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**GOVERNING COUNCIL**  
**87<sup>th</sup> session**  
**Rome, 21-23 April 2008**

UNIDROIT 2008  
C.D. (87) 8(b)  
Original: English  
February 2008  
RESTRICTED

**Item No. 8 (b) 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 Secretariat)

<i>Summary</i>	<i>Steps needed to permit the resumption and timeous completion of the intergovernmental negotiations on the preliminary draft Protocol</i>
<i>Action to be taken</i>	<i>Building of consensus, within a newly established Steering Committee, around the provisional conclusions reached at the June 2007 New York Government/industry meeting, as reflected in a revised alternative draft of the preliminary draft Protocol, with a view to the early reconvening of the Committee of governmental experts and an accelerated timetable for completion of the project</i>
<i>Related documents</i>	<i>Summary report on the New York Government/industry meeting and revised alternative draft (to be communicated in due course); Implementation of the Strategic Plan (C.D. (87) 6, pp. 4 and 14)</i>

**DISCUSSION LEADING PARAMETERS AS PROPOSED BY THE SECRETARIAT**

<b>Priority</b>			
	high	medium	low

**I. Strategic Plan**

Yes, because of (1) UNIDROIT's unique position to carry out work on specific areas of secured transactions (cf. Strategic Objective No. 1) and, (2) its potential benefits for developing countries and economies in transition (cf. Strategic Objective No. 7)

**II. Work Programme 2006-2008**

Yes

### III. Current assessment

- Recent feedback from member States  
Varied, from **high** (Czech Republic, France, Germany, India, Italy, Nigeria, Russian Federation, South Africa and United States of America) to **low** (Canada and United Kingdom)
- Recent feedback from industry and other private stakeholders  
Varied, from **high** (manufacturers and financiers as well as Organisation for Economic Co-operation and Development, which recommended it under the *Space 2030 project*) to **medium-low** (operators)

<b>On time</b>			
	yes	slightly delayed	no

Timeframe determined by CGE/Governing Council/General Assembly

Timeframe to be determined at this session

<b>Problems to be overcome</b>	<ol style="list-style-type: none"> <li>1. Building of consensus around a more narrowly delimited preliminary draft Protocol prior to reconvening the Committee of governmental experts</li> <li>2. Need in this context to build support for the solutions advocated on the fundamental outstanding problems both among Governments and industry, without the Space Working Group</li> </ol>
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<b>Potential benefits and beneficiaries</b>	<p><i>Benefits:</i> through extension of the advantages of asset-based financing to commercial space activities, an anticipated lowering in the cost of such financing and, thereby, the wider availability of space-based services in developing countries and countries in transition to a market economy</p> <p><i>Beneficiaries:</i> satellite manufacturers, financial institutions, smaller satellite operators, developing economies and economies in transition to a market economy</p>
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<b>Staffing implications</b>	One officer and one secretary (part-time), supported, for one year, by an externally funded research assistant
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<b>Budget implications</b>	Funding (inclusive of both premises and interpretation) for either two five-day sessions or one ten-day session of the Committee of governmental experts in 2009 ( <i>circa</i> € 34,000) and a diplomatic Conference as early as possible in 2010 (to be hosted and, accordingly, funded by a member State, if possible with support from the private sector)
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<b>Recommendations/ Guidance sought/ Decisions to be taken/ Alternatives?</b>	Depending on the success of the Berlin Steering Committee meeting and consensus-building efforts among Governments and industry around the revised alternative draft to come out of that meeting, reconvening of the Committee of governmental experts with a timetable for completion of the project
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### STATUS OF THE PROJECT

1. Since the last session of the Governing Council the Secretariat has made great progress in bringing prosecution of this project back on track. It will be recalled that this is a project which has aroused great interest among both Governments and industry. No fewer than 40 Governments participate in the UNIDROIT Committee of governmental experts for the preparation of a draft Protocol to the Cape Town Convention on Matters specific to Space Assets (hereinafter referred to as *the Committee*). Not only does this Committee include members of the United Nations Committee on the Peaceful Uses of Outer Space (U.N./COPUOS), in line with Resolution No. 3 passed by the Cape Town diplomatic Conference, but consideration of the preliminary draft Protocol itself is also a continuing feature of the agenda of the Legal Subcommittee of U.N./COPUOS. Moreover, with the exception of the Protocol to the Cape Town Convention on Matters specific to Aircraft Equipment, never has a UNIDROIT project benefitted from greater industry input, in this case essentially through the Space Working Group (S.W.G.).

