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

(Cape Town, 29 October to 16 November 2001)

THIRD REPORT OF THE INTERNATIONAL

REGISTRY TASK FORCE

UNIDROIT Committee of governmental experts for the preparation of a draft Convention on International Interests in Mobile to Aircraft Equipment

Sub-Committee of the ICAO Legal Committee on the study of international interests in mobile equipment (aircraft equipment)

THIRD REPORT OF THE INTERNATIONAL REGISTRY TASK FORCE

(for Registration of Interests in Aircraft Objects)

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THIRD REPORT OF THE INTERNATIONAL REGISTRY TASK FORCE

Respectfully submitted to UNIDROIT and ICAO
on October 10, 2001

I. INTRODUCTION.

1. The following countries, inter-governmental organizations, and non-governmental organizations are active participants of the Task Force: Brazil, Canada, Finland, France, Ireland, Japan, Singapore, Sweden, Switzerland, United States, ICAO, UNIDROIT, IATA, and AWG. Other countries such as Norway, Spain and Portugal are not presently active.

2. The Task Force was formed at the Joint Session in Rome in March 2000. The Task Force was asked to consider certain Terms of Reference (UNIDROIT CGE/Int.Int./3-WP/30; ICAO Ref. LSC/ME/3-WP/30). France and the United States were appointed co-chair.

3. The first meeting was in Paris in June 2000. The Task Force prepared documents relating to Request for Proposals for the International Registry. Additionally, certain expert papers were also submitted. (See First Report with attachments, as submitted to the Secretariats on July 28, 2000.)

4. The Task Force met informally in Montreal in August/September 2000 incident to the ICAO Legal Committee's 31st Session. Nine countries, an inter-governmental organization, and a non-governmental organization volunteered to prepare preliminary papers in six expert subject areas.

5. The Task Force met in Dublin in January 2001. Documents relating to the acquisition process for the International Registry were approved for submission to the Secretariats. All assigned papers were discussed.

6. The Task Force met in Washington, DC, in February 2001 to finalize discussion of a document titled "Basic Features of the International Registry", which document was made an attachment to the Request for Proposals.

7. The work of the Task Force in Dublin and Washington, DC, was submitted to the Secretariats in a Second Report dated February 20, 2001. The Second Report attached final acquisition documents and recommendations as to their issuance (Second Report, II. 10.)

8. The Task Force met in Geneva in September 2001 to finalize expert papers, and consider cost and timing of the International Registry.

II. WORK IN GENEVA (September 10-12, 2001).

9. The meeting in Geneva was graciously hosted by the Swiss delegation. The Task Force wishes to acknowledge its gratitude to the University of Geneva and its Faculty of Law for its extraordinary cooperation in making its facilities and services available for use by the Task Force.

10. The meeting was completed as planned despite the events occurring in the United States on September 11, 2001.

III. ASSIGNED PAPERS.

11. The following papers were presented and discussed in Geneva, and are submitted as attachments to this Third Report.

12. "Draft Regulations for the International Registry" (Switzerland and Japan). Switzerland has been primarily responsible for the presentation, response to discussion, and final revision of the Draft Regulations.

13. Preparing comprehensive Draft Regulations has been a particularly difficult undertaking. It represents an attempt to reflect the requirements of the Convention and Aircraft Equipment Protocol, as well as to describe the International Registry, and to provide important user information about matters such as applications for registration, searches, and fees.

14. The Draft Regulations were considered section-by-section. Consensus was achieved.

15. Although the Draft Regulations represent the best present efforts of the Task Force, they must be considered as an on-going process. That is because the answers to many important questions concerning design, cost, and timing are not known at this time. It is believed that when answers are known they may be accommodated in the structure of the Draft Regulations.

16. "Private-Law Aspects of the Relation between the Supervisory Authority and the Registry including Proprietary Rights in Software/Hardware." This paper is the result of unification of two papers separately assigned to UNIDROIT/France and Ireland/Singapore. The legal aspects of proprietary rights are intrinsic to the relationship between the Supervisory Authority and the Registry. Depending on the countries where the Supervisory Authority and the Registrar are located, domestic private law (common or statute law) and international private law will apply. Therefore, once these countries are chosen, the contractual relationship between the Supervisory Authority and the Registrar can be identified.

17. However, this study considers four areas pertinent to any private-law arrangements between the Supervisory Authority and Registrar:

- Rights, Duties and Liabilities in Setting up and Running the Registration system
- Proprietary Rights
- Infrastructure-related Aspects
- Dispute Resolution (measures against the Registrar, immunity of the Supervisory Authority, Arbitration.

18. "Liability of the International Registry" (Canada and Sweden). Cost of insurance to compensate for errors or omissions of the Registrar may be a significant element of the overall cost of operating the Registry, which will be principally supported by user fees.

19. It was stated that cost information has been difficult to develop because of the reluctance of insurance carriers to discuss premium costs in the absence of specific information about the design of

the Registry and the extent of liability risk and limitations. Nevertheless, an attempt to quantify the cost is attached to the paper.

20. It is significant to note that the paper attempts to assist in the development of Article 27 1.- of the Convention with respect to the bracketed language relating to exceptions from liability.

21. Consideration by the Task Force of the draft language of the proposed Article 27 focused largely on the scope of force majeure. After considerable discussion, the Task Force decided to defer further consideration pending the input of certain Task Force members. While full consensus on all aspects of the wording of Article 27 has not been reached, considerable progress has been made. Nevertheless, Task Force members may express their respective views with regard to Article 27 at the Diplomatic Conference.

22. The paper discusses alternative methods to traditional insurance company coverage, as allowed under Convention Article 27 2.- in the form of "a financial guarantee."

23. "Funding/Cost Recovery Methods for the New International Registry" (Finland and the AWG). The paper includes information about use and cost assumptions; funding cost options; and a specific Cost Recovery Mechanism.

24. As noted in paragraph 19 concerning Cost of Insurance, it is extremely difficult to quantify the eventual cost of the Registry. While competent technical review of the proposed Registry seems to suggest that start-up costs for development of hardware, software, and security will be manageable, it is difficult to quantify global costs at this time. It was pointed out that on-going costs relating to numbers of personnel needed to support the system are not known at this time. An example was given that the nature of the system's "help desk" to assist users may greatly affect cost. Nevertheless, an attempt to address costs was made to the extent possible based on the limited information provided.

25. Presentations regarding electronic access and interaction with the International Registry software were made by SITA (prototype) on September 10 and by Bureau Veritas on September 11. (At previous meetings, Canada and Singapore have made presentations.)

IV. COST OF THE REGISTRY.

26. As discussed in paragraphs 18 through 24 above, the Task Force is aware of the importance of minimizing Registry costs and of the desirability that information relating thereto be available at the Diplomatic Conference.[1]

27. Determining costs will depend in part on making decisions with respect to system variables (e.g. nature of help desk), with input from technical system developer(s) and potential system operator(s).

V. TIMING OF THE REGISTRY.

28. Decisions made during the Diplomatic Conference concerning ratification and entry into force will affect when the Registry becomes operational.[2] There was concern expressed about delay in the Registry becoming operational. It was suggested that the Diplomatic Conference consider the desirability of advancing the process for establishment of the International Registry prior to creation of the Supervisory Authority by setting up an appropriate interim mechanism, for example, a Provisional Supervisory Authority, in accordance with the Vienna Convention.

VI. OTHER OUTSTANDING ISSUES.

29. In addition to the cost and timing of the International Registry, other issues may need to be resolved, as illustrated in paragraph 27 of the Task Force's Second Report.

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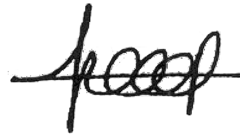
[1] With the Second Report, the Task Force provided Request for Proposal documents and a recommended schedule for delivery thereof, which is one method of deriving cost information.

[2] The Second Report provides some timing information incident to a competitive acquisition approval. See Second Report, VI. Paragraph 26."c" and particularly Request for Proposal, paragraph 2.i.

VII. FUTURE WORK.

30. There was consensus that there remained much to be done with respect to establishment of the International Registry, and that the Task Force might continue to contribute if appropriately constituted as a committee at the Diplomatic Conference.

On behalf of the ad hoc Task Force this 10th day of October, 2001:



Georges Grall, France

Joseph R. Standell, USA

Attachment 1

Convention on international interests in mobile equipment Protocol to the Convention on international interests in mobile equipment on matters specific to aircraft equipment

Regulations for the International Registry

(art. 16 2 c of the Convention and XVII of the Protocol)

DRAFT

Draft regulations for the International Registry-09/14/2001.

Convention on international interests in mobile equipment

Protocol to the Convention on international interests in mobile equipment on matters specific to aircraft equipment

Regulations for the International Registry

(art. 16 2 c of the Convention and XVII of the Protocol)

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CHAPTER 1 GENERAL PROVISIONS

1.1 The International Registry (hereinafter: the Registry) is a notice-based electronic registration system. It has a scalable (Internet or Intranet) architecture. Its is established for the registrations provided for in the Convention on international interests in mobile equipment (hereinafter: the Convention) and in the Protocol to the Convention on international interests in mobile equipment on matters specific to aircraft equipment (hereinafter: the Protocol).

1.2 The Registry can be accessed 24 hours a day, 7 days a week, except for maintenance (performed outside peak periods) or technical problems.

1.3 Technical support is provided to users by a help desk of the Registry, which is available 24 hours a day, 7 days a week via telephone and/or electronic mail.

1.4 The Registry drafts and provides the electronic forms required for its operation.

1.5 The technological structure used for the electronic transmission of data to the Registry must be established in compliance with international practice and standards, in order to provide an efficient, reliable and secured access to the database by means of electronic transmission.

CHAPTER 2 STRUCTURE OF THE REGISTRY

2.1 The Registry is composed of personal data records and of aircraft object files.

2.2 A personal data record is kept for each (natural or legal) person, and for any other entity, identified in an application to the Registry.

