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DIPLOMATIC CONFERENCE TO ADOPT A MOBILE EQUIPMENT CONVENTION AND AN AIRCRAFT PROTOCOL

(Cape Town, 29 October to 16 November 2001)

COMMENTS ON DRAFT CONVENTION

(Presented by the Space Working Group)

I. INTRODUCTORY REMARKS

1. - At its 76th session, held in Rome from 7 to 12 April 1997, the UNIDROIT Governing Council approved the scission of the future UNIDROIT Convention on International Interests in Mobile Equipment into a base Convention containing the general rules common to all the categories of equipment covered by its sphere of application and separate equipment-specific Protocols containing those additional rules necessary to adapt - and in effect amend - such general rules to the special financing patterns of each such category of equipment.¹

2. - Pursuant to this decision, the President of UNIDROIT on 8 August 1997 invited Mr Peter D. Nesgos,² expert consultant on international space finance matters to the UNIDROIT study group that prepared the preliminary draft UNIDROIT Convention on International Interests in Mobile Equipment - that was subsequently transmitted to Governments by decision of the Governing Council, taken at its 77th session, held in Rome from 16 to 20 February 1998 - to organise and chair a working group (hereinafter referred to as the *Space Working Group*) to prepare a preliminary draft Protocol to the future UNIDROIT Convention on Matters specific to Space Property capable of being submitted to UNIDROIT as early as possible.

¹ The immediate reason for this decision was “to accommodate the aviation industry’s desire to be able to enjoy the economic benefits of the new international regimen without having to wait for the formulation of the equipment-specific provisions relating to categories of equipment other than aircraft equipment” (cf. Martin J. Stanford: “A broader or a narrower band of beneficiaries for the proposed new international regimen?: Some reflections on the merits of the Convention/Protocol structure in facilitating the former” in *Uniform Law Review* 1999/2, 242 at 244). Thus “[t]he introduction of the Convention/Protocol structure was felt to accommodate the short-term desire of one equipment sector whilst at the same time adequately to safeguard the long-term benefits of uniformity for all the other categories of equipment encompassed by the future Convention’s sphere of application” (*idem*).

² Mr Nesgos is a partner in Milbank, Tweed, Hadley & McCloy, New York and the author of numerous works on international space finance, including “Satellites and Transponders” in *Equipment Leasing* (ed. Jeffrey J. Wong), 1998, Vol. 3, Chapter 30.

3. - After extensive consultations and several meetings, which involved not only representatives of the manufacturers, users, financiers and insurers of space assets³ but also representatives of the interested international Organisations⁴ and international space law jurists, on 30 June 2001 Mr Nesgos, on behalf of the Space Working Group, communicated to the President of UNIDROIT the text of a preliminary draft Protocol on Matters specific to Space Property (hereinafter referred to as the *preliminary draft Protocol*) which it considered ripe for transmission to Governments. The text of this preliminary draft Protocol is enclosed herewith as an Appendix to these comments.

4. - At its 80th session, held in Rome from 17 to 19 September 2001, the UNIDROIT Governing Council authorised the transmission of the preliminary draft Protocol to Governments, including member Governments of the United Nations Committee on the Peaceful Uses of Outer Space (U.N./COPUOS) - which are already considering the draft Convention and the preliminary draft Protocol, in particular in their relationship to international space law and with a view to the possibility of the Secretary-General of the United Nations acting as Supervisory Authority of the future international registration system for space property – with a view to the convening of a first session of a UNIDROIT Committee of governmental experts to prepare a draft Protocol capable of submission for adoption. It is planned to hold this first session of governmental experts in Rome at the seat of UNIDROIT in either June or September 2002.

