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INSTITUT INTERNATIONAL POUR L'UNIFICATION DU DROIT PRIVE

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**UNIDROIT COMMITTEE OF GOVERNMENTAL EXPERTS FOR  
THE PREPARATION OF A DRAFT PROTOCOL TO THE  
CONVENTION ON INTERNATIONAL INTERESTS IN  
MOBILE EQUIPMENT ON MATTERS SPECIFIC TO SPACE  
ASSETS  
Second session  
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*CONVENTION ON INTERNATIONAL  
INTERESTS IN MOBILE EQUIPMENT*

(opened to signature in Cape Town on 16 November 2001):

*PRELIMINARY DRAFT PROTOCOL  
ON MATTERS SPECIFIC TO SPACE ASSETS*

(as revised by the UNIDROIT Committee of governmental experts for the preparation of a draft Protocol to the Convention on International Interests in Mobile Equipment on Matters specific to Space Assets during its first session, held in Rome from 15 to 19 December 2003)

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*CONVENTION ON INTERNATIONAL  
INTERESTS IN MOBILE EQUIPMENT:*

*PRELIMINARY DRAFT PROTOCOL  
ON MATTERS SPECIFIC TO SPACE ASSETS<sup>1 2</sup>*

THE STATES PARTIES TO THIS PROTOCOL,

CONSIDERING it desirable to implement the Convention on International Interests in Mobile Equipment (hereinafter referred to as the *Convention*)<sup>3</sup> as it relates to space assets, in the light of the purposes set out in the preamble to the Convention,

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<sup>1</sup> The text of the preliminary draft Protocol to the Convention on Matters specific to Space Assets (hereinafter referred to as the *preliminary draft Protocol*) considered by the Committee of governmental experts at its first session, held in Rome from 15 to 19 December 2003, was that established by a working group (the Space Working Group) organised, at the invitation of the President of UNIDROIT, by Peter D. Nesgos, Esq., with the assistance of Dara A. Panahy, Esq., and revised, pursuant to a decision taken by the UNIDROIT Governing Council at its 80<sup>th</sup> session, held in Rome from 17 to 19 September 2001, by a Steering and Revisions Committee - which was convened by UNIDROIT and the membership of which was essentially made up of members of the UNIDROIT Governing Council - meeting in Rome on 1 February 2002 (cf. Study LXXIIJ - Doc. 10 rev.). The text of the preliminary draft Protocol reproduced in this document is that revised by the Committee of governmental experts at its first session (cf. C.G.E. Space Pr./1/Report/Appendix VI).

<sup>2</sup> The preliminary draft Protocol follows very closely the Protocol to the Convention on Matters specific to Aircraft Equipment, opened to signature in Cape Town on 16 November 2001 (hereinafter referred to as the *Aircraft Protocol*).

<sup>3</sup> The Convention and the Aircraft Protocol were opened to signature in Cape Town on 16 November 2001 at the conclusion of a diplomatic Conference organised, under the joint auspices of UNIDROIT and the International Civil Aviation Organization, by the Government of South Africa. This Conference was attended by 68 States and 11 international Organisations. Both the Convention and the Aircraft Protocol have been signed to date by 26 States (Burundi, Chile, China, Congo, Cuba, Ethiopia, France, Germany (with declaration), Ghana, Italy, Jamaica, Jordan, Kenya, Lesotho, Nigeria, Panama, Saudi Arabia, Senegal, South Africa, Sudan, Switzerland (*ad referendum*), Tonga, Turkey, United Kingdom (with declaration), United Republic of Tanzania and United States of America). The Convention and the Aircraft Protocol have to date been ratified by three States (Ethiopia (with declarations under Articles 39(1)(a), 40 and 54(2) of the Convention and Articles XXX(1), (2) and (3) of the Aircraft Protocol), Nigeria (with declaration under Article 54(2) of the Convention) and Panama (with declarations under Articles 13(1), 39, 50, 53 and 54(2) of the Convention and Articles XXX(1), (2) and (3) of the Aircraft Protocol)). The Convention and the Aircraft Protocol have to date been acceded to by one State (Pakistan (with declarations under Articles 39(1)(a), 39(1)(b), 39(4), 40, 52, 53 and 54(2) of the Convention and Articles XXIX and XXX(1), (2) and (3) of the Aircraft Protocol)). The Convention will therefore enter into force as between Ethiopia, Nigeria and Panama on 1 April 2004 *but only as regards a category of objects to which a Protocol applies* and as from the time of entry into force of that Protocol, subject to the terms of that Protocol and as between States Parties to the Convention and that Protocol (cf. Article 49(1) of the Convention) and for Pakistan on 1 May 2004, subject to the same additional requirements (cf. Article 49(2) of the Convention). An Official Commentary on the Convention and Aircraft Protocol has been prepared by Professor Sir Roy Goode, Chairman of the Drafting Committee at the diplomatic Conference, pursuant to Resolution No. 5 adopted by the latter, and is available from UNIDROIT, the publisher. An explanatory memorandum on the system of declarations under the Convention and the Aircraft Protocol (DC9/DEP Doc. 1) has been prepared by UNIDROIT, as depositary, and is also available from UNIDROIT.