2.3 An aircraft object file is kept for the identification and registration of each aircraft object; it is numbered and shows the relevant data from the personal data records. All registrations concerning an aircraft object are effected on its allocated file.

CHAPTER 3 PERSONAL DATA RECORDS

3.1 Natural persons

3.1.1 Personal data records concerning natural persons may include their complete name, birth date, permanent address and their electronic address.

3.2 Legal persons

3.2.1 Personal data records concerning a legal person may include their legal name, the address of the relevant office, their juridical form and their electronic address.

3.3 Other entities

3.3.1 Personal data concerning other entities may include their name, permanent address and electronic address.

3.4 Each personal data record receives an identification number when it is established.

3.5 The Registry's electronic system must ensure the recognition of electronic signatures (as defined by the relevant international provisions) with a high degree of security. The Registrar specifies the conditions of use and of recognition of electronic signatures.

CHAPTER 4 AIRCRAFT OBJECT FILE

4.1 A separate aircraft object file is kept for each airframe, helicopter or aircraft engine, allowing their identification.

4.2 The aircraft object file concerning an airframe must contain the following information:

- type of aircraft and name of the manufacturer;
- registration mark and State of registry;
- manufacturer's serial number.

4.3 The aircraft object file concerning a helicopter must contain the following information:

- type of aircraft and name of the manufacturer;
- registration mark and State of registry;
- manufacturer's serial number;
- designation of the engine(s).

4.4 The aircraft object file concerning an aircraft engine must contain the following information:

- designation of the engine and name of the manufacturer;
- manufacturer's serial number.

4.5 Each aircraft object file receives an identification number when it is established.

CHAPTER 5 APPLICATION FOR REGISTRATION IN THE REGISTRY

5.1 Each application for registration in the Registry must be submitted using the relevant electronic official form provided by the Registry.

5.2 The application form must contain :

- the date of the application;
- the applicant's name, with all the information enabling the keeping of a personal data record or, if such record already exists, with the number of the personal data record;
- the designation of the aircraft object affected by the registration, with all the information enabling the keeping of an aircraft object file or, if such file already exists, with the number of the aircraft object file;
- the type of transaction to be registered;
- the designation of the parties;
- the duration of the registration, if applicable.

CHAPTER 6 REGISTRATION IN THE REGISTRY

6.1 The aircraft object file records the date and time of reception of the application for registration, in chronological order with a sequentially ordered file number.

6.2 As soon as the registration is effected, all interested parties, including any entry point, receive a notice of the registration setting out all the data concerning the aircraft object.

SECTION 7 OTHER REGISTRATIONS

7.1 For the purposes of these regulations, the terms "other registrations" include notably applications for the amendment, the extension or the discharge of a registration.

7.2 The applications mentioned in paragraph 7.1 must be submitted using the relevant official electronic form provided by the Registry.

7.3 The application form must contain :

- the date of the application;
- the file number of the aircraft object;
- the names of the parties with all information enabling the keeping of a personal data record or, if such record already exists, with the number of the personal data record;
- the kind of registration which is requested.

7.4 The registration is effected on the file of the relevant aircraft object, and mentions the date and time of reception of the application for registration. It is assigned a sequentially ordered number.

7.5 As soon as the registration is effective, all interested parties to the registration, including any entry point, receive a notice of the registration setting out all the data concerning the aircraft object.

CHAPTER 8 DURATION OF REGISTRATION

8.1 Registration of an international interest remains effective until discharged or until expiry of the period specified in the registration.

CHAPTER 9 SEARCHES IN THE REGISTRY

9.1 Access to the Registry for searches is open to any person and does not require the establishment of a specific interest.

9.2 [Any data contained on the file of aircraft objects may be searched.]

9.3 Searches and requests for searches certificates are made by electronic means.

9.4 For purposes of Article 18 (5) of the Convention and Article XIX (1) of the Protocol, a registration shall be “searchable” only against the “legal search criterion”. The legal search criterion shall be the name of the manufacturer, the model of the aircraft object and the manufacturer’s serial number of the aircraft object.

9.5 Upon receipt of a request for a search certificate (against a legal search criterion; art. 9.4) , the Registrar issues either a registry search certificate stating the data contained in the file of the relevant aircraft object or a certificate indicating that there is no information in the Registry relating to that object.

9.6 Upon request, the certificates mentioned in paragraph 9.5 are issued on an official paper document.

CHAPTER 10 OPERATIONAL COMPLAINTS

10.1 Any person may file a complaint with the Supervisory Authority concerning the operation of the Registry.

10.2 A matter concerns the operation of the Registry when it relates to general procedures and policies of the Registry and does not involve specific adjudication by the Supervisory Authority. 10.3 A person making a complaint shall substantiate its assertions. 10.4 The Supervisory Authority shall promptly consider complaints and where, on the basis of that consideration, it determines changes in the procedures or policies are appropriate, it shall so instruct the Registrar.

10.5 The Registrar may correct manifest errors in the Registry where such corrections are not prejudicial.

CHAPTER 11 CONFIDENTIALITY

11.1 The Registrar must ensure the confidentiality of all data in the Registry which are not stated on aircraft object files.

11.2 The Registrar must also ensure the confidentiality and integrity of the messages transmitted by way of cryptographic and encoding.

CHAPTER 12 STORAGE OF DATA

12.1 Storage of the registry's data must ensure their historical record as well as point-in-time reporting of all operations performed.

12.2 All data registered in the Registry must be stored on electronic media.

12.3 Discharged registrations must be indicated as such on the aircraft object files

12.4 All data stored in the registry must be frequently backed-up on electronic media and stored in a secure area at a separate location from the Registry's hardware.

12.5 In the case of a system failure, the Registrar must ensure a restoration of the records to the point-in-time the system failed. The Registrar must also ensure the restoration of registrations in the case of improper manipulation.

CHAPTER 13 STATISTICS

13.1 The Registrar keeps updated registration statistics which will be published in an annual report. This report is electronically accessible to any person.

CHAPTER 14 RELATIONS WITH THE SUPERVISORY AUTHORITY

14.1 The Registrar draws up a report at the end of each calendar year, to be submitted with statistical data to the Supervisory Authority.

14.2 If necessary, this report includes proposals of the Registrar to improve the Registry's functioning. The Supervisory Authority may approve these proposals if it deems them appropriate.

14.3 Any request for modification of these regulations or of the structure of fees must be submitted by the Registrar to the Supervisory Authority, which has sole authority to approve such requests.

14.4 The Registrar is not bound by the confidentiality rule (paragraph 11.1) in its relations with the Supervisory Authority.

14.5 The Registrar must comply with the directives which are periodically issued by the Supervisory Authority.

CHAPTER 15 RELATIONS WITH THE ENTRY POINTS

15.1 The Registrar keeps an updated list of contracting States which have designated an entity in their territory as the entity through which the information required for registration shall or may be transmitted to the Registry (entry point).

15.2 The Registrar consults with the entry point before fixing and individualizing the registration procedure and the coordination of operations concerning that entry point. Any application for registration which does not comply with these procedure and coordination rules shall be electronically rejected.

CHAPTER 16 FEES

16.1 The Registrar collects a fee for each of the following operations:

- initial registration of an international interest ;
- other registrations (amendment, extension, discharge);
-
- searches;
- search certificates;
- such other matters as may be determined.

16.2 Fees, including fees arising from operations channeled through entry points, must be paid to the Registrar, prior to the requested operation.

16.3 Fees are collected according to a schedule issued by the Supervisory Authority.

CHAPTER 17 FINAL PROVISIONS

17.1 The present regulations take effect on...

17.2 Publication (to be determined, see art. 16 paragraph 2 (d) of the Convention and the corresponding footnote).

Attachment 2

Private-Law Aspects of the Relationship between the Supervisory Authority and the Registry

Submitted by France, Ireland, Singapore and the UNIDROIT Secretariat

INTERNATIONAL REGISTRY TASK FORCE

Private-Law Aspects of the Relationship between the Supervisory Authority and the Registry

Submitted by France, Ireland, Singapore and the UNIDROIT Secretariat

I. Anticipated Scenario

The following consideration are assuming that:

The Supervisory Authority (SA) is either a state A or an intergovernmental Organisation with its seat in State A (a civil-law jurisdiction) and

The Registry (R) is a private entity, e.g. a company or a non profit corporation organised under the laws of and having its (principal) place of business in State B (a common-law country).

Further discussions may assume

- that the Registry too is a public-law entity, but distinct from a state;
- that the Supervisory Authority is located in a common-law jurisdiction and the Registry in a civil law-law country or both in a common law country.

The remaining scenarios, i.e. that the SA is an intergovernmental Organisation and the Registry is run by a State or that the SA is an intergovernmental Organisation and the Registrar an officer of that Organisation, will not be discussed as Supervisory Authority and Registry, in these cases, would not be linked with each other by a private-law arrangement. In particular in the latter case the headquarters agreement between the Organisation and the host State would have to be adjusted with regard to its privileges and immunities provisions so as to ensure that the Registrar/the Registry can fulfil its obligations under the Convention. The same would apply to Article 26 (2) of the Convention. Domestic private law of the host State would to a large extent become irrelevant.

II. Texts of draft Instruments

The following remarks are based on the texts as submitted to the Diplomatic Conference.

III. Hierarchy of Relevant Sources of Law

The hierarchy of the relevant sources is reflected in the following order:

1. Convention and Protocol
2. Regulations to be made or approved in accordance with Article 16 (2) (d) Convention.
3. Mandatory provisions of private law (e.g. property, trusts, company and insolvency law, Contracts, restitution, torts), applicable by virtue of operation of the rules of conflict of laws.
4. Contractual agreement as governed by the (dispositive or suppletive) rules (of law) chosen by the parties.

Whether the Regulations insofar as mandated by the "treaty system" and established by the SA actually enjoy the assumed position within the hierarchy of sources may not be certain and may vary from one jurisdiction to another one. Whether other rules of public international law, such as general principles or customary public international law do have an impact and where they are positioned within the hierarchy of sources would also appear to depend on the domestic law, including, but not limited to, the constitutional provisions of the country where the two bodies are located or whose courts are seised of any dispute.

