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**Item No. 5 (b) on the agenda: International interests in mobile equipment –
preliminary draft Protocol on Matters specific to Space Assets**

(Memorandum prepared by the Secretariat)

<i>Summary</i>	<i>Steps being taken and 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>See para. 15, below</i>
<i>Mandate</i>	<i>Work Programme 2006-2008</i>
<i>Priority level</i>	<i>High</i>
<i>Status</i>	<i>On target for completion in late 2010 /early 2011</i>
<i>Related documents</i>	<i>UNIDROIT 2008 – Study LXXIIJ – Docs. 14 and 15; Implementation of the Strategic Plan (C.D. (87) 6, pp. 4/5 and 14); Annual Report 2008 (C.D. (88) 2)</i>

STATUS OF THE PROJECT

1. A summary of the considerable progress realised in the work of the UNIDROIT Steering Committee set up by the General Assembly, at its 61st session (Rome, 29 November 2007), to build consensus around the provisional conclusions reached at the second Government/industry meeting (New York, 19/20 June 2007) is to be found in the *Annual Report 2008*.
2. This memorandum will, accordingly, focus on the problems still to be resolved within the framework of the Steering Committee so as to permit an early resumption of the inter-governmental consultation process with a view to timeous completion of the project.

**KEY PROBLEMS TO BE RESOLVED WITH A VIEW TO THE RESUMPTION OF THE
INTERGOVERNMENTAL CONSULTATION PROCESS**

3. Before reviewing the problems to be resolved, it is appropriate, first, to highlight the considerable strengths of the project as these have emerged during the Steering Committee process.

4. First, reflecting the very strong participation of Governments from all over the world in the UNIDROIT Committee of governmental experts, all the key space-faring nations are giving full backing to the work of the Steering Committee, as evidenced, in particular, by the fact that the Government of Germany saw fit to host the launch meeting of that Committee in Berlin and the European Space Agency will be hosting the Paris meeting of that Committee. Secondly, notwithstanding continuing attempts by certain leading satellite operators to deflect the Committee from its chosen course, the Steering Committee has attracted the active participation of a representative cross-section of the various sectors of the international commercial space and financial communities, as testified by the fact that Commerzbank hosted the meeting of the Sub-committee of the Steering Committee on default remedies in relation to components in its prestigious representation offices in Berlin and that Crédit Agricole S.A. will be hosting two of the three meetings of the Steering Committee to be held in Paris, including the all-important meeting of the Sub-committee on public service. Thirdly, the process for preparation of an alternative version of the preliminary draft Protocol, along the lines of the provisional conclusions reached by the aforementioned New York meeting – to be put on the table, alongside the current text, when the Committee of governmental experts resumes its work – has attracted generous input from both the Governments and the representatives of the international commercial space and financial communities serving on the Steering Committee, which must augur well for its reception by these communities at large.

5. One of the first problems to be dealt with is to find an effective counter-weight to the determined efforts being mounted by the three leading satellite operators to undermine the project with a view to protecting, in the language employed by a leading representative of the international commercial space and financial communities who has hitherto actively supported the work of the Steering Committee, their “oligopolistic position”. One of the fundamental objectives of the project is to meet the legitimate expectations of those parts of the world standing to gain most from an expansion of the availability of space-based services, notably the developing world, and of those parties standing to gain most from enhanced access to lower-cost financing for investment in space, in particular small operators and start-up companies, both benefits that are expected to accrue from extension of the Cape Town Convention’s asset-based financing regimen to commercial space financing.

6. A sizeable problem needing to be dealt with concerns the way in which the future Protocol should address the vexed issue as to how to balance exercise of the creditor’s remedies under the Cape Town Convention as applied to space assets, on the one hand, and the need of a Government or an entity thereof to maintain the continuity of a public service guaranteed by a space asset, notwithstanding default by the debtor, on the other. The Steering Committee has taken the line that it would not be profitable for it to get involved in a political debate on the merits of the different approaches that might be taken on this issue. In the view of the Steering Committee, this is a debate that should be reserved for the Committee of governmental experts: better, in the view of the Steering Committee, for a Sub-committee to come up with options for a solution to this problem, capable of being laid before the Committee of governmental experts with a good chance of commanding broad support. One possible solution, already anticipated at the 87th session of the Council by Professor Carbone, has been formally put forward, by Finmeccanica, and this will be thoroughly considered by the Sub-committee both in preparation for the Paris meetings and in

Paris, as an alternative, together with other possible solutions, to the solutions set forth in the current Article XVI(3) of the preliminary draft Protocol.

7. One of the issues that emerged in the context of the Government/industry meeting's conclusion as to the desirability of the sphere of application of the preliminary draft Protocol being narrowed with a view to facilitating timeous completion of the project was the question as to whether components that were of less than high value should be covered, notably in view of the implications for the overriding of the application of domestic law and the cost of registering in the future International Registry. The Steering Committee at its launch meeting was seized of a proposal on this issue the effect of which would have been for the exercising of remedies, under the Cape Town Convention as applied to space assets, by a creditor with an international interest in a space asset in its entirety – consisting in, *par excellence*, the satellite itself together with those appurtenances without which it would not be operational but not including its separately identifiable high-value components – to be limited where this would negatively affect a solvent third-party creditor with an international interest in a separately identifiable component that was either physically or functionally¹ linked to the space asset in its entirety. The Sub-committee set up by the Steering Committee to look into this matter agreed that such a proposal was appropriate but only for those separately identifiable components that were physically linked to a space asset. This led to the Sub-committee recommending to the Steering Committee that it reconsider the appropriateness of components being included in the sphere of application of the preliminary draft Protocol at all.

