



EN

**STEERING COMMITTEE
to build consensus around the provisional
conclusions reached by the
Government/industry meeting regarding the
preliminary draft Space Assets Protocol
held in New York on 19 and 20 June 2007
Second meeting
Paris, 14/15 May 2009**

UNIDROIT 2009
Study LXXIIJ - Doc. 17
English only
June 2009

SUMMARY REPORT

(prepared by the UNIDROIT Secretariat)

I. INTRODUCTION ¹

(a) Background to the meeting

At its launch meeting, held in Berlin from 7 to 9 May 2008, the Steering Committee, set up by the UNIDROIT General Assembly, at its 61st session, held in Rome on 29 November 2007, to build consensus around the provisional conclusions reached by the Government/industry meeting held in New York on 19 and 20 June 2007 (hereinafter referred to as the *Steering Committee*), had considered the key outstanding issues referred to intersessional work 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 (hereinafter referred to as the *Committee of governmental experts*), at its second session, held in Rome from 26 to 28 October 2004, in the light of those conclusions.

The Steering Committee had reached general consensus on the solution to be adopted in respect of three such issues, that is, first, the question of the sphere of application of the preliminary draft Protocol to the Convention on International Interests in Mobile Equipment on Matters specific to Space Assets (hereinafter referred to as the *preliminary draft Protocol*) and, in particular, the definition of space assets in general and components in particular,² secondly, the question, that again arose in the context of the sphere of application of the preliminary draft Protocol, of debtor's rights, related rights and the transfer of related rights³ and, thirdly, albeit subject to review by the Sub-committee of the Committee of governmental experts on certain

¹ For the origins of the establishment of the Steering Committee and the work accomplished at the Steering Committee's first meeting, cf. Summary report on that meeting (Study LXXIIJ - Doc. 14).

² Cf. Study LXXIIJ - Doc. 14, pp. 7-10.

³ Cf. Study LXXIIJ - Doc. 14, pp. 12-16.

aspects of the future international registration system for space assets, the identification of space assets for the purposes of registration.⁴

On one of the key outstanding issues arising out of the referral by the Committee of governmental experts to intersessional work, namely that of default remedies in relation to components, general consensus could not, however, be reached at the launch meeting of the Steering Committee. Resolution of this issue had, therefore, been referred to a sub-committee,⁵ which had met in Berlin on 31 October and 1 November 2008 and which, subject to clarification of the question whether it was desirable for components to be covered by the preliminary draft Protocol, had invited the Governments of Germany and the United States of America to formulate a joint proposal for a new Article IX(4).⁶

On the other key outstanding issue referred to intersessional work, namely the question of how best to strike a balance between the creditor seeking to exercise remedies against the space asset in the event of its debtor's default, on the one hand, and one or more organs of the State anxious to ensure the continuity of the performance of a particular "public" service secured by the space asset in question, notwithstanding the debtor's default, on the other (hereinafter referred to as the *public service issue*), the Steering Committee at its launch meeting had invited a sub-committee to develop options that might be capable of being laid before the Committee of governmental experts, once reconvened.⁷ This Sub-committee had met in Paris for this purpose on 13 May 2009.

The co-chairmen of the Drafting Committee of the Committee of governmental experts (hereinafter referred to as the *Drafting Committee*), Canada and the United Kingdom, in the persons of Mr J.M. Deschamps and Sir Roy Goode, its representatives on the Steering Committee, were invited by the Steering Committee to implement the conclusions reached by the latter on the aforementioned three key outstanding issues in an alternative version of the preliminary draft Protocol, to be laid before the Committee of governmental experts, once reconvened, alongside the current text of the preliminary draft Protocol, as it had emerged from the first session of that Committee.⁸

Following the preparation of such a first alternative version, comments had, in July 2008, been invited from all those invited to participate in the work of the Steering Committee. In the light of the comments received as of 30 September 2008, the co-chairmen of the Drafting Committee had prepared a second alternative version.

(b) *Objectives of the meeting*

It had been concluded at the meeting of the Sub-committee on default remedies in relation to components that a second meeting of the Steering Committee would be needed. The purposes of this meeting would be not only to review the results of the work of both that Sub-committee and the Sub-committee on public service but also to respond to the query raised by the Sub-committee on default remedies in relation to components as to the desirability of components being covered in the preliminary draft Protocol in particular⁹ and, generally, to assess whether the progress made in the building of consensus around the provisional conclusions reached at the aforementioned New

⁴ Cf. Study LXXIIJ - Doc. 14, pp. 16-19.

⁵ Cf. Study LXXIIJ - Doc. 14, p. 12.

⁶ Cf. *infra*, at pp. 4-8.

⁷ Cf. Study LXXIIJ - Doc. 14, p. 25.

