practice – especially on the drafting of model contracts in specific domestic environments, as had been the case for the Legal Guide on Contract Farming. *Ex ante* assessment may be more difficult, unless the instrument was related to a type of transaction where a high level of standardisation applies at international level. She submitted that an evaluation could be made not only in economic terms but also in terms of practical application of principles of fairness and balance in transactions, for example by applying general principles approved by international bodies – such as human rights principles – in a particular field.

92. *The President* noted that in his view, the impact of uniform rules could not be assessed equally. While it may be relatively straightforward to measure the economic impact of certain rules – the Cape Town instruments being an example -, this may be more difficult for other instruments. For example, regarding contractual relationships in agriculture, economic benefits could accrue in the longer term as a result of disseminating a culture of fairness and social justice in contracts around the world. He noted that the wealthy countries had developed laws to facilitate commerce between themselves but he advocated that time had come to focus on these aspects of the law which will effectively fill the gap in economic and social development between countries of the world.

93. *Mr Tricot* expressed his congratulations for the activities that had been carried out on the definition of good practices in the field of agriculture, from the beginning to their promotion. As to the impact assessment, he believed that it would be comparable to the UNIDROIT Principles of International Commercial Contracts. Beyond arbitration, the success of the Principles was to be found in their application in contractual practice. The relevant professional circles – in agriculture as in international commercial contracts- should not engage in contractual operations without intellectually or practically referring to such good practices, which provide models and answers to legal uncertainty. Having said this, if these instruments contributed to the influence of UNIDROIT, it was very difficult to quantify their impact, to appreciate the extent to which practices were actually inspired by the model.

94. *Mr Sandoval Bernal* underlined the importance of agricultural contracts, particularly for the economic and social development of rural areas in developing countries, insisting on the areas of post- conflict and contexts of national reconstruction.

95. *The Council took note of the follow-up activities and promotion of the UNIDROIT/FAO/IFAD Legal Guide on Contract Farming.*

**(b) Preparation of an international guidance document on agricultural land investment contracts (C.D. (97) 7(b))**

96. *Mr Neale Bergman (UNIDROIT Secretariat)* introduced the topic by noting that this work represented the next step in UNIDROIT's ongoing study of private law and agricultural development. It was strengthening the collaboration with FAO and IFAD, building on the success of the UNIDROIT/FAO/IFAD Legal Guide on Contract Farming and the UNIDROIT Principles of International Commercial Contracts, and continuing to make UNIDROIT highly responsive to the international community's development goals. More specifically, the work sought to contribute UNIDROIT's private law expertise by providing contractual guidance that was consistent with key international instruments, including the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security (VGGT), the CFS Principles for Responsible Investment in Agriculture and Food Systems (CFS-RAI Principles) and the UN Guiding Principles on Business and Human Rights.

97. He then referred to the relevant Secretariat document (C.D. (97) 7(b)), which provided background on UNIDROIT's work in this area; described recent developments; offered an overview of the future instrument on agricultural land investment contracts; and summarised the next steps for the project. He proceeded to provide an update on the work, particularly in light of the Working Group's deliberations during its third meeting (Rome, 25-27 April 2018), which was held the week before the Council's session. In this respect, he expressed his gratitude again to Mr José Moreno Rodríguez for very ably and kindly chairing the Working Group.

98. Regarding recent developments, he highlighted five key events since the Council's last session. First, the Working Group had held its second meeting (Rome, 13-15 September 2017) at which the Group discussed general considerations in relation to the work, examined in detail the draft outline of the future instrument and initial drafting contributions for certain chapters, and considered the organisation of future work, including possible events and other means for raising awareness about the work, consulting stakeholders and seeking their input. Second, on 11 October 2017, an informal meeting had been held at FAO during the 44th plenary session (Rome, 9-13 October 2017) of the Committee on World Food Security (CFS), which raised awareness about the work among experts and stakeholders who were in Rome for that session and solicited input on the draft in-progress outline. Third, on 8 February 2018, the Working Group had held a videoconference to discuss the input received at the informal meeting, to review an initial draft of the Preface and Introduction of the future instrument and to consider the experts' questions and comments relating to their respective drafting responsibilities. Fourth, on 22 March 2018, the Secretariat had delivered a presentation on UNIDROIT's future instrument on agricultural land investment contracts as part of a panel on "Land Governance and the VGGT" at the World Bank's Annual Land and Poverty Conference in order to seek stakeholder input. Fifth, on 25-27 April 2018, the Working Group had held its third meeting, at which the Group considered the future instrument's scope and key themes and reviewed in detail 14 Working Papers containing drafts of nearly all the chapters and sections identified in the draft outline. Five of those Working Papers (WP) had been circulated to Council members, specifically WPs 1, 2, 11, 12 and 13, so that the Council could see the progress that had been made and the direction of the instrument, though they were subject to revision in accordance with the Working Group's review and input at the meeting.

99. Regarding the development of the Working Group itself, Mr Bergman noted that the Working Group had expanded to include more experts and representatives. The Group relied on a very good

mix of contract law experts who were steeped in the UNIDROIT Principles, as well as human rights, land tenure, agriculture and dispute resolution experts. In this regard, he thanked all of the members of the Working Group, including FAO and IFAD colleagues and recognising in particular MsVidar who was in attendance and was an excellent partner in this work.

100. Mr Bergman then turned to the future instrument, as currently envisioned by the Working Group. As far as form, what was currently envisioned – at least as an initial step in the ongoing work – was a Legal Guide on Agricultural Land Investment Contracts. In this regard, he referred to WP.1, which contained a draft of the Preface and Introduction of the future Guide, and set out the purpose, target audience, approach and scope of the Guide and provided an overview of the need for greater investment and the important role of agricultural land investment contracts. As far as the purpose and target audience, the Guide sought to assist legal professionals – whether working for investors, host-State governments or local communities – with the preparation, negotiation, implementation and review of agricultural land investment contracts. The Guide would assist such professionals – by identifying issues and providing related contractual guidance – to navigate the many important considerations at play, including possible investment models, different applicable legal frameworks, as well as the investment’s potential impact on tenure rights, food security, livelihoods and the environment. A summary of such issues was included at paragraph 17 of the Working Paper, which highlighted first difficulties with respect to legitimate tenure right holders – who were, in general, those individuals who regularly used, produced food, and generated their livelihoods on certain lands, but might not have a legal title to those lands and whose rights might be negatively impacted by agricultural land investment contracts – and other issues. The failure to understand and address these issues and to incorporate contractual safeguards as needed increased investment risks and might generate significant negative impacts.

101. He then recognised, however, that the purpose of the Guide was not to support large-scale transfers of land to investors that lacked necessary safeguards and effectively constituted land-grabs. Such transfers were not the only option for setting up an agricultural investment, and the VGGT and CFS-RAI Principles promoted investment forms and models that did not result in the large-scale transfer of tenure rights to investors and that encouraged partnerships between investors and legitimate tenure right holders, such as through contract farming or other supply arrangements. In this regard, the importance of the Legal Guide on Contract Farming to the future instrument was emphasised.

102. As far as the scope was concerned, the Guide was to cover various possible parties and contractual arrangements, though it was to focus on agricultural land investment contracts involving leases of land between investors and host-State governments, as well as legitimate tenure right holders and local communities, including as possible parties or as stakeholders to be consulted. The focus on leases arose from two main bases. First, in recent years, leases had been more common than sales. Second, unlike sales, leases entailed ongoing obligations between the host-State, local communities or private parties which granted the tenure and related rights, and the investors which received those rights in exchange for payment and other obligations. These ongoing obligations allowed for incorporation of contractual safeguards and for monitoring of them.

103. For chapter one (The Legal Framework), which was set out in WP.2, the future Guide was to explain briefly the legal framework on agricultural land investment contracts, which is made up of the host-State’s law and regulations, various international treaties, custom and principles of law, and the agricultural land investment contract, of which the host-State’s law is the most important component. The legal guidance was to assist with the evaluation of the applicable legal framework and the identification of gaps in that framework, as well as the understanding of customary systems and rules.

104. For chapter two (Parties, formation and form), the Secretariat had received various Working Papers addressing issues identified in the outline for this chapter. There were numerous stakeholders that could be affected by agricultural land investment contracts, and difficult tasks for prospective contractual parties could include: (a) identifying both the holders of legal title to the land and any holders of legitimate tenure rights with respect to that land; (b) consulting with those various holders, including in customary settings in which the roles of various authorities might not be clearly defined; and (c) conducting detailed feasibility studies and rigorous impact assessments, with respect to possible tenure, social and environmental impacts. The legal guidance was to assist with the identification of all tenure right holders, determination of the contractual arrangements for taking into account those holders and the assessment of any possible impacts for which contractual safeguards would be needed.

105. For chapter three (Obligations and rights of the parties), the Secretariat had also received various Working Papers addressing issues identified in the outline for this chapter. It was intended to provide contractual guidance organised in accordance with the key themes identified in the legal framework chapter, in particular land tenure; human rights, including food security, gender and youth; social obligations; the environment; finance; investment protection and regulatory autonomy of host States; and transparency, contract monitoring and compliance. The legal guidance was to assist with the negotiation of provisions in these areas, and particular emphasis was to be placed upon possible safeguards, such as mechanisms for ensuring compliance with environmental requirements and for sharing the benefits arising from the leased agricultural land with legitimate tenure right holders and local communities.

106. For chapter four (Contractual non-performance), which was set out in WP.11, the future Guide covered excuses for non-performance and remedies for breach. The draft made extensive use of the UNIDROIT Principles and the Legal Guide on Contract Farming and provided legal guidance to help to ensure a more balanced and sustainable contract and to prevent conflicts.

107. For chapter five (Transfer and return), which was set out in WP.12, the future Guide dealt with the transfer of leased agricultural land from one investor to another and the return of leased agricultural land. Both situations could raise various concerns, including with respect to the condition and use of the land and the importance of disclosure, and the legal guidance was to flag issues in this regard and analyse possible contractual provisions for addressing them.

108. For chapter six (Dispute resolution), which was set out in WP.13, the future Guide provided an overview on disputes arising from agricultural land investment contracts and identified issues and options with respect to non-judicial dispute resolution, judicial dispute resolution and enforcement of settlements or decisions resolving a dispute. The legal guidance was to assist with understanding various grievance and dispute resolution possibilities and addressing them, as needed, in the contract. In addition, in light of the various references in this chapter and elsewhere to UNCITRAL's arbitration and transparency rules and to the Hague Principles on Choice of Law in International Commercial Contracts, the interventions earlier in the Council's session by the Secretary of UNCITRAL and the representative of the Hague Conference were very welcome, and the UNIDROIT Secretariat wished to thank them for their kind willingness to be involved in the work, for which the various drafts would be shared and invitations to the next Working Group meeting would be forthcoming.

109. In concluding his presentation, Mr Bergman made a few points about drafting issues and next steps. Regarding drafting, the Working Group was aiming for a concise document, which contributed UNIDROIT's private law expertise where it was most needed – for example with respect to contractual mechanisms for involving legitimate tenure right holders or possible contractual safeguards for protecting against negative impacts – while at the same time referring to other intergovernmental instruments and guidance documents where appropriate. In this regard, he noted that the Working Group had emphasised the importance of creating checklists of issues and using such references as

a means of creating a holistic instrument, yet not one that would be many hundreds of pages long. Regarding next steps, the Secretariat and the experts would be revising the various drafts in the coming months, holding a follow up teleconference in early July and then meeting again on 9-11 October 2018. The Secretariat would continue to reach out to interested Organisations and stakeholders, including by seeking to participate in the IBA's Annual Conference in Rome that same week and by applying to hold a formal side event at the CFS' next plenary session at FAO in mid-October. Subject to the Guide's progress, the Secretariat was planning to hold an open consultation to seek any input on the Guide online, as had been done for the Legal Guide on Contract Farming, and to hold consultation events around the world in coordination with Working Group experts, with the Secretariat incorporating comments in conjunction with the respective experts.

110. *Mr Moreno Rodríguez* emphasised that this was an extremely complex project which touched upon very delicate issues far beyond contract law aspects, including environmental law, food security, human rights, gender issues, investment law, trade, private international law and arbitration among others. He expressed warm thanks to Mr Bergman for his outstanding commitment and high-quality contribution to the project. In addition to supporting the Working Group with research work and writing, and providing key assistance in the Working Group's deliberations, Mr Bergman had attended meetings and events hosted by other institutions, thus building bridges which would help in the future implementation phase of the project. He emphasised the close and productive relationship in particular with FAO and its representative Ms Vidar, who was very active in participating and supporting the UNIDROIT project. He referred in particular to the third meeting of the Working Group held the previous week, which had a particularly intense agenda, and was able to come to consensus on many issues. He noted that the attendance of a particularly high number of participants in this meeting, with highly qualified experts. He also thanked Ms Mestre of the UNIDROIT Secretariat and the Secretary-General *a.i.* for their very useful contributions to the Working Group deliberations. He concluded by expressing his confidence that the Working Group would be able to develop a very useful instrument.

