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**Item No. 7 (c) on the Agenda: International interests in mobile equipment -
preliminary draft Protocol to the Cape Town Convention
on Matters specific to Space Assets**

(memorandum prepared by the UNIDROIT Secretariat)

<i>Summary</i>	<i>State of progress on the Secretariat's preparation of a future Space Protocol to the Cape Town Convention</i>
<i>Action to be taken</i>	<i>See §§ 7, 11, 14, 17, 25 and 28</i>
<i>Related document</i>	<i>C.G.E./Space Pr./2/Report</i>

I. INTRODUCTION

1. Since the last session of the Governing Council the Secretariat has continued, first, laying the essential groundwork for the success of the intergovernmental consultation process in respect of the preliminary draft Protocol to the Convention on International Interests in Mobile Equipment (hereinafter referred to as the *Convention*) on Matters specific to Space Assets (hereinafter referred to as the *preliminary draft Protocol*), secondly, carrying forward the work of the UNIDROIT Committee of governmental experts for the preparation of a draft Protocol to the Convention on Matters specific to Space Assets (hereinafter referred to as the *Committee of governmental experts*), thirdly, prosecuting its efforts with the United Nations designed to secure the agreement of that Organisation to acting as Supervisory Authority of the future international registration system for space assets, fourthly, exploring other options for the role of Supervisory Authority of that system in the event that the United Nations decides ultimately not to accept such a role, fifthly, seeking to provide the Space Working Group (S.W.G.) with the resources necessary for it to play the vital role that is expected of it in the intergovernmental consultation process and, sixthly, giving publicity, wherever possible, to this work.

2. This memorandum supplements, where appropriate, the Annual Report for 2004 (hereinafter referred to as the *Annual Report*), in particular highlighting those areas which raise policy issues for the Governing Council's consideration.

II. CONTINUATION OF THE LAYING OF THE GROUNDWORK FOR THE SUCCESS OF THE INTERGOVERNMENTAL CONSULTATION PROCESS

3. It will be recalled that the extreme novelty of the solutions advocated in the preliminary draft Protocol in the context of commercial space financing convinced the Secretariat as to the

absolute necessity of organising colloquia involving Government and industry in the run-up to the intergovernmental consultation process. The essential aim of these colloquia was to prepare the position of Governments in relation to the preliminary draft Protocol, and in particular to enable them better to appreciate the key issues involved in the negotiation of a commercially viable Space Protocol. For practical reasons, it was decided to hold one colloquium for the Western Hemisphere (seen essentially as the Americas, Europe and Africa) and the other for the Eastern Hemisphere (seen essentially as Asia and the Asia-Pacific region). The original intention was to hold both colloquia in advance of the first session of the Committee of governmental experts; in the event, this however only proved possible in respect of the Western Hemisphere colloquium (see C.D. (83) 9(c), p. 2), that for the countries of Asia and the Asia-Pacific region having to be postponed because of the outbreak of the SARS epidemic and only finally being held in Kuala Lumpur on 22 and 23 April 2004, at the kind invitation of the Malaysian National Space Agency.

4. This colloquium was structured in such a way as, first, to permit representatives of a cross-section of Asian and Asia-Pacific countries to comment on the relevance of the preliminary draft Protocol from the perspective of their countries, secondly, to permit representatives of the various sectors of the local space industry (manufacturers, operators and financiers) to comment on the adequacy of the solutions advocated in the preliminary draft Protocol for the purpose of achieving its commercial objectives and, thirdly, to permit participants to comment critically on the key provisions of the preliminary draft Protocol, in a round table led by S.W.G. members.