⁸ Cf. Study LXXIIJ - Doc. 14, p. 28

⁹ Cf. Study LXXIIJ - Doc. 15, p. 7.

York meeting was such as to justify the reconvening of the Committee of governmental experts, as well as to review the second alternative version in general.

II. HOLDING OF THE COMMITTEE'S MEETING

(a) *Opening of, and participation in the meeting*

The second meeting of the Steering Committee was held in Paris, under the auspices of the European Centre for Space Law (E.C.S.L.), on 14 and 15 May 2009. The meeting was attended by the representatives of 12 of the Governments serving on the Committee of governmental experts, 28 representatives of the international commercial space and financial communities and eight experts attending in their personal capacity.¹⁰ Mr S. Marchisio (Italy) was in the chair.

The meeting was opened by Mr P. Hulsroj, Director of Legal Affairs and External Relations of E.S.A., who stressed the importance of the preliminary draft Protocol in making outer space more accessible to denizens of the world.

Mr M.J. Stanford, Deputy Secretary-General, expressed UNIDROIT's keen appreciation of the kind hospitality of both E.S.A. and the E.C.S.L., extending particular thanks to Ms M. Vincent, Executive Secretary to the latter, for her excellent organisation in difficult circumstances. He reminded the Steering Committee of the unprecedented success being enjoyed by both the Convention on International Interests in Mobile Equipment (hereinafter referred to as the *Convention*)¹¹ and the Protocol to that Convention on Matters specific to Aircraft Equipment (hereinafter referred to as the *Aircraft Protocol*).¹² He noted the benefits to be reaped under the new regimen for not only those States with developing economies, through enhanced access to life-transforming space-based services, but also the international commercial space and financial communities, through enhanced legal certainty and transparency. This highlighted, he suggested, the significance of the Steering Committee as a unique bridge between Government and industry, affording those dealing with commercial space financing transactions on a daily basis a unique opportunity to influence the shape of the preliminary draft Protocol at a key stage in its development. He stressed the importance of the synergies thus set in motion in ensuring the achievement of a commercially viable Protocol.

(b) *Adoption of the Agenda*

The draft Agenda, prepared by the Secretariat, was adopted.¹³

¹⁰ Cf. the list of participants, reproduced in Appendix I to this report.

¹¹ As of 14 May 2009, there were 32 Contracting Parties to the Convention: Afghanistan, Albania, Angola, Bangladesh, Cape Verde, the People's Republic of China, Colombia, Cuba, Ethiopia, the European Community, India, Indonesia, Ireland, Kazakhstan, Kenya, Luxembourg, Malaysia, Mexico, Mongolia, Nigeria, Oman, Pakistan, Panama, Saudi Arabia, Senegal, Singapore, South Africa, the Syrian Arab Republic, Tanzania, the United Arab Emirates, the United States of America and Zimbabwe.

¹² As of 14 May 2009, there were 29 Contracting Parties to the Aircraft Protocol: Afghanistan, Albania, Angola, Bangladesh, Cape Verde, the People's Republic of China, Colombia, Cuba, Ethiopia, the European Community, India, Indonesia, Ireland, Kenya, Luxembourg, Malaysia, Mexico, Mongolia, Nigeria, Oman, Pakistan, Panama, Saudi Arabia, Senegal, Singapore, South Africa, Tanzania, the United Arab Emirates and the United States of America.

¹³ The Agenda as thus adopted is reproduced in Appendix II to this report.

(c) *Documentation for the meeting*

Draft Agenda (prepared by the Secretariat);

Explanatory note to the draft Agenda (prepared by the Secretariat);

Revised provisional order of business (prepared by the Secretariat);

The Convention;

The preliminary draft Protocol;¹⁴

Second alternative version of the preliminary draft Protocol;¹⁵

Summary report on the first meeting of the Steering Committee (prepared by the Secretariat) (hereinafter referred to as the *Summary report on the first meeting*);

Summary report on the meeting of the Sub-committee on default remedies in relation to components (prepared by the Secretariat);

Summary of the conclusions of the informal consultations on default remedies in relation to components that took place in Paris on 12 and 13 May 2009 (prepared by Sir Roy Goode) (hereinafter referred to as the *Summary of the conclusions of the informal consultations*).¹⁶

(d) *Organisation of the meeting*

The Chairman reminded the Steering Committee of the importance of its work in enabling timeous completion of the proposed Protocol. Apart from providing the elements necessary to decide on the case for the reconvening of the Committee of governmental experts, its conclusions would provide the basis for a third alternative version of the preliminary draft Protocol.