5. - At its most recent session, held in Evry Courcouronnes on 3 and 4 September 2001, the Space Working Group, considering in particular the preliminary draft Protocol in relation to existing international space law with a view to the first Working Meeting of the *ad hoc* consultative mechanism of U.N./COPUOS held in Paris on 10 and 11 September 2001, noted a number of areas in which the text of the draft [UNIDROIT] Convention on International Interests in Mobile Equipment (hereinafter referred to as the *draft UNIDROIT Convention*) to be considered by the diplomatic Conference to adopt a Mobile Equipment Convention and an Aircraft Protocol (hereinafter referred to as the *diplomatic Conference*) as it relates to space property might be improved. The diplomatic Conference is invited to consider the points raised by the Space Working Group, set forth below as comments on the draft UNIDROIT Convention.

II. COMMENTS ON THE DRAFT UNIDROIT CONVENTION

General comments

6. - The Space Working Group strongly urges the diplomatic Conference to uphold the dual Convention/Protocol structure endorsed by both the three UNIDROIT/ICAO Joint Sessions and the ICAO Legal Committee at its 31st Session. The decisive virtue of this structure, in the opinion of the Space Working Group, is that it will permit the economic benefits of the draft UNIDROIT Convention, essentially those benefits resulting from the greater access to asset-based financing facilities that it is specifically designed to provide, to be extended *within a reasonable time frame* to those space assets, in particular commercial communications satellites, for which such financing opportunities are at present urgently required,⁵ as they are all too rarely available. The present-day customer for asset-

³ The expertise tapped by the Space Working Group has included such majors players in the world aerospace industry and finance and insurance communities as Alcatel, ANZ Investment Bank, Arianespace, Assicurazioni Generali, Astrium, BNP Paribas, the Boeing Company, Crédit Lyonnais, European Aeronautic Defence & Space Company (EADS), La Réunion Spatiale and Lockheed Martin as well as space financing experts from major international law firms.

⁴ The expertise tapped by the Space Working Group has also included representatives of the United Nations Office for Outer Space Affairs, the European Centre for Space Law of the European Space Agency, the International Bar Association, the International Institute of Space Law and the Aviation Working Group.

⁵ “Total revenue for the global satellite industry is expected to reach over U.S.\$ 97 billion in 2001 alone, an increase of over 15% from 2000. The manufacture of satellites, satellite-related ground equipment and payments made to the worldwide launch services industry accounted for almost U.S.\$ 50 billion of the U.S.\$ 81 billion industry total for 2000. It is expected that more than 500 commercial communications satellites, valued at

based satellite financing will typically be a start-up company with little other than its satellite to offer by way of collateral. Only well-established satellite companies using market-proven applications such as television broadcast services are able to obtain financing on the strength of their balance-sheets.

7. - The particular commercial significance of these considerations is that the benefits of the future Convention and Space Assets⁶ Protocol should be made available to the international community at the earliest possible opportunity. The unique opportunity for asset-based financing to make a difference to the quality of life of countless human beings in the emerging and developing worlds through the enhanced access to satellite services (for such life-and-death matters as disaster forecasting) and broader diversity of satellite operators that the future Convention and Space Assets Protocol may foster is an opportunity that needs to be seized now. This is particularly true in the light of all the major setbacks that have been suffered by the telecommunications sector in recent times, a major contributory factor in which has been precisely the absence of a suitable international legal framework for those called upon to meet the financing needs of this sector.⁷

8. - This invaluable opportunity will be simply wasted if the present structure of the draft Convention is altered: whereas it is reasonable to estimate that it should be possible to complete adoption of the preliminary draft Protocol at the intergovernmental level within three years of the end of the diplomatic Conference, it is wholly impossible to imagine how many more years might be necessary to complete the work should it become necessary to renegotiate from scratch all the basic asset-based financing provisions at present embodied in the draft UNIDROIT Convention and the preliminary draft Protocol for an instrument solely covering space assets.