5. It is a matter of particular satisfaction to the Secretariat that it was able to secure the services of a wide range of eminent local speakers from the worlds of both Government and industry to speak in Kuala Lumpur. To give but some examples, Mr Justice Peter Jacobson of the Federal Court of Australia, Ms Liu Xiaohong, Division Director in the Department of Foreign Affairs and of the China National Space Administration, Mr Rajeev Lochan, Director of INSES and Assistant Scientific Secretary to the Indian Space Research Organisation, Ms Setsuko Aoki of Keio University in Japan and Ms Sharifah Anisah Syed Omar, Senior Legal Counsel, Astronautic Technology (M) Sdn Bhd of Malaysia each assessed the relevance of the preliminary draft Protocol from the perspective of their respective countries, Ms Farah Suhanah Ahmad Sarji, General Counsel of Measat, and Ms Catherine Chang, Legal Counsel of AsiaSat, a member of the SES Global Group, assessed the practical interest of the preliminary draft Protocol from the point of view of operators, while Mr Sandeep Aggarwal, Director of the Media & Telecoms Finance Group for the Asia-Pacific region of BNP Paribas, and Mr David Koay, Head of the Large Local Corporates Section of the Corporates & Institutions Department of Standard Chartered Bank Malaysia Berhad, assessed its practical interest from the point of view of financiers. The colloquium was opened by Mr Jamaludin Jarjis, the Malaysian Minister of Science, Technology and Innovation.

6. Just as it was considered vital to organise fora where Governments could compare notes with representatives of industry in the run-up to the intergovernmental consultation process, it was recognised by both the Institute and the S.W.G. that it would be crucial to secure as broadly based a participation as possible in this work of all the various sectors of the space industry, and in particular satellite operators, who had, it was felt, the potential to play in respect of the preliminary draft Protocol very much the same sort of dynamic role as had been played by the airlines in the development of the Protocol to the Convention on Matters specific to Aircraft Equipment (hereinafter referred to as the *Aircraft Protocol*). The Institute and the S.W.G., in co-ordination with the European Satellite Operators Association (E.S.O.A.), accordingly organised a special meeting on the preliminary draft Protocol in Rome on 25 October 2004. This meeting was, significantly, attended by Ms Aarti Holla-Maini, Secretary-General of E.S.O.A., and representatives of a number of E.S.O.A. members (Hellas Sat, New Skies Satellites, SES Global,

Telenor and Telespazio), as well as representatives of two other major operators from Japan and the United Arab Emirates (JSAT Corporation and Thuraya Satellite Telecommunications Company). Significantly, one of these companies subsequently became a sponsor of the S.W.G. and, together with the representatives of JSAT and Thuraya, participated in the second session of the Committee of governmental experts.

7. *The Governing Council is invited to take note of the success achieved by the Kuala Lumpur colloquium and the special meeting held in Rome for satellite operators in continuing to lay the groundwork for the intergovernmental consultation process.*

III. CONSIDERATION OF THE PRELIMINARY DRAFT PROTOCOL BY GOVERNMENTS

8. The success of the Secretariat's efforts in laying the groundwork for the intergovernmental consultation process may be gleaned from the range and quality of the participation in the Committee of governmental experts. The second session of this Committee was held in Rome from 26 to 28 October 2004 (see pp. 10/11 of the Annual Report). The third session has provisionally been scheduled to take place in Rome from 27 June to 1 July 2005. Before the Secretariat can confirm these dates it will, however, need to be sure that the S.W.G. will be in a position to be represented there, given the absolutely essential nature of the expertise brought by its representatives to the work of the Committee of governmental experts. For the time being, however, a question-mark must hang over its ability to attend (see §§ 18, 21/22, *infra*).

9. One of the aspects of the preliminary draft Protocol that has attracted particular controversy concerns the extent to which the use of space assets to ensure public services should affect the availability of the creditor's remedies. Quite a significant division of opinion has opened up within the Committee of governmental experts on this question. All members of the Committee and the S.W.G. have, as a result, been invited to inform the Secretariat as to the services considered to be in the nature of public services in their countries, with an indication as to how such services are protected, and any comments and proposals regarding how this matter should be dealt with under the preliminary draft Protocol. The intention is for the Secretariat, on the basis of the information received, to prepare a paper for consideration by the next session of the Committee of governmental experts.