III. THE STEERING COMMITTEE'S CONSIDERATION OF THE PROGRESS MADE SINCE ITS FIRST MEETING

(a) *Conclusions of the Sub-committee on default remedies in relation to components*

(i) Background

Article IX(4) of the preliminary draft Protocol, provided that:

[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.]¹⁷

¹⁴ The preliminary draft Protocol is reproduced in Appendix III to this report.

¹⁵ The second alternative version is reproduced in Appendix IV to this report.

¹⁶ The Summary of the conclusions of the informal consultations is reproduced in Appendix V to this report.

¹⁷ The text of Article IX(4) was accompanied by a footnote indicating that:

"[t]his 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".

At the first meeting of the Steering Committee, the Government of Germany and the German Space Agency had tabled a proposal for a new Article IX(4), that sought, in essence, to limit the ability of a creditor to exercise his default remedies in a space asset where such an action would impair ownership rights in an independent asset that was either physically - as in the case of a satellite and one of its transponders - or functionally linked - as in the case of a constellation of satellites carrying out a single function.¹⁸ The Steering Committee, not, however, being able to reach consensus on this issue, had set up a sub-committee to develop a commercially viable solution agreeable to all.

The Sub-committee was agreed that the preliminary draft Protocol should only address default remedies that affected physically linked assets, such as the physical movement of a satellite from one orbit to another, and their ability to generate revenue.¹⁹ It had further agreed that limitations on the exercise of default remedies should not apply to functionally-linked assets, namely satellite constellations. In the light of these conclusions and pending clarification by the Steering Committee of the question whether it was desirable for components to be covered by the preliminary draft Protocol, the Governments of Germany and the United States of America had been invited to formulate a joint proposal for a new Article IX(4), that should take as its starting point the aforementioned proposal of the Government of Germany and the German Space Agency.

The task of formulating this joint proposal was the subject of informal negotiations, in which the Secretariat and Sir Roy Goode, acting as co-draftsman of the Steering Committee, had also been involved. Agreement was quickly reached on the desirability of three principles being reflected in such a joint proposal, namely, first, that the creation of an international interest in a space asset, such as a satellite, and in a physically linked component, such as a transponder, should, as far as possible, follow the concept used in the Aircraft Protocol for distinguishing between the airframe and aircraft engines, secondly, that there was no problem regarding the enforcement of a creditor's rights where there was no interference with the rights of creditors in a physically linked space asset and, thirdly, that, while steps should not in general be taken that would adversely affect the rights of a creditor in a physically linked asset, a creditor should be free to exercise his rights in an asset if his interest had been registered prior to the interest of another creditor of a physically linked asset.²⁰

It did not, however, prove possible for an agreed joint proposal to be formulated in time for the second meeting of the Steering Committee, although the parties involved in the negotiations did in the meantime also reach agreement on a number of further elements to be reflected therein, namely, first, that the limitations on the exercise of default remedies to be built into the preliminary draft Protocol in respect of components should only apply in the absence of agreement between the parties, secondly, that the application of the priority rule established under Article 29 of the Convention needed to be spelled out in the specific context of default remedies in relation to components and, thirdly, that, while the identification criteria set out in the second alternative version might be adequate for identifying a satellite as a whole, they would need to be expanded for certain components, particularly transponders.²¹

Two issues in particular remained to be resolved before the aforementioned joint proposal could be finalised, namely, first, whether it should be possible for one creditor to register an international interest in an entire satellite, covering all its physically linked components (such as transponders), or whether a creditor should have to register a separate interest in each independent asset and, secondly, assuming that an interest could be taken in a satellite as a

¹⁸ Cf. Study LXXIJJ - Doc. 14, pp. 10-11.

¹⁹ Cf. Study LXXIJJ - Doc. 15, p. 7.

²⁰ Cf. Summary of the conclusions of the informal consultations, p. 2.

²¹ Cf. Summary of the conclusions of the informal consultations, pp. 3-4.

whole, whether an international interest in a transponder subsequently added to a satellite would continue to be effective following its incorporation into the overall satellite, effectively giving the holder of an international interest in the transponder priority over the holder of an international interest in the satellite as a whole, even if the latter had registered his interest first.²² The informal negotiations, therefore, continued and the Governments of Germany and the United States of America were confident that they would, in due course, be able to table the joint proposal that they had been invited by the Sub-committee to formulate.

(ii) Discussion

The Chairman reminded the Steering Committee that, at its first meeting, it had been agreed that the basic categories of space asset to be covered by the preliminary draft Protocol should be listed but be capable of being supplemented by such other space assets as were “uniquely identifiable” and capable of “independent control”.²³ The two main points before the Steering Committee at its second meeting regarding default remedies in relation to components concerned, first, whether the decision taken at the first meeting of the Steering Committee to include components in the sphere of application of the preliminary draft Protocol was still considered to be appropriate and, secondly, if components were still to be so included, which types of limitation, if any, should be placed on the exercise of default remedies in the event of a conflict of interests between the creditor of a space asset, on the one hand, and the creditor of an independent component that was physically linked to that space asset, on the other.