If, in fact, the Regulations, under the relevant domestic law, rank second, i.e. higher than mandatory rules of private law, the relationship between SA and R would to a considerable extent depend on the SA and Contracting States may wish to take a particularly pro-active stance in the consultations provided for in Article 16 (2) (d).

Finally, if the Regulations were not yet established when the private-law relationship is established, i.e. the contract entered into, the inter-temporal aspects would have to be addressed in the contract and the Regulations.

IV. Problem Areas

Any private-law arrangement between the SA and the R is likely to cover four problem areas:

1. Rights, Duties, and Liabilities in Setting up and Running the Registration System;
2. In Particular: Proprietary Rights including Intellectual Property;
3. General, Infrastructure-Related Aspect;
4. Dispute Resolution.

1. Rights, Duties, and Liabilities in Setting up and Running the Registration System

a. Convention and Protocol

The "top layer" within the hierarchy of sources contains the following relevant provisions:

- Article 16 (2) (b)-(i)
Article XVI, XIX (3), (4) → on appointment and dismissal of Registrar and regulating the conduct of registration procedures by the Registry

  [note: to the extent contracting States do not establish a prerogative for other means, details may be specified, sanctions for non-compliance defined etc. through private-law arrangements, in particular contractual agreements, Article 16(3)]

- Article 17 Article XVIII	→	on registration requirements, certificates, search, confidentiality [note: as such not subject to contractual arrangements, but SA may seek guarantees, establish modes of monitoring and impose "soft" sanctions for non-compliance before administrative action is taken]
- Articles 18, 19, 20, 21, 23, 24, 25 Articles XIX (1), (2)	→	on who may register and search, type of Registry, certificates, duration, discharge, confidentiality
- Article 27 Article XIX (5)	→	on liability of Registrar for damages [note: not subject to private-law arrangements but related to mandatory taking of insurance]

b. Regulations

The draft Regulations drawn up by the Swiss delegation clarify many points concerning the rights, duties, and liabilities relating to the setting up and running of the Registration System. Three chapters are particularly relevant to the relationship between the SA and the Registrar:

- Chapter 10 (operational complaints)

  Chapter 14 (the Registrar/SA relationship)
- Chapter 15 (relationship with the entry points)
- Chapter 16 (fees).

c. Mandatory Provisions of Private Law

aa. Contract

Depending on the jurisdiction where the Registry is located and what types of specific contracts are available under common law and statute, the SA and R may enter into such contract (e.g. a "contract for services"). Freedom of contract both as regards the freedom to enter a particular contract and the freedom to determine on what terms to do so are the starting point in all legal systems.

In common law jurisdictions the courts have for some time been willing to imply terms into contracts and this willingness is characteristic of the common law system. Statute will in both common law and civil law systems also imply terms into contracts. It will, for example, attach a legal consequence directed to the conclusion of a particular type of contract. The relevant statute or case law may also provide for mandatory rules (e.g. with regard to formal requirements, legality, void contracts, other matters of public policy).

Although the SA and the R are free to choose the law that shall govern their contracts, their choice may not restrict the application of mandatory provisions, which are applicable in accordance with the relevant rules of private international law. For example, the forum's private international law is likely to state that parties are precluded from departing from its own (i.e. the forum's) or the mandatory rules of the law of the country in which the parties are established.

These mandatory rules may be even more restrictive in certain civil-law countries than in some common law jurisdictions. For example, mandatory rules may limit the freedom of contract in the following areas or on the following grounds (for illustrations, see Annex):

(1) competition law (both anti-trust and trade practices);
(2) currency regulations, price-index clauses;
(3) insolvency law;
(4) labour law;
(5) special statutory provisions for certain types of contracts (e.g. lease in France);
(6) general doctrines of the law of contractual obligations (e.g. fraud, disparity, protection against unfair standard terms, hardship, force majeure, etc).

While in principle the conflict-of-laws rules of the court or the arbitral tribunal seised of a dispute would determine whether those mandatory rules are in fact applied, for all practical purposes it is advisable to assume that such rules will apply if in force in the locus registri (either because part of the lex contractus or by virtue of modern theories on the applicability of mandatory rules not forming part of the lex contractus, e.g. Article 3 and 7, Rome Convention on the Law Applicable to Contractual Obligations of 1980[1], Article 11, Inter-American Convention on the Law Applicable to International Contracts of 1994[2]).

Therefore, once the country where the R is located is chosen (and only then) the mandatory rules governing the contractual relationship between SA and R can be identified to any meaningful extent.

bb. Torts

The conduct of the Registry may give rise to claims in tort under one legal system whereas those claims would be characterised as contractual under another legal system. Different conflict-of-laws rules would then be relevant and the governing substantive law would depend on those conflict rules. This situation, however, escapes predictability.

There are cases of non-performance of contractual duties, which under certain legal systems give equally rise to claims in tort. This, again, may be different with regard to vicarious liability. Also, whether non-pecuniary harm has to be compensated depends on the qualification and varies considerably from one system to an another.

If an action in tort lies under the applicable lex delicti the relevant provision may be of public policy[3]. This, in turn, may raise the issue whether and in which circumstances the Supervisory Authority is to waive the Registrar's immunity (cf. Article 26 (5) Convention).

It is noted, moreover, that the infringement of intellectual property rights (infra IV 2) are characterised under some systems as tort/delict (cf. Annex E).

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[1] Article 7 - Mandatory rules. 1. When applying under this Convention the law of a country, effect may be given to the mandatory rules of the law of another country with which the situation has a close connection, if and in so far as, under the law of the latter country, those rules must be applied whatever the law applicable to the contract. In considering whether to give effect to these mandatory rules, regard shall be had to their nature and purpose and to the consequences of their application or non-application. 2. Nothing in this Convention shall restrict the application of the rules of the law of the forum in a situation where they are mandatory irrespective of the law otherwise applicable to the contract.

[2] Article 11, Inter-American Convention on the Law Applicable to International Contracts of 1994. 1. Notwithstanding the provisions of the preceding articles, the provisions of the law of the forum shall necessarily be applied when they are mandatory requirements. 2. It shall be up to the forum to decide when it applies the mandatory provisions of the law of another State with which the contract has close ties

[3] Example in French civil law where exemption clauses referring to tort and quasi tort liability are forbidden cf. Article 1382 & 1383 of the French civil code.

d. <u>Contractual Agreement as Governed by the Dispositive Rules Chosen by the Parties.</u>

aa. Issues which may be subject to contractual agreement between SA and R.

- Who are the eligible users and how is confidentiality to be secured?
- Technical requirements (how to ensure that the conversion-imposed requirements are complied with the setting up the system?)
- Choice of location and facilities
- Ensure that R is operational by convention-imposed date
- Responsibilities (developing design, software, hardware, specifications, provide site, security of data entered, duration of storage the data, security of transactions, training of users, reports, statistics).
- Costs recovery from users (fees) and sharing of income (self-financing envisaged, start-up costs, profit factor to be foreseen? Does SA get share as reimbursement of its expenses?).
- Will R be entitled to recover what it pays in damages to third parties when instructions from SA were complied with?

bb. Applicable Substantive Contract Law

In theory, the parties (i.e. SA and R) would be free to choose the national (domestic) law governing their contract.

However, the choice of the Registry's (or the SA's) own domestic law may not seem proper because it is not neutral and/or not apt to govern this very peculiar international relationship.

Alternatively, the parties may elect the UNIDROIT Principles of International Commercial Contracts (1994) as the body of rules governing their contract. The recommended choice of law clause reads either: "This contract shall be governed by the UNIDROIT Principles (1994) [except as to Articles…]" or "This contract shall be governed by the UNIDROIT Principles (1994) [except to Articles…] supplemented when necessary by the law of [jurisdiction X]".

Currently, the Principles (i.e. Part I of the Principles, Part II is in preparation) deal with the following subject matters: General (freedom of contract, form, mandatory, rules, usages, good faith and fair dealing, notice, etc), Formation, Validity, Interpretation, Content, Performance, Non-Performance.

The "Principles have been recognised by numerous arbitral awards as "generally accepted rules of international commercial practice" or lex mercatoria. They have been agreed upon by several public and private parties (e.g. the UN) to arbitral proceedings as the functionally best suited set of rules and therefore the ones governing their contract. Moreover, they have served as model for domestic law reform in Latin America, Europe and Asia. Finally, they have been recommended (in combination with the Vienna Sales Convention) for the trade in perishable goods by the International Trade Centre, a joint UNCTAD/WTO Organisation.

Even after completion of Part II, dealing with agency, assignment, third parties' rights, set-off, limitation of actions and waiver, the "Principles" will not provide rules for each and every issue. Therefore, both the choice of the "Principles" in general and the selection of either of the above choice of law clause would be made in the light of the otherwise applicable dispositive rules pertaining to the issues mentioned (*supra* aa).

Consequently, the parties may wish to have certain special dispositions applied to them which, will prevail over the UNIDROIT Principles. But such an analysis can only be made once the SA and the R are known.

On the basis of these assumptions, the contract would deal with the problem areas in a detailed ("American style") document setting forth the applicability of the UNIDROIT Principles as well as rights, duties and liabilities of the parties not (yet) covered by the "Principles".