MINDFUL of the need to adapt the Convention to meet the particular demand for and the utility of space assets and the need to finance their acquisition and use as efficiently as possible,

MINDFUL of the benefits to all States from expanded space-based services which the Convention and this Protocol will yield,

MINDFUL of the established principles of space law, including those contained in the international space treaties under the auspices of the United Nations,<sup>4 5</sup>

MINDFUL of the continuing development of the international commercial space industry and recognising the need for a uniform and predictable regimen governing the taking of security over space assets and facilitating asset-based financing of the same,

HAVE AGREED upon the following provisions relating to space assets:

## CHAPTER I – SPHERE OF APPLICATION AND GENERAL PROVISIONS

### *Article I – Defined terms*

1. – In this Protocol, except where the context otherwise requires, terms used in it have the meanings set out in the Convention.

2. – In this Protocol the following terms are employed with the meanings set out below:

(a) “debtor’s rights”<sup>6</sup> means all rights to performance or payment due to a debtor by any person with respect to a space asset;<sup>7</sup>

(b) “guarantee contract” means a contract entered into by a person as a guarantor;

(c) “guarantor” means a person who, for the purpose of assuring performance of any obligations in favour of a creditor secured by a security agreement or under an agreement,

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<sup>4</sup> Cf. the corresponding clause of the preamble to the Aircraft Protocol (“Mindful of the principles and objectives of the Convention on International Civil Aviation, signed at Chicago on 7 December 1944”).

<sup>5</sup> The preliminary draft Protocol is not intended to affect the obligations of States under the United Nations Outer Space Treaties and Principles; cf. Article XXI *bis*, *infra*.

<sup>6</sup> The definition of “associated rights” remains as it is in the Convention. At the first session of the Committee of governmental experts the Space Working Group made a proposal introducing the new terms “debtor’s rights” and “related rights” but it is suggested that further work is needed to determine how the Convention and the preliminary draft Protocol will apply to these two new terms.

<sup>7</sup> Cf. the proposed new definition of debtor’s rights put before the Committee of governmental experts at its first session by the Space Working Group in UNIDROIT C.G.E./Space Pr./1/W.P. 13. This definition, together with the other proposals contained in that document, will be considered by the Committee of governmental experts at its next session.

gives or issues a suretyship or demand guarantee or standby letter of credit or other form of credit insurance;<sup>8</sup>

(d) “insolvency-related event” means: (i) the commencement of the insolvency proceedings; or (ii) the declared intention to suspend or actual suspension of payments by the debtor where the creditor’s right to institute insolvency proceedings against the debtor or to exercise remedies under the Convention is prevented or suspended by law or State action;

(e) “primary insolvency jurisdiction” means the Contracting State in which the centre of the debtor’s main interests is situated, which for this purpose shall be deemed to be the place of the debtor’s statutory seat, or, if there is none, the place where the debtor is incorporated or formed, unless proved otherwise;

(f) “related rights” means any permit, licence, authorisation, concession or equivalent instrument that is granted or issued by, or pursuant to the authority of, a national or intergovernmental or other international body or authority to manufacture, launch, control, use or operate a space asset, relating to the use of orbits positions and the transmission, emission or reception of electromagnetic signals to and from a space asset;<sup>9 10</sup>

(g) “space assets” means<sup>11</sup>:

(i) any identifiable<sup>12</sup> asset that is intended to be launched and placed in space or that is in space;

(ii) any identifiable<sup>12</sup> asset assembled or manufactured in space;

(iii) any identifiable<sup>12</sup> launch vehicle that is expendable or can be reused to transport persons or goods to and from space; and

(iv) any separately identifiable<sup>12</sup> component forming a part of an asset referred to in the preceding sub-paragraphs or attached to or contained within such asset.

As used in this definition, the term “space” means outer space, including the Moon and other celestial bodies.

## *Article II – Application of the Convention as regards space assets and related rights*

1. – The Convention shall apply in relation to space assets as provided by the terms of this Protocol.

2. – The Convention and this Protocol do not determine whether related rights are transferable or assignable, without prejudice however to the application of Article XVI(2).

<sup>8</sup> Further consideration is required of the inclusion in the definition of demand guarantees, standby letters of credit and credit insurance so as better to understand the consequences thereof.

<sup>9</sup> This definition is limited to regulatory licences and permits necessary for the operation of space assets. The words deleted at the end of this sub-paragraph were replaced by a new substantive provision (new Article II(2)).

<sup>10</sup> Cf. the proposed new definition of related rights put before the Committee of governmental experts at its first session by the Space Working Group in UNIDROIT C.G.E./Space Pr./1/W.P. 13. This definition, together with the other proposals contained in that document, will be considered by the Committee of governmental experts at its next session.

<sup>11</sup> It was agreed that assets in manufacture, transport or pre-launch stages may qualify as space assets.

<sup>12</sup> The term “identifiable” is intended to be read in the context of Article VII.

3. – The Convention and this Protocol shall be known as the Convention on International Interests in Mobile Equipment as applied to space assets.

*Article III – Application of the Convention to sales*

The following provisions of the Convention apply as if references to an agreement creating or providing for an international interest were references to a contract of sale and as if references to an international interest, a prospective international interest, the debtor and the creditor were references to a sale, a prospective sale, the seller and the buyer respectively:

Articles 3 and 4;  
Article 16(1)(a);  
Article 19(4);  
Article 20(1) (as regards registration of a contract of sale or a prospective sale);  
Article 25(2) (as regards a prospective sale); and  
Article 30.