The representatives of several Governments sought clarification as to the meaning of the term “independent control” in the context of the definition of a space asset. This term had aroused concern in that there were different forms of control that could be exercised over a space asset, such as technical, contractual or legal control. This point had in particular arisen in the context of “modules” on board space stations, since such sections of a space station could be financed and operated by different parties whilst at the same time having shared resources on board the same space station.

It was explained that the term “independent control” had been employed in the alternative version with a view to covering those components on board a space asset that would retain value to a creditor seeking to exercise default remedies, as opposed to a potentially infinite number of low-value components, such as nuts and bolts, which would unduly encumber the future International Registry with registrations that could not be enforced by a creditor owing to the impracticableness of physically repossessing most space assets, notably satellites.

However, the representative of one Government suggested that no component should be excluded from the sphere of application of the preliminary draft Protocol provided that it was uniquely identifiable and of high value;²⁴ in the opinion of this representative, the future International Registry was not in danger of being encumbered with registrations in respect of nuts and bolts, because these would not meet the criteria of being either of high value or uniquely identifiable.

The representatives of both several Governments and the international commercial space and financial communities expressed the view that, whilst it could be left to the parties to determine whether they wished to file registrations for any given component and thus themselves to run the risk of being unable to enforce an international interest in such a component, such an approach

²² Cf. Summary of the conclusions of the informal consultations, p. 4.

²³ Cf. Study LXXIJJ - Doc. 14, p. 10.

²⁴ Cf. the preamble to the Convention, where it was stated that the latter was intended to facilitate the financing of “mobile equipment of high value or particular economic significance”.

would increase the burden of monitoring registrations and create complications in the application of default remedies. In this connection, the view was expressed that the aim of the preliminary draft Protocol should be to facilitate the smooth functioning of transactions between the parties and not to complicate matters further with complex regulations or an International Registry that was cumbersome to search.

The view was also expressed that it was important to maintain components within the sphere of application of the preliminary draft Protocol and that additional criteria might be laid down, for instance, in the regulations to be promulgated by the future Supervisory Authority, to determine which components should be capable of being the subject of registrable international interests.

The view was further expressed that the sphere of application of the preliminary draft Protocol should be delimited not just by reference to a list of specific categories of asset and a residual category of assets capable of independent control but also by reference to whether such categories of asset were capable of being used for independent business purposes.

The representative of one Government suggested that the term "independent control" be broadened to encompass assets that were "capable of independent use, ownership or control". This approach was widely supported as bringing clarity to linguistic ambiguities and limiting the potential number of assets that might be encompassed by the preliminary draft Protocol.

A representative of the international commercial space and financial communities expressed concern regarding the inclusion of components within the sphere of application of the preliminary draft Protocol in view of shared interests in certain components, in particular redundant transponders on board a satellite.²⁵ In response to this concern, it was pointed out that, under the Convention, a party could register his interest in a shared component as a fractional interest, as was the current practice with airframes and aircraft engines.²⁶

Several representatives of the international commercial space and financial communities expressed concern that the inclusion of components within the sphere of application of the preliminary draft Protocol might not be in line with current space financing practice, financial institutions typically looking at a satellite as a whole when considering whether or not to extend credit to a debtor. Responding to this concern, two other representatives of those communities noted the significant growing trend of "hosted payloads" or "shared payloads", whereby a Government would finance and manufacture a component, notably a transponder, and then attach it to a commercial satellite bus already under construction. The significance of this practice was seen as lying in the lower cost at which it enabled Governments to have access to satellite services and the earlier date at which it permitted them to deploy such components.

However, this practice raised the question of how a Government, as the owner of, rather than the holder of an international interest in such a component would be able to register the interest it held in that component in the future International Registry. Responding to this query, it was pointed out that a Government, while not being able to register such an ownership right under

²⁵ A "redundant transponder" is a spare or reserve transponder that is placed on board a satellite and assigned to a group of functional transponders. Typically, a group of six to eight functional transponders will have two redundant transponders assigned to it. In the event that up to two transponders prove to be defective, the necessary signals being transmitted by those transponders will be transmitted by the spare transponders. However, if more than two transponders prove defective, other means will have to be sought to replace that signal.