111. *Mr Schnabel* noted that this was another very important project in the area of law and agricultural development, and he strongly supported the continuing cooperation with the Rome-based organisations and building on the contract farming work, with UNIDROIT bringing its private law expertise to this additional agricultural finance issue. He expressed satisfaction at the progress made by the Working Group and he congratulated Working Group members, particularly the Chair and the Secretariat. Regarding the various drafts, he made two observations. First, he had noticed that chapter one made reference to various international instruments urging compliance with those instruments regardless of whether they were in force in the State in question. He recommended that the Working Group be careful in this regard and not create an expectation that an instrument which was not actually in force could create binding obligations, a matter which was related to respecting States' choices regarding which treaties they decided to ratify. Second, regarding chapter six on dispute resolution, he recommended that, in addition to the reference to UNCITRAL's arbitration work, reference could also be made to UNCITRAL's mediation work.

112. Mr Schnabel then made a broader comment relating to the scope of the project, drawing attention to the draft outline's reference to the possibility of including annexes, such as model provisions. He would indeed support an ambitious approach to the scope, not necessarily limited to a guide, in order to ensure that the project would result in a product that was widely used because there were a number of other guides in this area. He believed that UNIDROIT could add unique value by supplementing the guide with that type of annex, with model provisions dealing with central issues, such as the recognition of customary land use rights. He believed that it would be useful for UNIDROIT's work to recognise that States have some responsibility in this area, in terms of assisting investors in identifying legitimate tenure rights and with whom investors would need to consult. This would in fact be breaking new ground for UNIDROIT, and he would very much encourage the Working

Group to consider this approach, which had been presented by the United States of America in written comments and at the General Assembly's discussions, and which he believed was important for the project's success. He concluded by commending the Secretariat for the use of videoconferences which was an excellent way of making more efficient use of resources.

113. *Mr Bergman* thanked Mr Schnabel for his comments and assured him that they would be shared with the Working Group. Regarding his observation on the possible preparation of model provisions, he confirmed that the comments that had been submitted by the United States in relation to the preparation of the Work Programme had been included in the documents submitted to the experts at the beginning of their work. As he had mentioned in his presentation, the Working Group was very much in favour of drafting a check-list of issues as a way to streamlining the work, and whether this could serve as a basis for future work on provisions would be considered at a later stage by the Working Group and the Council itself.

114. *The Secretary-General a.i.* emphasised that the Working Group would carefully review the draft to make sure that the language was accurate and fully took into consideration the sensitivity of certain issues. She added that further inputs would be welcome in this regard, and that the future consultations on the draft would provide an opportunity to make any necessary improvements. Referring to the use of videoconferences during the work, although they were originally intended to streamline the experts' work, they had also proven to be useful from a substantive point of view.

115. *Mr Wilkins* expressed congratulations regarding the ongoing work. Following up on Mr Schnabel's remarks relating to the international instruments referred to in the document, he inquired about the nature of the obligations that were referred to, for example, in Working Paper 2 at paragraph 29 in relation to human rights: "Investors *have a duty* to respect and avoid infringing upon human rights and to identify [...] ". He noted that a number of sources in this respect, such as the UN Guiding Principles on Business and Human Rights, were aspirational documents. He further inquired whether the Guide would characterise investor's duties as best practices and moral obligations or as legal obligations.

116. *The President* indicated that in his understanding, respecting human rights was not a mere moral duty. It referred to an overriding legal obligation external to the contract and going beyond the traditional concept of privity of contract that the parties could not modify or exclude in the contract or in their practices.

117. *Ms Bouza Vidal* referred to chapter six on dispute resolution and asked whether the rule reflected in the European regulation conferring exclusive jurisdiction to the courts of the State where the immovable property was located had been taken into consideration. *Mr Bergman* replied that matters of choice of court and applicable law were indeed sensitive issues that the Working Group had extensively discussed, with particular attention paid to the central role that the host-State's law played in regulating the contract and connected issues.

118. *Ms Shi* acknowledged that the project drew a lot from UNIDROIT's experience on private law but she noted that many aspects fell under different areas of the law. The contract might involve a variety of parties, including a foreign investor and the host State, in which case public law aspects would come into play. In the context of dispute resolution, for example, commercial arbitration was quite different from treaty-based arbitration. In this regard, she referred to the current work within UNCITRAL Working Group III regarding investor-State dispute settlement reform. She therefore wondered whether the Working Group was relying on adequate public law expertise to address these questions.

119. *Mr Bergman* replied that the overlap at play between private and public law aspects in this particular work was being fully considered. Regarding the Working Group, he referred to footnote 4

of document C.D. (97) 7(b), which showed that the Group's membership had been expanded to include additional public law expertise, and he pointed in particular to Mr James Gathii, Professor of International Law at Loyola University Chicago School of Law, Mr Virgilio de los Reyes, Professor at De La Salle University in Manila and a former Secretary for Agrarian Reform in the Philippines, and Ms Yuliya Panfil, an Associate in investments and property rights at Omidyar Network. He also expressed gratitude to FAO which had been represented in the last meeting of the Group, not only by members of the legal division, but also by members of policy departments who contributed their expertise and experiences. While fully taking into account the public law dimension of the topic, it was intended that the Guide would extensively reflect UNIDROIT's private law expertise and refer to other international instruments and guidance documents as necessary, while remaining in a concise format.

120. *The Council took note of the update on the preparation of an international guidance document on agricultural land investment contracts and in particular expressed its satisfaction at the progress made by the Working Group at its second and third sessions, held in September 2017 and April 2018 respectively.*

## **Item 8: Transnational civil procedure**

### **(a) Formulation of ELI-UNIDROIT regional rules (C.D. (97) 8(a))**

121. *The Secretary General a.i.* introduced the topic. She recalled that the preparation of regional rules of transnational civil procedure was the continuation of the Work done by UNIDROIT, in cooperation with the American Law Institute, of preparation of Principles of Transnational Civil Procedure, which were adopted in 2004. The project of formulating regional rules intended for Europe was based on a Memorandum of Understanding concluded with the European Law Institute, with the setting up of a joint Steering Committee.

122. As regards the architecture of the project, the drafting of the Rules had been entrusted to Working Groups, one for each main topic covered by the ALI/UNIDROIT Principles: i.e. "access to information and evidence", "provisional and protective measures", "service of documents and due notice of proceedings", "*lis pendens* and *res judicata*", "obligations of the parties and lawyers", "Costs", "Judgments", "Parties" and "Appeals". The Working Groups started functioning in successive waves to keep the project manageable and to allow some members of the earlier groups to join the newer ones, in order to make full use of their experience. The first three Working Groups finalised their drafts in 2017 for inclusion in a consolidated text reviewed by an overarching "structure group" set up with the task of providing substantive coordination.

123. As the Secretariat's document reported, a number of activities had taken place since last session of the Governing Council. On 7 September 2017, the consolidated draft had been discussed at the ELI Annual Conference in Vienna. On 16-17 November 2017, Steering Committee members, Co-Reporters and members of the Working Groups had met in Vienna and debated on *res judicata* and pendency, parties, costs, and judgments. She noted that advisers and observers had also been invited to this session, including a number of Council members and observers. The latest plenary meeting of the Steering Committee, Co-reporters and active Working Groups members had been held in Rome on 9-10 April 2018. On this occasion, a portion of the allocated time was dedicated to a closed session, to discuss the coordination of the drafts and progress of the Groups, while another part allowed participants to discuss advanced drafts of the Groups on "Res Judicata", "*Lis Pendens*" "Parties", "Judgments" and "Appeals".

124. She invited Council members to refer to the Secretariat's revised document, which contained a draft version of the rules in its annexes, including black letter rules also in French. This version was still confidential, and intended to bear witness of the development of the work though it was by no means a consolidated draft. She noted that a great challenge regarding the finalisation of the work relied on the structure of the rules and the consolidation of the different parts in a coherent whole. Although discussion was still in progress, considerable progress had been made in reaching consensus on issues of general principles, structure of the proceedings and respective roles of judges, parties and lawyers. In addition, work was advancing in preparing other linguistic versions of the rules, not only in French, but also German, Italian and Spanish. The aim was to circulate a complete consolidated draft of the rules by the end of this year for comments.

125. As regards future events, she mentioned: 1 - a Presentation in Riga at the ELI General Assembly on 5-7 September 2018, to be held with Ms Broka's assistance. 2 - a Joint ELI/UNIDROIT Conference organised in cooperation with the Academy of European Law (ERA) to be held at ERA's Headquarters in Trier (Germany), on 26-27 November 2018. This Conference would present the project but also discuss open issues such as the impact of new technologies on access to documents and on the providing of evidence. Finally, she referred to the current discussions within the Group on the contentious issue of third party funding, although she noted that whether or not this topic would eventually be included in the rules had not yet been decided.

126. Replying to the Secretary of UNCITRAL's request for further information on the interest of the UNIDROIT/ELI initiative addressing the topic of third party funding, *the Secretary-General a.i.* explained that the issue had been discussed in relation with costs but even more so in the context of parties, with particular regard to collective proceedings. The preliminary discussions had found that the most critical issues related to information sharing and transparency. However, no decision had been taken as to whether it should be addressed in a specific section, also in view of the difficulty of agreeing on one specific type, on the scope of the topic and how to deal with it. The interim decision was to point out that this type of funding may play an important role in the proceedings and in particular regarding access to justice in different legal systems.

127. *The Secretary of UNCITRAL* shared information regarding developments in this regard in other fora. First, a Task Force on third party funding in international arbitration had been set up within ICCA five years ago, where she had participated. The questions encountered were similar to those in the context of civil proceedings. This type of participation in procedure had appeared recently and had evolved over the five last years, with a variety of forms and ways of understanding it, which made very difficult to come to a definition. For example, the concept could range from financial support provided by a family relative to bring a case to a court, to an actual risk sharing in the outcome of the award. Regarding transparency and making information about third party funding available, the issues that had been discussed were: how disclosure should take place, either at the court's request or upon automatic request for disclosure; the scope of the disclosure, *vis-à-vis* the court and *vis-à-vis* the other party; the link with the counsels' duty and work for example regarding conflicts of interests. The Task Force had just released a very complete report, which reflected a high level of expertise. Second, she reported that UNCITRAL would address third party funding as one of the relevant topics in the context of the reform process of investment arbitration as this type of funding had been used in many cases, and was repeatedly mentioned by States and other stakeholders as one of the issues to be tackled. She concluded by calling for further exchanges and coordination between organisations in this regard.

128. *Mr Tricot* commended the remarkable and needed work, and paid homage to all its participants. Returning to the issue of access to justice, he remarked that there were very different approaches in Europe, with a very open access to judges in certain countries, contrarily to others. Concerning third-party funding in arbitration, the issue of information of arbitrators has raised different opinions. In his personal opinion it was absolutely necessary for the arbitrator to be

informed, also to avoid risks related to conflict of interests. It was certainly a complex matter, that however in his view needed to be addressed, if only in form of some deontological or ethical principles to provide guidelines. Finally, he noted the importance of new technologies that had revolutionised procedure, such as computerised processing and dematerialisation of deeds, and that even if development was very rapid on this front, he thought it useful to provide at least some general guidelines.

129. *Mr Erdem* congratulated all participants in the project, which represented a remarkable achievement in an area – procedural law –, which is more difficult to harmonise than substantive law. He noted third party funding was still a very new and complex area: while it may not always be clear whether it ultimately served the interests of the party or the company, it also sometimes represented the only way for a party to have access to effective remedy.

130. *Mr Kiraly* noted the remarkable advancement of the project and commended the Working Group for its work. Admittedly the issue of third party funding was a very thorny issue, and he believed that how the matter would be addressed would depend on the general approach, whether it was intended to provide a restatement of the best practices and rules based on a comparative law analysis, or whether the aim would be to “pre-state”, taking into account the future development. In any event, he was confident that the Group would come to a satisfactory compromise.