In addition, the general provisions of Article 1, Article 5, Chapters IV to VII, Article 29 (other than Article 29(3) which is replaced by Article XIII), Chapter X, Chapter XII (other than Article 43), Chapter XIII and Chapter XIV (other than Article 60) shall apply to contracts of sale and prospective sales.<sup>13</sup>

*Article III bis – Sphere of application*

The return<sup>14</sup> of a space asset from space does not affect an international interest in that asset.

*Article IV – Derogation*

The parties may, by agreement in writing, exclude the application of Article XI and, in their relations with each other, derogate from or vary the effect of any of the provisions of this Protocol except Article IX(2)-(3).

*Article V – Formalities, effects and registration of contracts of sale*

1. – For the purposes of this Protocol, a contract of sale is one which:

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<sup>13</sup> Cf. the proposed new Article IV dealing with the application of the Convention and the preliminary draft Protocol to debtor's rights and related rights put before the Committee of governmental experts at its first session by the Space Working Group in UNIDROIT C.G.E./Space Pr./1/W.P. 13. This proposal, together with the other proposals contained in that document, will be considered by the Committee of governmental experts at its next session.

<sup>14</sup> The Drafting Committee of the Committee of governmental experts (hereinafter referred to as the *Drafting Committee*) considered that the word "return" covered both intentional and non-intentional return. The Drafting Committee suggested that this interpretation should be reflected in the Commentary on the future Protocol.

- (a) is in writing;
- (b) relates to a space asset of which the seller has power to dispose; and
- (c) enables the space asset to be identified in conformity with this Protocol.

2. – A contract of sale transfers the interest of the seller in the space asset to the buyer according to its terms.

3. – Registration of a contract of sale remains effective indefinitely. Registration of a prospective sale remains effective unless discharged or until expiry of the period, if any, specified in the registration.

#### *Article VI – Representative capacities*

A person may, in relation to a space asset, enter into an agreement or a contract of sale, effect a registration as defined by Article 16(3) of the Convention and assert rights and interests under the Convention in an agency, trust or representative capacity.<sup>15</sup>

#### *Article VII – Identification of space assets*

A description of a space asset that satisfies the requirements established in the regulations is necessary and sufficient to identify<sup>16</sup> the space asset for the purposes of Article 7(c) of the Convention and Article V(1)(c) of this Protocol.

#### *Article VIII – Choice of law*

1. – This Article applies unless a Contracting State has made a declaration pursuant to Article XXVI(1).

2. – The parties to an agreement, or a contract of sale, or a related guarantee contract or subordination agreement may agree on the law which is to govern their contractual rights and obligations, wholly or in part.

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<sup>15</sup> This provision was brought into line by the Committee of governmental experts at its first session with the comparable provision (Article IV) of the preliminary draft Protocol to the Convention on Matters specific to Railway Rolling Stock, with the exception of the last words (“on behalf of a creditor or creditors”), because it was felt that this limitation was not appropriate for the preliminary draft Protocol.

<sup>16</sup> “Identifiability is a crucial requirement because the registration system is asset-based”; cf. Sir Roy Goode, *Official Commentary on the Convention on International Interests in Mobile Equipment and Protocol thereto on Matters specific to Aircraft Equipment*, at 12. The concept of identifiability is to be understood in the context of the “notice filing” registration system envisaged under the Convention, that is a system based on “the filing of particulars which give notice to third parties of the existence of a registration, leaving them to make enquiries of the registrant for further information, as opposed to a system which requires presentation and/or filing of agreements or other contract documents or copies” (cf. *idem* at 88).



3. – Unless otherwise agreed, the reference in the preceding paragraph to the law chosen by the parties is to the domestic rules of law of the designated State or, where that State comprises several territorial units, to the domestic law of the designated territorial unit.

## CHAPTER II – DEFAULT REMEDIES, PRIORITIES AND ASSIGNMENTS

### *Article IX – Modification of default remedies provisions*

1. – This Article applies only where a Contracting State has made a declaration to that effect under Article XXVI(2) [and to the extent stated in such declaration].<sup>17</sup>

2. – (a) Article 8(3) of the Convention shall not apply to space assets.

(b) In relation to space assets the following provisions shall apply:

(i) any remedy given by the Convention shall be exercised in a commercially reasonable manner;

(ii) a remedy shall be deemed to be exercised in a commercially reasonable manner where it is exercised in conformity with a provision of the agreement between the debtor and the creditor except where such a provision is manifestly unreasonable.

3. – A chargee giving ten or more working days' prior written notice of a proposed sale or lease to interested persons shall be deemed to satisfy the requirement of providing "reasonable prior notice" specified in Article 8(4) of the Convention. The foregoing shall not prevent a chargee and a chargor or a guarantor from agreeing to a longer period of prior notice.

[4. When two space assets, one of which is a separately identifiable component of the other within the meaning of Article I(2)(f), are subject to two separate registered interests, both registered interests shall be valid and have priority as determined under Article 29 of the Convention unless otherwise agreed between the holders of such registered interests.]<sup>18</sup>

### *Article IX bis – Placement of data and materials*

The parties to an agreement may specifically agree for the placement of data and materials with another person in order to afford the creditor the opportunity to take possession of, establish control over or operate the space asset.

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<sup>17</sup> A decision regarding the inclusion or otherwise of the bracketed language will hinge on the treatment or consideration of the bracketed language in Article XXVI(2).