2. This progress has been achieved thanks to two intersessional meetings hosted by the Royal Bank of Scotland (RBS) and Milbank Tweed Hadley & McCloy in London on 24 April 2006 and in New York on 19 and 20 June 2007 respectively. These meetings were attended by a number of key Governments (China, France, Germany, India, Italy, Japan, Mexico, Nigeria, Republic of Korea, Russian Federation, Spain, United Kingdom, United States of America) participating in the Committee and representatives of leading players from the international commercial space and financial communities (among manufacturers, Arianespace, Boeing Capital Corporation, EADS, EADS Astrium, Space Systems/Loral, Space Exploration Technologies ("SpaceX"), Thales Alenia Space France and Thales Alenia Space Italia; amongst operators, Eutelsat, Hellas Sat, Hispasat, Intelsat, JSAT, ManSat, SES and Telespazio; among financiers, ABN Amro, BNP Paribas, Calyon Groupe Crédit Lyonnais, Commerzbank, Crédit Agricole and Royal Bank of Scotland; amongst insurers, Marsh U.S.A. Inc. and the Space Law Practice Group, as well as the German Space Agency and the GNSS Supervisory Authority), as well as leading lawyers advising such communities (Mr O. Gebler of Baker & McKenzie, Mr N. Bliss and Mr M. Goodwin of Freshfields Bruckhaus Deringer, Mr J. Bertran de Balanda of Herbert Smith, Mr C. Robson of Lovells, Mr Nesgos and Mr R. Olofsson of White & Case). The purpose of these meetings was to advance completion of the assignments handed out to Governments and the S.W.G. at the conclusion of the second session of the Committee, held in Rome from 24 to 26 October 2004; it will be recalled that the response of Governments to these assignments was inadequate.

3. At the London meeting agreement was reached on the tasks needing to be completed and the best means of achieving them with a view to permitting timeous completion of the project; in particular, the representatives of industry present indicated their willingness to contribute their expertise to the completion of these assignments, on the understanding, however, that the project would be completed as speedily as possible. Three key issues were identified as being in need of clarification, first, the criteria to be employed for the identification of space assets for the purposes of their registration in the International Registry for space assets to be established under the future Protocol, secondly, the extent to which the creditor's remedies under the Cape Town Convention as applied to space assets should be capable of being cut back in respect of those assets performing a public service and, thirdly, the amendments to the preliminary draft Space Protocol needed to achieve the extension of the Cape Town Convention to debtor's rights and related rights.

4. With a view to filling out the limited amount of Government input on the first two issues, the Secretariat subsequently sent out questionnaires, in particular among financial institutions, on the question of public service and, among satellite manufacturers, launch service providers and financial institutions, on the question of the most appropriate criteria to be employed for the identification of space assets. On the basis of the responses to these questionnaires, combined with

the input of Governments, it prepared interim reports on the conclusions to be drawn from these inquiries. At the same time, Sir Roy Goode, in his capacity of Adviser to the UNIDROIT Secretariat on the Committee, with the assistance of Mr S. Harris, a member of the U.S. delegation on the Committee, and Mr M. Sundahl, Assistant Professor in the Cleveland Marshall College of Law, Cleveland, Ohio, prepared a redraft of the preliminary draft Space Protocol designed to achieve the extension of the Cape Town Convention, as agreed, to debtor's rights and related rights.

5. These papers provided the principal focus of discussion at the New York meeting. One of the main issues that came up there was that of the sphere of application of the preliminary draft Protocol. In the context of consideration of the most appropriate criteria to be employed for the identification of space assets, the conclusion was reached that, whereas the approach previously taken had been to seek to embrace as many likely developments in the field of commercial space activities as possible - for instance, the current text of the preliminary draft Protocol referred to assets manufactured or assembled in space - it was agreed that the preliminary draft Protocol should henceforth rather focus on those assets which were currently the subject of commercial financing. The principal conclusion reached in New York was, therefore, that the sphere of application of the preliminary draft Protocol should be redrawn by reference more or less to the satellite itself, which, all were agreed, probably, in any case, represented 90% of the space assets at present subject to commercial financing.

