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Examination of the preliminary draft protocol on matters specific to space assets to the Convention on International Interests in Mobile Equipment (opened for signature in Cape Town on 16 November 2001): considerations relating to the possibility of the United Nations serving as Supervisory Authority under the preliminary draft protocol

Convention on International Interests in Mobile Equipment (opened for signature in Cape Town on 16 November 2001) and its preliminary draft protocol on matters specific to space assets: considerations relating to the possibility of the United Nations serving as Supervisory Authority under the protocol

Report of the Secretariat

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I. Introduction

1. At its forty-second session, to be held from 24 March to 4 April 2003, the Legal Subcommittee of the Committee on the Peaceful Uses of Outer Space will discuss an agenda item entitled “Examination of the preliminary draft protocol on matters specific to space assets to the Convention on International Interests in Mobile Equipment (opened for signature in Cape Town on 16 November 2001)”.
2. Under the item, the Subcommittee will consider two sub-items: (a) Considerations relating to the possibility of the United Nations serving as Supervisory Authority under the preliminary draft protocol; and (b) Considerations relating to the relationship between the terms of the preliminary draft protocol and the rights and obligations of States under the legal regime applicable to outer space. A new working group will also be established to consider these sub-items separately.
3. At its forty-first session, the Subcommittee requested the Secretariat to prepare a report on sub-item (a) in consultation with the United Nations Legal Counsel for consideration by the working group (A/AC.105/787, para. 137). The present report has been prepared, in consultation with the United Nations Legal Counsel, in response to that request.

II. Background

A. Convention on International Interests in Mobile Equipment and protocols relating to specific categories of mobile equipment

4. The International Institute for the Unification of Private Law (Unidroit) is an intergovernmental organization, not affiliated with the United Nations, whose primary role is to modernize and harmonize private law, in particular commercial law, between States. Unidroit develops draft international instruments relating to commercial law and other aspects of private law, which are then presented to States for consideration and adoption.
5. Unidroit has an ongoing project on the establishment of an international regime for asset-based financing of high-value mobile equipment.
6. Asset-based financing is financing where a particular asset or property is used as collateral. A mortgage on a house is one type of asset-based financing. If the borrower fails to make payments to the bank, the bank can seize the house. This gives a greater degree of security to the bank that the credit will be repaid, and gives it an alternative source of revenue (the house) if it is not. This, in turn, makes it easier for people wishing to buy a house to obtain credit, and means the credit can be offered at a lower interest rate.
7. Asset-based financing is difficult in the case of certain categories of high-value equipment, such as aircraft or railway rolling stock, that regularly move across national boundaries, or spacecraft, which are outside national boundaries altogether. These assets are not so easily made subject to any particular national jurisdiction for the purposes of securing and enforcing the interests of financiers. In particular, one common choice-of-law rule, that in the case of a dispute, the validity, enforceability and priority ranking of security rights in an asset are governed by the

law of the country in which the asset is located (*lex rei sitae*), is difficult to apply in the case of spacecraft, which are outside national boundaries.

8. The regime for asset-based financing of high-value mobile equipment is being established under the model of a multilateral base convention, which sets out the common basic principles, and a number of equipment-specific protocols, which adapt the fundamentals to the specific needs of each category of equipment. A more detailed background on the development of this legal regime is provided in a report prepared by the United Nations Secretariat and the Unidroit secretariat in 2001 (A/AC.105/C.2/L.225).

9. The Convention on International Interests in Mobile Equipment and its Protocol on Matters Specific to Aircraft Equipment (the "Aircraft Protocol") were opened for signature on 16 November 2001 at the Diplomatic Conference to Adopt a Mobile Equipment Convention and an Aircraft Protocol, held under the auspices of the International Civil Aviation Organization (ICAO) and Unidroit at Cape Town from 29 October to 16 November 2001. The protocols on matters specific to space assets and on railway rolling stock are still at the preliminary draft stage, meaning they have not yet been finalized by governmental experts for submission to the Unidroit Governing Council. The preliminary draft protocol on matters specific to space assets (the "space assets protocol") has been developed by the Space Working Group, which is comprised of experts in the field serving in their individual capacity. The preliminary draft protocol may be reviewed by a meeting of governmental experts for the first time in late 2003.