²⁶ Cf. Explanatory memorandum to second alternative version, § 13.

the future Protocol, would be able to protect its interest under the Convention by registering an international interest in such a component as an outright buyer.²⁷

(iii) Conclusions

There was broad agreement that components should be maintained in the sphere of application of the preliminary draft Protocol. There was, likewise, broad agreement that the definition of “space asset” found in Article I(2)(l) of the second alternative version should be broadened to include assets “capable of independent use, ownership and control”, an approach that, while recognised as not being perfect, was seen as an improvement on the definition adopted at the first meeting of the Steering Committee. It was noted, however, that this approach did not go so far as to identify components as a separate category of asset.

It was noted that the informal negotiations on the formulation of a joint proposal for a new Article IX(4) were continuing and that the results of these negotiations would, in due course, be incorporated in the alternative version.

(b) *Conclusions of the Sub-committee on public service*

(i) Background

The public service issue was dealt with in Article XVI(3) of the preliminary draft Protocol. This paragraph was set forth in alternative formulations, the alternative nature of which was indicated by the employment of square brackets:

[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 and 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 the State notified to the Depositary.]

[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 and 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 the State notified to the Depositary.]

It had been agreed at the first meeting of the Steering Committee that a Sub-committee be set up to develop options on the public service issue that might be capable of being laid before the Committee of governmental experts, once reconvened.²⁸ It had originally been intended that the Sub-committee on public service should work by electronic means and conference call but one member of the Sub-committee on public service had called for the holding of a meeting. This meeting had taken place in Paris on 13 May 2009.

There was general consensus at this meeting that the proposed Protocol should provide a menu of options, rather than a single rule, on the question of public service limitations on the exercise of default remedies under the Convention as applied to space assets and that Contracting States should be free to choose from this menu of options by means of a system of declarations, at

²⁷ Cf. Article 41 of the Convention.

²⁸ Cf. *supra*, p. 2.

the time of ratifying or acceding to the future Protocol. There was also general consensus that the term "public service" should not be defined within the proposed Protocol but that it should be left to Contracting States to define what was considered to be a "public service" under their own national laws, again by declaration.

The menu of options developed by the Sub-committee on public service, for submission, subject to further elaboration of their precise wording, to the Committee of governmental experts, was as follows:

- the holder of an international interest in a space asset providing a public service may not exercise default remedies that would result in the interruption of that public service;
- the holder of an international interest in a space asset providing a public service shall have the right to exercise a "step-in" right in the event of default by the debtor providing that public service;
- a Contracting State shall have the right to exercise a "step-in" right in the event of default by a debtor providing a public service;
- fair compensation shall be provided to the holder of an international interest in a space asset providing a public service in the event that a Contracting State intervene in the operation of that asset;
- default remedies may only be exercised after the elapsing of a specified period of time;
- where a privately owned space asset provides public services to more than one Contracting State, a Contracting State shall declare how it will perform its overall obligations in respect of that asset, for example by the granting of compensation or the exercising of a "step-in" right;
- a Contracting State may record a notice with the future International Registry in respect of a space asset providing a public service, the effect of which will be, first, that any creditor having registered an international interest in that space asset prior to the recording of such notice may only exercise any default remedy that he possesses under the Convention as applied to space assets to the extent that the Contracting State does not elect to assume the obligations of the defaulting debtor and, secondly, that any creditor having registered an international interest in the space asset after the recording of such notice may only exercise any default remedy that he possesses under the Convention as applied to space assets to the extent that the public service in question is not thereby interrupted;
- a Contracting State may determine the application of public service limitations on a case-by-case basis, namely at the time of the issuing of a licence or permit for the operation of a space asset intended to be used for the provision of a public service; and/or
- a Contracting State may, at the time when the space financing project arises, agree with the holder of an international interest in a space asset providing a public service as to the conditions necessary for "step-in" rights to be exercised.²⁹

(ii) Discussion

The representative of one Government suggested that, during the proposed incorporation of these options in the planned third alternative version of the preliminary draft Protocol, some options should be coupled with either a mandatory or optional duty of compensation on States where the creditor would be debarred from the exercise of his default remedies under the Convention as applied to space assets.

²⁹ Cf. Study LXXIJJ - Doc. 16, p. 8.

It was suggested by the representative of another Government that it should be possible to add further options.