131. The *President* acknowledged that financing by specialised companies was expanding where very high amounts were at stake, not only in litigation but also before State courts. In his view, fundamental aspects were involved, the main one relating to the interest of a financing company distinct from the party who has an interest to bring the suit. There would probably be a very large variety of approaches between countries in dealing with this issue, liberal ones seeing the benefits of it, and others considering that it distorts the proceedings. The conception of who has an interest to bring a claim had evolved dramatically over time, and multiparty litigation and third party funding were examples of new developments. It would probably not be realistic for the ELI -UNIDROIT Rules to show a specific direction, but he thought that as had been indicated, some guidance – such as deontological rules – may be provided to illustrate the debate and help modernising the approach in civil procedure.

132. *Ms Shi* referred to the draft version of the rules, and asked for clarification in two respects: first, whether third party funding would also be possible outside collective proceedings, in individual actions; and two, whether third party funding would be available for a defendant, since the rules referred only to “qualified claimants”.

133. The *Secretary General a.i.* pointed out that the document presented to the Council was the one which had been submitted to the Group at its session in April and reflected a possible approach, but the topic of third party funding had been heavily debated with a number of participants expressing doubts as to whether specific rules should be included in this regard. The discussion was still ongoing, and she would report the full content of the Council’s discussion in this regard to the Group and thanked all speakers for their contribution.

134. *Ms Broka* congratulated the Working Group for the compromise that had already been reached considering the aim of the document to reduce the impact of differences existing among countries in matters of civil proceedings and in particular in transnational commercial litigation. She felt that the project was mature enough, although admittedly certain issues were still under discussion, but she was hopeful that the work over the year to come would result in a successful final product. She mentioned that even then however, the instrument should not be considered as a closed book, since new elements may come into play, for example advanced technology may affect the service of documents. She concluded by referring to the Annual Meeting of the ELI which would be held in September in Riga, to which all Council members were very welcome.

135. *The representative of the Hague Conference* noted with great pleasure the very significant progress made by the Group especially in the last year. He expressed thanks to the ELI and UNIDROIT for facilitating the Hague Conference's continuing involvement in the Group as an observer. He reiterated his organisation's availability to cooperate in areas with potential overlap, particularly relating to the current negotiations on the "Judgements Project" (i.e. the future Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters), and the topics to be discussed at the Conference in Trier (i.e. the Hague Conference work on the use of new technologies). His organisation was looking forward to the successful conclusion of the project, and also believed that it would inform the process of developing similar rules for other regions in the future. In relation to promotion of the rules within Europe, beyond the group of academics and practitioners, he wondered whether it had been considered to engage in discussions with Government representatives with a view to considering how the model rules could be used or implemented once finalised.

136. *The Secretary-General a.i.* thanked the representative of the Hague Conference for the active participation of the Hague Conference in the ELI-UNIDROIT joint project. As to his comment on promoting the future instrument in particular in Governmental circles, she reported that a number of stakeholders had indeed expressed interest. In particular, interest had been expressed by representatives of ministries of certain countries regarding matters beyond the realm of European law such as *lis pendens*, the delivery of documents and access to proceedings; the *huissiers de justice* on service of documents, representatives of judges, as well as the European Commission itself, in relation to instruments developed at EU level. She particularly welcomed the observation of the usefulness for UNIDROIT to develop rules on the basis of the ALI/UNIDROIT Principles in other regions of the world, and believed that the current work on drafting regional rules for Europe would certainly be beneficial in facilitating solutions to possible common problems.

137. *Mr Schnabel* congratulated the Working Group and expressed satisfaction at the encouraging Secretariat report and the excellent cooperation with ELI. He supported the view that it was a very good model to build upon for similar projects in other regions of the world, and was happy to hear that next steps were already being considered. Regarding promotion, he also believed that it was very important to ensure that the rules would raise interest and be found useful at least in Europe if not more broadly.

138. *Ms Pauknerová* noted that the project was very advanced and based on rich comparative study, and that it would be very useful for academic research.

139. *The Council took note of the developments relating to the joint ELI-UNIDROIT project on the development of regional rules based on the adaptation of the ALI-UNIDROIT Principles of Transnational Civil Procedure. The Council expressed its continuing support for the project and to all efforts toward its finalisation and approval.*

#### **(b) Principles on Effective Enforcement (C.D.(97) 8(b))**

140. *The Secretary General a.i.* introduced the topic. She recalled that the Governing Council had decided to recommend this topic for inclusion in the UNIDROIT Work Programme for the Triennium 2017-2019 by the General Assembly, proposing to assign it a low level of priority. The General Assembly had endorsed this recommendation at its 75<sup>th</sup> session (Rome, 1 December 2016). A preliminary feasibility study conducted by Rolf Stürner, Emeritus Professor at the University of Freiburg (Germany) and former co-reporter of the ALI/UNIDROIT Principles of Transnational Civil Procedure had been submitted to the Council in 2016.

141. She noted that the decision to work on this topic had been based on different reasons. First, while single international instruments approved so far by other intergovernmental organisations such as UNCITRAL, the United Nations, and the Hague Conference or regional organisations may contain specific rules dealing with enforcement, there was a lack of a more general guidance document in this area. She specified that the topics of recognition and the enforcement of judicial decisions and awards would not be encompassed by the project. Second, the right to effective enforcement represented an integral part of the fundamental right to a fair and effective procedure. Moreover, the economic significance of effective enforcement mechanisms embraced decision-making and execution and had been considered by the World Bank as well as in an increasing number of national governments a fundamental criterion for the assessment and evaluation of national economies and for credit rating purposes. Transnational Principles of Enforcement could provide helpful guidelines for legislators wishing to improve their national law, while at the same time contributing to the emergence of common minimum standards for national procedures as the necessary basis of the improvement of international cooperation in this area.

142. Pending the conclusion of the ELI-UNIDROIT project on Regional Rules of Transnational Civil Procedure, which had been assigned a higher priority in this area of work, the Secretariat had undertaken some basic research activities focusing on existing international instruments addressing, one way or the other, issues of enforcement, and on compiling a list of bibliographical references. The Secretariat would continue to monitor developments in this area with a view to commencing more substantial work when specific resources become available, and in this context also would engage in cooperation with all concerned partner organisations.

143. *Mr Frederiks and Ms Sandby-Thomas* asked for clarifications regarding the connections and possible overlap with the Hague Conference Judgments Project which dealt with issue of enforcement and was at an advanced stage.

144. *The Secretary-General a.i.* pointed out that as regards the scope, the idea was not to deal with issues of recognition and enforcement of foreign court decisions and awards, as covered by a number of existing instruments or the current Hague Conference project. The UNIDROIT “effective enforcement” project would focus on the mechanisms available under domestic procedural laws which would ensure in practice that parties’ substantive rights and remedies are effectively enforced.

145. *Ms Sabo* noted that this was a challenging but very important topic and Canada would look forward the commencement of the work when it would receive higher priority attention. She agreed that there would be no overlap with the Judgments Project, which dealt only with the first step before execution is sought. She reported that the Uniform Law Conference of Canada had dealt with this issue in 2004 covering both civil law and common law jurisdictions, which might provide useful reference for the project. Lastly, regarding another potentially related initiative, she recalled that there had been a proposal within UNCITRAL Working Group V on Insolvency on the issue of asset tracing and recovery. She wondered whether a decision had been made in this context, but she thought that this issue went beyond the area of insolvency.

146. *The Council took note of the status of the project.*

**Item 9: International Commercial Contracts: Formulation of Principles of Reinsurance Contracts (C.D. (97) 9 rev.)**

147. *The Secretary-General a.i.* introduced the topic. She recalled that the Secretariat had been approached by a group of scholars and practicing lawyers based at the Universities of Zurich, Vienna and Frankfurt, who were examining the feasibility of formulating *Principles of Reinsurance Contract*

*Law (PRICL)*. In developing the project, the leaders had found that the proposed principles presupposed the existence of modern, general contract law rules. In this respect, they had thought that rather than attempting to re-create such rules, adequate rules were already provided by the UNIDROIT Principles of International Commercial Contracts, and that the proposed PRICL could be drafted as a “special part” of the UNIDROIT Principles. In this context, the Governing Council had decided to recommend this topic for inclusion in the UNIDROIT Work Programme for the triennium 2017-2019, which had been confirmed by the General Assembly. The project had been allocated a low level of priority due to the fact that it relied on its own funding, being supported by the sponsoring universities and external *ad hoc* funds.

148. The Group involved a number of participants from different legal systems. It also included two very active advisory groups made up of representatives of the global insurance and reinsurance markets. As regards UNIDROIT’s involvement, it aimed at better explaining the content and operation of the UNIDROIT Principles and ensuring consistency between this instrument and the PRICL. The Group had held a number of meetings, the latest being the 5<sup>th</sup> PRICL Workshop on 16-17 January 2018 in Vienna, where UNIDROIT had been represented by the Secretary-General *a.i.* The main focus on this occasion had been to ensure consistency with and provide interpretation, particularly as regards the section on remedies of the UNIDROIT Principles. The Group’s discussion had addressed to what extent special rules on remedies were needed in reinsurance contracts.

149. The Group was at an advanced stage of drafting, as seen in the draft outline of the rules and the excerpt of an article authored by Professor Heiss, reproduced in the Secretariat document. She noted that the next meeting should be the last one discussing substantive issues, and was scheduled for June 2018. The Group was expecting to finalise the draft by the end of 2018 or the beginning of 2019 to present a finalised product at the next Governing Council session, and she suggested that perhaps a Colloquium could be organised on this topic in conjunction with the Council session.

150. She drew the Council members’ attention to draft Article 1.1.2 of PRICL, which established a connection between the PRICL and the UNIDROIT Principles by stating that the latter apply to issues not governed by the PRICL. She noted however that a number of issues were still being discussed, one of which was the choice of law mechanism.- In this regard, one option that had been privileged was that the parties would chose both instruments, the PRICL and the UNIDROIT Principles, together. The final form and means of publication of the PRICL were still under consideration.

151. *The President* pointed out that in his view, this project was particularly interesting as a pilot project. It was a particularly good example of a special type of transaction - reinsurance – which was typically international and essentially practice-led, where the UNIDROIT Principles could be the overarching instrument providing general contract law rules. He emphasised that far from being an academic endeavour, by responding to ascertained practitioners’ needs, the approach would have great practical impact.

152. *The Secretary-General a.i.*, echoing the President’s view, reported that a number of PRICL Group members, had indicated that while they had initially been sceptical on the application of the UNIDROIT Principles, which were new to them, they had been convinced of their usefulness after discussing them with the leaders of the project and the former UNIDROIT Secretary-General. She noted that it was therefore a particularly interesting example of promotion for the UNIDROIT Principles, to be applied in a very specific setting, where the typical international character of the contract made the application of the UNIDROIT Principles easier.

153. *Mr Schnabel* concurred that it was very useful for the UNIDROIT Principles to expand into specific types of contracts, as was the case for contract farming and agricultural land investment contracts, and also that it was an excellent promotion vehicle to raise awareness within a specific industry. Regarding the way forward, he wondered how the final product would be framed, and in

view of the fact that UNIDROIT had not appointed the experts and had not participated substantively in the policy and drafting decisions of the project, specifically whether it was intended to be labelled as a UNIDROIT instrument by the Council next year.

154. The *Secretary-General a.i.* noted that the group itself had made no decision yet regarding the final form of the instrument. It was not intended to introduce the project as a formal additional part to the UNIDROIT Principles, nor would it be a UNIDROIT instrument. However, in view of the active participation of UNIDROIT in the work sessions and the privileged reference to the UNIDROIT Principles, the Council might wish to consider a positive action, for example to endorse the final document.

155. *Mr Bonell* recalled that this was by no means the only example of rules relating to a specific type of contract prepared by other international organisations, such as the many model contracts prepared by the ICC, which referred to the UNIDROIT Principles as gap fillers. In those various cases, UNIDROIT had not endorsed the instruments, not least because it had not participated in their elaboration, as opposed for example to the joint work with ELI of preparation of European rules of transnational civil procedure. He would personally advise against a formal endorsement or sponsorship regarding initiatives that were external to UNIDROIT, although there might be some form of expression of UNIDROIT'S interest.

156. *The President* expressed the view that the situation might be considered on a case-by-case basis. Projects elaborated by other organisations, not only referring to the UNIDROIT Principles as gap filler, but clearly inspired by the objectives of the UNIDROIT Principles and where there had been a deliberate coordination and some level of contribution by UNIDROIT, might deserve a certain form of recognition by UNIDROIT. This was in his view the case with the future reinsurance rules, which could serve as a pilot project, and he suggested that the Council might consider the level of recognition to be given when considering the finalised instrument next year. He noted however that in providing endorsement, special consideration should be given to the sponsor institution'S reliability, in particular regarding the fact that the product would not be altered in the future.