10. Unidroit has sought to work closely with those intergovernmental organizations that already play important roles in international cooperation relating to categories of mobile equipment. ICAO co-sponsored the development of the Convention and Aircraft Protocol, and the Intergovernmental Organisation for International Carriage by Rail (OTIF) is co-sponsoring the development of the preliminary draft protocol on railway rolling stock.

11. In the case of the space assets protocol, Unidroit has approached the Committee on the Peaceful Uses of Outer Space. Consideration of the preliminary draft protocol was introduced onto the agenda of the Committee's Legal Subcommittee for the first time in 2001, and was the subject of extensive discussions in the Subcommittee and the Committee in 2001 and 2002, as well as of two inter-sessional meetings on the issue, held in Paris on 10 and 11 September 2001 and Rome on 28 and 29 January 2002. As indicated in paragraphs 1 and 2 above, the Legal Subcommittee will consider the matter at its forty-second session, to be held in 2003.

B. International Registry and Registrar

12. As indicated in article 16 of the Convention, among other things, the Convention, together with the space assets protocol, would establish an International Registry for international interests in space assets. The Registry would be fully computerized and would allow for the possibility of data being entered by authorized users worldwide. It would be operated and administered 24 hours a day.

13. The Registrar is the entity that would operate the International Registry. As stipulated in article 17, paragraph 5, of the Convention, the Registrar would be required to ensure the efficient operation of the International Registry and perform the functions assigned to it by the Convention, the Protocol and the regulations developed by the Supervisory Authority. The Registrar selected under the Aircraft Protocol is likely to be a private company.

14. Under article 27 of the Convention, the assets, documents, databases and archives of the Registry would be inviolable and immune from seizure or other legal or administrative process. However, the Supervisory Authority would be able to waive this immunity where it was deemed appropriate. In addition, as stipulated in article 28 of the Convention and article XIX, paragraphs 5 and 6, of the preliminary draft protocol, the Registrar would, with some exceptions, be liable for compensatory damages for loss suffered by a person resulting directly from an error or omission of the Registrar and its officers and employees or from a malfunction of the international registration system. The Registrar would be required to provide insurance or a financial guarantee covering all its liability under the Convention.

C. Supervisory Authority

15. Article 27 of the Convention and article XVII, paragraph 2, of the preliminary draft protocol on space assets also envisage the establishment of a Supervisory Authority, which should have international legal personality and, together with its officers and employees, would enjoy immunity from legal or administrative process as is provided under the rules applicable to them as an international entity. The Supervisory Authority would also enjoy exemption from taxes and such other privileges as may be provided by agreement with the host State in which it is situated.

16. As indicated in article 17 of the Convention, the Supervisory Authority would be responsible, among other things, for:

- (a) Establishing or providing for the establishment of the International Registry;
- (b) Appointing or dismissing the Registrar;
- (c) Ensuring that any rights required for the continued effective operation of the International Registry in the event of a change of Registrar will vest in or be assignable to the new Registrar;
- (d) After consultation with the Contracting States, making or approving regulations pursuant to the Protocol dealing with the operation of the International Registry (article XVIII of the preliminary draft protocol states that the first regulations shall be made by the Supervisory Authority so as to take effect on the entry into force of the Protocol);
- (e) Establishing administrative procedures through which complaints concerning the operation of the International Registry can be made to the Supervisory Authority;
- (f) Supervising the Registrar and the operation of the International Registry;

(g) At the request of the Registrar, providing such guidance to the Registrar as the Supervisory Authority thinks fit;

(h) Setting and periodically reviewing the structure of fees to be charged for the services and facilities of the International Registry;

(i) Doing all things necessary to ensure that an efficient notice-based electronic registration system exists to implement the objectives of the Convention and the Protocol;

(j) Reporting periodically to Contracting States concerning the discharge of its obligations under the Convention and Protocol.