<sup>18</sup> This paragraph needs further consideration by the Committee of governmental experts as to whether the protection provided is sufficient or needs extending, especially in order to protect a user of components who is neither in default nor insolvent.

*Article X – Modification of provisions regarding relief pending final determination*

1. – This Article applies only where a Contracting State has made a declaration to that effect under Article XXVI(3) and to the extent stated in such declaration.

2. – For the purposes of Article 13(1) of the Convention, “speedy” in the context of obtaining relief means within such number of working days from the date of filing of the application for relief as is specified in a declaration made by the Contracting State in which the application is made.

3. – Article 13(1) of the Convention applies with the following being added immediately after sub-paragraph (d):

“(e) if at any time the debtor and the creditor specifically agree, sale and application of proceeds therefrom”,

and Article 43(2) applies with the insertion after the words “Article 13(1)(d)” of the words “and (e)”.

4. – Ownership or any other interest of the debtor passing on a sale under the preceding paragraph is free from any other interest over which the creditor’s international interest has priority under the provisions of Article 29 of the Convention.

[5. – The creditor and the debtor or any other interested person may agree in writing to exclude the application of Article 13(2) of the Convention.]<sup>19</sup>

*Article XI – Remedies on insolvency*

1. – This Article applies only where a Contracting State that is the primary insolvency jurisdiction has made a declaration pursuant to Article XXVI(4).

*Alternative A*

2. – Upon the occurrence of an insolvency-related event, the insolvency administrator or the debtor, as applicable, shall, subject to paragraph 7, give possession of or control and operation over the space asset to the creditor no later than the earlier of:

(a) the end of the waiting period; and

(b) the date on which the creditor would be entitled to possession of or control and operation over the space asset if this Article did not apply.

3. – For the purposes of this Article, the “waiting period” shall be the period specified in a declaration of the Contracting State which is the primary insolvency jurisdiction.

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<sup>19</sup> The former Article X(6) was deleted by the Committee of governmental experts at its first session. It was at the same time suggested that further consideration be given to the role of administrative authorities.

4. – References in this Article to the “insolvency administrator” shall be to that person in its official, not in its personal, capacity.

5. – Unless and until the creditor is given possession of or control and operation over the space asset under paragraph 2:

(a) the insolvency administrator or the debtor, as applicable, shall preserve the space asset and maintain it and its value in accordance with the agreement; and

(b) the creditor shall be entitled to apply for any other forms of interim relief available under the applicable law.

6. – Sub-paragraph (a) of the preceding paragraph shall not preclude the use of the space asset under arrangements designed to preserve the space asset and maintain it and its value.

7. – The insolvency administrator or the debtor, as applicable, may retain possession of or control and operation over the space asset where, by the time specified in paragraph 2, it has cured all defaults other than a default constituted by the opening of insolvency proceedings and has agreed to perform all future obligations under the agreement. A second waiting period shall not apply in respect of a default in the performance of such future obligations.<sup>20</sup>

8. – No exercise of remedies permitted by the Convention or this Protocol may be prevented or delayed after the date specified in paragraph 2.

9. – No obligations of the debtor under the agreement may be modified without the consent of the creditor.

10. – Nothing in the preceding paragraph shall be construed to affect the authority, if any, of the insolvency administrator under the applicable law to terminate the agreement.

11. – No rights or interests, except for non-consensual rights or interests of a category covered by a declaration pursuant to Article 39(1) of the Convention, shall have priority in insolvency proceedings over registered interests.

12. – The Convention as modified by Article IX of this Protocol shall apply to the exercise of any remedies under this Article.

#### *Alternative B*

2. – Upon the occurrence of an insolvency-related event, the insolvency administrator or the debtor, as applicable, upon the request of the creditor, shall give notice to the creditor within the time specified in a declaration of a Contracting State pursuant to Article XXVI(4) whether it will:

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<sup>20</sup> The former Article XI(8), Alternative A was deleted by the Committee of governmental experts at its first session. It was at the same time suggested that further consideration be given to the role of administrative authorities.

(a) cure all defaults other than a default constituted by the opening of insolvency proceedings and agree to perform all future obligations, under the agreement and related transaction documents; or

(b) give the creditor the opportunity to take possession of or control and operation over the space asset, in accordance with the applicable law.

3. – The applicable law referred to in sub-paragraph (b) of the preceding paragraph may permit the court to require the taking of any additional step or the provision of any additional guarantee.

4. – The creditor shall provide evidence of its claims and proof that its international interest has been registered.

5. – If the insolvency administrator or the debtor, as applicable, does not give notice in conformity with paragraph 2, or when it has declared that it will give the creditor the opportunity to take possession of or control and operation over the space asset but fails to do so, the court may permit the creditor to take possession of or control and operation over the space asset upon such terms as the court may order and may require the taking of any additional step or the provision of any additional guarantee.

6. – The space asset shall not be sold pending a decision by a court regarding the claim and the international interest.

#### *Article XII – Insolvency assistance*

1. – This Article applies only where a Contracting State has made a declaration pursuant to Article XXVI(1).

2. – The courts of a Contracting State: (i) in which the space asset is situated; (ii) from which the space asset may be controlled; (iii) in which the debtor is located; or (iv) otherwise having a close connection with the space asset, shall [, in accordance with the law of the Contracting State,]<sup>21</sup> co-operate to the maximum extent possible with foreign courts and foreign insolvency administrators in carrying out the provisions of Article XI.<sup>22</sup>

#### *Article XIII – Modification of priority provisions*

1. – A buyer of a space asset under a registered sale acquires its interest in that asset free from an interest subsequently registered and from an unregistered interest, even if the buyer has actual knowledge of the unregistered interest.