157. *The Council took note of the status of the project.*

**Item 10: International Sales Law: Preparation of a guidance document on existing texts in the area of international sales law in cooperation with UNCITRAL and the Hague Conference on Private International Law (C.D. (97) 10)**

158. The *Secretary-General a.i.* introduced the topic commonly referred as "tripartite project". She recalled that the initiative had originated in an invitation from the Secretariat of UNCITRAL, to UNIDROIT and the Hague Conference to cooperate on a project for the "creation of a roadmap to the existing texts in the area of international sales law (sales contracts) prepared by each organisation, primarily the CISG, the UNIDROIT Principles and the Hague Principles, and providing an assessment of interactions between the texts, their actual and potential use, application, and impact, all with the goal to facilitate promotion of their appropriate use, uniform interpretation, and adoption." The Governing Council had recommended this topic for inclusion in the UNIDROIT Work Programme for the triennium 2017-2019 by the General Assembly, as a useful example of cooperation between the three organisations, and proposed to assign it a high level of priority. The General Assembly had endorsed this recommendation at its 75<sup>th</sup> session (Rome, 1 December 2016).

159. During 2017, the three Secretariats had devised an outline of the Guide and, in the interest of representing different legal traditions and geographic regions, they had identified a small joint panel of experts of international commercial contracts law and/or private international law to produce it. The small joint group had held a teleconference and subsequently an in-person meeting hosted

by Professor Stefan Vogenauer in Frankfurt. This meeting had been particularly fruitful, allowing the group to agree on the table of contents of the guide, with the following chapters, each of which to be assigned to a sub-group: Introduction, Determination of the Law Applicable to International Commercial Contracts, Substantive Law of Sales, Recurring Legal Issues Arising in connection with Sales Contracts, and Guidance for Specific Business Sectors. She reported that the project had been presented at the Meeting of the Council on General Affairs and Policy of the Hague Conference held earlier in March 2018.

160. The *Secretary-General a.i.* pointed out that the experts had been asked to provide a non-legislative text that would illustrate the relations between the instruments while leaving aside issues of interpretation. The first draft was scheduled to be submitted before summer 2018, and subsequently discussed during a videoconference. She noted that the three Secretariats saw stakeholder involvement as particularly important, and had had agreed to consult them, in particular associations of judges and practitioners, before seeking formal approval of their respective governing bodies. In this context, it had been suggested that a first version of the draft guide might be presented at the International Bar Association Annual Conference in Rome in October 2018. As far as the timeline of approval of the Guide was concerned, UNCITRAL had expressed the wish to have the finalised text, including the consultation period, approved by its organs by July 2020, in conjunction with the 40<sup>th</sup> Anniversary of the CISG. The three Secretariats had agreed on this timeline. However, a consolidated draft should be produced by the Experts and ready for distribution to the UNIDROIT Governing Council by May 2019.

161. She concluded by thanking UNCITRAL and the Hague Conference for their partnership with UNIDROIT in this matter, as yet another aspect of the successful cooperation in the organisations' legislative activities.

162. *Mr Fredericks* emphasised that the project deserved to be strongly supported and encouraged. From an educational point of view, the instrument would be very useful in emerging countries like South Africa, and in this regard he suggested that the stakeholders to be consulted in the project should also include the educational sector. As far as the instruments were concerned, he wondered whether regional rules would be considered. In this respect, he referred in particular to OHADA, a supranational organisation comprising seventeen member States of Western and Central Africa that had adopted a Uniform Act on General Commercial Law, and produced a preliminary draft on the law of obligations. The *Secretary-General a.i.* in reply, mentioned that although the focus was to provide information regarding the instruments of the three promoting organisations, referencing other relevant regional instruments had indeed been envisaged during the discussion of the outline.

163. *Mr Kiraly* pointed out that this was a highly interesting project from both an academic and practical point of view. It was also a particularly appropriate model for a tripartite cooperation, and extremely useful for promotional purposes. As a mere suggestion, he shared the view that it would provide an ideal topic for a conference to be held in conjunction with a Council session, with the experts being invited to speak on the many substantive issues involved in the areas of contract law, private law and private international law.

164. *Mr Tricot* approved of this project, and noted that it was modest given that it did not imply any new legislative work and would present a comparative analysis of existing instruments on the matter. He believed that the presentation of the document in 2020 was a bit far off, but recognised the importance of it coinciding with the anniversary of the Vienna Convention. Concerning the Uniform Act on General Commercial Law of OHADA, he commended the idea of integrating it into the study. This Act included a chapter on commercial sales, including international ones given that it also aimed to apply to sales between the various OHADA states and beyond. He underlined that the revised version of the Act, which he had contributed to, was largely inspired by the Vienna Convention

and the UNIDROIT Principles, reformulated to adapt to the French drafting traditions, and had been ratified by OHADA authorities.

165. *The Secretary of UNCITRAL* thanked the Secretary-General *a.i.* for her presentation of the project, its objectives and working methods. She mentioned that during their Tripartite meeting that had been held at UNCITRAL the previous month, they had touched on the idea of building a technical assistance programme around the Tripartite project, and that she believed it would be a very useful tool to promote the implementation of the respective instruments. She added words of thanks for having graciously allowed for the preparation of the document on such an important anniversary for UNCITRAL.

166. *The representative of the Hague Conference* expressed his satisfaction at the development of the Guide. He reported that at its meeting in March, the Council on General Affairs and Policy had envisaged that the draft should be circulated to the HCCH members in March 2019 for comments.

167. *The Council took note of the progress made on the preparation of a guidance document on international sales law. The Council encouraged the Secretariat to continue its collaboration with the Hague Conference and UNCITRAL on the project.*

**Item 11: International protection of cultural property (C.D. (97) 11)**

**(a) Follow-up activities and promotion of the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects and the Model Provisions on State Ownership of Undiscovered Cultural Objects (C.D. (97) 11)**

168. *Ms Schneider (UNIDROIT Secretariat)*, informed the Council of the increasing number of States who had become parties to the 1995 Unidroit Convention on stolen or illegally exported cultural objects (the "1995 Convention") since the last Council's session (the Lao People's Democratic Republic, Botswana and South Africa). A certain number of other States had made the decision to ratify or accede to the Convention and UNIDROIT had assisted them in the procedure.

169. Ms Schneider reported that follow up and promotion activities for the 1995 Convention had been strongly linked to the implementation of Resolutions adopted by the United Nations Security Council since 2015. UNIDROIT had continued its cooperation with the Working Group formed by UNESCO (mainly with INTERPOL, UNODC and the WCO) for the implementation of Resolution 2199 (2015) and had participated in training events, for Syria and Iraq in particular, as well as for neighbouring countries, in light of their accession to the 1995 Convention. UNIDROIT had also participated in training sessions for the private sector, on the application of Resolution 2253 (2015) and generally on the fight against illegal trafficking of archaeological objects during armed conflict, following the adoption of Resolution 2347 (2017). The declaration of the President of France in Burkina Faso in November 2017 concerning African heritage had also led to more awareness in the continent, and UNIDROIT had been contacted several times in this respect. More information concerning these activities were contained in the Annual Report 2017 (C.D. (97) 2 and document C.D.(97) 11).

170. The importance of well-established partnerships with UNESCO, INTERPOL, UNODC, WCO, as well as the European Union, was recalled among the follow up activities, as well as the development of new forms of cooperation in this domain, such as with the OECD, UNICRI or the International Bar Association (IBA). These partnerships had both the objective to improve synergies between various instruments as well as to increase visibility.

171. The Informal Ratification Task Force of the 1995 Convention constituted in 2017 at the United Nations headquarters in New York would meet in 2018, and it was reported that UNIDROIT and the permanent missions of Italy and Cyprus were studying forms of coordination between this Group and the “Group of Friends for the Protection of Cultural Heritage”, created in 2018. This was an important step towards the implementation of international legal frameworks, with a view to raise awareness on the need to fight illicit trafficking, share best practices, promote their internationalization and strengthen connections among different legal sources.

172. Finally, the 1995 UNIDROIT Convention Academic Project (UCAP), announced at the 96<sup>th</sup> session of the Governing Council, had been launched in November 2017 to support the promotion of UNIDROIT instruments for the protection of cultural property. The project already boasted ten institutional partners, fifteen individual partners, mainly expert professors in cultural heritage law, and sponsors such as UNESCO, INTERPOL and UNODC. UNIDROIT had also received numerous proposals related to the Academic Project, and had increased its online presence and the visibility of its activities on cultural property on social networks.

173. *Mr Sánchez Cordero* noted the great visibility the Organisation had gained thanks to UNIDROIT’s work in the international protection of cultural property and thanked the Secretariat for the quality and diversity of the activities it had carried out in this field. He insisted on the importance of the Resolutions of the UN Security Council and the central role of UNIDROIT in their implementation. *Mr Sánchez Cordero* finally informed the Governing Council of an important victory that had been obtained recently by Mexico before the German courts, after a long legal battle that had followed the request for very important items of cultural property (the Patterson Affair).

174. *Mr Sandoval Bernal* underscored the strong preoccupation regarding the situation of cultural heritage in periods of armed conflict and above all internal conflict, and insisted upon the importance of cooperation and prevention, as well as the role of the 1995 UNIDROIT Convention.

175. *Mr Vrellis* congratulated the Secretariat for the extraordinary variety of its activities in this field, and commented upon the declaration of the President of France, regarding the fact that African heritage should be in Africa, indicating that this should be so for all nations, including his own: Greece.

176. *Ms Sabo* shared the views of previous speakers, concerning the many activities that had been carried out, and the extraordinary visibility they shed on the Organisation.

177. *The Council took note of the follow-up activities and promotion of the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects. The Council expressed its appreciation for the continued work and the achievements of the Secretariat in the cultural property field.*

#### **(b) Private art collections**

178. *Ms Schneider* recalled that the topic of private art collections was on the UNIDROIT Work Programme for the 2017-2019 Triennium with a low level of priority. UNIDROIT continued examine the topic to identify aspects of private law that fell within its mandate and provided added value. UNIDROIT had also continued to monitor developments concerning private art collections and to collect information on studies that had been conducted in the past by other organisations (UNESCO, Council of Europe, etc.), and the specific topic of private art collections had also been included in the Academic Project (UCAP) to collect further material. Furthermore, another ISCHAL conference (International Society of Research on Art and Cultural Heritage Law) entitled “Provenance of cultural objects” had taken place in Geneva on 1-2 March 2018, where an entire session had been dedicated to the provenance of collections with the participation of lawyers, museum

directors and collectors. The importance of the concept of “due diligence” of the 1995 Convention and the need to work with collectors had been underscored both on this occasion, as well as at the conference entitled “Engaging the European art market in the fight against the illicit trafficking of cultural property”, which had been held at UNESCO Headquarters in March 2018.

179. Ms Schneider went on to report on the preliminary exchanges the Secretariat had had and expected to develop with the IBA Art, Cultural Institutions and Heritage Law Committee to determine, *inter alia*, the difficulties collectors faced from the point of view of practicing lawyers. While it was early to determine the exact type of instrument that would be developed, she indicated the possibility of model contracts or guidelines being a possible output for art collectors, inspired by international practice, or model provisions, guidelines or simply a “catalogue” of recommendations for collectors and/or States.

180. Mr *Sánchez Cordero* encouraged UNIDROIT to continue its work in the private art collections, and noted that a meeting of the Mexican branch of the IBA that would be held at the beginning of June would include a session to examine whether or not practicing lawyers deemed it necessary to develop a more articulated legal framework to protect private collections.

181. Mr *Sandoval Bernal*, as well as Mr *Vrellis* and Ms *Sabo*, expressed their support for UNIDROIT’s work in this field, and Mr Sandoval Bernal noted that his country had adopted specific legislation in this respect.

182. Mr *Tricot* expressed his interest for the idea of drafting specific model contracts for collectors and requested further information on the type of instrument that had been envisaged. Ms *Schneider* replied that there were many factors to be considered in the determination of the type instrument to be developed, which depended on the preliminary work. Whilst it was clear that a “binding”, convention-type solution would not be likely in the case of private collections, it was still too early to know if it would be a model law, general principles, or a legal guide. UNIDROIT’s usual working methods would apply.