17. It is envisaged in article 17, paragraphs 3 and 4, of the Convention, that the Supervisory Authority would be able to enter into any agreement requisite for the performance of its functions, and would own all proprietary rights in the databases and archives of the International Registry.

D. Rationale for considering the designation of the United Nations as Supervisory Authority

18. The Secretariat understands that consideration is being given to the feasibility of designating the United Nations as Supervisory Authority under the protocol for reasons that included the following:

(a) The desirability of conferring these functions on a credible and already existing international organization;

(b) The existing role of the Office for Outer Space Affairs as secretariat for the Committee on the Peaceful Uses of Outer Space and its subcommittees;

(c) The maintenance by the Office for Outer Space Affairs, on behalf of the Secretary-General of the United Nations, of the United Nations Register of Objects Launched Into Outer Space, in accordance with the 1975 Convention on Registration of Objects Launched Into Outer Space (General Assembly resolution 3235 (XXIX), annex, the "Registration Convention").

19. The International Registry under the space assets protocol would be very different from the Register currently maintained by the Office under the Registration Convention. Most importantly, the subject matter of the two registries is entirely different. The existing United Nations Register of Objects Launched Into Outer Space includes information such as the date of launch and orbital parameters of satellites. The International Registry under the space assets protocol would contain information on international financial interests in various space assets.

20. The existing Register was originally conceived as a paper-based filing system. While the Register is now available online, the staff of the Office still vet the information that is received from States Parties to the Convention, issue it as an official United Nations document in the ST/SG/SER.E series and manually enter the information into the online index.

21. In contrast, the International Registry under the space assets protocol is conceived as an electronic notice-filing system. Authorized users would enter the information into the electronic system directly from their home country. The

information would not be verified or entered manually by the staff of the International Registry.

E. Status of the Aircraft Protocol and the role of the International Civil Aviation Organization

22. The present section gives a brief update on the status of the Aircraft Protocol, which was opened for signature on 16 November 2001 (see para. 9 above). Since the aircraft regime is at a more advanced stage than that for space assets, and since ICAO has accepted, in principle, the functions of Supervisory Authority under the Aircraft Protocol, the situation under the Aircraft Protocol may help to anticipate possible developments under the space assets protocol.

23. The Diplomatic Conference, in adopting the Convention and the Aircraft Protocol formally invited ICAO to accept the functions of Supervisory Authority under that Protocol upon the entry into force of the Convention and Protocol. The Conference also invited ICAO to establish a Commission of Experts to assist the ICAO Council in discharging these functions. The acceptance by ICAO of the role of Supervisory Authority “in principle” signifies that a final decision has not yet been taken. Issues such as cost recovery, liability and immunity would require further consideration, and the matter is being kept under review.

24. As at 10 January 2003, 24 States had signed the Convention and the Aircraft Protocol, but no States had ratified either instrument, meaning that neither instrument had entered into force.

25. Pending entry into force of the Convention and Aircraft Protocol, the Diplomatic Conference also decided to set up a Preparatory Commission to act as provisional Supervisory Authority for the establishment of the International Registry. Among other things, the Preparatory Commission would select the Registrar, under the guidance and supervision of the ICAO Council. The Conference urged the States participating in the Conference and interested private parties to make available the necessary start-up funding on a voluntary basis, to be administered by ICAO, needed for the Preparatory Commission and ICAO to carry out their tasks. The International Registry should be operational by the time the Convention and Protocol enter into force.

26. The Preparatory Commission held its first meeting at ICAO headquarters in Montreal from 8 to 10 May 2002. On the basis of work by an ad hoc task force set up during the intergovernmental consultation process, the Preparatory Commission approved a package of documentation for an international tendering process for the selection of the Registrar. The Preparatory Commission also approved a budget of \$270,000 to cover the costs of the work for the selection of the Registrar and other steps required to render the International Registry operational, over a period of nine months, which should have started on 1 July 2002. The figure of \$270,000 included \$250,000 for the tendering process to be conducted by ICAO. The tendering process has not yet begun because the necessary funds have not been made available to date.