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<sup>21</sup> One delegation did not agree with the addition of the words in square brackets.

<sup>22</sup> Participants at the third session of the Space Working Group noted the particular importance of heightened cross-border co-operation by Contracting States with regard to the space asset insolvency remedies contemplated in Article XI of the preliminary draft Protocol and recognised that similar obligations existed under the UNCITRAL Model Law on Cross-Border Insolvency.

2. – A buyer of a space asset acquires its interest in that asset subject to an interest registered at the time of its acquisition.

*Article XIV – Modification of assignment provisions*

Article 33(1) of the Convention applies with the following being added immediately after sub-paragraph (b):

“and (c) the debtor has consented in writing, whether or not the consent is given in advance of the assignment or identifies the assignee.”

*Article XV – Debtor provisions*

1. – In the absence of a default within the meaning of Article 11 of the Convention, the debtor shall be entitled to the quiet possession and use of the space asset in accordance with the agreement as against:

(a) its creditor and the holder of any interest from which the debtor takes free pursuant to Article 29(4)(b) of the Convention or, in the capacity of buyer, Article XIII(1) of this Protocol, unless and to the extent that the debtor has otherwise agreed; and

(b) the holder of any interest to which the debtor’s right or interest is subject pursuant to Article 29(4)(a) of the Convention or, in the capacity of buyer, Article XIII(2) of this Protocol, but only to the extent, if any, that such holder has agreed.

2. – Nothing in the Convention or this Protocol affects the liability of a creditor for any breach of the agreement under the applicable law in so far as that agreement relates to space assets.

*Article XVI – Limitations on remedies*

1. – This Article applies only where a Contracting State has made a declaration pursuant to Article XXVI(1).

2. – A Contracting State [, in accordance with its laws and regulations,]<sup>23</sup> may restrict or attach conditions to the exercise of the remedies provided in Chapter III of the Convention and Chapter II of this Protocol, including the placement of data and materials pursuant to Article IX *bis*, where the exercise of such remedies would involve or require the transfer of controlled goods, technology, data or services, or would involve the transfer or assignment of related rights.

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<sup>23</sup> If the phrase “in accordance with its laws and regulations” were deleted from Article XVI(2), further consideration would need to be given to the rights of Contracting States to place restrictions or limitations on the placement of data and materials with another person as contemplated in Article IX *bis*, given that such restrictions or limitations would no longer be applied in accordance with the relevant domestic laws of a Contracting State.

[3. – A Contracting State may, at the time of ratification, acceptance, approval of, or accession to this Protocol, declare whether and to which extent the remedies provided in Chapter III of the Convention and in Articles IX to XII of this Protocol shall be exercisable for space assets as far as they are used for establishing or maintaining its public services as specified in its declaration or determined by a competent authority of that State notified to the Depository.]<sup>24</sup>

[3. – A Contracting State may, at the time of ratification, acceptance, approval of, or accession to this Protocol, declare any limitations to the exercise of remedies provided in Chapter III of the Convention and in Articles IX to XII of this Protocol with respect to space assets designed and used for flight control and navigation of aircraft, maritime navigation, search and rescue and similar public services as specified in its declaration or determined by a competent authority of that State notified to the Depository.]<sup>24</sup>

### CHAPTER III – REGISTRY PROVISIONS RELATING TO INTERNATIONAL INTERESTS IN SPACE ASSETS

#### *Article XVII – The Supervisory Authority*

1. – The Supervisory Authority shall be designated<sup>25</sup> at the Diplomatic Conference to Adopt a Space Assets Protocol to the Cape Town Convention, provided that such Supervisory Authority is able and willing to act in such capacity.<sup>26 27</sup>

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<sup>24</sup> It was agreed by the Committee of governmental experts at its first session that both texts of Article XVI(3) should be inserted for further consideration at its next session.

Some delegations attending the first session of the Committee of governmental experts expressed the view that Article XVI(3) should narrowly define the circumstances of a public service nature in which Contracting States should be able to limit the exercise of remedies so as to promote the objectives of the preliminary draft Protocol, whereas other delegations took the view that Article XVI(3) should broadly define such circumstances. The Space Working Group indicated that it strongly disagreed with the idea of any provision being included on public service.

It should be considered at a later stage whether Article XVI(3) is subject to the opt-in declaration provided under Article XVI(1).

<sup>25</sup> It was agreed to refer the proposal put forward at a late stage during the first session of the Committee of governmental experts for the addition of the words “or alternatively a process agreed to for a future designation” after the word “designated” for consideration by the Drafting Committee at the next session of the Committee of governmental experts.

<sup>26</sup> The United Nations has been approached as one possible Supervisory Authority. The possibility of the United Nations serving as Supervisory Authority was considered by the Legal Subcommittee of the United Nations Committee on the Peaceful Uses of Outer Space at its 42<sup>nd</sup> session, held in Vienna from 24 March to 4 April 2003. Other intergovernmental Organisations have also expressed an interest in serving as Supervisory Authority. The possibility of these Organisations serving as Supervisory Authority and other possible options are under consideration.