9. - It is clear moreover that the extraordinary efforts of all those from the space industry and the space finance community who have played such a pioneering role in the development of the preliminary draft Protocol to date have been predicated on the basis of the completion of this work within the reasonable time-frame mentioned above. This calculation has reflected the fact that the benefits expected to accrue under the preliminary draft Protocol are ones that are needed urgently. The time that so many parties from the space industry and the space finance community have seen fit to devote to this project to date must necessarily be seen in terms of the commercial opportunity it currently represents. It is not however as though present-day market needs will necessarily remain the same indefinitely. The Space Working Group accordingly believes it to be vital that the diplomatic Conference maintain the Convention/Protocol structure as the best guarantee of achieving completion of the preliminary draft Protocol within the time-frame recognised by the space industry and the space finance community as best responding to market needs.

10. - The Space Working Group would also invite the diplomatic Conference to take special care when preparing the final text of the draft UNIDROIT Convention to ensure that the maximum degree of flexibility be left to those whose task it will be to negotiate the preliminary draft Protocol at the

an average price of U.S.\$ 85 million each, will be launched over the next 10 years. Commercial, broadcast, broadband and telecommunications satellite services should witness 30% annual growth (including manufacturing – growth projections are 17% annually) over the next decade. In the same period, approximately 40 launches of commercial satellites are expected *per* year, representing more than U.S.\$20 billion in revenues.” (cf. Dara A. Panahy, “The prospective UNIDROIT Convention on international interests in mobile equipment as applied to space assets,” *International Bar Association 2001 Conference (Cancun, Mexico) papers (Committee Z: UNIDROIT’s draft Convention on International Interests in Mobile Equipment)*, at p. 1).

⁶ Although the preliminary draft Protocol submitted to the UNIDROIT Governing Council in September 2001 and featuring as an Appendix to these comments refers to “space property”, it is to be noted that, at its most recent session, the Space Working Group decided to replace this term by the term “space assets” and to recommend the making of a similar change in Article 2(3)(c) of the draft UNIDROIT Convention (cf. § 12, *infra*).

⁷ Cf. comments made by Mrs Lyndall Shope-Mafole, Minister Plenipotentiary, Communications, South African Embassy, Paris on the occasion of the first Working Meeting of the *ad hoc* consultative mechanism of the United Nations Committee on the Peaceful Uses of Outer Space (U.N./COPUOS), held in Paris on 10 and 11 September 2001.

intergovernmental level, in particular given the specificity of all activities carried out in outer space and the uniqueness of the law relating thereto.

11. - The Space Working Group would also invite the diplomatic Conference in framing the provisions of the draft UNIDROIT Convention governing the Supervisory Authority not to do anything that might prejudice the ability of the United Nations to act as Supervisory Authority of the future international registration system for space property.⁸ Consideration of the United Nations exercising such functions is currently under consideration within U.N./COPUOS.

Comments relating to specific provisions of the draft UNIDROIT Convention

Re: Article 2(3)(c)

12. - The Space Working Group, after lengthy consideration of the issues involved, and in particular the need to avoid any potential confusion with the terminology used in the United Nations space law treaties, has decided to replace the term “space property”, at present featuring in Article 2(3)(c) of the draft UNIDROIT Convention, by the term “space assets”⁹ and would invite the diplomatic Conference accordingly to make the same change in Article 2(3)(c).

Re Article 17(1)(c)

13. - The Space Working Group, noting that the proposed international registration system is designed to be an “open” system, would invite the diplomatic Conference to review whether the term “confidentiality” employed in Article 17(1)(c) is the most apt term to be used in this context and, if not, to consider its deletion.

Re Article 35

14. - The Space Working Group expressed concern that, as at present worded, Article 35 would not permit the use of the additional types of monetary and non-monetary associated right proposed in the preliminary draft Protocol (cf. Article I(2)(a) thereof), which may be integral to the inherent value of the space assets to which they relate. The commercial significance for space financing of this point is to be seen especially in the importance for a satellite operator who is already operating other satellites in space of being able to pledge such rights as the revenue stream derived from the leasing of transponders on those satellites as collateral for the financing of a third satellite that he needs to procure. The Space Working Group would therefore invite the diplomatic Conference to review the wording of this Article with a view to ensuring the elimination of this undesirable result.