27. The decision of the ICAO Council to accept, in principle, the functions of Supervisory Authority was taken on the understanding that all costs incurred by ICAO should be recovered from the user fees referred to in article 17,

paragraph 2 (h), of the Convention, and that the Organization would not accept any liability and would keep full immunity with respect to the performance of these functions. Relevant provisions include articles 27 and 28 of the Convention and article XVII of the Aircraft Protocol (which is similar to article XVII of the preliminary draft space assets protocol).

F. Possible approaches to cost-recovery

28. It is contemplated that the major, ongoing method for the Supervisory Authority to recover its costs, which may be significant (see para. 26 above), would be through fees charged to the users of the International Registry. Under article XIX, paragraph 3, of the preliminary draft space assets protocol, the Supervisory Authority should determine the user fees for the International Registry so as to recover the reasonable costs of establishing, operating and regulating the International Registry and the reasonable costs of the Supervisory Authority associated with the performance of the functions, exercise of the powers and discharge of the duties contemplated by article 17, paragraph 2, of the Convention.

29. In addition to recovering costs of the Supervisory Authority through user fees, initial funding or financing would have to be obtained to cover costs during the start-up phase, such as establishing the International Registry and selecting the first Registrar. One possible source would be funding provided on a voluntary basis by individual States, groups of States (such as States parties to the space assets protocol) or private entities.

III. Analysis

A. Procedure for a decision on the assumption by the United Nations of the functions of Supervisory Authority under the space assets protocol

30. A decision on whether the United Nations would serve as Supervisory Authority under the space assets protocol would be made by the General Assembly. The Assembly would consider whether the functions of the Supervisory Authority were consistent with the mandate and existing activities of the United Nations.

31. The United Nations, unlike ICAO, is a universal intergovernmental organization established to maintain international peace and security, develop friendly relations and achieve international cooperation in solving international problems of an economic, social, cultural or humanitarian character. In that respect, it is different from the specialized agencies, which were created to carry out various functions, including legislative and regulatory functions, in a specific area of human activities such as civil aviation. On the other hand, no specialized agency similar to ICAO has yet been established for outer space matters, although the International Telecommunication Union (ITU) already plays a major role with regard to communications satellites, which constitute a major part of the current commercial outer space market.

32. The Committee on the Peaceful Uses of Outer Space was established by the General Assembly shortly after the launch of the first artificial satellite. Its mandate and activities have been defined by the Assembly in annual resolutions on international cooperation in the peaceful uses of outer space, as well as in recommendations of three United Nations Conferences on the Exploration and Peaceful Uses of Outer Space (UNISPACE, UNISPACE 82 and UNISPACE III). In establishing the Committee as a permanent body in 1959, the Assembly requested the Committee to review the area of international cooperation, to study practical and feasible means for giving effect to programmes in the peaceful uses of outer space which could appropriately be undertaken under United Nations auspices and to study the nature of legal problems which might arise from the exploration of outer space (General Assembly resolution 1472 (XIV) A).

33. The Office for Outer Space Affairs implements decisions of the General Assembly and of the Committee on the Peaceful Uses of Outer Space; serves as the secretariat for the Committee, its two subcommittees and related bodies; and assists countries in using space technology for development, in particular through the United Nations Programme on Space Applications. Among other additional activities, the Office, on behalf of the Secretary-General, maintains the United Nations Register of Objects Launched Into Outer Space under the Registration Convention, as referred to in section II.D above.

34. In addition to the General Assembly's decision on whether to assume the functions of Supervisory Authority under the space assets protocol, a number of related decisions would need to be made, including the following:

(a) The decision to extend the privileges and immunities accorded to the United Nations under the Convention on the Privileges and Immunities of the United Nations to its possible functions as Supervisory Authority under the space assets protocol (see para. 39 below) would need to be considered and approved by the General Assembly;

(b) The functions of Supervisory Authority may be included in the regular budget of the United Nations only upon prior explicit authorization by the General Assembly.