<sup>27</sup> It was agreed to refer the proposal for the introduction of a new Article XVII(1*bis*) - designed to match the corresponding provision (Article XVII(2)) of the Aircraft Protocol - put forward at a late stage during the first session of the Committee of governmental experts for consideration by the Drafting Committee at the next session of the Committee of governmental experts. Article XVII(2) of the Aircraft Protocol reads as follows: “Where the international entity referred to in the preceding paragraph is not able and willing to act as Supervisory Authority, a Conference of Signatory and Contracting States shall be convened to designate another Supervisory Authority.”

2. – The Supervisory Authority and its officers and employees shall enjoy such immunity from legal and administrative process as is provided under the rules applicable to them as an international entity <sup>28</sup> or otherwise.

3. – The Supervisory Authority may establish a commission of experts, from among persons nominated by Signatory and Contracting States and having the necessary qualifications and experience, and entrust it with the task of assisting the Supervisory Authority in the discharge of its functions.

#### *Article XVIII – First regulations*

The first regulations shall be made by the Supervisory Authority so as to take effect on the entry into force of this Protocol.

#### *Article XIX – Additional modifications to Registry provisions*

1. – For the purposes of Article 19(6) of the Convention, the search criteria for space assets shall be the criteria specified in Article VII of this Protocol.

2. – For the purposes of Article 25(2) of the Convention, and in the circumstances there described, the holder of a registered prospective international interest or a registered prospective assignment of an international interest shall take such steps as are within its power to procure the discharge of the registration no later than five working days after the receipt of the demand described in such paragraph.

3. – The fees referred to in Article 17(2)(h) of the Convention shall be determined so as to recover the reasonable costs of establishing, operating and regulating the International Registry and the reasonable costs of the Supervisory Authority associated with the performance of the functions, exercise of the powers and discharge of the duties contemplated by Article 17(2) of the Convention.

4. – The centralised functions of the International Registry shall be operated and administered by the Registrar on a twenty-four hour basis.

5. – The insurance or financial guarantee referred to in Article 28(4) shall cover all liability of the Registrar under the Convention.

6. – Nothing in the Convention shall preclude the Registrar from procuring insurance or a financial guarantee covering events for which the Registrar is not liable under Article 28 of the Convention.

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<sup>28</sup> It was agreed to refer the proposal for the addition of the words "Organisation or" before the word "entity" in Article XVII(2) - so as better to reflect the purport of footnote 25 - put forward at a late stage during the first session of the Committee of governmental experts for consideration by the Drafting Committee at the next session of the Committee of governmental experts.

## CHAPTER IV – JURISDICTION

*Article XX – Waiver of sovereign immunity*

1. – Subject to paragraph 2, a waiver of sovereign immunity<sup>29</sup> from jurisdiction of the courts specified in Article 42 or Article 43 of the Convention or relating to enforcement of rights and interests relating to a space asset under the Convention shall be binding and, if the other conditions to such jurisdiction or enforcement have been satisfied, shall be effective to confer jurisdiction and permit enforcement, as the case may be.

2. – A waiver under the preceding paragraph must be in writing and contain a description, in accordance with Article VII, of the space asset.

## CHAPTER V – RELATIONSHIP WITH OTHER CONVENTIONS

*Article XXI – Relationship with the UNIDROIT Convention on International Financial Leasing*

The Convention as applied to space assets shall supersede the *UNIDROIT Convention on International Financial Leasing* in respect of the subject matter of this Protocol, as between States Parties to both Conventions.

*[Article XXI bis – Relationship with the United Nations Outer Space Treaties and instruments of the International Telecommunication Union<sup>30</sup>*

The Convention as applied to space assets does not affect State Party rights and obligations under the existing United Nations Outer Space Treaties or instruments of the International Telecommunication Union.]<sup>31</sup>

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<sup>29</sup> At a late stage during the first session of the Committee of governmental experts one delegation proposed that the words “by a party to an agreement or contract of sale” be added after the word “immunity” in Article XX(1), so as to make it clear that the waiver in question was one made by a State or governmental agency as a party to a given transaction. Another delegation however objected to this proposal, on the ground that it was too narrow to reflect the fact that in some countries a waiver could be more general and with a view to avoiding the possibility of a waiver being permitted by implication. It was agreed that the question should be referred to the Drafting Committee at the next session of the Committee of governmental experts for the finding of a formulation satisfactory to both points of view.

<sup>30</sup> Experts at the third session of the Space Working Group noted that the concept of “jurisdiction and control” set forth in Article VIII of the 1967 United Nations Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies relating to control and ownership of space objects was quite different from the concept of “jurisdiction” employed by the Convention, which referred to the jurisdiction of national courts.

<sup>31</sup> It was agreed by the Committee of governmental experts that the precise formulation of Article XXI *bis*, and in particular the question as to whether the United Nations Outer Space Treaties should be specifically enumerated, was a matter that would need to be considered further at its next session.



[CHAPTER VI – FINAL PROVISIONS <sup>32</sup>*Article XXII – Signature, ratification, acceptance, approval or accession*

1. – This Protocol shall be open for signature in ... on ... by States participating in the Diplomatic Conference to Adopt a Space Assets Protocol to the Cape Town Convention held at ... from ... to ... . After ..., this Protocol shall be open to all States for signature at ... until it enters into force in accordance with Article XXIV.

2. – This Protocol shall be subject to ratification, acceptance or approval by States which have signed it.

3. – Any State which does not sign this Protocol may accede to it at any time.