Re Article 47

15. - The Space Working Group has noted that this provision, whilst intended originally to regulate the relationship between the draft UNIDROIT Convention and each Protocol *in a general manner*, in particular to affirm the controlling nature of each Protocol in relation to the category of equipment covered thereby, has, by virtue of its present location, namely as a final provision dealing with “Entry into force”, inadvertently forfeited its original general purpose. It would nevertheless suggest that a

⁸ Both UNIDROIT and the Space Working Group believe in principle that the United Nations may be considered the most appropriate body to exercise such functions (cf. Draft Convention of the International Institute for the Unification of Private Law on international interests in mobile equipment and the preliminary draft protocol thereto on matters specific to space property: report of the Secretariat of the United Nations Office for Outer Space Affairs and the Secretariat of the International Institute for the Unification of Private Law (A/AC.105/C.2/L.225, § 41)).

⁹ The Space Working Group has decided to employ the term “biens spatiaux” in the French text of the preliminary draft Protocol instead of the term “matériel d’équipement spatial” and would accordingly invite the diplomatic Conference to make a similar change in the French text of Article 2(3)(c).

general provision spelling out the nature of the relationship between the future Convention and each Protocol thereto is still very much needed, not least in respect of space assets.

16. - The Space Working Group would accordingly suggest that, whilst a rule along the lines of the provisions of Article 47(1) dealing with the *specific* question of the *entry into force* of the draft UNIDROIT Convention clearly needs to be retained, a new Article should also be included amongst its general provisions dealing *generally* with the *relationship between the draft UNIDROIT Convention and each of its Protocols*. The essential purpose of such a general provision would be to reaffirm the primacy of the Protocol over the Convention as regards a specific category of equipment. This is a matter that will be of fundamental importance for each judge called upon to apply the future Convention and Protocols.

17.- It is suggested that such a provision should enshrine, first of all, the principle that each Protocol may amend any or all terms of the Convention, secondly, the consequential principle that, where on a given issue the particular Protocol is silent or refers to the Convention only (as in Article VI of the draft Aircraft Protocol), then the Convention alone applies and, thirdly, the rule at present contained in Article 47(2), dealing with the interpretation of the Convention and each Protocol as a single instrument.

18.- Moreover, the Space Working Group, while noting that the draft UNIDROIT Convention is intentionally still missing a full set of draft final provisions,¹⁰ would imagine from the preliminary negotiations thereon¹¹ that the final provisions to be adopted at the diplomatic Conference, both for the draft UNIDROIT Convention and the draft Aircraft Protocol, will include provisions dealing with the procedure to be put in place for future amendments. It would in this case invite the diplomatic Conference to take especial care when drafting these provisions to deal with the relationship between the procedure for amending the future Convention and that for amendments to each Protocol.

Re Chapter XIV

19.- Whilst aware, as already noted, that a comprehensive set of draft final provisions for the draft UNIDROIT Convention has still to be prepared, the Space Working Group would nevertheless commend those responsible for this exercise to make every effort to ensure that such draft final provisions conform in every way with the 1969 Vienna Convention on the Law of Treaties. In particular, it would note that the term “Contracting State” is regularly employed in the draft Aircraft Protocol when the correct term should be “State Party.”

¹⁰ Cf. Draft [UNIDROIT] [~~UNIDROIT~~] Convention on International Interests in Mobile Equipment and draft Protocol thereto on Matters specific to Aircraft Equipment: Explanatory Report and Commentary (DCME-IP/2), p. 9, § 32.

¹¹ Cf. Discussion paper on the legal relationship between the draft Convention and its equipment-specific Protocols (prepared by Ms C.Chinkin (Professor of Public International Law; London School of Economics) and Ms C. Kessedjian (Professor of Law; Deputy Secretary-General, Hague Conference on Private International Law) at the request of the Steering and Revisions Committee (UNIDROIT CGE/Int. Int/2 ICAO LSC/ME/2 WP/2).