6. One of the main demands voiced by representatives of the international commercial space and financial communities in New York was for Governments to take a greater lead in moving the proposed Protocol forward to timeous completion. This, together with the decision taken by Milbank Tweed Hadley & McCloy (the law firm of Mr P.D. Nesgos, who had acted as co-ordinator of the S.W.G. since its inception) in August 2007 to stand down from the S.W.G., prompted the Secretariat, after sounding the key space-faring Governments, to propose to the General Assembly at its 61<sup>st</sup> session, held in Rome on 29 November 2007, that it approve the establishment of a Steering Committee, open to both the Governments and the representatives of the international commercial space and financial communities that had taken part in the intersessional work to date, to build consensus, among Governments and industry, around the provisional conclusions of the New York meeting, in particular on the basis of an alternative revised version of the preliminary draft Protocol. In especial, it being clear that the support of industry was every bit as important as that of Governments to the realisation of a successful and, therefore, by definition, commercially viable end-product, it was the view of the Secretariat that such a Steering Committee could provide the perfect bridge between the viewpoints of Government and industry and facilitate, at this relatively advanced stage in the negotiations, the reaching of mutually acceptable solutions.

#### **NEXT STEPS FOR ADVANCEMENT OF PROJECT**

7. The General Assembly having endorsed the Secretariat's proposal in this regard, the Secretariat is currently negotiating with the Government of Germany, which has kindly offered to host a meeting of the Steering Committee to consider the preliminary results of its work, and in particular the alternative revised draft prepared in the light of the provisional conclusions reached in New York, regarding the arrangements for the holding of such a meeting in Berlin in May 2008. The idea would be for the alternative revised draft prepared by Sir Roy Goode to be sent out under cover of the invitations to this meeting, for comment, and for the Secretariat after the planned meeting in Berlin to lead efforts with Governments and industry to build consensus around the solutions embodied in the alternative revised draft as it emerges from that meeting.

8. With the removal from the scene of Mr Nesgos, responsibility for this will fall squarely on the Secretariat. The latter, though, will shortly be reinforced by a research assistant, recruited with

funds kindly provided by the U.K. Foundation for International Uniform Law. The German Space Agency has also kindly agreed to fund an external assistant, familiar with the space industry. The idea will be for the Secretariat to co-ordinate these consensus-building efforts, in particular leading the way with Governments, and for the external assistant to concentrate on industry.

9. The auguries for the success of these efforts are very encouraging. During the soundings carried out by the Secretariat preliminary to the proposal that it put to the General Assembly for the establishment of the Steering Committee, it received clear confirmation of the high priority that the key space-faring nations attach to this project and to timeous completion thereof; even the Government of India, the representative of which on the Committee has always raised particularly awkward questions, signalled its complete support. Likewise, some of the leading industry representatives that have been associated in the intersessional meetings have clearly signalled their keen desire to see the project completed and to take a full part in the process; in this context, it is significant that, notwithstanding the low priority that this project enjoys with the United Kingdom Government, it was a speech by Mr C. McGinn, Senior Director, Structured Asset Finance with RBS, to the United Kingdom Parliamentary Space Committee on 17 July 2007 that led Mr I. Pearson, Minister of State for Science and Innovation, to ask the British National Space Centre to meet Mr McGinn with a view to reprioritising the preliminary draft Protocol.

10. The Secretariat is, accordingly, quietly confident that, on the basis of its unremitting efforts to regalanise support among Governments and industry over the past two years, this project is now firmly back on track. Moreover, with the representative of the Russian Federation having informed the General Assembly at its 60<sup>th</sup> session, held in Rome on 1 December 2006, that his Government was favourably considering the hosting of the diplomatic Conference in the event of the Committee's work concluding successfully and the statement of interest in running the future International Registry for space assets made by the then Managing Director of the International Registry for aircraft objects at the New York meeting, some of the most important elements for the success of the future Protocol have already been secured. It is now, therefore, very much a matter of the Secretariat leading efforts with Governments (and in particular those who have raised difficulties in the past, notably on the public service issue) and industry to secure the degree of broad consensus necessary to justify reconvening the Committee. The Secretariat believes that it should be possible for it to be in a position to reconvene the Committee for the purpose of finalising a draft Protocol early in 2009 – it is too early to judge whether it may be possible for the Committee to complete its work in one longer session or whether two shorter sessions may be preferable - and, hopefully, to lay that draft before a diplomatic Conference one year later.

#### **ACTION TO BE TAKEN**

11. *The Secretariat would, accordingly, invite the Council, subject to the success of the planned Berlin meeting and the building of the necessary degree of broad consensus among Governments and industry around the alternative revised draft the preparation of which has emerged from the New York meeting, to authorise the reconvening of the Committee early in 2009.*