183. *The Council took note of the activities of the Secretariat in relation to private art collections and encouraged the Secretariat to continue to work on this topic.*

## **Item 12: Promotion of UNIDROIT instruments (C.D. (97) 12)**

184. Ms *Schneider* (UNIDROIT Secretariat) introduced the topic. She recalled the importance of promotional activities for the Institute and its instruments, which benefitted from a high level of priority assigned by the Governing Council and the General Assembly. She pointed out that the Annual Report contained the promotional activities carried out by the Institute during the previous year, and that document C.D. (97)12 focussed on the numerous activities carried out from the beginning of 2018 onwards.

185. Ms Schneider then described the efforts that had been put into promoting some instruments in particular. She pointed out that the 2016 edition of the UNIDROIT Principles had been presented in several academic and commercial meetings. She also reported that the International Bar Association (IBA) had formed a working group made up of a number of international lawyers, to support UNIDROIT in raising of awareness, promotion and application of the UNIDROIT Principles in the practice of international contracts and conflict resolution worldwide. She also underlined the importance of the UNILEX database for the analysis of case law concerning the Principles.

186. As far as the Cape Town Convention was concerned, Ms Schneider, as the Officer in charge of the Depositary functions of the Institute for the Convention and existing Protocols, noted that, since the beginning of the current year, Romania and Argentina had acceded to the Convention and the Aircraft Protocol, and other States had manifested a strong interest in doing the same. The Institute had assisted States involved in this procedure. Sweden had also signed the Rail Protocol in June 2017. UNIDROIT had also prepared and disseminated the Depositary's Report on the way in which the international system established by the Convention had worked in practice during the period between 1 January 2014 and 31 December 2016.

187. Numerous conferences had also been organised on the Cape Town Convention and its Protocols in academic, governmental and stakeholder circles, included the annual conference of the Cape Town Academic Project, which was scheduled to be held in Oxford in September 2018.

188. Ms Schneider also recalled that UNIDROIT had received an increasing amount of requests from universities to present the Institute, its achievements, current Work Programme and its working methods to their students. Finally, she referred to the Governing Council members' support in the organisation of conferences where UNIDROIT had been represented.

189. *Mr Komarov* recalled the interest in the UNIDROIT Principles in his country and noted that the Russian version of the 2016 edition of the Principles would be published in June or July 2018. *Mr Sánchez Cordero* noted the importance of updated versions of the Principles in all languages and mentioned that the Spanish version was currently underway.

190. *The Secretary-General a.i.* reported that some members of the International Sales Team of the IBA had contacted UNIDROIT proposing to study the application of the Principles worldwide via the IBA network with a view to compile examples of their application. A first draft of this group's project would be informally presented to UNIDROIT during the month of May 2018, and the global results would be presented during the Annual IBA Conference to be held in Rome in October 2018. To *Mr Schnabel*'s query as to whether or not the Governing Council would be called upon to adopt this work, the *Secretary-General a.i.* replied that this was not the case, specifying that it was not a common project, but an initiative of the IBA that would be very useful for the promotion of the Principles.

191. *Ms Mestre (UNIDROIT Secretariat)*, reported that an international workshop was held in Jakarta at the invitation of the Ministry of Foreign Affairs and the Ministry of Agriculture of the Republic of Indonesia in November 2017, entitled "Improving Small Scale Farmers' Welfare". On this occasion, Secretariat representatives presented the Legal Guide on Contract Farming, and made presentation on contract farming as an expanding economic model and the role of Government in contract farming. She warmly thanked the Indonesian authorities for this promotional activity.

192. *Mr Fredericks* reminded attendees that South Africa was proud to organise a one day workshop in June 2018 in Johannesburg, which would allow potential stakeholders, beneficiaries and users of the future Protocol of the Cape Town Convention on matters specific to Mining, Agricultural and Construction Equipment (the MAC Protocol), to gain familiarity with this future instrument, its objectives, advantages and mechanisms.

193. *The Council took note of the initiatives that had been carried out and envisaged by the Secretariat to promote UNIDROIT instruments. The Council reiterated the importance of promoting UNIDROIT work and instruments.*

**Item 13: Library and research activities (C.D. (97) 13)**

194. *Ms Maxion (UNIDROIT Secretariat)* recalled that at its 96<sup>th</sup> session (Rome, 10-12 May 2017), the Governing Council had agreed that the Secretariat should proceed with the digitisation of Library materials so as to offer readers an even broader range of research material. In 2017, the UNIDROIT Library had proceeded therefore on the implementation of the digitisation project. The software module ADAM for the implementation of the digitised objects into the online catalogue, distributed by the firm Ex Libris, had been acquired in November 2017. It had been integrated into the ALEPH 500 library management system, and made it possible to easily connect a large quantity of electronic documents to the catalogue data. The professional book scanner “Alpha Planetario” had been ordered and delivered in February 2018. Thanks to the greatly improved technical resources, the full entry into the partial digitisation of the UNIDROIT library collection had been secured.

195. *Ms Maxion* explained that there were three main different categories of digital objects that had been added to the Library Collection. The first one consisted of scanned monographs and articles accessible only to users with privileged user rights, with a dedicated password. Secondly links to external digital collections, such as American university libraries and numerous European institutions and libraries had been added. This category was an extremely resource-saving option to enrich the electronic library collection. Thirdly, lists and summaries of digital content had been added, provided free of charge by many large libraries.

196. The process of digitisation involved quality control and indexing by the Library staff, and about 500 monographs and articles that had been scanned in-house by the Library staff would be incorporated into the digital collection as of July 2018. In addition to professionally cost-intensive scanned books, the material also included PDF files and other forms of electronic files processed directly by Library staff and Library interns, as well as a wide range of digital materials available from other libraries. Furthermore, the interesting possibility of scanning-on-demand might be considered, not only with a view to encouraging donations to the Library, but also to ensure the best use of the available financial resources.

197. As far as access to the digital resources was concerned, an important question regarded which user group should have privileged rights. The Secretariat’s proposal was to give full access to the members of the Governing Council, to members of UNIDROIT working groups during the period of work on the projects, and to users who contribute to the UNIDROIT Library by donations. Ensuring such privileged rights could also be a good way to encourage donations in the future. It could be mentioned that the digitisation of materials proposed by the user group with privileged access rights might significantly accelerate the “intelligent” process of digitisation, making the best possible use of the available financial resources.

198. *Ms Maxion* reported that in 2017, as in previous years, the Library had received donations in kind from the Max-Planck-Institute of Foreign Private and Private International Law in Hamburg. The UNIDROIT Library continued to attract researchers and readers from all over the world and, among the 1054 visitors in 2017, 63 foreign guests came from 39 different countries.

199. *Ms Mestre (UNIDROIT Secretariat)* provided brief information regarding the Research Scholarship Programme, an important feature of UNIDROIT’s activities that also contributes to the promotion and dissemination of its work. She started expressing the Secretariat’s warm thanks to those members of the Council who had contributed to the Programme with a donation, in some cases significant, on a personal basis, which altogether would fund two scholarships. She noted that the main donor over the last three years had been the UNIDROIT Foundation, enabling an average of 15 researchers to come to the library each year and study legal issues in relation to UNIDROIT work and instruments. However, regrettably the Foundation’s support had decreased dramatically in 2018 leaving the scholarship programme virtually without resources. The Secretariat therefore would call

upon the members of the Council to support the request that it would send to Governments later in 2018.

200. *Mr Kiraly, Mr Meier, Ms Sabo, Mr Schnabel, Ms Shi* commended the Secretariat's efforts regarding the digitisation of research material. Regarding access, they recommended that it should be as open as possible while complying with any copyright limitation that may be applicable. In particular, they wished to add the member State Governments to the suggested list of privileged users that had been proposed by the Secretariat. Ms Shi asked whether a subscription modality could be implemented, possibly against a fee, and Ms Sabo suggested that if this were possible, then some discount might apply for certain users for example from developing countries.

201. The *Secretary-General a.i.* pointed out that copyright issues would make it necessary to apply a privileged access policy, excluding most probably any paying subscription option. However, she suggested that privileged users may also include donors contributing not only to the library itself but more generally to UNIDROIT activities, which may be an incentive, for example for law firms, to support the organisation.

202. *The Council took note of developments regarding the Library and research activities, in particular regarding the digitisation of the Library's collections.*

**Item 14: UNIDROIT information resources and policy (C.D. (97) 14)**

203. Introducing this item on the Agenda, *Ms Lena Peters (UNIDROIT Secretariat)* recalled that UNIDROIT information resources were both paper-based and electronic. She indicated that her oral presentation would relate to the publications, both paper and electronic, but not to the Depository Libraries, a list of which was annexed to document C.D. (97) 14.

204. Turning first to the paper-based resources, she recalled that starting in 2013, the Uniform Law Review was published by Oxford University Press. It was available both on paper and online and subscriptions could be to either or both. Subscriptions to the paper edition of the Review were decreasing progressively, while subscriptions to the online edition increased. Among the latter were the special Developing Country subscription arrangements of OUP, which in 2016 had had 873 subscriptions, many to subscribers the Institute would never have been able to reach without OUP. Unfortunately, as these subscriptions were to collections, it was not possible to know how many actually consulted the Uniform Law Review. She observed that the number of articles submitted spontaneously had increased, many being submitted by authors in Africa, often dealing with questions relating to OHADA, and the Middle East. The Review regularly published contributions to international conferences of interest to UNIDROIT. In 2018, the contributions to the "9<sup>th</sup> Transnational Commercial Law Teachers' Meeting - 'Transnational Commercial Law and Natural Resources'" held in Radboud University Nijmegen, on 2 and 3 November 2017, would be published (Issue 2).

205. As regarded other publications, the UNIDROIT Principles of International Commercial Contracts 2016, the 4th edition of the Principles, had been printed in both English and French in 2017. The Spanish version would be published before the summer of 2018. The members of the Council, Mr Radu Bogdan Bobei and Mr Alexander Komarov, had prepared the Romanian and Russian versions respectively, both of which were expected to be published shortly. Furthermore, the Korean translation was almost ready, care of the translators of the 2004 edition. As regarded the Spanish edition, a certain number of copies would be printed directly by the Institute, but it would also be published by publishers in Latin American countries to facilitate its dissemination.

206. An initiative which had been brought to completion in autumn 2017, was the publication of a volume to mark the 90th anniversary of the foundation of the Institute under the title "UNIDROIT 90 Years / Les 90 Ans d'UNIDROIT". It was not for sale, but was distributed for representation purposes only.

207. Furthermore, the booklets with the text of UNIDROIT instruments to use as hand-outs were printed regularly. In 2017, the English and French booklets with the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects and the UNESCO-UNIDROIT Model Provisions on State Ownership of Undiscovered Cultural Objects had been reprinted, and the English and French texts of the UNIDROIT Legislative Guide on Intermediated Securities, had been printed. The Spanish version of this last publication had just been delivered by the printer.

208. As regarded the UNIDROIT website, Ms Peters stressed the collegiate nature of the work on the website, whether it was the writing of the entries or their translation, or the creation of other features. Most recently, Ms Frédérique Mestre had proposed the creation of thematic portals for accessing the material on the website. These portals already featured on the website, even if they needed fine-tuning. The website was regularly monitored and the pages consulted were a surprise: of the first 100 entries the pages most consulted were, in the order, the English page on the UNIDROIT Principles 2016, followed by the page on scholarships and internships, the Cape Town Convention, the page giving an overview of the Organisation, the UNIDROIT Principles 2010, the status of the Cape Town Convention, the Aircraft Protocol, and the 1995 Cultural Property Convention. Another surprise was that the pages devoted to the current projects of the Institute were very low down on the list of the pages consulted. Ms Peters observed that they might be consulted more once the projects had come to fruition and the instruments adopted. Ms Peters informed the Council that on the occasion of the first meeting of the newly elected Governing Council in May 2019, a demonstration of the different resources on information would be made.

209. Complementary to the website, during the Institute's 90<sup>th</sup> anniversary celebrations in April 2016 UNIDROIT had launched its social media programme on Facebook and LinkedIn, the purpose being to promote UNIDROIT's work to a wider audience in an innovative, efficient and cost effective manner. Mr Brydie-Watson worked on the social media together with Mr Hameed, Research Assistant.

210. Ms Peters reiterated the collegiate nature of the resources of information and their management, from the sale of publications managed by Ms Françoise Ghin, or their formatting by Ms Isabelle Dubois, the contributions of Ms Valentina Viganò, Ms Marina Schneider and Ms Frédérique Mestre to the website, which was managed by Mr Stefano Muscatello, without whom there would be no website.