10. At its second session, the Committee of governmental experts set up a Sub-committee to develop proposals on the international registration system to underpin the future Space Protocol (hereinafter referred to as the *Sub-committee*). For the time being, the work of the Sub-committee is to be conducted by electronic means alone, using a web forum kindly placed at the disposal of the Sub-committee by the International Telecommunication Union (I.T.U.). This work is to be co-ordinated by the Secretariat. The Sub-committee has been asked to consider, as a matter of priority, first, the identification of space assets and related matters, secondly, the practical operation of the future International Registry for space assets and, thirdly, the role of the Supervisory Authority of the future International Registry with a view to reporting back to the Committee of governmental experts in advance of its next session.

11. *The Governing Council is invited to take note of the progress achieved by the Committee of governmental experts at its second session.*

IV. CONSIDERATION OF THE PRELIMINARY DRAFT PROTOCOL BY U.N./COPUOS

12. The question as to whether the United Nations should act as Supervisory Authority of the future international registration system for space assets continues to be the subject of lively discussion within the United Nations Committee for the Peaceful Uses of Outer Space (U.N./COPUOS), and in particular the Legal Subcommittee of that body. Since the 43rd session of

the Legal Subcommittee, held in Vienna from 29 March to 8 April 2004, an *ad hoc* working group has been at work, by electronic means, considering the question of the appropriateness of the United Nations indeed acting as Supervisory Authority with a view to preparing a report, including the text of a draft General Assembly Resolution, for consideration by the Legal Subcommittee at its 44th session, to be held in Vienna from 4 to 15 April 2005. The work of this working group has been co-ordinated by the Government of the Netherlands. The Secretariat has played a full part in shaping the report to be laid before the Legal Subcommittee.

13. The idea behind this intersessional work has been to move forward the process, which, notwithstanding a strong tendency within the Legal Subcommittee in favour of the United Nations acting as Supervisory Authority, has tended to get bogged down as a result of the hesitations of a small number of members, whether for reasons linked to the compatibility of such a solution with the United Nations Charter, for fear of possible liability implications or out of concern as to where the start-up funding would be found. The hope is that the report prepared by the working group together with the annexed draft Resolution will help to focus the discussions within the Legal Subcommittee and permit the matter to move forward timeously to the next stage, that is within the General Assembly, having regard to the advanced stage reached in the development of the preliminary draft Protocol itself.

14. *The Governing Council is invited to take note of the Secretariat's continuing efforts to advance the cause of the United Nations serving as Supervisory Authority.*

V. ALTERNATIVE OPTIONS FOR THE ROLE OF SUPERVISORY AUTHORITY IN THE EVENT THAT THE UNITED NATIONS DECIDES AGAINST ACCEPTING THAT ROLE

15. Given the uncertainty that continues to dog the question as to whether the United Nations will ultimately agree to act as Supervisory Authority and the advanced stage reached in the intergovernmental consultation process, the Secretariat has felt it necessary to pursue alternative options. Thus, the question as to whether I.T.U., the International Mobile Satellite Organization (I.M.S.O.) and the European Space Agency (E.S.A.) might wish to act as Supervisory Authority is under consideration within those Organisations. The I.T.U. Secretariat is planning to lay the question before the I.T.U. Council at its next annual session, to be held in Geneva from 12 to 22 July 2005. At its 17th session, held in October 2004, the I.M.S.O. Assembly already approved in principle the amendment of that Organisation's Constitution so as to enable it to assume the role of Supervisory Authority and will be considering the matter further at its Eighteenth (Extraordinary) Assembly session, which will probably be held in September 2005. E.S.A. meanwhile is monitoring the issue while waiting for all outstanding issues in this regard to be resolved.

16. It will be recalled that other possible solutions have either been put informally to the Secretariat or were tabled by governmental representatives during the first session of the Committee of governmental experts. These include the creation of an *ad hoc* governmental agency or an *ad hoc* Organisation to be set up by the Contracting States to the future Protocol and the Institute itself. As the Secretariat pointed out at the last session of the Council a propos of this last idea, it would be as well not to underestimate the considerable staffing and therefore funding implications for the Institute were it to be invited to act as Supervisory Authority and to bear in mind that the exercising of such functions might not sit entirely well with the depositary functions which the Institute, as depositary of the Convention and the Aircraft Protocol, might reasonably expect to receive under the future Space Protocol.