2. Proprietary Rights (incl. Intellectual Property)

a. Convention and Protocol

- Article 26 (4) (b) → on immunity of assets, documents, databases (incl. software) and archives from seizure or other legal (or administrative) process

  [note: see *supra*, IV 1 a, regarding Article 17 Conv., Article XVIII Prot.]

b. Private Law Arrangements

aa. Private International Law

From the view of private international law (conflict of laws) it is noted that:

(1) Intellectual property rights are generally considered to be "territorial", i.e. recognised only within the territory of the state which has granted those rights.
(2) International treaties may affect the basic rule.
(3) If the R is located in a common law jurisdiction (or Quebec c.f. articles 1260-1298 Code civil) not only contractual devices (for the applicable law see supra IV 1 c-d) but also a trust (the SA being the beneficiary and/or the settlor and the Registrar the trustee) may be an appropriate solution for regulating the rights and duties of the parties. In this case, customary conflict of law rules, on average, would provide that the law of the country where the trust property is situated or where the trust was set up and/or where it is administered governs. According to some systems the conflict rules pertaining to property rights apply only as far as the trustee's position is concerned whereas the settlor's as well as the beneficiary's position are characterised as contractual. Moreover, in States that have ratified the 1985 Hague Convention on the Law applicable to Trusts, articles 6 to 11 of the convention would have be taken into account.

bb. Substantive Law

(1) General

Under Article 16 (4) *the SA shall own* all proprietary rights in the *data* and the *archives* of the Registry. This decision was taken in light of the fact that the Registrar enjoys only a fixed term of appointment. It was necessary therefore to make provision for the ongoing protection of the electronic system of the International Registry System and the information therein.

A separate issue which needs to be addressed is who will be the owner of the intellectual property rights in the software and who will be entitled to the royalties.

(2) Proprietary Interests in Software and Data

It is likely that much of the software required to operate the Registry is already in existence and very little may need to be developed ab initio. In that instance, it is a matter of ensuring that adequate licensing arrangements are entered into which protect the interests of the Registrar in the daily use of the software and the interests of the Supervisory Authority both during the contract and at the end. Nevertheless, it is conceivable that some particular software elements will be developed specifically for the system and the proprietary rights therein would depend upon:

- who is the creator or developer;
- whether the creation or development was done upon the instruction of the client (the Registrar or Supervisory Authority), and any contractual terms between the developer and the Registrar or Supervisory Authority dealing with ownership

It should also be remembered, however, that such newly developed software may not be readily distinguishable from existing pre-written software and indeed may have no operational or commercial value independent of such other software. It is suggested that the best interests of the Supervisory Authority and the Registrar would be to seek to license such software rather than seek to acquire ownership rights therein.

Similarly, it is suggested that analogous rights relating to, for example, the creation and layout of the International Registry Website, and the registration, use and upkeep of its domain name, protection of any relevant trademarks and copyright of material published therein etc. can also be met through normal contractual and licensing arrangements.

It is also evident that, in the lead up to the appointment of the Registrar, practical arrangements would have to be put in place to store backup copies of the data together with the electronic archives of data in a separate and secure location on an ongoing basis.

International agreements (GATT Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) of 15 April 1994, Annex 1c part 2, Article 10(1)), European Community legislation (cf. Directive 91/250/EEC of 14 May 1991) as well as probably all domestic legislation establish the principle that the rights in question belong to the software's designer or creator. Recognition of this principle under national law may be subject to reciprocity (cf. Article L 111-5 of the French Code on intellectual property).

However, there may be specific rules under the applicable law (e.g. the SA's, the R's law and the law of the creator's place of business or any law applicable by virtue of the parties' choice).

For example French case law gives the priority in software which has been in commissioned to an independent designer to the latter, and if the principal (i.e. the ordering party) wishes to become the owner contractual provision to this effect has to be made.

As far as the *data bases* (made up of a structure, the "container", and the data, the "content") are concerned and *subject to the principle* provided for in *Article 16(4)*, *two systems* of protection exist and may apply *depending* on the place *where the SA and the R are located*.

Firstly, under international regulations (cf. GATT, quoted previously) the *designer of the data base for the registration system* may be particularly protected because of the originality of the structure (the "container").

Secondly, under the Directive 96/9/EC of 11 March 1996, the manufacturer of the database may be protected (even) with regard to the content if it has substantially invested

intellectual or material resources in the setting-up, the verification or presentation of the database. These rights are granted to both EC and non-EC nationals on condition that the latters' State of origin has entered into an agreement with the EC in this respect.

These rights expire fifteen years after the completion of the database.

(3) Hardware and other property

As has been suggested with regard to existing standardised software, the ICT hardware and other additional equipment necessary for the operations of the system can be purchased by the Registrar for the Registry or leased from one or more service providers.

(4) Who are the likely 'owners' of proprietary interests? The impact of the choice of the Registrar and business models

It is assumed herein that, in keeping with normal commercial practices, the Registrar will have engaged the services of one or more service providers in order to carry out the responsibilities on behalf of the International Registry.

The establishment and day-to-day running of the International Registry will involve the following entities:

- the Supervisory Authority;
- the International Registry itself;
- the Registrar and
- any service providers/suppliers contractually engaged by the Registrar

While it is clear that the Supervisory Authority will be separate to and independent of the Registrar (unless the SA were to be an intergovernmental Organisation and the R one of its officers), the International Registry and the service provider, other matters such as the set up of the International Registry, the legal personality of the Registrar and its relationship with the Registry, have yet to be fully determined. Hence, because the Registrar will be vested with legal personality, it is assumed that, for practical purposes, the Registrar will have full powers to, for example, enter into contracts and conduct a wide range of business transactions to provide for its everyday operations. It is also assumed that the Registrar will act on behalf of the International Registry in this regard and that the latter will not have a separate legal capacity in this respect.

The issue of protection of proprietary interests will be very dependent on the model of business operation of the Registry. The major working tools of the Registry will be Information and Communications Technology (ICT) software, services and equipment. In relation to ownership of such assets, a common situation is for different parties to own different elements of the overall suite of software and hardware in a particular electronic system, such as the system envisaged under the Convention and Protocol. It is very difficult to envisage how a single party such as the Registrar could purport to own the entire technical infrastructure for the International Registry service, especially in the light of the envisaged use of Internet-type technologies and infrastructures. In reality, there will probably be a complex matrix of contractors, sub-contractors and licensors, operating under specific service level agreements.

Thus, one model of operation would be to have one or more service providers, in a contractual relationship with the Registrar, owning all hardware and software, but providing the Registrar and the Supervisory Authority with an irrevocable or fixed term licence for its use. In any event, the Supervisory Authority should, as a practical arrangement prior to appointing the Registrar, satisfy itself that the Registrar would have proper service level agreements and licensing arrangements in place to ensure that the service can function as envisaged. The Authority should also ensure that the Registrar has arrangements in place to

implement such upgrades and new releases of software etc. as may be required from time to time. This has the merit of removing major complexities about ownership of intellectual property rights from the relationship, unless the International Registry, Registrar or the Supervisory Authority wants, and wishes to pay for, full and complete ownership.

Accordingly, it is considered that the arrangement may be largely a matter of contract between the Registrar and the Registrar's contractual partners.

(5) Termination and Transition

Clearly, therefore, a change of Registrar or a change of service provider will require a fresh set of arrangements. These can be verified by the Supervisory Authority in the lead up to the appointment of a new Registrar. It is also essential that a smooth handover is achieved if a change of Registrar or change of one of the Registrar's key ICT suppliers or contractor arises. Specific contractual clauses dealing with transitional arrangements are very common in such circumstances.

3. General, Infrastructure-Related Aspects

(1) Either the Registrar or the State where the R is located will have to provide the necessary infrastructure, such as, office building (incl. maintenance, rent) and conservation building, communication system, insurance, security, staff (employment contract, social security, retirement pension), legal expenses.

The contract (for the applicable law see supra IV 1 c-d) would have to set forth the details such as who has to provide what by which date at whose expense.

(2) The same applies, *mutatis mutandis*, and baring impact by the final drafting of the privileges and immunity provisions of the Convention to permits and taxes.

4. Dispute Resolution

a. Authority for taking measures against the Registrar under the terms of the Convention

As a matter of principle, international law of procedure tends to concentrate jurisdiction and to channel it to courts, which have particular expertise and are locally well positioned, i.e. close to the subject matter; this would indicate the R’s centre of administration as the proper forum.

Article 43 (1) of the Convention states that *“[t]he courts of the place in which the Registrar has its centre of administration shall have exclusive jurisdiction to award damages against the Registrar under article 27”*.
Paragraphs 2 and 3 of Article 43 enable the courts of the State on whose territory the Registrar has its administrative headquarters to direct the Registrar to take measures to modify or withdraw registration.

The Registrar benefits from functional immunity under Article 26 (4) of the Convention. This immunity may be waived according to Article 26(5) by the SA; paragraph 4 of Article 43 should take that into account.

b. Authority to take measures against the Registrar in accordance with International Regulations

Any such measures will have to be considered in the light of the final draft of the Regulations. For the current draft, cf. points 10.5 and 14.5.

c. Immunity of the Supervisory Authority

Under the Convention, the Registrar's (functional) immunity may be waived by the Supervisory Authority whereas no analogous provision has been made as far as the SA's immunity is concerned. This flows from the assumption that the SA will be an intergovernmental Organisation which enjoys such immunity. While this does not raise concerns in general, the IRTF draws the negotiating States' attention to the fact that this *may not be an appropriate* result as far as the *private-law relationship between SA and the R* is concerned. The SA may, for example, breach its contract or harm the R through delictual conduct.

In order to avoid a denial of justice, Article IX, section 31 of the 1947 Convention on Privileges and Immunities of Specialized Organizations calls upon such Organisations to make provision for the settlement of disputes arising out of contractual and other private-law relationships or to waive their immunity in case such disputes arise.

Although Article 26 of the Convention only provides for a waiver of the R's immunity (cf. Article 26 (5)), it is submitted that the immunity granted to the SA itself under Article 26 (2) may also be waived under general principles. However, the negotiating States may wish to establish this expressly in Article 26.

d. Dispute Resolution Trough Arbitration

Advantages of arbitration do not have to be discussed here (confidentiality, expertise, expeditious procedure, sometimes cost). The major *disadvantage* of dispute resolution by arbitration would be that, as rule, no appeal lies against the award rendered by the arbitration tribunal. However, the parties to the arbitration agreement (SA and R) may, given the peculiarities of this case, provide for a special review procedure. Moreover, the general remedies against enforcement of an award are available.