211. *Mr Fredricks* expressed appreciation for the retaining of the system of Depository Libraries, which was still important for many developing countries, and for the development of the peer review system for the Uniform Law Review. In this regard he wondered whether it would be possible to increase the presence of the Uniform Law Review in lists such as PULP, which listed journals accredited by the Department of Higher Education and Training of South Africa. This would be important when there was a requirement for academics to publish in accredited journals. *Ms Veneziano* stated that this was repeatedly a topic for discussion with OUP. The Uniform Law Review had accreditation in the list in Italy, but not all countries had these lists. OUP would be approached again, to further discuss the matter.

212. *Mr Schnabel* expressed appreciation for the recent developments. He stated that social media were a good way to promote the Institute and its work and wondered what strategy was in place, whether any additional platforms, such as Twitter, had been or were being considered. *Mr Hameed* indicated that a Twitter account had recently been launched and informed the Council that referral

to the UNIDROIT website was greatest from Facebook. He further illustrated how duty travel by the officers of the Institute and other events were publicised on the social media, with good results.

213. *Ms Shi* asked for clarifications regarding the procedure for translations of the Principles, following which *Ms Peters* illustrated this procedure. *Mr Sánchez Cordero* stated his commitment to publish the Spanish Principles 2016 in Mexico.

214. *Mr Király* expressed his appreciation for the volume celebrating the 90<sup>th</sup> anniversary of the Institute. *Mr Hartkamp* agreed with *Mr Király* and wondered whether it would not be possible to post the book on the website, as it was an excellent introduction to the Institute. *Ms Peters* stated that the problem was that the three paintings reproduced in the volume were covered by the copyright of the institutions that owned them (the Vatican, the City of Rome and the Prado Museum in Madrid) and that the Institute had paid for the right to reproduce them in only 400 paper volumes. If they wanted to print more copies, they would need to contact the institutions again, and the same applied for electronic reproduction. *Mr Hartkamp* suggested that the paintings might be omitted and the rest of the volume posted.

215. *The Governing Council expressed its satisfaction at the developments in the resources of information of the Institute.*

#### **Item 15: Administrative matters**

##### **(a) Preparation of the draft Budget for the 2019 financial year (C.D. (97) 15(a))**

216. The *Secretary-General a.i.* introduced the draft Budget for the 2019 financial year, as set out in document C.D. (97) 15(a), which had been approved by the Finance Committee at its spring session (Rome, 15 March 2018). She noted that the 2019 draft Budget was consistent with the policy of zero nominal growth as requested by member States.

217. The *Secretary-General a.i.* explained that the estimates reflected in the draft Budget would be revised on the basis of actual expenditure during 2018. Revisions would be made in particular regarding the salary and social security items to reflect the filling of the position of Secretary-General in accordance with the appointment by the Council of *Mr Ignacio Tirado*, as well as the implementation of the reform of the compensation and social security schemes. Any comment made by Council members would be included in a revised version of the draft Budget, which would be sent to Member States during the Summer for their review and comment. The Budget would then be discussed again at the next Finance Committee meeting in the fall of 2018 and submitted for final adoption by the General Assembly, at its 77<sup>th</sup> session in early December 2018.

218. Regarding receipts, the *Secretary-General a.i.* pointed out that contributions of member States essentially reflected a zero-growth policy. However, as decided by the General Assembly, the amounts would be revised on the basis of the new UNIDROIT Contributions Chart which would come into effect in 2019, based on the United Nations scale of assessments for 2019-2021. She noted that concerns had been expressed within the Finance Committee as to whether the expected publication of the UN scale of assessment in December 2018 might affect the possibility of States to adjust their financial budget in case of modifications. She also noted that the increase in receipts of €17,500 compared to the 2018 Budget was a result of the addition of an annual payment from *Aviareto*. The International Registrar under the Aircraft Protocol to the Cape Town Convention would provide such funds in accordance with a five-year licencing agreement relating to the use of the electronic version of the third edition of the Aircraft Protocol Official Commentary by *Sir Roy Goode*. She wished to

reiterate the Institute's gratitude to Sir Roy Goode in this context for his very generous donation of his royalties to UNIDROIT.

219. Regarding expenditure, the Secretary-General *a.i.* briefly illustrated the information provided in the corresponding notes of the Secretariat document. She noted that the Secretariat had allocated the payment from Aviareto specifically to promotion activities for the Cape Town Convention and its Protocols.

220. The Secretariat had also tweaked other Articles to cautiously take into account the recent compensation and social security reforms and the resignation of the former Secretary-General in July 2017. This included increases in the articles on salary and social security respectively. These increases were mostly offset by (a) reductions to the Institute's administrative expenses and maintenance costs, in particular through the implementation of a new paper saving policy and the increased use of online communications and teleconference services in place of long-distance calling; b) reductions in the article on committee of experts in view of the actual activities envisioned in 2019. In conclusion, she noted that the Secretariat proposed a total expenditure of €2,289,370.00 for the year 2019, which equaled the expenditure authorised under the 2018 Budget, except for the addition of the annual payment from Aviareto and subject to the implementation of the new Contributions Chart.

221. *Mr Meier* thanked the Secretary-General *a.i.* for her presentation, and expressed his agreement with the proposed draft budget. He wanted to thank the Chair of the Finance Committee for his remarkable work, particularly in his work to obtain consensus.

222. *Ms Sandby-Thomas* considered that this was a very considered and conservative budget, and expressed her agreement to it.

223. *The Council considered the draft Budget for the 2019 financial year and authorised the Secretariat to communicate it to member States.*

**(b) Report of the Secretary-General *a.i.* on the implementation of the new compensation and social security scheme applicable to the UNIDROIT staff (C.D. (97) 15(b))**

224. The *Secretary General a.i.* recalled that the compensation and social security reforms had been adopted by the General Assembly at its 76<sup>th</sup> session (Rome, 7 December 2017). Their aim was to simplify the organisation's compensation and administration structure, as well as to address mobility concerns. She added that in adopting the reforms, the General Assembly had provided the Secretariat with flexibility in the timing of their implementation, which had been reviewed by the Finance Committee at its Spring session (Rome, 15 March 2017).

225. Regarding compensation aspects, the Secretary General *a.i.* reported that the transition to the UN salary scales localised for Rome had been implemented in February 2018, with all staff now placed on – and paid in accordance with – those scales. The budgetary impact of the transition would not be expected to exceed the forecast reflected in the Budget for 2018, and any update would be reviewed by the Finance Committee in the context of the adjustments to the 2018 budget at its fall session.

226. Regarding social security aspects, the Secretary General *a.i.* reported on the progress in implementing the new pension plan and obtaining the necessary health insurance coverage. Since the General Assembly's session, the Secretariat had been in contact with the International Service for Remunerations and Pensions and was working to identify those staff members who might wish to join the new pension plan and to forecast the hiring of new staff to estimate the plan's growth.

The Secretariat had also been following up on the rates for health and related insurances, with a view to identifying the most affordable rate for the required coverage. The Secretariat was aware of the complexity of the implementation of the new system and was working towards full implementation within the timeframe discussed during the General Assembly's 76<sup>th</sup> session (Rome, 7 December 2017), hopefully by mid-2018.

227. In conclusion, the Secretary General *a.i.* reported two suggestions that had been raised for the future in the context of the compensation and social security review. The Secretariat had been asked to bring to the Finance Committee's attention, the possibilities of (a) a review and update of the UNIDROIT Regulations and (b) the further development of job descriptions for UNIDROIT staff. Discussions on these issues would take place at the Finance Committee's fall session.

228. *Mr Chang Dong Hee* thanked the Secretary-General *a.i.* for her report on the draft budget for 2019 and on the implementation of the new compensation and social security scheme applicable to the UNIDROIT staff. He wanted to congratulate the Secretariat for its efficiency in achieving excellent results, with a very small number of staff members certainly deserving their compensation for their hard work and dedication. Referring to the Finance Committee report annexed to the Secretariat document, he asked for clarification, first regarding the UN salary scales that had been taken into consideration, and second, as to whether the UNIDROIT or the UN compensation package would indeed be higher. He then enquired about UNIDROIT employees tax treatment: in particular, if foreign nationals were tax exempted as was the practice for the staff of international organisations, whether local staff who was not tax exempted was entitled to some adjustment mechanism in order to ensure equal treatment among different categories of staff.

229. The *Secretary General a.i.* in reply expressed thanks for the expression of appreciation marked towards UNIDROIT staff members. Regarding the compensation package and allowances at UNIDROIT as compared with the UN, she noted that this had indeed been discussed within the Finance Committee and seemed to originate from considering different reference values (e.g. net or gross salary figures; different regime on allowance, etc.); the Secretariat would however provide further elements at the Finance Committee's next session. She then confirmed that the UN compensation scale that had been taken into consideration was the one applicable to Rome, according to UN practice. Regarding staff tax treatment, she acknowledged that in accordance with the Statute of UNIDROIT and the applicable Italian regulations, Italian staff members were not entitled to tax exemption under the applicable Italian regulations and there was no mechanism at UNIDROIT to offset this difference in treatment.

230. *The Council took note of the Secretariat's information regarding the implementation of the new compensation and social security scheme applicable to UNIDROIT staff and possible next steps.*

**Item 16:           Date and venue of the 98<sup>th</sup> session of the Governing Council**  
(C.D. (97) 1 rev. 2)

231. *The Council agreed that the 98<sup>th</sup> session of the Governing Council should be held from 8–10 May 2019, at the seat of UNIDROIT in Rome.*

**Item 17: Any other business****(a) Private Law and Development - Cooperation with the Legal Forum on Law Justice and Development (LFLJD) and possible future work in relation with the “Human-Centered Business Model” Project (C.D. (97) 16)**

232. *Ms Mestre (UNIDROIT Secretariat)* recalled that this subject was not a part of the current UNIDROIT Work Programme, but referred to an initiative of the Global Forum on Law Justice and Development (GFLJD), of the World Bank group, to promote a project regarding a “Human Centred Business Model”. This project that involved a high number of potential partners was still seeking a global coordinator and funding. Meanwhile UNIDROIT, who had carried out preliminary work on social enterprises, had been invited to participate in the future development of the project in its capacity of co-leader with the University of Florence, for the pillar on Legal Framework and Governance. The Council had authorised the Secretariat to accept this request at its 96<sup>th</sup> session (Rome, 10-12 May 2017), and to invest time and preliminary research compatibly with the Work Programme topics that had priority.

233. In this context, UNIDROIT, represented by its President, had participated in two presentations of the project, one in June 2017 at the University of Barcelona, and another in November 2017 in Paris organised by the High Council of French Notaries supported by the French Ministry for Europe and Foreign Affairs. The Secretariat had essentially held a role of coordination and follow-up on the work of interns and researchers on the existing forms and proposals for new legal structures of profit based enterprises with social goals. It was envisaged that the results of the preliminary research would be summarised in a Concept Note or an article, which could serve as a basis for future UNIDROIT work, on the legal framework and governance of “Human Centred Businesses”.

234. *The President* underlined the interest that he saw in this project. He stated to be convinced that the “Human Centred Business” model, a particular type of business that was gaining more and more recognition, was leading to an evolution of the classical concept of profit-based businesses, with potential financial speculation issues, into a business model oriented towards human rights and social and environmental values. He underlined the useful cooperation with the Global Forum and the partnership with the University of Florence, and hoped that UNIDROIT would be able to play an even more active role in this domain.

235. *Mr Tricot* agreed that the subject was indeed of great interest. He briefly summarised the vast debate in France, particularly within the Government appointed Commission, directed by Ms Notat and Mr Sénard. The very recently published report proposed first, for article 1833 of the civil code to reflect the evolution in case-law according to which the company has its “own” interest distinct from the interests of its associates; second, to acknowledge employees no longer as stakeholders, but as a constituting part of the company; third, the creation of a specific legal framework for “special purpose enterprises” (“*entreprise à mission*”). This was a very topical issue and he believed that UNIDROIT should participate in the conversation, seize the opportunities and take initiatives if necessary, and engage actively in this area.

236. *Ms Sandby-Thomas* noted that this was a very forward thinking project and joined the former speakers in supporting UNIDROIT being involved.

237. *The Council took note of the information provided by the Secretariat and encouraged the Secretariat to continue working on the topic.*

**(b) Proposal submitted by the Czech Republic on artificial intelligence**  
(C.D. (97) 17)

238. Ms Pauknerová introduced the proposal submitted by the Czech Republic and made the following statement.

“The Czech Republic would like to bring to the attention of the Governing Council the possibility to consider studying the field of Artificial Intelligence. The aim consists in creating an international legal framework that would benefit further development in this field.