17. *The Governing Council is invited to take note of the various initiatives being actively explored by the Secretariat with a view to identifying bodies other than the United Nations that*

might suitably be invited by a future diplomatic Conference to act as Supervisory Authority and in particular to give thought to the implications of UNIDROIT serving in this capacity.

VI. NEED TO PROVIDE THE SPACE WORKING GROUP WITH THE RESOURCES NECESSARY FOR IT TO PARTICIPATE EFFECTIVELY IN THE INTERGOVERNMENTAL CONSULTATION PROCESS

18. As has already been noted earlier (see § 8, *supra*), at the time of writing, a question-mark hangs over the future participation of the S.W.G. in the intergovernmental consultation process. It will be recalled that it was the decision of the President of the Institute in 1997 to entrust preparation of a first draft of the preliminary draft Protocol to a working group bringing together representatives of the various sectors of the space industry for consideration by the Governing Council prior to any decision regarding the convening of governmental experts on this subject. The President entrusted the task of organising and co-ordinating such a working group (the S.W.G.) to Mr Peter D. Nsgos, Partner, Milbank, Tweed, Hadley & McCloy LLP, New York, undoubtedly the world's leading satellite finance lawyer. Since that time the S.W.G. has performed outstanding service in not only executing the mandate entrusted to it by the President, in the shape of the first draft communicated to the President on 30 June 2001, but subsequently also taking a key part in the revision of the preliminary draft Protocol to reflect the final version of the Convention and the Aircraft Protocol opened to signature in Cape Town and in the intergovernmental consultation process to date.

19. The main burden of the efforts of the S.W.G. to date has fallen on the shoulders of Mr Nsgos. Of this there can be no doubt and without his unique expertise in the field of commercial space financing the extremely delicate path to be trodden in working out a commercially viable Space Protocol could so easily already have led to a dead end: one cannot underestimate the difficulty involved in seeking to make available, through an international instrument, the benefits of a commercial financing technique (asset-based financing) not as yet widely practised in the field in question. It is true that Mr Nsgos has put together a strong team but, for some time now, he has expressed concern regarding the level of direction, participation and support, and in particular the very limited financial support, received from the satellite industry and the banking community. The Kuala Lumpur colloquium and the special meeting for satellite operators mentioned above (see pp. 2/3, *supra*) are just two examples of the active way in which the Secretariat has sought to help in attracting broader and more active support from the satellite industry and the banking community. The Secretariat has moreover been tireless in its efforts to direct financial support, through sponsorship, to the S.W.G. The past year has in fact been among its most successful in this respect, with Alenia Spazio, BNP Paribas and Telespazio all becoming sponsors. The support of Professor Carbone in the decisions reached by Alenia Spazio and Telespazio is gratefully acknowledged by the Secretariat. Yet the only other current sponsor of the S.W.G. is The Boeing Company and the trough in which the satellite industry has been languishing in recent years, together with the consequent belt-tightening by the remaining players, renders the finding of additional sponsors at this time extremely difficult.¹

¹ Astrium S.A.S., Astrium G.m.b.H. and EADS Deutschland G.m.b.H., together representing the major European manufacturer of space assets, were all until recently sponsors but their successor company, EADS Astrium, has indicated that, as a result of the process of reorganisation it is going through and the staffing and expenditure cuts that have been levied, it will not be able to renew its sponsorship. Arianespace, another leading European manufacturer, has likewise had to terminate its sponsorship as a result of major financial difficulties. One of the five leading players in the space financing industry until a couple of years ago, Assicurazioni Generali, also once a sponsor, has also had to withdraw, as indeed it has had to withdraw from the space market altogether.

20. On the other hand, the dependence of the Committee of governmental experts on the S.W.G.'s expertise was brought home with particular force at its second session. On that occasion, the S.W.G. was asked, first, to revise the all-important working paper it had submitted to the Committee on debtor's rights and related rights for consideration by the Committee at its next session, secondly, to provide the revised paper with an explanatory introduction, thirdly, to include in the revised paper a detailed explanation of the workings of a typical satellite financing transaction, fourthly, to ensure that the revised paper be circulated sufficiently in advance of the next session of the Committee to ensure that Governments have sufficient time to give it the necessary consideration, fifthly, to provide the Secretariat with information on the services to be considered as "public services" with a view to the preparation by the Secretariat of the paper referred to above and, sixthly, to assist the intersessional work of the Sub-committee.