If arbitration is chosen as the dispute resolution mechanism, the following issues have to be considered:

- Formulation of the arbitration clause (e.g. "any dispute, controversy or claim arising out of or relating to […], or the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the UNICITRAL Arbitration Rules as present in force");
- Applicable rules of arbitration (e.g. UNICITRAL Rules of 1976, the ICC Rules of 1998 etc.);
- Choice and appointment of arbitrators;
- Recognition and enforceability of awards (not all contracting States may also be contracting States of the 1958 New York Convention).

If the parties were to opt for arbitration, both institutional and ad-hoc arbitration proceedings may be taken into consideration:

(1) The Permanent Court of Arbitration at The Hague, applying its optional arbitration rules between international organisations and private parties of July 1996 (on condition that the SA is an international organisation).

(2) The International Court of Arbitration of the International Chamber of Commerce or other permanent arbitral institutions such as the Stockholm Chamber, the Vienna Chamber, the London Court of International Arbitration or the various regional centres such as Cairo, Kuala Lumpur etc.

(3) If the parties were to opt for ad-hoc arbitration they may wish to select the UNICITRAL Rules of 1976 as the framework governing any proceedings.

However, the insertion of forum selection or arbitration clauses into the contract should take national regulations concerning mandatory rules (cf. IV 1 c) into account.

ANNEX

The purpose of this Annex is to give examples of mandatory rules as referred to *supra*, IV 1 c aa. The examples reflect mostly French and European Union law.

Delegations from other countries are invited to submit additional examples of problem areas or specific mandatory provisions.

(1) Competition law

The SA and the R may wish to include a non-competition clause in their contract. In some legal systems, non-competition clauses are prohibited and therefore void. In others, they may be required if public economic interests are at stake. In others still, they are prohibited in principle, but individuals and corporations may obtain exemptions which are justified by considerations of public economic policy (cf. for example, Article 81 (3) [formerly Article 85] Treaty of Rome).

(2) Currency regulations; price-index clauses

Some legal systems *require* prices, fees, interests, etc., owed under a contract, to be indicated in local currency. Moreover, the debtor may have the *right* to perform in one (mostly the local) currency even if the contract provides for payment in another one. Currency regulations are without any exceptions mandatory.

Under some legal systems, the use of price-index clauses ("sliding scales") are either prohibited [4] or subject to approval by some authority such as the central bank.

(3) Labour Law

Statutes on individual labour relations (contracts) as well as collective industrial relations (e.g. regulating collective bargaining etc.) frequently are mandatory. This may have an impact on the internal organisation of the Registry (rights and duties of its employees) as well as on the relationship between the Supervisory Authority and the Registrar if the latter were to be a natural person and employee of the former (see, however, *supra*, III).

(4) General doctrines of contract law; special legislation concerning standard term contracts

According to doctrines such as "frustration of contracts", "théorie de l'imprévision", "eccessiva onerosità", "Wegfall der Geschäftsgrundlage", "hardship", etc., a judge or arbitrator may, under many legal systems, intervene to restore an imperilled or lost equilibrium of a (mostly long-term) contract. In order to avoid unforeseeable results of any such intervention, the parties may establish themselves under which conditions the terms of their contract can be re-negotiated.

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[4] In France, Article 79-3 of the Decree of 30 December 1958 as amended.

(5) Criminal offences entailing civil liability

The violation of cerain rights (e.g. the infringement of intellectual property rights) may be a criminal offence (e.g. counterfeit, reproduction and distribution unauthorised by the auther, unlawful publishing [5]). Therefore, the Registrar and its officers and employees who are not the developers or creators of the software, the databases, etc., have to be cautious not to commit any such offence. Committing a criminal offence may in turn entail civil liability for damages whether or not other requirements for liability in tort or contract are fulfilled.

[5] GATT Agreements on offences relating to pirating, and French code on intellectual property: Articles L. 335-2 to 335-10 and L. 343-1 to 343-4 punishable by fines and/or imprisonment.

Liability of the International Registry

(presented by Canada and Sweden)

1. Overview

In preparation for the second meeting of the Registry Task Force Canada and Sweden were asked to prepare a paper on "Cost of Insurance (Article 27, Alternative A – Strict Liability/Describe What Constitutes Force Majeure)".

After preliminary investigations, it became apparent that any quotations for insurance costs would not be useful since these costs would be conditioned by the design and extent of liability of the International Registry. These are matters that have yet to be settled at the Diplomatic Conference. Consequently, this report focuses almost entirely on the issue of liability.

Initially an attempt was made to describe the Registry System on the basis of existing texts and reasonable assumptions. This was contained in a document entitled *Description of the International Registry created pursuant to the draft Convention on International Interests in Mobile Equipment and the draft Protocol on Matters specific to Aircraft Equipment*. That document set out the main legal, organizational, administrative and technological issues relating to the International Registry according to the draft Convention on International Interests in Mobile Equipment and the draft Protocol on Matters specific to Aircraft Equipment as well as the risks of damage due to failure to make the Registry available or to corruption of the content of the Registry.

During the discussions within the group and with the insurers it became evident that Article 27 of the Convention needed further refinement. As a result a number of amendments are proposed. The amendments relate for the most part to four different questions: the definition of the events that should be covered by the liability, a limitation of the liability in cases of *force majeure*, a limitation of liability in case of contributory fault and a possibility for the Supervisory Authority to determine the extent of the insurance coverage.

2. Risks covered by the liability of the Registrar

The following risks were identified as those that reasonably ought to fall within the scope of liability of the Registrar:

(a) failure of software to correctly identify persons transmitting data or to detect corruption of data in the transmission process (*i.e.,* failure of the PKI technology);

(b) failure in the "handling" of data once it has been received by the Registry;

(c) failure to disclose or to accurately disclose to a searching party data in the database when the required search criterion is used;

(d) failure to have sufficiently modern technology to address the risk of hackers, subject to the limitation that new technology that becomes available after the Registry is in operation should be required only when it can be implemented without substantial cost and disruption to the operation of the Registry; or

(e) failure to operate the Registry when the factor requiring it to be shut down does not constitute *force majeure*.

The most patent risk is with item (b). This risk could be reduced through the use of technology and the minimization or, if possible, the elimination of human involvement in the handling of registration data.

An important question in relation to the risk of damage is the quantum of damages arising from a single event. Generally, damages can occur either because information in the system has been altered or corrupted or because the system was inoperative for a period longer than the permitted shutdown time.

The quantum of damage relating to the former cases is dependent on the whether the liability of the Registrar would cover events that lead to the total corruption of the Registry system, with massive damages as a result, or if it is only to cover events relating to single registrations or single aircraft. With modern technology, the making of duplicate copies of the Registry and taking all necessary precautions, total

corruption of the system would only occur in the cases of *force majeure*: meteorite strikes, acts of war, *etc.* Therefore, liability would only extend to cases where a single interest or all interests in a single aircraft are lost and the total amount of direct damage would not rise above the total value of an aircraft.

In cases of failure to operate the system for the prescribed time periods, the losses would encompass costs related to interest and losses of income due to the fact, for instance, that anticipated agreements were not concluded. The actual losses would probably be substantially less than the damages arising from the other cases mentioned above.

An attempt was also made to assess the level of risk. Information was gathered on compensation for damage paid by comparable national registries in Canada and Sweden.

In examining Canadian registries, it became apparent that one could rely on the Canadian experience only in a very general way as predictive of what might happen under an international system.

Indeed the *Personal Property Security Acts* of the provinces of Alberta, British Columbia, Saskatchewan and Manitoba specifically provide that the registry will be liable only with respect to hardcopy registrations and searches. The Atlantic Provinces systems are completely electronic and user driven. Consequently, in this respect they are as close to the proposed system as any in Canada (or the world). Under these systems, the only basis on which a claim can be made against the registry is to recover loss resulting from reliance on a printed search result issued by the registry. There appears to be no basis for a claim against the registry for loss resulting to a registering party as a result of failure of the system. Possibly, the reasoning here is that a registering party can immediately do a search and discover within seconds of effecting a registration whether or not the information transmitted has entered the database.

The Ontario system is much less specific on the liability of the registry. The Ontario Act focuses exclusively on loss resulting from reliance on a defective search result. The Ontario Registrar informed us that there have been no claims and no complaints from anyone using electronic access to the system which has been in operation for about 12 years in its current form.

In summary, on the basis of anecdotal information from the Canadian systems, modern computer technology reduces the potential for loss to a very low level. However, for the reasons noted above, it would be a wrong to surmise that the experience with the Canadian systems is conclusive proof that the number of claims will be negligible.

In Sweden a notice-based computerized system for registration of ownership of, and interests in real estate has been operating since 1972. The State is the Registrar and as such absolutely liable for all damage. During the period 1990–1999 rights of an estimated value of 200 billion US $ were subject to registration. The total amount of damages paid during the same period were less than 250 000 US $.

3. Liability provision

Based on the above assumption of the risks that ought to be covered by the strict liability of the Registrar, the following amended version of Article 27 of the Convention (Art. 40 of the Consolidated Text) is proposed (new wording underlined).

Article 27
Liability and insurance

1. The Registrar shall be liable for compensatory damages for loss suffered by a person directly resulting from an error or omission of the Registrar, and its officers and employees, <u>within the operation of the Registry</u> or from a malfunction of the international registration system <u>except where the damage is caused by an event of an inevitable and irresistible nature</u>.

1*bis*. For the purposes of paragraph 1 of this Article:

(a) neither the factual inaccuracy of data transmitted by a user nor the unauthorised use of an electronic signature obtained from a user is considered an error or omission;
(b) acts or circumstances arising prior to receipt of registration information at the Registry shall not be considered as being part of the operation of the Registry; and
(c) an amendment or corruption of data in the Registry database resulting from unauthorised external access to the database by a person not using an authorised signature that could not be prevented by using the best practices and standards in current use in electronic registry operation, including those related to back-up and security systems, shall not be considered as an error or omission.

1*ter*. Compensation under paragraph 1 of this Article may be reduced to the extent that the person who suffered the damage caused or contributed to that damage.

2. The Registrar shall provide insurance or a financial guarantee covering the liability referred to in this Article to the extent determined by the Supervisory Authority.