8. One of the intersessional tasks decided upon by the Committee of governmental experts at its second session (Rome, 26-28 October 2004) was an examination of aspects of the future international registration system for space assets. A sub-committee was appointed for this purpose. It was, however, instructed to work by electronic means. The response, in terms of participation, notwithstanding the placing of a special web forum at the disposal of the Sub-committee by the International Telecommunication Union, was disappointing, although the few responses that were received, in particular on the desirability of components of less than high value being included in the sphere of application of the preliminary draft Protocol, have been channelled into the other intersessional work. The principal issue referred to the Sub-committee having been the appropriate identification criteria for space assets, this is one of the issues on which the Steering Committee has focussed. Although the Steering Committee made considerable progress with this problem in Berlin, it is evidently an issue that, together with the other issues referred to the Sub-committee, will need to be further considered by that body. The Secretariat would envisage holding a meeting of the Sub-committee, immediately prior to the next session of the Committee of governmental experts.

9. A major problem that has increasingly arisen as a result of the project being delayed is that many of the key players committed to the project have moved on professionally, exacerbating the problems for the Secretariat when seeking to revitalise the project over the past few years. That so much progress has been made, nonetheless, is largely due to the fact that the member of the Secretariat looking after this project has, for the last eleven months, been able to count on the valiant assistance of a young lawyer, Mr D.A. Porras, funded by the U.K. Foundation on International Uniform Law and the International Bar Association, for the preparation of documentation and support in the necessary correspondence and communication with the far-flung network of individuals involved, thus leaving the member of the Secretariat in question somewhat freer to pursue the re-establishment of the necessary contacts. However, the funding of Mr Porras' position is due to expire on 28 February 2009, with the funding needed to cover the renewal of his position only, to date, notwithstanding the Secretariat's best efforts, being guaranteed for another six months, thanks to further generous grants from the U.K. Foundation and the German Space Agency.

¹ The term "functionally linked component" refers to separate space assets working together to carry out a common function.

NEXT STEPS FOR ADVANCEMENT OF PROJECT

10. As recorded in the *Annual Report 2008*, the next stages in this project are to consist in, first, the Secretariat's launching of the work of the Sub-committee on public service, on the basis of a background paper, prepared by Mr D.J. Den Herder, a member of the Steering Committee – this Sub-committee is to work by electronic means – and, secondly, the sending out of invitations for a meeting of that Sub-committee, a seminar in particular designed to provide those among the international commercial space and financial communities having expressed particular concerns about the direction being taken by the Steering Committee to engage in a direct dialogue with members thereof, and the second meeting of the Steering Committee. All these meetings will, as mentioned above, be held in Paris and it is probable that they will be held in the first three and a half days of the week commencing on 11 May 2009 but, at the time of writing (19 February 2009), the Secretariat was still waiting for a number of replies necessary for it to be able to settle the dates.

11. The Governments of Germany and the United States of America are preparing a proposal for a revised Article IX(4) of the preliminary draft Protocol designed to implement the agreement reached by the Sub-committee on components. Once this proposal is ready, it will be incorporated in the second alternative version of the preliminary draft Protocol under preparation by Mr J.M. Deschamps (Canada) and Sir Roy Goode (United Kingdom), on behalf of the Steering Committee. This second alternative version will then be circulated among members of that Committee, both for comment and with a view to the Steering Committee's Paris meeting. The conclusions to be reached by the Sub-committee on public service will be directly referred to that meeting.

12. On the basis of the conclusions to be drawn from the Paris meetings, as, in particular, reflected in the second alternative version of the preliminary draft Protocol, as amended, the Secretariat would propose, in consultation with Mr S. Marchisio (Italy), Chairman of the Committee of governmental experts and the Steering Committee, immediately thereafter to take a decision as to the case for reconvening the Committee of governmental experts, in Rome in late 2009. The idea would be for the Committee of governmental experts on such occasion to be seised of both the text of the preliminary draft Protocol which emerged from the last session of governmental experts and the alternative version as endorsed by the Steering Committee in Paris.

13. The Secretariat remains confident that, on the basis of its unremitting efforts to regalanise support among Governments and the international commercial space and financial communities over the past few years, this project is now firmly back on track, with an excellent chance of the key outstanding problems being resolved at the Paris meetings so as to permit the reconvening of the Committee of governmental experts in late 2009 and completion of the project at a diplomatic Conference in either late 2010 or early 2011. It would, in this connection, recall both the statement delivered by the representative of the Russian Federation on the occasion of the 60th session of the General Assembly (Rome, 1 December 2006), that his Government was favourably considering the hosting of the diplomatic Conference in the event of the Committee of governmental experts' 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, two of the most important elements for the success of the future Protocol having thus already been secured.

14. The Secretariat would, accordingly, see its priority at this point as being to maintain the momentum generated since the setting up of the Steering Committee, first, by preserving the all-important alliance of interests that this forum has nurtured between the Governments of the leading space-faring nations and leading representatives of all the different sectors of the international commercial space and financial communities and, secondly, by ensuring that the fruits of this alliance, in the shape of the alternative version of the preliminary draft Protocol under

preparation by the Steering Committee, go on to command broad support among the international community at large, as represented within the Committee of governmental experts, so as to justify the resultant draft Protocol being laid before a diplomatic Conference for adoption within the time estimated above.

ACTION TO BE TAKEN

15. *The Secretariat would, accordingly, invite the Council, subject to the success of the Paris meetings, to authorise it, in consultation with the Chairman of the Committee of governmental experts and the Steering Committee, to reconvene the Committee of governmental experts in late 2009.*