We consider UNIDROIT to be the right place to start the discussion as any intended work would include a broad range of issues, especially liability issues, where the international solution would be the most suitable and appropriate. We are aware of activities within the EU, as very recently, on 25 April 2018, the European Commission issued a Communication on AI for Europe which is a long and relatively detailed document. Moreover, European Parliament issued in 2017 a resolution with recommendations on civil law rules on robotics where, however, the AI was not mentioned. Also, an Opinion of the European Economic and social Committee on the consequences of AI on the digital single market was issued in 2017.

In our opinion, UNIDROIT seems to be a convenient platform, the research groups in projects within UNIDROIT are mostly scientific communities connected with practitioners, creating soft law – that means that there are no direct conflicts and clashes with various state regulations, UNIDROIT texts are mostly not a substantive law. Evidently, there is a need to create global rules, not only rules limited to the EU. Google, Facebook or IBM function on a global level.

There is a proven track of excellence within UNIDROIT in providing international solutions in a variety of fields. In this respect, we would like to invite the Governing Council to consider future UNIDROIT’s engagement in this sector.

*Artificial Intelligence:*

AI is defined as a science of developing systems capable of solving problems and performing tasks by means of simulating intellectual processes. AI can be taught to solve a problem but it can also study the problem and learn how to solve it by itself without human intervention. Different systems can reach different levels of autonomy and can act independently. Their functioning and its outcomes are unpredictable as those systems sometimes act as “black boxes”.

Nowadays, AI plays an important role in the current trend of automation, it is presumed to change economic functioning of companies and have a huge societal impact. Recent public debates have especially focused on the necessity to regulate the very field of AI and to set boundaries in order to prevent development of so called artificial general intelligence, i.e. an intelligent system comparable to or even exceeding human intellectual capacity.

These debates are justified and should be reflected. Current laws have not yet recognized the specificities of AI in such fields as business contracts, or liability disputes.

*Proposed field of work*

In the area of private law, there are several problems, all of which become even more complicated when related to different jurisdictions.

The first and obvious problem relates to contracts, based on which services or systems with AI are provided. Intelligent autonomous systems: can they be considered a service or a product? What is the scale of due diligence, how should be conceived a liability for malfunction of the system? Often, we are unable to predict future behavior and have no control over its future use and data input.

As for a procedure, for example in case of damages, parties may be in an evidentiary vacuum and might be unable to determine liability. Strict liability combined with insurance seem like the most suitable tools for this problem but the rules on contractual liability are often different. Moreover, insurance would usually not be applicable in cases when a party claims that damages were caused intentionally.

The law needs to set up clear rules and balance obligations in order to protect both parties to a contract – users and service providers - as well as third parties when suffered damages. In this respect, it is important to consider the impact that substantive legal rules have on procedural rules. Whether the civil law is in the sphere of liability based on the doctrine of unlawfulness of a legal act or on the doctrine of unlawfulness of an effect. It determines which party will bear the burden of proof. Effects of possibly shifting the burden of proof on the developers of intelligent autonomous systems while providing them with clearer guidelines on due diligence should be considered.

Regarding the tort liability, the main question is whether a new liability title is necessary, or whether it would be sufficient to simply limit the liability, or whether we can use the current rules and interpret them for the purposes of this technology. The technology is still unpredictable to a certain degree and not under full control of manufacturers, or owners and users of the systems.

Given the fact that AI technology and services based on it are often provided on a cross-border basis, parties need to be provided with efficient means for protecting their interests worldwide. Without an international approach, some countries might intentionally avoid adopting specific rules in order for companies to exploit existing regulation for escaping liability.

Legal acts of AI systems are also questionable. A current consensus is that AI systems are considered as electronic means by which parties enter into legal transactions and are bound by them. However, some AI applications may act on their own behalf and create another AI system. So far, there is no satisfactory legal solution.

The same is true for harmful acts.

The international community should focus on all the mentioned issues as soon as possible before the problems related to artificial intelligence and its application domains including robotics begin to produce partial and non-systematic solutions on national levels.

Therefore, especially liability issues, due diligence, contracts on AI systems, as well as status of AI and its legal acts should be analyzed and addressed.

Those systematic international solutions should be based on a deep analysis of the mentioned legal concepts in the context of their application domains. These domains, such as autonomous cars, may have particularities that need to be handled separately. For example, as for the autonomous cars, the concept of liability is different: product liability on the one hand or on the other, liability of the operator or owner of the car: the latter is the solution in Czechia.

An international instrument should be considered to unify the approach to tort liability and the status of autonomous intelligent systems.

Contractual liability and due diligence are, however, issues that are highly individual given a particular context. They require high level of flexibility in order to promote autonomy as well as personal responsibility.

Therefore, model laws represent a more appropriate solution for these topics.

#### *International conference on artificial intelligence and law*

The Institute of State and Law of the Czech Academy of Sciences started intensive public discussion of artificial intelligence, autonomous systems as well as self-driving cars in 2017.

During 5 – 6 September 2018 the Institute of State and Law is organizing an international conference SOLAIR (Society, Law, Artificial Intelligence and Robotics) in Prague. The main goal of this conference is to bring together legal experts and to facilitate a discussion on how harmonized laws can promote trust and acceptance of artificial intelligence and intelligent autonomous robotics in the society.

The Czech Republic considers this as a convenient opportunity for elaboration on the subject and possible involvement of the UNIDROIT.

We would like to invite the member states of UNIDROIT and their experts in this field as well as other persons interested in this subject to participate in the conference. You will receive a formal invitation of the Ministry of Industry and Trade.

Should it be of the interest to UNIDROIT we invite you to consider its endorsement at an appropriate time for the future work.”

239. *Mr Bollweg* noted that artificial intelligence and its legal treatment attracted a lot of interest. However, he invited to a cautious approach in this regard. In his view, the often-stated idea that there was a “legal vacuum” would need to be substantiated by a thorough legal study, as this did not seem necessarily the case for example regarding liability law implications. He also noted that legal rules would run the risk of being quickly overtaken by technological developments. He noted that a number of initiatives were taking place, particularly within the EU Commission, to elaborate guidelines and examine gaps in the existing law. Therefore, whether there would be room for an international proposal should be assessed carefully.

240. *Ms Broka, Mr Fredericks, Mr Kanda, Mr Kiraly, Mr Meier, Mr Sánchez Cordero, Ms Shi, Mr Tricot, Mr Vrellis* thanked the Czech Republic. They expressed their appreciation for a most timely proposal, which aimed to focus UNIDROIT’s attention on a phenomenon that represented a new economic model, involving a true technological revolution with potentially challenging implications. Admittedly, this was a very vast area and in-depth research would have to be carried out to identify particular topics on which UNIDROIT’s work would be useful, while taking into consideration the related initiatives conducted in other international fora, UNCITRAL in particular.

241. *Ms Broka* referred to the earlier discussion at the session where smart contracts, blockchain technology and digital currency were mentioned. *M. Kanda* suggested that consideration might be given to how artificial intelligence might affect the operation of the existing UNIDROIT instruments. In the specific case of the UNIDROIT Principles for instance, the question might be raised as to whether the rules relating to the power of the court to interpret, adapt or enforce the contract, or deny enforcement would equally apply when dealing with computer programmes. Another example related to the question of the legal personality of an automated mechanism as a potential party to a contract, and to what extent concepts such as good faith, diligence, and fault would apply.

242. *Ms Shi* noted that there were a large number of legal implications and policy issues related to new technologies. She referred to product liability applied to automated cars, to artificial intelligence coupled with big data and new financial technologies (FinTech), as examples where there may be a need to adapt legal rules which had been thought to apply to people and not to machines. She also referred to UNCITRAL’s work in this area.

243. *The Secretary of UNCITRAL* pointed out that within in the work in progress at UNCITRAL on digital identity, one of the issues that had been encountered was the identity of digital object – either physical or moral as an entity – with its own artificial intelligence. In depth studies on the matter would certainly be very useful.

244. *Mr Hartkamp* agreed with the *Secretary-General a.i.*'s observation that UNIDROIT's future work in this area should be discussed by the Council at its next session within the preparation of the Work Programme for 2020-2022, relying on the input of the newly appointed Secretary-General. The current discussion should therefore be considered as very preliminary. He would support that the Secretariat monitor current developments without however engaging into substantive work.

245. *The Council* took note of the information and proposal presented by the Czech Republic and agreed that the Secretariat should monitor developments regarding legal implications and policy issues and their treatment in other fora, with a view to discussing at its 98<sup>th</sup> session on the possible inclusion of the topic in the Work Programme for 2019-2021.

246. *H.E. Esti Andayani, Ambassador of the Republic of Indonesia and Chair of the General Assembly*, expressed her appreciation towards the members of the Secretariat, in particular, to Ms Anna Veneziano for her able leadership during the interim period. Ms Veneziano had successfully continued the good work and had bridged all the needs within the Institute.

247. She also took the opportunity to congratulate and welcome M. Ignacio Tirado, who was solidly approved by consensus by the members of the Governing Council, as the new Secretary-General of UNIDROIT. She believed that his strong background, as well as his valuable experience, would be able to further benefit the Institute in the area of Civil Procedure and Commercial Law.

248. She expressed her appreciation for former Secretary-General, Mr José Angelo Estrella Faria, who had established a strong foundation for UNIDROIT's day-to-day work, and expressed her strong belief that his contribution during his tenure had brought inspiration to many of those present to continue the Institute's good work.

249. As previously mentioned by Mr Mazzone and Ms Veneziano, 2017 had been a big year for UNIDROIT, substantively as well as in the area of institutional development. She expressed Indonesia's commitment to a common responsibility to continue this hard work, and maintain the work in many important areas of Private International Law, particularly, the finalization of the draft Protocol to the Cape Town Convention on matters specific to Agricultural, Construction and Mining Equipment, the preparation of an international guidance document on agricultural land investment contracts, and many more.

250. In support of UNIDROIT's work, Indonesia was very honoured to have hosted the International Workshop on Improving Small-scale Farmers' Welfare that took place in our transforming metropolitan in Jakarta on 6 November 2017. The Indonesian Government had been very fortunate that Ms Anna Veneziano and Ms Frédérique Mestre were able to attend this very important event, as a constructive joint-effort by the Embassy in Rome and with the Ministry of Foreign Affairs of the Republic of Indonesia and the Ministry of Agriculture of the Republic of Indonesia to increase the livelihood of small-scale farmers in Indonesia through the application of the UNIDROIT/FAO/IFAD Legal Guide on Contract Farming.

251. Before ending her statement, she congratulated all the members of the Governing Council that had been working with determination in conducting the functions of the Institute and assisting the variety of the discussions by providing their expertise in many areas in private and private international law. She stated to be at their disposal to further continue working in her capacity as the Ambassador and Representative of the Indonesian Government.

252. As Ambassador and Representative of the Republic of Indonesia as well as the Chairperson of the 76<sup>th</sup> Session of the General Assembly, she expressed her great pleasure in assuring the commitment of the Government of the Republic of Indonesia to renew her full support to all the works done by the Institute.

253. *Ms Bouza Vidal*, in taking leave of her two mandates as Governing Council member, said that it had been a great honour to serve on the Council and to have contributed to UNIDROIT's work. She expressed her heartfelt gratitude to all the members of the Council, the President, the Secretary-General *a.i.*, as well as to the members of the Secretariat for the fruitful exchanges, friendly support and cooperation over the years.

254. *Mr Hartkamp*, in his capacity as first Vice-President of the Governing Council, expressed his appreciation for the work and achievements of the Institute over the preceding twelve months. He hoped that many of the members of the Governing Council would meet again next year, and that the newly elected Council would work in the same friendly, respectful and efficient way that has characterised the Council's deliberations over the five last years.