Article XIX, paragraph 5 of the Protocol (Art. 40(2) of the Consolidated Text) to be deleted.

It should be pointed out that a definition of "user" might be appropriate.

4. Reasons for the amendments to the liability provision

Two amendments are suggested to paragraph 1 of the Article. The first amendment consist of the addition of the clause "within the operation of the Registry" and is in itself not intended as a limitation of the liability but only as a link to paragraph 1*bis*. The second amendment contains a limitation of the liability in case of *force majeure*;

see below. It is for consideration whether the use of the expression "officers and employees" ought not best be replaced by the broader expression "servants and agents" more commonly found in international agreements (*e.g.,* the 1999 Montreal *Convention for the Unification of Certain Rules for International Carriage by Air*).

Two new paragraphs are added, paragraphs 1*bis* and 1*ter*. Paragraph 1*bis* is added to provide a definition of what falls outside of the management of the Registry and what is not an error or omission of the Registrar. (a) The first subparagraph in paragraph 1*bis* reflects the basic principle that the Registrar would have no liability for information provided to it by the person requesting registration of an interest. It also addresses cases where the damage is due to an unauthorized act by someone using an unauthorized signature obtained from a person having authority to access the registry data base. (b) The second subparagraph is intended to define the point from which the Registrar is liable for corruption of the information sent to or from it. In practice, the result of the provision is that the Registrar will be liable for anything that happens within its firewalls, but have no liability for corruption of information at any other point. This means *e.g.,* that a person requesting a registration will have to check that its request has duly reached the Registry. It was noted that a person could only get hold of a signature from three sources, the user, the Registry or the supplier of signatures. For reasons of fairness it is suggested that the Registrar be liable in the cases where the signature is obtained from someone else than the user. (c) Finally, the third subparagraph deals with the problem of hackers. It is suggested that the Registrar be required to put in place technology designed to guard against intrusion by hackers. However, the level of responsibility would not exceed the capabilities of available software. To balance this, the Registrar should be required to put in place new software where this would be warranted by best practices and standards in current use in electronic registry operation.

Paragraph *1ter* is new. It implements the normal principles of contributory negligence.

Finally one amendment is suggested to paragraph 2. The present text of paragraph 2 sets out that liability should be covered to "the extent provided by the Protocol". The Protocol states in Article XIX, paragraph 5 (Article 40(2) of the Consolidated Text) that "The Registrar shall provide insurance or a financial guarantee covering all liability under this Convention." However, it is not possible to get insurance to an unlimited amount. Insurers do for different reasons have to set a specific insurance amount. The consequence is that the present draft requires at least an additional guarantee. Such a guarantee would have to be set at a level that probably only States normally could cover. The question is whether coverage for an unlimited amount is needed. Above, the assumption is made that the liability of the Registrar would not cover total corruption of the system and that the maximum amount of damage would not exceed the maximum value of an aircraft. On the basis of this assumption, the insurance amount could well be limited in fact. If such an approach is accepted, the question arises as to who should determine the limit. One solution is that it be determined by the Diplomatic Conference and be set in either the Convention or the Protocol. A need to amend such a limit can however arise due to the development of new aircraft. It would be unpractical if the Convention or the Protocol would have to be amended just for such a reason. It is thus proposed that the Supervisory Authority determine the extent of the insurance.

5. *Force Majeure*

Traditionally *force majeure* is described in terms of irresistible events that cause damage. This concept includes event such as natural catastrophes, political risks, *i.e.* acts of war, insurrections, terrorist attacks, *etc.* and some other events such as strikes. The main reasoning behind the concept is that damages that occur under such exceptional circumstances are inherent risks of life and should rest with the victim. (Of course *ex gratia* compensation is in some cases paid by States.)

The more interesting questions arise when one tries to construe this concept in relation to a web-based system. Generally two sources of exceptional damage can be identified, a total breakdown of the web and a corruption of the registry system

caused by a computer virus. Above it is suggested that the Registry will bear no liability in respect of communications outside of its firewalls. Therefore it will not bear liability in a case where all communications on the web fail regardless of whether the failure is to be considered as *force majeure* or not. The virus case is more interesting. A virus may either penetrate the system itself or be carried, *e.g.* by an e-mail. In cases it is carried in by an e-mail as an attachment to it, someone has to open the attachment for the virus to become active. Such an act by an employee of the Registry ought to be regarded as an error or even as a negligent act, given the information currently available on how viruses work. In such a case the Registrar could not escape liability. The case where a virus enters directly can be compared with a hacker situation. The Registry should have systems to prevent unauthorised entry by both persons and data. If the systems fail to protect against the virus and are nevertheless state-of-the-art, the virus may be regarded as being in the nature of *force majeure*.

6. Alternative methods to cover the liability

In International Law several methods for covering liability are used. These are generally insurance, guarantees, pledge and declarations of self-insurance.[1] Article 27 paragraph 2 the Convention (Art. 42(2) of the Consolidated Text) stipulates that the Registrar shall provide insurance or a financial guarantee, *i.e.* two of the abovementioned four forms of security. The Convention would have to be amended in order for the Registrar to be able to use a pledge or a declaration of self-insurance.

Insurance has been discussed above. Guarantees can take on different forms, but legally they mean that a person other than the person exposed to liability commits itself to cover the liability of the liable person. There is no reason to discriminate between the different forms for guarantees so long as the format provides a legally binding commitment in the jurisdiction of the Registrar.

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[1] See *e.g.*, the 1999 *Protocol on Liability and Compensation for Damage resulting from the Transboundary Movements of Hazardous Wastes and their Disposal* (the Basel Protocol) or the 1996 *Convention on Liability and Compensation for Damage in Connection with Carriage of Hazardous and Noxious Substances by Sea* (the HNS-Convention).

It could of course be accepted if the Registrar wanted to deposit bonds or any other collateral to guarantee its liability. Such collateral would probably be deposited with the Supervisory Authority. However, it could be difficult to determine a scheme of replacement of such bonds if they were to be drawn upon to cover a specific damage. Furthermore, it is debatable how the Supervisory Authority should handle such security.

Generally, declarations of self-insurance in international agreements are acceptable only when coming from States. The Registry would be a separate international person and thus legally not connected to any State. A declaration of insurance by the Host State would legally speaking be a guarantee. A declaration of self-insurance by the Registrar would not have a great value, as its total worth in capital will not be substantial.

Against this background, no amendment of Article 27, paragraph 2 is proposed in this respect. Neither pledge, nor declaration of self-insurance seems to be suitable forms for security in relation to the liability of the Registrar.

– END –

Funding/Cost Recovery Methods for the New International Registry

October 2001

Discussion-Paper Prepared by Finland and the AWG

for the International Registry Task Force

Funding/Cost Recovery Methods for the New International Registry

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Funding/Cost Recovery Methods for the New International Registry

The International Registry Task Force (**IRTF**), created by the Third Joint Session, met in Paris 21-23 June 2000. The results of that meeting were reported to and generally approved by the ICAO Legal Committee, meeting 28 August – 8 September 2000. The Legal Committee asked the IRTF to continue its work on a variety of topics.

One such topic is the funding of and cost recovery methods for the new International Registry (**IR**). Finland and the AWG were assigned that topic, which, in accordance with the modus operandi of the IRTF, entails the preparation of this discussion-paper..This paper will be attached to the final Report of the IRTF, and, as such, will be made available to upcoming Diplomatic Conference.

The primary purposes of this paper are to outline such funding and cost recovery options, and, equally, to provide an analytic framework and lexicon for their development and assessment. ((This lexicographical objective is centered on capturing fundamental concepts in key defined terms – which might be used be the IRTF and others in discussing any financial modeling of the IR. See glossary of key terms contained in **part A-1** of the **annex** hereto.))

This paper is organized as follows. Preliminary matters are addressed in **Part I**. The options for funding the initial costs of the IR are outlined in **Part II**. Issues relating to the cost recovery – or amortization – of such costs will be addressed in **Part III**. Finally, **Part IV will provide tentative and hypothetical estimates of cost recovery and transaction fees based on the limited information received to date.** In that regard, reference will be made to a list of principal questions for the diplomatic conference, or, if delegated thereby, the Supervisory Authority. See **part A-2** of the **annex**hereto.

A preliminary, cautionary note on this paper is in order. While, in line with the working methods of the IRTF, we have taken a systematic approach to the identified topics, it may well be the case that (as this is an electronic registry) the relatively small funding amounts may justify more streamlined and informal approaches to such topics.

Part I Preliminary Matters

A review and summary of the relevant provisions in the texts, and a statement of basic assumptions, are required to establish a framework for discussing the IR's possible funding options and cost-recovery methods.

A Provisions in Texts relating to Creation of IR and Cost Recovery

The draft Convention on International Interests in Mobile Equipment (**Convention**)[1] as applied to aircraft objects through the Aircraft Equipment Protocol (**Aircraft Protocol)**[2] contain provisions relating to the creation of the IR and the general standard applicable to the setting of user fees for the IR.

First and foremost, Convention Art. 16(2)(a) provides that the Supervisory Authority shall "establish or provide for the establishment of the International Registry." For purposes of this paper, it is assumed that the points of entry that a State may designate under Convention Art. 17(4) and Aircraft Protocol Art. XVIII (**Designated Entry Points**) are not part of the IR, as such. Thus, their initial and operation funding requirements, as well as cost recovery and fee-setting arrangements relating thereto, fall outside of the Convention/Aircraft Protocol, and, accordingly, are not under international consideration.[3] For our purpose, questions remain as to the proper characterization of communication systems between the IR and the Designated Entry Points.

Secondly, under Convention Art. 16(2)(h), the Supervisory Authority is to "set and periodically review" the fees to be charged "for the services and facilities" of the IR.

Aircraft Protocol Art. XIX(3) sets the general standard for the setting of such fees, namely, to "recover the reasonable costs of establishing, operating and regulating the [IR] and the reasonable costs of the Supervisory Authority associated with the performance of the functions, exercise of the powers, and the discharge of the duties contemplated by Article 16(2) of the Convention.[4]" However, the Convention/Aircraft Protocol does not address matters relating to

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[1] References in this paper to the Convention are to the text as amended by the ICAO Legal Committee. *See Report of the 31st session of the Legal Committee* (Doc 9765-LC/191), Attachment D, Part I.