B. Assumption of the functions of Supervisory Authority by the General Assembly rather than the Secretary-General

35. Any proposal to designate the United Nations as Supervisory Authority under the space assets protocol should clarify who would be designated as Supervisory Authority, the General Assembly or the Secretary-General.

36. In the case of ICAO agreeing, in principle, to assume the functions as Supervisory Authority under the Aircraft Protocol, it was the ICAO Council that took the decision, and it is the Council that will perform the functions of Supervisory Authority under the Aircraft Protocol. The ICAO Council is the Organization's governing body. It consists of 33 member States elected by the ICAO Assembly for a three-year term of office. In turn, the Assembly consists of representatives from all Contracting States, making it, for the purposes of the present analysis, comparable to the General Assembly of the United Nations.

37. Acceptance by the United Nations that the Secretary-General should assume the functions of Supervisory Authority under the space assets protocol would create a conflict between the role of the Secretary-General under the Charter of the United Nations as the chief administrative officer of the United Nations, and the functions of Supervisory Authority, as outlined in paragraph 16 above, owing to the fact that those functions include functions that are legislative.

38. If the General Assembly assumes the functions of Supervisory Authority, it could, of course, delegate certain functions to the Secretary-General.

C. Potential exposure of the United Nations to liability as the result of service as Supervisory Authority

39. Under article 27, paragraph 2, of the Convention on International Interests in Mobile Equipment and article XVII, paragraph 2, of the preliminary draft space assets protocol, the Supervisory Authority and its officers and employees shall enjoy immunity from legal and administrative process as is provided under the rules applicable to them as an international entity. Thus, were the United Nations to be designated Supervisory Authority, the immunity would stem from the Convention on the Privileges and Immunities of the United Nations (resolution 22 A, the "General Convention").

40. While the United Nations and its officials and employees enjoy immunity under the General Convention, the Organization is also, under article VIII, section 29, of the General Convention, obliged to make provisions for appropriate modes of settlement of disputes arising out of contracts or other disputes of a private law character to which the United Nations is a party.

41. There is therefore a concern that, given the extensive functions of the Supervisory Authority, it would not always be possible or appropriate to claim such immunity. If a claimant is not satisfied with the compensation received from the International Registry and has evidence that the Supervisory Authority's actions or inactions contributed to the claimant's loss, it would be difficult for the United Nations simply to reject such a claim because of immunity. Consequently, if any such claims were instituted against the United Nations in relation to its functions as Supervisory Authority, provisions would need to be made for the resolution of such disputes.

42. Under article 28, paragraph 1, of the Convention on International Interests in Mobile Equipment, the Registrar would be liable for compensatory damages for loss suffered by a person directly resulting from an error or omission of the Registrar and the officers and employees of the Registry or from a malfunction of the international registration system. Under article 28, paragraph 4, of the Convention, the Registrar shall procure insurance or a financial guarantee covering its liability under the article. If the Registrar were a private company or a national organization, not enjoying immunity, the United Nations would not be responsible for its activities, at least not in theory. Whether the United Nations is seen to be responsible in practice would depend on the nature of the relationship between the Registrar and the United Nations as the Supervisory Authority.

43. If the United Nations were to agree to be the Supervisory Authority under the space assets protocol, the possibility of including a provision in the protocol to the effect that the United Nations would not be liable for the actions of the Registrar and the officers and employees of the International Registry should be explored. However, such a provision would not necessarily eliminate the risks referred to above.

44. On the other hand, if the United Nations were to accept the functions of Supervisory Authority under the space assets protocol, such acceptance should also be conditional on the recovery of all costs incurred in performing the functions of Supervisory Authority. This was a requirement of the ICAO Council in accepting, in principle, the functions of Supervisory Authority under the Aircraft Protocol. The costs the United Nations would need to recover would include those associated with establishing and supervising the International Registry, as well as any damages paid by the United Nations in connection with its functions as Supervisory Authority.