255. *Seeing no further points to be discussed, the President declared the session closed.*

**APPENDIX I****LIST OF PARTICIPANTS / LISTE DES PARTICIPANTS****(Rome, 2- 4 May/mai 2018)****MEMBERS OF THE GOVERNING COUNCIL /*****MEMBRES DU CONSEIL DE DIRECTION***

Mr Alberto MAZZONI	President of UNIDROIT / <i>Président d'UNIDROIT</i>
Ms Stefania BARIATTI	Professor of International Law School of Law Università degli Studi di Milano Milan (Italy)
Mr Radu Bogdan BOBEI	Attorney; Professor Faculty of Law University of Bucharest Bucharest (Romania)
Mr Hans-Georg BOLLWEG	Head of Division Federal Ministry of Justice Berlin (Germany)
Ms Núria BOUZA VIDAL	Professor of Private International Law Pompeu Fabra University School of Law Law Department Barcelona (Spain)
Ms Baiba BROKA	Adviser to the Minister of Environmental Protection and Regional Development Riga (Latvia)
Mr B. Bahadır ERDEM	Professor of Law İstanbul Üniversitesi Hukuk Fakültesi; Lawyer İstanbul (Turkey)
Mr Timothy SCHNABEL	Attorney-Adviser Office of the Legal Adviser U.S. Department of State Washington, D.C. (United States of America) <i>Representing Mr Henry D. GABRIEL</i>

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)
Mr Hideki KANDA	Professor Law School Gakushuin University Tokyo (Japan)
Mr Miklós KIRÁLY	Professor of Law Dean of the Faculty of Law Eötvös Loránd University Budapest (Hungary)
Mr Alexander S. KOMAROV	Professor Head of International Private Law Chair Russian Academy of Foreign Trade Moscow (Russian Federation)
Mr Antti T. LEINONEN	Director of Legislation Law Drafting Department (Civil Law) Ministry of Justice Helsinki (Finland)
H.E. Mr CHANG Dong Hee	Ambassador Visiting Professor, Kyungpook National University Daegu (Republic of Korea) <i>Representing Mr Byung-Hwa LYOU</i>
Mr Niklaus MEIER	Head of Unit ( <i>in jobsharing</i> ) Federal Office of Justice Federal Department of Justice and Police Berne (Switzerland) <i>Representing Ms Monique JAMETTI</i>
Mr José Antonio MORENO RODRÍGUEZ	Professor of Law; Attorney Asunción (Paraguay)
Mr Esa FREDRICKS	Deputy Director: Research Centre for Private International Law in Emerging Countries University of Johannesburg (South Africa) <i>Representing Mr Jan NEELS</i>
Ms Monika PAUKNEROVÁ	Professor of Private International Law and International Commercial Law Department of Commercial Law Charles University, Faculty of Law Prague 1 (Czech Republic)

Mr Wojciech POPIOŁEK	Associate Professor of Law; Lawyer ADP Popiołek Advocates and Advisers, Law Firm Katowice (Poland)
Mr Jorge SÁNCHEZ CORDERO	Director of the Mexican Center of Uniform Law Professor Notary public Mexico City (Mexico)
Ms Rachel SANDBY-THOMAS	University of Warwick Registrar - University Executive Team Warwick (UK)
Mr Álvaro SANDOVAL BERNAL	Ambassador de Colombia en Egipto Embajada de Colombia en Egipto El Cairo (Egypt)
Ms SHI Jingxia	Professor of Law Dean, School of Law China University of International Business & Economics (UIBE) Director of UIBE International Law Institute (ILI) Beijing (People's Republic of China)
M. Daniel TRICOT	Président de l'Association française des docteurs en droit (AFDD); Arbitre et médiateur en affaires Soc. DTAM Paris (France)
Mr Spyridon VRELLIS	Emeritus Professor of Law; Director Hellenic Institute of International and Foreign Law Athens (Greece)
Mr Roger Bruce WILKINS	former Secretary to the Attorney-General's Department Barton, ACT, 2600 (Australia)

#### **OBSERVERS / OBSERVATEURS**

FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS (FAO) / <i>ORGANISATION DES NATIONS UNIES POUR L'ALIMENTATION ET L'AGRICULTURE (FAO)</i>	Ms Margret VIDAR Legal Officer FAO Legal Office Rome (Italy)
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Mr Don WALLACE, Jr	Professor International Law Institute Washington (United States of America)

#### **UNIDROIT MEMBER STATES / ETATS MEMBRES D'UNIDROIT**

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	Mr Sebastian ROSALES Counsellor Embassy of Argentina in Italy
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INDONESIA / <i>INDONESIE</i>	H.E. Ms Esti ANDAYANI Ambassador (Designate) Embassy of the Republic of Indonesia in Italy  Mr Royhan N. WAHAB First Secretary Embassy of the Republic of Indonesia in Italy
IRAN	Mr Mohsen Daneshmand First Counsellor Embassy of the Islamic Republic of Iran in Italy
IRELAND / <i>IRLANDE</i>	Ms Margaret RYAN Deputy Head of Mission Embassy of Ireland in Italy
MEXICO / <i>MEXIQUE</i>	Mr Benito JIMÉNEZ SAUMA Second Secretary Permanent Mission of Mexico to the Rome-based UN Agencies
PORTUGAL	Ms Ana POUSA Lawyer Embassy of Portugal in Italy
SAN MARINO / <i>SAINT-MARIN</i>	Mr Maurizio LUPOI <i>Corte per il Trust e i Rapporti Fiduciari</i> Republic of San Marino

Mr Antonio SEMPRONI (4 May)  
Lawyer  
*Corte per il Trust e i Rapporti Fiduciari*  
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Ms Frédérique MESTRE  
Ms Lena PETERS  
Ms Marina SCHNEIDER  
Mr Neale BERGMAN  
Mr William BRYDIE-WATSON  
Ms Bettina MAXION

Secretary-General *a.i.* / *Secrétaire Générale a.i*  
Senior Officer / *Fonctionnaire principale*  
Senior Officer / *Fonctionnaire principale*  
Senior Officer / *Fonctionnaire principale*  
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Legal Officer / *Juriste*  
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**APPENDIX II****AGENDA**

1. Adoption of the annotated draft agenda (C.D. (97) 1 rev.2)
2. Appointment of the First and Second Vice-Presidents of the Governing Council (C.D. (97) 1 rev.2)
3. Reports
  - (a) Annual Report 2017 (C.D. (97) 2)
  - (b) Report of the UNIDROIT Foundation
4. Report of the President on the conduct of the selection process of the Secretary-General and appointment of the new Secretary-General (C.D. (97) 3) (RESTRICTED)
5. International Interests in Mobile Equipment
  - (a) Implementation and status of the Luxembourg Rail Protocol and of the Space Protocol (C.D. (97) 4)
  - (b) Preliminary draft Protocol to the Cape Town Convention on Matters Specific to Mining, Agricultural and Construction Equipment (C.D. (97) 5)
  1. (c) Preparation of other Protocols to the Cape Town Convention: "Ships and maritime transport equipment" and "Renewable energy equipment" (C.D. (97) 18)
6. Transactions on Transnational and Connected Capital Markets: the UNIDROIT Legislative Guide on Intermediated Securities (C.D. (97) 6)
7. Private Law and Agricultural Development
  - (a) Follow-up activities and promotion of the UNIDROIT/FAO/IFAD Legal Guide on Contract Farming (C.D. (97) 7(a))
  - (b) Preparation of an international guidance document on agricultural land investment contracts (C.D. (97) 7(b))
8. Transnational civil procedure
  - (a) Formulation of ELI-UNIDROIT regional rules (C.D. (97) 8(a))
  - (b) Principles on Effective Enforcement (C.D.(97) 8(b))
9. International Commercial Contracts: Formulation of Principles of Reinsurance Contracts (C.D. (97) 9 rev.)

10. International Sales Law: Preparation of a guidance document on existing texts in the area of international sales law in cooperation with UNCITRAL and the Hague Conference on Private International Law (C.D. (97) 10)
11. International protection of cultural property (C.D. (97) 11)
  - (a) Follow-up activities and promotion of the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects and the Model Provisions on State Ownership of Undiscovered Cultural Objects
  - (b) Private art collections
12. Promotion of UNIDROIT instruments (C.D. (97) 12)
13. Library and research activities (C.D. (97) 13)
14. UNIDROIT information resources and policy (C.D. (97) 14)
15. Administrative matters
  - (a) Preparation of the draft Budget for the 2019 financial year (C.D. (97) 15(a))
  - (b) Report of the Secretary-General *a.i.* on the implementation of the new compensation and social security scheme applicable to the UNIDROIT staff (C.D. (97) 15(b))
16. Date and venue of the 98<sup>th</sup> session of the Governing Council (C.D. (97) 1 rev.2)
17. Any other business
  - (a) Private Law and Development - Cooperation with the Global Forum on Law Justice and Development (GFLJD) and possible future work in relation with the "Human-Centered Business Model" Project (C.D. (97) 16)
  - (b) Proposal submitted by the Czech Republic on artificial intelligence (C.D. (97) 17)

**APPENDIX III****LIST OF ABBREVIATIONS AND ACRONYMS****UNIDROIT INSTRUMENTS**

1995 UNIDROIT Convention	UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (1995)
Aircraft Protocol	Protocol to the Convention on International Interests in Mobile Equipment on Matters specific to Aircraft Equipment (2001)
Cape Town Convention or CTC	Convention on International Interests in Mobile Equipment (2001)
ELI/UNIDROIT Rules	Joint project with the European Law Institute to formulate European transnational civil procedure regional rules (ongoing)
Geneva Securities Convention	UNIDROIT Convention on Substantives Rules for Intermediated Securities (2009)
Legal Guide on Contract Farming	UNIDROIT/FAO/IFAD Legal Guide on Contract Farming (2015)
Guide on Intermediated Securities	UNIDROIT Legislative Guide on Intermediated Securities – Implementing the Principles and Rules of the Geneva Securities Convention
Luxembourg Rail Protocol	Luxembourg Protocol to the Convention on International Interests in Mobile Equipment on Matters specific to Railway Rolling Stock (2007)
MAC Protocol	Future Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Mining, Agricultural and Construction Equipment (ongoing)
Netting Principles	Principles on the Operation of Close-out Netting Provisions (2013)
Space Protocol	Protocol to the Convention on International Interests in Mobile Equipment on Matters specific to Space Assets (2012)
UNESCO/UNIDROIT Model Provisions	UNESCO/UNIDROIT Model Provisions on State Ownership on Undiscovered Cultural Objects

UNIDROIT Principles or UPICC	UNIDROIT Principles of International Commercial Contracts (editions issued 1994, 2004, 2010, 2016)
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### **OTHER INTERNATIONAL INSTRUMENTS**

CFS-RAI Principles	Principles for Responsible Investment in Agriculture and Food Systems (2014)
CISG Convention	United Nations Convention on Contracts for the International Sale of Goods (1980)
Hague Principles on Choice of Law	The Hague Principles on Choice of Law in International Commercial Contracts (2015)
Hague Securities Convention	Convention on the law applicable to certain rights in respect of securities held with an intermediary (2006)
Harmonized System or HS System	Harmonized Commodity and Coding System
VGGT	Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the context of National Food Security (2012)

### **INTERNATIONAL ORGANISATIONS AND OTHER INSTITUTIONS**

ALI	American Law Institute
CEDEP	<i>Centro de Estudios de Derecho, Economía y Política</i>
ELI	European Law Institute
ERA	Academy of European Law
EU	European Union
FAO	Food and Agriculture Organization of the United Nations
HCCH	Hague Conference on Private International Law
IBA	International Bar Association
ICCA	International Council for Commercial Arbitration
IFAD	International Fund for Agricultural Development

IISD	International Institute for Sustainable Development
INTERPOL	International Criminal Police Organization
ISCHAL	International Society for Research on Art and Cultural Heritage Law
ITU	International Telecommunication Union
NatLaw	National Law Center for Inter-American Free Trade
OECD	Organisation for Economic Co-operation and Development
OUP	Oxford University Press
ULCC	Uniform Law Conference of Canada
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNIDROIT	International Institute for the Unification of Private Law
UNODC	United Nations Office on Drugs and Crime
WCO	World Customs Organization

### **GROUPS**

CFS	Committee on World Food Security
Committee of Governmental Experts / CGE2	The second session of the UNIDROIT Committee of Governmental Experts for the preparation of a draft Protocol to the Convention on International Interests in Mobile Equipment on Matters specific to Mining, Agricultural and Construction Equipment
Committee on Emerging Markets	Committee on Emerging Markets Issues, Follow-up and Implementation
Forum on Legal Aspects of Contract Farming	Forum on Legal Aspects of Contract Farming (has succeeded the "Community of Practice")

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GFLJD	Global Forum on Law, Justice and Development
Rail Preparatory Commission	Preparatory Commission for the establishment of the International Registry for Railway Rolling Stock pursuant to the Luxembourg Rail Protocol
Ratification Task Force	Ratification Task Force
Space Preparatory Commission	Preparatory Commission for the establishment of the International Registry for Space Assets pursuant to the Space Protocol
UCAP	UNIDROIT Convention Academic Project