21. The fact, though, is that, even whilst agreeing to assist the work of the Sub-committee, Mr Nesgos has served notice that the S.W.G. "will only be able to restart [its] efforts once the satellite industry and banking community have underwritten the S.W.G. financially and agreed to participate more actively in its activities" (cf. message of 8 January 2005 from Mr Nesgos to Mr Stanford).

22. It is clear that, in these circumstances, it may prove necessary for the Secretariat to revisit the feasibility of holding the third session of the Committee of governmental experts on the dates provisionally announced. Not only is there a risk that the S.W.G. will not by that time have been able to respond to all the requests addressed to it by the Committee of governmental experts but that the very ability of the Committee to ensure the commercial viability of the end-product of its labours will be irrevocably compromised by the absence of S.W.G. expertise.

23. This problem is not, of course, new to the Governing Council. It will be recalled that, at its 80th session, held in Rome from 17 to 19 September 2001, the Council passed a Resolution (Resolution (80) 1) calling upon UNIDROIT member States "to provide to, or procure for the UNIDROIT Secretariat, as a matter of the greatest urgency, the resources ... necessary to endow the UNIDROIT Space Working Group with the funding necessary to enable it to respond to the vital calls on its expertise that are to be expected in the coming 12 months" (cf. C.D. (80) 21, Appendix III). Notwithstanding the importance of the issues at stake, the sad fact is that this Resolution has clearly fallen on stony ground.

24. At this point, which options are open to the Institute? Clearly, the significant interest of Governments in this project, evidenced both within UNIDROIT and U.N./COPUOS, would indicate that it will be extremely difficult to interrupt the process already initiated. Equally, the huge investment already made by Mr Nesgos and his S.W.G. colleagues would be quite wasted if the process were interrupted at this stage, and, far from encouraging further industry involvement, such an interruption would probably drive away the few sponsors remaining. It would seem therefore that, even at the risk of some slight slippage in dates, it is essential for both sides - and UNIDROIT too - to keep the ship afloat. The question, though, remains as to how to meet Mr Nesgos' concerns. The Secretariat intends to step up its efforts to secure new sponsors and to ensure the renewal of existing sponsorships with a view to guaranteeing the S.W.G. the minimum resources that will be needed for it to respond adequately to the increasingly onerous tasks being entrusted to it by the Committee of governmental experts. It would, though, at the same time renew its appeal to Council members to seek, as Professor Carbone has done, to interest manufacturers, banks, operators and insurers in their countries in sponsoring the crucial work that remains to be done by the S.W.G. in ensuring that the intergovernmental consultation process comes out with an instrument that may be commercially viable.

25. *The Governing Council is invited to consider all measures possible to secure the continuing existence of the Space Working Group as an entity, in particular given what may be expected to be its determining role in the commercial viability of the end-product of this work.*

VII. GIVING OF PUBLICITY TO THE PRELIMINARY DRAFT PROTOCOL

26. With a view to expanding awareness of the preliminary draft Protocol and placing it at the centre of future developments in the development of space infrastructure to meet the requirements of the commercialisation of outer space, the Secretariat has participated in the Futures Project of the Organisation for Economic Co-operation and Development (O.E.C.D.) looking at the role of public and private actors in the commercialisation of space and the development of space infrastructure (see Annual Report p. 12). It is as a result of its participation in this work that the O.E.C.D. Steering Group is contemplating the inclusion in the final report that it anticipates publishing toward March or April 2005 of a recommendation to support UNIDROIT's efforts in this field as a means of encouraging the private financing of space activities.

27. The Secretariat has also been active in giving publicity to the Institute's project in industry publications. An article, jointly penned by Mr Nesgos and Mr Stanford, thus appeared in the November 2004 issue of *Satellite Finance*.

28. *The Governing Council is invited to take note of the Secretariat's efforts to give publicity to the preliminary draft Protocol.*

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