45. The preliminary draft space assets protocol contemplates that those costs, as well as various costs of the Registrar, would be recovered through fees charged to the users of the International Registry. The coordinator of the Unidroit Space Working Group has provided a preliminary estimate that the International Registry would initially be used for about 12 to 18 satellites per year. Therefore, in the event that the United Nations is liable to a user of the International Registry, any costs would ultimately be paid for by a relatively small community of users, to which the successful claimant would probably belong. Similarly, any insurance taken out by the Supervisory Authority to cover possible future liability would ultimately be paid for by users of the International Registry through the user fees. This assumes that the user fees could absorb the sums of money involved.

D. Other issues

46. According to article 17, paragraph 4, of the Convention on International Interests in Mobile Equipment, the Supervisory Authority shall own all proprietary rights in the databases and archives of the International Registry. Under article 17, paragraph 5, of the Convention, the Registrar shall, among other things, ensure the efficient operation of the International Registry. The Supervisory Authority may, under article 17, paragraph 3, of the Convention, enter into any agreement requisite for the performance of its functions. The Registrar would have no proprietary rights in the databases and archives of the International Registry, and would be compensated for its services with the user fees it collects as set by the Supervisory Authority. Those user fees are also meant to pay for all expenses that the United Nations would incur as Supervisory Authority. Thus, it would appear that the Supervisory Authority would essentially “recruit” a private entity or national organization to perform services for it. The private entity or national organization is also supposed to collect money for the Supervisory Authority to compensate for any expenses. Such a situation could sit uneasy with the status of the United Nations. This would also affect any liability for acts by the Registrar and the officers and employees of the Registry (see sect. III.C above).

47. Article 27, paragraph 4, of the Convention on International Interests in Mobile Equipment provides for the assets, documents, databases and archives of the

International Registry to be inviolable and immune from seizure or other legal and administrative process. However, under article 27, paragraph 5, of the Convention, for the purposes of any claim against the Registrar, the claimant shall be entitled to access such information and documents as are necessary to enable the claimant to pursue its claim. These two provisions appear to be somewhat contradictory, in particular since article 27, paragraph 6, provides for the possibility of the Supervisory Authority to waive the inviolability and immunity of the assets, documents, databases and archives of the International Registry. If a claimant is already entitled to access all information and documents necessary to pursue its claim, it is not clear why it would be necessary for the Supervisory Authority to specifically waive any inviolability and immunity of assets, documents, databases and archives.

IV. Summary and recommendations

48. A decision on whether the United Nations would assume the functions of Supervisory Authority under the space assets protocol would be taken by the General Assembly, taking into account the mandate and existing activities of the United Nations.

49. If the United Nations assumes the functions of Supervisory Authority, those functions should be assumed by the General Assembly, since the functions of Supervisory Authority include legislative functions, which would be in conflict with the role of the Secretary-General as chief administrative officer of the Organization. The Assembly could, of course, delegate certain functions to the Secretary-General.

50. If the United Nations is designated Supervisory Authority under the space assets protocol, there is a risk of its being liable for damages caused by its actions or inactions, notwithstanding its immunity under the Convention on the Privileges and Immunities of the United Nations. The possibility of including a provision in the protocol to the effect that the United Nations would not be liable for the actions of the Registrar and the officers and employees of the Registry should be explored, but would not necessarily eliminate the risk of liability.

51. If the United Nations were to accept the functions of Supervisory Authority under the space assets protocol, such acceptance should also be conditional on the recovery of all costs incurred in performing the functions of Supervisory Authority.

52. In view of the issues described in the present report, it would be extremely helpful to continue to study the practical experience of ICAO in carrying out the functions of Supervisory Authority under the Aircraft Protocol before taking a final decision concerning the United Nations serving as Supervisory Authority under the space assets protocol. Further, given all the difficulties, it may be appropriate to consider other options, including that of the establishment by the Conference of Parties of a mechanism to appoint a Supervisory Authority consisting of States parties to the Convention, once the Convention enters into force.