One such further option, it was suggested, could be the creation of a duty under the proposed Protocol on creditors, debtors and the relevant State to seek arbitration where disputes arose concerning maintenance of a public service being performed by a space asset, a practice that was common in modern international finance. It was suggested that the proposal on dispute resolution in matters related to international interests in space assets tabled at the New York meeting by Mr J. Lueiro García (Spain) might serve as the basis for the development of such an option.³⁰

It was also suggested that the potential solution offered by Article XXV of the Protocol to the Convention on Matters specific to Railway Rolling Stock, opened to signature in Luxembourg on 23 February 2007 (hereinafter referred to as the *Luxembourg Protocol*) also be included in the menu of options to be forwarded to the Committee of governmental experts, notwithstanding the concerns voiced at the first meeting of the Steering Committee regarding the practicability of adopting this approach.³¹

(iii) Conclusions

It was agreed by the Steering Committee that the proposals put forward by the Sub-committee on public service, as complemented, first, by that providing for the creation of a duty under the proposed Protocol on creditors, debtors and the relevant State to seek arbitration where disputes arose concerning maintenance of a public service being performed by a space asset and, secondly, by the solution offered in Article XXV of the Luxembourg Protocol, were ready, subject to drafting, to be forwarded to the Committee of governmental experts, in the planned third alternative version. It was further agreed that the possibility should be left open to add more options that might also be seen as meriting inclusion within the proposed Protocol. The Steering Committee confirmed the conclusion reached by the Sub-committee on public service that the proposed approach was the one most likely to command the broadest degree of consensus within the Committee of governmental experts, once reconvened.

(c) *Second alternative version of the preliminary draft Protocol*

(i) Background

It should be noted that both the first and second alternative versions contained two types of amendment, the first being policy-based additions and amendments to reflect decisions taken by the Steering Committee and the second proposed technical additions and amendments regarding matters outside the remit of the Steering Committee. Only the first type of amendment dealt with those key outstanding issues referred to intersessional work by the Committee of governmental experts and, consequently, only these amendments were intended to be forwarded to that Committee on behalf of the Steering Committee. The second type of amendment represented essentially drafting improvements that had commended themselves, independently of the terms of reference of the Steering Committee, to the co-chairmen of the Drafting Committee, who would, therefore, be presenting them, in that capacity, to the Committee of governmental experts, once reconvened. It had, therefore, been agreed that it would not be appropriate for these proposed technical additions and amendments to be discussed by the Steering Committee or its Sub-committees.

³⁰ Cf. Juan Lueiro García: *Dispute Resolution in Matters Related to International Interests in Space Assets* in *Uniform Law Review* 2007, 323 *et seq.*

³¹ Cf. Study LXXIIJ - Doc. 14, pp. 24-25.

(ii) Discussion

Sir Roy Goode, in his capacity of co-Chairman of the Drafting Committee, presented a number of the new concepts that had been reflected in the alternative version, and in particular the way in which he and his co-Chairman had given effect to the agreement at the first meeting of the Steering Committee that the application of the Convention as applied to space assets be extended to debtor's rights and related rights.³²

Commenting on the deletion from Article II(1) in the second alternative version of the reference to debtor's rights and related rights, the representative of one Government proposed that, because debtor's rights and related rights were quite distinct from the space asset itself, this reference be reintroduced back into the text, for clarity.

It was noted that there were many different types of licence and permit relating to space assets and that, while some of these were asset-specific (such as the right to manufacture or launch a particular space asset), others were general (such as the right to operate a satellite or to use a particular orbit), a distinction which was not felt to have been dealt with properly in the definition of "related rights" found in the second alternative version. It was further noted by the representatives of several Governments that the approach adopted in Article II(2) for the transfer of related rights under the applicable national law was not appropriate, since most national laws prohibited a transfer of such rights altogether, rendering this approach pointless. The objective hitherto pursued through seeking to permit the transferability of such related rights was thus seen as being better effected by an approach consisting in facilitating the cancellation of one party's rights and the issuance of new rights for a new party. General concern was, however, expressed that, through seeking to make it a duty for Governments to cancel one set of such rights and issue a new set of rights, the preliminary draft Protocol ran the risk of diminishing the chances of reaching consensus on this issue within the Committee of governmental experts.

Several representatives of the international commercial space and financial communities pointed out that, while financial institutions would typically enquire of the appropriate regulatory bodies as to the transferability of related rights prior to agreeing to finance a space asset, there was no guarantee that a transfer would be granted when requested. There were, thus, representatives of both Government and the international commercial space and financial communities who took the view that a transfer of related rights could not be adequately dealt with in the proposed Protocol.

It was suggested that this issue could be resolved by the substitution of a new definition of licences, based on the definition of related rights found in the second alternative version, for references to related rights, along with the inclusion of a new provision imposing a duty on the defaulting debtor/assignor to co-operate, to the fullest extent possible, in either the transfer of the relevant licence or permit to a creditor/assignee or, where this was not permitted, the termination of its own licence and the procuring of a new licence for a creditor/assignee. The representatives of several Governments supported this approach, in particular because it also addressed conflicts of interest that might arise where the Government that issued the licence or permit for the operation of a space asset was also the defaulting debtor in respect of that asset.