4. – Ratification, acceptance, approval or accession is effected by the deposit of a formal instrument to that effect with the Depositary. <sup>33</sup>

5. – A State may not become a Party to this Protocol unless it is or becomes also a Party to the Convention.

*Article XXIII – Regional Economic Integration Organisations <sup>34</sup>*

1. – A Regional Economic Integration Organisation which is constituted by sovereign States and has competence over certain matters governed by this Protocol may similarly sign, accept, approve or accede to this Protocol. The Regional Economic Integration Organisation shall in that case have the rights and obligations of a Contracting State, to the extent that that Organisation has competence over matters governed by this Protocol. Where the number of Contracting States is relevant in this Protocol, the Regional Economic Integration Organisation shall not count as a Contracting State in addition to its Member States which are Contracting States.

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<sup>32</sup> It is envisaged that, in line with practice, draft Final Provisions will be prepared for the Diplomatic Conference at such time as the Committee of governmental experts has completed its work. The draft Final Provisions set out in Chapter VI are in no way intended to prejudge that process but simply to indicate the suggestions of the Space Working Group on this matter. They are based on the Final Provisions contained in the Aircraft Protocol.

<sup>33</sup> It is recommended that a resolution be adopted at, and contained in the Final Acts and Proceedings of, the Diplomatic Conference to Adopt a Space Assets Protocol to the Cape Town Convention, contemplating the use by Contracting States of a model ratification instrument that would standardise, *inter alia*, the format for the making and/or withdrawal of declarations and reservations.

<sup>34</sup> At its fifth session, the Space Working Group took note of the addition of this Article to the Aircraft Protocol at the Diplomatic Conference and noted that further consideration should be given to the applicability of the type and nature of Organisations to be covered by Article XXIII.

2. – The Regional Economic Integration Organisation shall, at the time of signature, acceptance, approval or accession, make a declaration to the Depositary specifying the matters governed by this Protocol in respect of which competence has been transferred to that Organisation by its Member States. The Regional Economic Integration Organisation shall promptly notify the Depositary of any changes to the distribution of competence, including new transfers of competence, specified in the declaration under this paragraph.

3. – Any reference to a “Contracting State” or “Contracting States” or “State Party” or “States Parties” in this Protocol applies equally to a Regional Economic Integration Organisation where the context so requires.

#### *Article XXIV – Entry into force*

1. – This Protocol enters into force on the first day of the month following the expiration of three months after the date of the deposit of the [fifth]<sup>35</sup> instrument of ratification, acceptance, approval or accession, between the States which have deposited such instruments.

2. – For other States, this Protocol enters into force on the first day of the month following the expiration of three months after the date of the deposit of their instrument of ratification, acceptance, approval or accession.

#### *Article XXV – Territorial units*

1. – If a Contracting State has territorial units in which different systems of law are applicable in relation to the matters dealt with in this Protocol, it may, at the time of ratification, acceptance, approval or accession, declare that this Protocol is to extend to all its territorial units or only to one or more of them and may modify its declaration by submitting another declaration at any time.

2. – Any such declaration shall state expressly the territorial units to which this Protocol applies.

3. – If a Contracting State has not made any declaration under paragraph 1, this Protocol shall apply to all territorial units of that State.

4. – Where a Contracting State extends this Protocol to one or more of its territorial units, declarations permitted under this Protocol may be made in respect of each such territorial unit, and the declarations made in respect of one territorial unit may be different from those made in respect of another territorial unit.

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<sup>35</sup> In line with UNIDROIT practice, the Space Working Group at its fifth session, taking the view that the entry into force of the Convention as applied to space assets should be accomplished with the minimum number of ratifications/accessions possible, suggested that the appropriate number would be five.

5.– If by virtue of a declaration under paragraph 1, this Protocol extends to one or more territorial units of a Contracting State:

(a) the debtor is considered to be situated in a Contracting State only if it is incorporated or formed under a law in force in a territorial unit to which the Convention and this Protocol apply or if it has its registered office or statutory seat, centre of administration, place of business or habitual residence in a territorial unit to which the Convention and this Protocol apply;

(b) any reference to the location of the space asset in a Contracting State refers to the location of the space asset in a territorial unit to which the Convention and this Protocol apply; and

(c) any reference to the administrative authorities in that Contracting State shall be construed as referring to the administrative authorities having jurisdiction in a territorial unit to which the Convention and this Protocol apply.<sup>36</sup>

#### *Article XXVI – Declarations relating to certain provisions*

1. – A Contracting State may, at the time of ratification, acceptance, approval of, or accession to this Protocol, declare:

(a) that it will not apply Article VIII;

(b) that it will apply any one or both of Articles XII and XVI.

2. – A Contracting State may, at the time of ratification, acceptance, approval of, or accession to this Protocol, declare that it will apply Article IX [wholly or in part].<sup>37</sup>

3. – A Contracting State may, at the time of ratification, acceptance, approval of, or accession to this Protocol, declare that it will apply Article X wholly or in part.<sup>38</sup> If it so declares with respect to Article X(2), it shall specify the time-period required thereby.

4. – A Contracting State may, at the time of ratification, acceptance, approval of, or accession to this Protocol, declare that it will apply the entirety of Alternative A, or the entirety of Alternative B of Article XI and, if so, shall specify the types of insolvency proceeding, if any, to which it will apply Alternative A and the types of insolvency proceeding, if any, to which it will apply Alternative B. A Contracting State making a declaration pursuant to this paragraph shall specify the time-period required by Article XI.