[2] References in this paper to the Aircraft Protocol are to the text recently amended by the ICAO Legal Committee. *See Report of the 31st session of the Legal Committee* (Doc 9765-LC/191), Attachment E, Part I.

[3] This assumption is made is view of the Convention's definition of the "International Registry" (the "international registration facilities established for purposes of" the Convention/Aircraft Protocol), and, more pertinently, direct comments to that effect made at the Legal Committee meeting. *See Report of the 31st session of the Legal Committee* (Doc 9765-LC/191) at para. 3:86.

[4] As with the estimated costs of the Registrar, it is important to establish the estimated costs of the Supervisory Authority, and to do so prior to the setting of the initial fees. In view of the distinct possibility that ICAO or an organ thereof may act as the Supervisory Authority, *see* Part II(C) *infra*, a request that the ICAO Council authorize the preparation of a preliminary budget, including

the initial funding of the IR (**Initial Funding Costs**), that is, the costs to create the IR. Nor does it set out the means by which ongoing operational expenses of the IR will be funded prior to their recovery through user fees (**Operational Funding Costs**). (The Initial Funding Costs and the Operational Funding Costs, where appropriate, will be referred to collectively as **Registry Costs**.) Finally, the Convention/Protocol does not establish a detailed mechanism for fee-based recovery of the Registry Costs (**Cost Recovery Mechanism**).

The failure to address the Registry Costs and/or the Cost Recovery Mechanism in the texts - or through a resolution at the diplomatic conference - would have the effect of placing such matters under the residual authority of the Supervisory Authority. The desirability of so tasking the Supervisory Authority, with or without guidelines or parameters, is a question of policy for States.

B Basic Assumptions to be taken into Account

Two sets of interrelated assumptions are central to the funding of the IR: assumptions relating to the anticipated use of the IR (**Registry Use Assumptions**) and those relating to the Registry Costs (**Registry Cost Assumptions**).

B.1 Registry Use Assumptions

In addition to their relevance for the technical design of the IR, the Registry Use Assumptions are germane to the timing and particulars of the Cost Recovery Mechanism. Importantly, they may affect cost allocations among users, particularly between early and later users of the system.

While it is outside the scope of this paper to address the specifics underlying the Registry Use Assumptions, they relate to the number and timing of filings, searches, and issued certificates. The key assumptions[5] include:

1) the number and the specific identity of ratifying States, as well as the timing of their respective ratifications;[6]

2) the size of future markets for aircraft equipment;

3) future transactional terms, including the average terms of different types of transactions and the frequency of amendments to such transactions;

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its supervisory expenses, has been noted. *See Report of the 31st session of the Legal Committee* (Doc 9765-LC/191) at para. 3:84.

[5] The AWG has prepared a Memorandum dated 18 July 2000 for IRTF addressing select aspects of the these assumptions.

[6] It is particularly noteworthy that a relatively small number of States account for a relatively large percentage of potential IR- use transactions. *See id*. at footnote 6 and accompanying text.

4) future transactional practices, including the number of searches and certificates that transaction parties come to require; and

5) the extent to which pre-existing transactions are brought into the system, and whether the same is done on a mandatory[7] or voluntary basis.
For purposes of this paper, the key point to note is that in attempting to prudently forecast use-related figures for the IR (that is, the number of IR "transactions" over which the Registry Costs may be spread), **material assumptions** must be made. These assumptions, by necessity, will be **speculative**.

The foregoing underscores the need for the Cost Recovery Mechanism to contemplate adjustment - and re-amortization - based on the inevitable lack of correspondence between the initial Registry Use Assumptions and the actual use of the IR. See Part III, below.

B.2 Registry Cost Assumptions

As noted above, while estimates relating to the Registry Costs Assumptions (i.e., the costs negotiated as part of the Registrar selection process and the estimated costs of the Supervisory Authority) should be available shortly, associated policy questions require consideration at this stage.

The first such question is whether the Cost Recovery Mechanism should contemplate adjustments to reflect inaccuracies in the Registry Cost Assumptions. In other words, should increases or decreases in actual IR costs be translated into revised fee schedules. If so, according to what criteria and over what period of time. In addition, are the answers to these questions the same for Registrar and Supervisory Authority (bearing in mind that the former reports to the latter, and the latter reports to the Contracting States).

The answer to these policy questions will provide certain incentives, including efficiency-related incentives, which must be considered by interested parties. The diplomatic conference will ultimately need to settle these matters - or provide an appropriate mechanism for doing so.

These matters are addressed further in Parts III and IV below.

Part II Funding Costs

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[7] If pre-existing interests are subject to mandatory registration, which remains a possibility, it is anticipated that the filing fees associated therewith would be nominal. *See Report of the 31st session of the Legal Committee* (Doc 9765-LC/191), Attachment D, Part I, footnote 5. The cited notation seeks to address the concerns of those who feel that parties to existing transactions ought not *indirectly finance* a registry which primarily regulates future priority disputes.

A threshold question requiring attention is how the Funding Costs will be advanced.

To economize on time and effort, we have not addressed the options for financing the Operating Funding Costs. Two reasons support that approach. First, such options are similar to those available to finance the Initial Funding Costs. Secondly, the amounts may be small enough to permit their amortization from fees collected in the ordinary course.

There are at least five general options, elements of which may be combined.

A Host State Funding

One option for addressing the Initial Funding Costs is simply for the Host State to provide such funds. This option would eliminate most issues associated with the Initial Funding Costs (but may raise issues for potential Host States). As funding is an important aspect of a State's cost/price proposal, its willingness to fund would be a factor.

It is entirely up to the Host State candidates to decide whether they will require repayment of any such initial funding. If repayment is required, the next question is whether that Host State would expect interest, and, if so, at what rate. These matters would impact the economic value of the cost/price funding proposal.[8]

Host State funding could also take the form of a guarantee or other form of credit support or enhancement, rather than direct financing. This may be more acceptable to Host State candidates. Without limiting the possible options, the Host State could:

(a) guarantee to a commercial lender the repayment of principal and interest at specified times, if the Cost Recovery Mechanism does not generate sufficient funds; or

(b) under defined conditions, commit to repay and replace that commercial lender.

B Registrar funding

A variation of the foregoing is to permit the operation of the IR by a private entity (sponsored - through the proposal process - by a State, or, alternatively, joint venturing with that State). The private entity could agree, as part of its contribution to the proposal, to advance the Initial Funding Costs (and/or the Operating Funding Costs).

In sum, options A and B above are matters for consideration by States wishing to host the IR, and, if appropriate, any private partners associated with their proposals.

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[8] As this paper addressing funding/cost recovery, these aspects of the Host State's proposal are noted. That is not meant to suggest that the other factors, most importantly technical capacity and experience, are secondary. In fact, they are primarily under the evaluation criteria.

C Supervisory Authority funding

A third option would have the Supervisory Authority, or, should the concept be agreed, the provisional Supervisory Authority,[9] advance the Initial Funding Costs, presumably, but not necessarily, as an intermediary between the IR and ratifying States.

The allocation of financial responsibility under this option depends upon the identity of the Supervisory Authority, in general, and whether non-State Parties are constituent members of the Supervisory Authority.

Turning to particulars, Convention Arts. 1 and 16(1) point to the Aircraft Protocol for designation of the Supervisory Authority. Aircraft Protocol Art. XVI(1) leaves the matter open for resolution at the diplomatic conference.

The ICAO Legal Committee has recommended that the ICAO Council consider accepting the role of the Supervisory Authority, if so requested.[10] The ICAO Council, in turn, has decided that the "functions of the Supervisory Authority…were acceptable in principle."[11]

In its working paper for the ICAO Council, the Secretary General of ICAO noted that, should the Council accept that role, it should also consider setting up a special body for this purpose along the lines of the arrangements set up under the Joint Financing Agreements or of the MEX Convention.[12] The special body could consist of Council Members or Experts from States Parties to the Convention/Aircraft Protocol. That group (**States Parties Group**) would report, through the ICAO Council, to States Parties to the Convention/Aircraft Protocol.[13]

In the event that the ICAO Council acts, in some form, as the Supervisory Authority or provisional Supervisory Authority, two potential options for advancing the Initial Funding Costs present themselves.

First, should a States Parties Group arrangement be employed, States Parties could contribute the Initial Funding Costs pursuant to an agreed formula. The obvious advantage to this option is

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[9] *See Report of the 31st session of the Legal Committee* (Doc 9765-LC/191) at para. 3:72.

[10] id. at para. 3:80.

[11] *See Summary of Decisions of the 161st Council* (C-DEC 161/9) at para. 10(d).

[12] *See Report of the 31st session of the Legal Committee* (C-WP/11381) at para. 3.2.2.4.

[13] This arrangement could potentially reduce the aggregate amount payable by users of the IR. That would occur if, following precedent, State Experts in the States Parties Group are directly funded by their respective governments.

the correspondence between use and funding: all but only those States involved in the new treaty system would pay for the creation of the associated IR. A disadvantage is that the set of State Parties will change from time-to-time and cannot be known ex ante. Thus, ICAO might serve as coordinating function under this option.

Secondly, ICAO could advance such repayable funds made available through standard or special budgetary arrangements. This option – which may raise administrative issues - would have the effect of distributing the cost among all potential user States, rather than the actual users. There are policy-based arguments in favor and against such an approach.

It is also possible to contemplate a combination of the two foregoing options, namely, a repayable outlay by ICAO of the Initial Funding Costs for the account of State Parties, signatories States or some other grouping of States.

D Ratifying States funding

The above-noted State Parties Group funding option – linked to the Supervisory Authority - is but one example of a distinct concept. That concept is the funding by the group of States that ratify the Convention/Aircraft Protocol.