(iii) Conclusions

It was agreed that references to related rights should be replaced by a definition of licenses, based on the definition of related rights found in the second alternative version, along with a new provision imposing a duty on a defaulting debtor/assignor to co-operate, to the fullest extent

³² Cf. Study LXXIJJ - Doc. 14, p. 16.

possible, in either the transfer of the relevant licence to a creditor/assignee or, where this was not permitted, the termination of its own licence and the procuring of a new licence for a creditor/assignee.

(d) *Any other business*

- (i) Review of policy considerations regarding the development of the preliminary draft Protocol

(a) *Background*

Three leading satellite operators and a regional association of such operators had written to the Secretariat on 24 September and 10 October 2008 respectively, expressing concern over the general direction being taken by the Steering Committee and, in particular, expressing the view that the preliminary draft Protocol would neither benefit the satellite industry nor facilitate space finance but rather add new and burdensome layers of law and impose vague and broad rules concerning ownership and security interests in certain types of undefined space asset.³³ The letter from the satellite operators had also drawn attention to certain specific issues, including default remedies in relation to components.

In line with the request addressed to the Secretariat in both letters that it, therefore, review the case for proceeding with the project, the Secretariat had brought the matter before the Sub-committee on default remedies in relation to components. There was unanimity among those attending the meeting of the Sub-committee, representatives of a good cross-section of the leading space-faring nations and the international commercial space and financial communities, that the specific points raised by the operators could be addressed in the ongoing process for revision of the alternative version and that the direction being taken by the Steering Committee should be maintained, on the understanding that the preliminary draft Protocol should be a user-friendly tool that would be useful for all States, particularly those with developing economies, as well as the international commercial space and financial communities, particularly small operators and start-up ventures.³⁴ It was, at the same time, recognised that simplification of the preliminary draft Protocol was desirable and that the possibility should be left open for future modification thereof in order to allow for future technological developments.

Answers to all the specific areas of concern raised by the operators were, moreover, set out in the explanatory memorandum to the second alternative version prepared by Mr Deschamps and Sir Roy Goode.³⁵

The Secretariat had, nevertheless, received a further letter from the same operators on 12 May 2009, in response to its invitation to them to participate in the second meeting of the Steering Committee. In this letter, whilst indicating their appreciation of the Secretariat's invitation to the space industry to engage in the process of formulating the proposed Protocol, they reiterated that it was their position that the path chosen by UNIDROIT to reach consensus on the key outstanding issues was not one that they were prepared to follow or support and reaffirmed the position taken in their previous letter, furthermore expressing the concern that continuing to discuss "broad principles and undefined terms, without being attuned to current finance practices in [their] industry" risked producing a result that would impede future satellite financing. Accordingly, they asked the Secretariat to "take heed of [their] views" and reconsider its decision to proceed.

³³ Cf. Study LXXIIJ – Doc. 15, p. 3.

³⁴ Cf. Study LXXIIJ – Doc. 15, p. 3.

³⁵ Cf. Explanatory memorandum to second alternative version.

(β) *Discussion*

The Steering Committee, having taken cognizance of the letter of 12 May from the operators, took the view that progress had been made on the issues raised by the operators and that a commercially viable Protocol was within reach.

Several representatives of Governments, moreover, drew attention to the unique nature of the process that had always been followed in the development of the preliminary draft Protocol, offering, as it did, the international commercial space and financial communities a full opportunity to voice their concerns and help shape the end-product, an opportunity not usually afforded in other intergovernmental fora.

Everyone was agreed that all efforts should continue to be made with a view to bringing the operators concerned back on board.

(γ) *Conclusions*

There was consensus that all efforts should continue to be directed toward timeous completion of the proposed Protocol, and in particular to bringing the aforementioned operators back to the negotiating table; it was recognised that a special duty in this last connection was incumbent on those Governments that enjoyed a unique relationship with the operators concerned.

Mr Stanford announced that the Secretariat would, in responding to the operators, report on the overall position taken by the Steering Committee in this connection and that it would also be preparing a paper explaining the potential benefits of the future Space Protocol for those operators.

(ii) Criteria for the identification of space assets for the purpose of registration

(a) *Background*³⁶

At the launch meeting of the Steering Committee, a proposal had been made by Sir Roy Goode that the approach employed in the Luxembourg Protocol for the question of identification criteria be followed in the preliminary draft Protocol. This approach distinguished between two sets of identification criteria, first, the requirements for the constitution of an agreement, for which purposes a generic description of the asset was sufficient and, secondly, the requirements for registration, for which purposes unique identification of the asset was required.³⁷ Sir Roy Goode had, moreover, added his voice to those for whom identification criteria should not be left to be spelled out in the regulations to be promulgated under the future Protocol, proposing, therefore, the inclusion of certain basic identification criteria in the preliminary draft Protocol itself, to be supplemented by the future regulations.