5. – The courts of Contracting States shall apply Article XI in conformity with the declaration made by the Contracting State that is the primary insolvency jurisdiction.

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<sup>36</sup> But see footnotes 19 and 20, *supra*.

<sup>37</sup> Due consideration should be given to the deletion of the bracketed words in paragraph 2 in order to promote the uniformity of application of declarations made by States.

<sup>38</sup> The deletion by the Drafting Committee of the square brackets that had previously surrounded the words “wholly or in part” is a consequence of the deletion by the Committee of governmental experts of the brackets that had previously surrounded the words “and to the extent stated in such declaration” in Article X(1).

*Article XXVII – Declarations under the Convention*

Declarations made under the Convention, including those made under Articles 39, 40, 53, 54, 55, 57, 58 and 60 of the Convention, shall be deemed to have also been made under this Protocol unless stated otherwise.

*Article XXVIII – Reservations and declarations*

1. – No reservations may be made to this Protocol but declarations authorised by Articles XXV, XXVI, XXVII and XXIX may be made in accordance with these provisions.

2. – Any declaration or subsequent declaration or any withdrawal of a declaration made under this Protocol shall be notified in writing to the Depositary.

*Article XXIX – Subsequent declarations*

1. – A State Party may make a subsequent declaration, other than the declaration made in accordance with Article XXVII under Article 60 of the Convention, at any time after the date on which this Protocol has entered into force for it, by notifying the Depositary to that effect.

2. – Any such subsequent declaration shall take effect on the first day of the month following the expiration of six months after the date of receipt of the notification by the Depositary. Where a longer period for that declaration to take effect is specified in the notification, it shall take effect upon the expiration of such longer period after receipt of the notification by the Depositary.

3. – Notwithstanding the previous paragraphs, this Protocol shall continue to apply, as if no such subsequent declaration had been made, in respect of all rights and interests arising prior to the effective date of any such subsequent declaration.

*Article XXX – Withdrawal of declarations*

1. – Any State Party having made a declaration under this Protocol, other than a declaration made in accordance with Article XXVII under Article 60 of the Convention, may withdraw it at any time by notifying the Depositary. Such withdrawal is to take effect on the first day of the month following the expiration of six months after the date of receipt of the notification by the Depositary.

2. – Notwithstanding the previous paragraph, this Protocol shall continue to apply, as if no such withdrawal of declaration had been made, in respect of all rights and interests arising prior to the effective date of any such withdrawal of declaration.

*Article XXXI – Denunciations*

1. – Any State Party may denounce this Protocol by notification in writing to the Depositary.

2. – Any such denunciation shall take effect on the first day of the month following the expiration of twelve months after the date of receipt of the notification by the Depositary.

3. – Notwithstanding the previous paragraphs, this Protocol shall continue to apply, as if no such denunciation had been made, in respect of all rights and interests arising prior to the effective date of any such denunciation.

*Article XXXII – Review Conferences, amendments and related matters*

1. – The Depositary, in consultation with the Supervisory Authority, shall prepare reports yearly, or at such other time as the circumstances may require, for the States Parties as to the manner in which the international regimen established in the Convention as amended by the Protocol has operated in practice. In preparing such reports, the Depositary shall take into account the reports of the Supervisory Authority concerning the functioning of the international registration system.

2. – At the request of not less than twenty-five per cent of the States Parties, Review Conferences of the States Parties shall be convened from time to time by the Depositary, in consultation with the Supervisory Authority, to consider:

(a) the practical operation of the Convention as amended by this Protocol and its effectiveness in facilitating the asset-based financing and leasing of the assets covered by its terms;

(b) the judicial interpretation given to, and the application made of the terms of this Protocol and the regulations;

(c) the functioning of the international registration system, the performance of the Registrar and its oversight by the Supervisory Authority, taking into account the reports of the Supervisory Authority; and

(d) whether any modifications to this Protocol or the arrangements relating to the International Registry are desirable.

3. – Any amendment to this Protocol shall be approved by at least a two-thirds majority of States Parties participating in the Conference referred to in the preceding paragraph and shall then enter into force in respect of States Parties which have ratified, accepted or approved such amendment when it has been ratified, accepted or approved by [five] States Parties in accordance with the provisions of Article XXIV relating to its entry into force.

*Article XXXIII – Depositary and its functions*

1. – Instruments of ratification, acceptance, approval or accession shall be deposited with ..., which is hereby designated the Depositary.

2. – The Depositary shall:

(a) inform all Contracting States of:

(i) each new signature or deposit of an instrument of ratification, acceptance, approval or accession, together with the date thereof;

(ii) the date of entry into force of this Protocol;

(iii) each declaration made in accordance with this Protocol, together with the date thereof;

(iv) the withdrawal or amendment of any declaration, together with the date thereof; and

(v) the notification of any denunciation of this Protocol together with the date thereof and the date on which it takes effect;

(b) transmit certified true copies of this Protocol to all Contracting States;

(c) provide the Supervisory Authority and the Registrar with a copy of each instrument of ratification, acceptance, approval or accession, together with the date of deposit thereof, of each declaration or withdrawal or amendment of a declaration and of each notification of denunciation, together with the date of notification thereof, so that the information contained therein is easily and fully available; and

(d) perform such other functions customary for depositaries.]