Such an arrangement need not be linked to the Supervisory Authority. The sponsoring Organizations, the Depositary or the Registrar itself could coordinate funding arrangements with such States. In any event, the advantages and disadvantages of the States Parties Group funding option noted-above would be present in any variant of ratifying State funding.

E Commercial funding (with or without Host State support)

A variety of IR funding options involving arms-length, commercial financing exist. For purposes of simplicity, we define "commercial funding" as an extension of credit on terms where the risk of loss on account of non-repayment, large or small, is factored into and compensated by a commercial rate of interest (added to the lender's borrowing costs).

Commercial funding could be secured (e.g., by an assignment of future revenues of the IR) or unsecured, guaranteed by a credit-worthy entity (e.g., the Host State, as noted above) or not. Possible creditors include, without limitation, financial institutions and manufacturers.

There are a few threshold points worth noting in any assessment of the commercial funding options.

First, and most obviously, a commercial rate of interest will add to the aggregate amount of the Initial Funding Costs, thus increasing the ultimate amounts payable by users. Users may raise concerns. The higher the rate of interest, the more significant the point.

Secondly, the actual source of repayment (and the nature of its commitment) must be clearly identified. Is it the general credit of the Registrar, and, if so, is the Registrar credit-worthy. The answer to the latter question will be affirmative if the Registrar is a meaningful governmental

entity or supported by one, the loan is full recourse to the Registrar or its guarantor, and the necessary waivers of sovereign immunity are in place.

If, on the other hand, the Registrar is a special purpose entity designed solely to perform this function, it will not be credit-worthy. Commercial financing would not be available in that case - absent risk-mitigating factors, of which there are two. The funding can be secured by adequate collateral or guaranteed by a credit-worthy entity.

Third, and following from the above-point, would an assignment of future revenues – future fees payable by users – constitute adequate security to a commercial lender. Given the speculative nature of the Registry Use Assumptions, it is reasonable to assume that the projected revenues of the IR will not alone constitute adequate security. A fuller statement of the foregoing is that a commercial lender, acting as such, would either not extend such a credit or would only do so at high rates of interest.

Without knowing the amount of the Initial Funding Costs – which requires, inter alia, definitive Registry Cost Assumptions, it is difficult to say more about the commercial funding options (that are not centered on repayment obligations of a credit-worthy entity). This fact itself has procedural implications.

Part III Cost Recovery Mechanism: Amortization of Registry Costs

However the Registry Costs are funded, a Cost Recover Mechanism will be required to recover or "amortize" such costs. It must also adjust the fee schedule based on inaccuracies in the Registry Use Assumptions, and, to the extent agreed at the diplomatic conference, the Registry Cost Assumptions.

To simplify and streamline the following discussion, we will express the Cost Recovery Mechanism formulaically, as follows:

(F)RCs % [(F)U/T1s+(F)U/T2s +(F)U/T3s] = Fs

where –

(F)RCs = Forecasted Registry Costs – that is, Forecasted Initial Funding Costs + Forecasted Operating Costs (over an agreed period);

(F)U/T1s = Forecasted Use Transactions related to filings;
(F)U/T2s = Forecasted Use Transactions related to searches;
(F)U/T3s = Forecasted Use Transactions related to the issuance of certificates;

Fs = Transactional Fees payable to the IR –

((This formula is oversimplified in that it will be necessary to have differentiated fees for (a) filings, searches, and the issuance of certificates, and (b) each of the foregoing in respect of aircraft engines, airframes and helicopters.))

The following items arise in connection with the Cost Recovery Mechanism.

A Period of time for cost recovery/fee schedule

The Registry Use Assumptions have a temporal element. Over what period of time should the Registry Costs be amortized.[14] In other words, what is the forecast (F) period (**Forecast Period**).

There are two points that favor a relatively long Forecast Period.[15] First, a long Forecast Period will avoid/minimize the risk of financially penalizing early ratifiers of the Convention/Aircraft Protocol by placing disproportionate fee responsibilities on aviation industry participants located

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[14] It is possible, though not strictly speaking necessary, to link this question to the parallel matter of the period of time over which the Operating Funding Costs will be forecasted - for purposes of their amortization.

[15] This assertion suggests that the 5 year appointment period for the Registrar in Aircraft Protocol Art. XVI(2) may be too short. The diplomatic conference should consider this point.

in those States. Secondly, and as a corollary, the longer the Forecast Period, the lower the actual fees chargeable per transaction. Both of these points may have ratification implications.

B Mechanism for adjustment of initial fee schedule

Whatever the Forecast Period, the Cost Recovery Mechanism must contemplate adjustment and re-amortization based on the inevitable lack of correspondence between the initial Registry Use Assumptions and the actual use of the IR. Subject to policy decisions at the diplomatic conference, the same may be necessary for inaccuracies associated with the Registry Cost Assumptions.

The basic questions in this regard relate to:

(a) the criteria for adjustment;

(b) the length of the revised Forecast Period (raising similar issues to those noted above, if less acutely); and

(c) whether any classification or other substantive changes may be made (e.g., adjusting allocations between types of use transactions or categories of aircraft equipment).

On the procedural side, questions relating to the respective roles and responsibilities of the Registrar, Supervisory Authority, Contracting States (and, depending on the agreed funding arrangements, the Host State) also need to be addressed. By way of example, what is the appropriate timing of, and documentation for, use, cost and revenue reports by the Registrar, and the cost figures of the Supervisory Authority.

It seems appropriate to have any party providing the initial funding involved in adjustments to the repayment schedule and/or mechanism.

C Applicable/imputed interest rate

An element of the forecasted Registry Costs – F(RC) – is the interest rate, or imputed interest rate, applicable to the funding.

Depending upon the incentives and profile of the funding entity, that rate could range from 0% (subsidized funding) to the funder's borrowing rate (concessionary funding) to the funder's borrowing rate plus a risk premium (commercial funding). Such incentives and profile might be considered in evaluating the funding options - should the magnitude of the amounts so justify.

As noted above, the risk of non-repayment may be mitigated by several factors or a combination of factors, including (a) a full or partial guarantee by a creditworthy entity, and/or (b) security for the loan. It also may be the case that the funding entity is prepared, on commercial or policy grounds, to extend the repayment term of the loan pursuant to a pre-agreed formula. That would also lessen the risk of non-repayment, but might put more pressure on the interest rate and adjustments thereto.

Part IV Hypothetical Estimates of Cost Recovery and Transaction Fees

In Part III, a formula was provided to assist in calculating end-user transactions (Fs), a matter of interest to the Diplomatic Conference and States that will consider ratifying the Convention/Aircraft Protocol.

To iterate, that formula is –

(F)RCs % [(F)U/T1s+(F)U/T2s +(F)U/T3s] = Fs

where –

(F)RCs = Forecasted Registry Costs – that is, Forecasted Initial Funding Costs + Forecasted Operating Costs (over an agreed period);

(F)U/T1s = Forecasted Use Transactions related to filings;
(F)U/T2s = Forecasted Use Transactions related to searches;
(F)U/T3s = Forecasted Use Transactions related to the issuance of certificates;

Fs = Transactional Fees payable to the IR

While appreciating the desire to address this matter with precision, we start by noting that (a) very limited information has been provided to us regarding the Registry Cost Assumptions, particularly the Initial Funding Costs and the Operating Funding Costs, and (b) Registry Use Assumptions are unknown, and, in some cases, unknowable.

Nonetheless, and with a view towards providing a general frame of reference, we now will fill in that formula with tentative and wholly hypothetical figures, which should not be seen as reflecting actual amounts or expectations.

We have only received Registry Cost information from one party that has expressed an interest in developing the IR. That entity has estimat**ed Initial Funding Costs** at approximately **US $ 650,000** and yearly **Operating Funding Costs** at approximately **US $ 200,000.**

Scenario One

If one randomly assumes (i) that the Host State would provide the funding yet expect repayment over a period of 10 years (in our terminology, a 10 year Forecast Period), without charging interest on this US $ 2,650,000, 10 year outlay, (ii) 5,000 yearly registrations, 5,000 yearly searches, and 5,000 yearly certificates (i.e., 150,000 IR transactions over that 10 year period), and (iii) all fees are the same (which will likely not be the case, see below) the results (in US Dollars) are as follows:

US$ 2,650,000 % US$ 150,000 = US$ 17

Scenario Two

If one more conservatively assumes double the expenses and half the IR transactions, the transaction fees are US $ 70, calculated as follows:

US$ 5,300,000 % US$ 75,000 = US$ 70

If we now more realistically contemplate that fees will differentiate amount registrations, searches and certificates, **scenario one** fees might realistically **range from 5 to 50 US Dollars** and **scenario two** fees from **35 to 115 US Dollars**.

These figures are given to help establish a range, yet, as noted, are based on Assumptions which are speculative.

END

<u>Annex</u>

to Finland/AWG prepared discussion-paper on Funding/Cost Recovery Methods for the new International Registry

A-1 Glossary of Key Terms

Cost Recovery Mechanism - mechanism for recovery of Registry Costs through user fees, as adjusted from time-to-time.
Forecast Period - length of time over which Registry Costs will be recovered though user fees.
Initial Funding Costs - costs to create the IR.
Operating Funding Costs - expenses relating to the ongoing operational and supervision of the IR.
Registry Costs - Initial Funding Costs plus Operational Funding Costs.
Registry Cost Assumptions - assumptions relating to Registry Costs used in setting, and, as appropriate, adjusting fee schedules.
Registry Use Assumptions - assumptions relating to the use of the International Registry in setting, and, as appropriate, adjusting fee schedules.

A-2 Key Questions for the Diplomatic Conference/Supervisory Authority

i) What are the Registry Cost Assumptions.
ii) What are the Registry Use Assumptions.
iii) What is the Forecast Period.
iv) What are the criteria and procedures for adjusting the fee schedules, once set.

v) Which of the identified funding options or combination thereof is appropriate: Host State funding; Registrar funding; Supervisory Authority funding; Ratifying State funding; or Commercial funding.

vi) What is the interest rate for any funding.