The Steering Committee had endorsed Sir Roy Goode's proposal, pending the further consideration of the issue that was due to be given by the Sub-committee set up by the Committee of governmental experts at its last session to examine certain aspects of the future international registration system, including the question of identification criteria (hereinafter referred to as the *Sub-committee on registration*).³⁸

³⁶ For the work accomplished on this issue at the first and second sessions of the Committee of governmental experts and as part of the intersessional work decided upon by that Committee at its second session, notably at the New York Government/industry meeting, cf. Study LXXIIJ - Doc. 14, at pp. 16-18.

³⁷ Cf. Study LXXIIJ - Doc. 14, p. 18.

³⁸ Cf. C.G.E. Space Pr./2/Report, § 51.

(β) *Discussion*

The representative of one Government maintained that the issue of identification criteria for the purposes of registration could not yet be resolved, since there was not yet agreement as to the sphere of application of the preliminary draft Protocol, an issue that was fundamentally tied to the identification criteria for the purposes of registration.

The representative of another Government noted that many of the issues to be examined by the Sub-committee on registration were highly technical in nature, relating to questions such as how parties should be able to conduct searches or file interests in the future International Registry, and had not been resolved in respect of the Aircraft Protocol until after adoption of that Protocol. However, there was general consensus that the time was ripe for these technical issues to be considered in respect of the preliminary draft Protocol and for the Sub-committee on registration, therefore, to begin looking at how such questions should be approached.

However, the representative of Aviareto, the Registrar of the International Registry for aircraft objects, suggested that it was the complexity of the identification criteria ultimately to be decided upon that would determine how expensive it would be to operate the future International Registry for space assets and, therefore, how expensive it would be for users. Since, once the future International Registry was established, it would be extremely difficult and costly to change it, he further suggested that it would help to have as complete set of identification criteria as possible available when work on development of the future International Registry began.

One representative of the international commercial space and financial communities suggested that, in looking at the identification criteria to be employed in the future Protocol, consideration be given to other international instruments and bodies that established prescriptions for the registration or identification of specific space assets, particularly with a view to avoiding confusion between the prescriptions laid down in those instruments and by those bodies, on the one hand, and the future Protocol, on the other. In the ensuing discussion reference was made, in particular, to the criteria employed by the International Telecommunication Union and the Committee on Space Research and in Article IV of the United Nations Convention on Registration of Objects Launched into Outer Space.

(γ) *Conclusions*

It was agreed that the Sub-committee on registration would, in so far as the identification criteria to be chosen for the space assets to be encompassed by the future Protocol would, necessarily, depend on the final content to be given to the sphere of application thereof, need to work in close co-operation with those engaged in determining that content.

(iii) *Salvage interests*

(a) *Background*³⁹

An informal working group, external to the Steering Committee, had been set up at the first meeting of that Committee, to look into salvage interests as these related to the preliminary draft Protocol with a view to the development of a proposal for consideration by the Committee of governmental experts.

³⁹ For the origins of this item cf. Study LXXIIJ - Doc. 14, at pp. 26-27.

(β) *Discussion*

Ms P. Meredith, co-Chair of the Space Law Practice Group, reported on the progress made by the informal working group on salvage interests and the solutions currently under consideration by that group for title salvage, on the one hand, and revenue salvage, on the other: for the former it was proposing that title salvage be treated as a contract of sale and that the insurer be allowed to register his interest in the future International Registry for space assets, whereas for revenue salvage it was proposing that the insurer be permitted to subrogate into a creditor's international interest in a space asset to the extent of the salvage interest.⁴⁰

It was widely suggested that the informal working group on salvage interests should develop specific illustrations of instances showing how title and revenue salvage would be endangered by the preliminary draft Protocol, with a view to enabling the Committee of governmental experts better to assess the need for this to be dealt with in the preliminary draft Protocol.

(γ) *Conclusions*

The Steering Committee took note of the fact that the informal working group on salvage interests would be continuing its work, and in particular that it would be developing clear examples of those situations that raised concerns for space insurers for submission to the Committee of governmental experts.

V. NEXT STEPS TO BE TAKEN IN RESPECT OF THE PRELIMINARY DRAFT PROTOCOL

It was agreed that the conclusions reached by the Steering Committee on the key outstanding issues, in particular the public service issue, should be reflected in a third alternative version. The Steering Committee was confident that, even if the informal negotiations for the finding of a solution to the issue of default remedies in relation to components had not yet been completed, a sound basis for the satisfactory conclusion of these negotiations had been laid and that a solution would, therefore, be able to be laid before the Committee of governmental experts, once reconvened. In the preparation of the third alternative version, the representatives of a number of Governments urged that an effort be made to give additional clarity to those terms – such as “independent control” and “step-in” rights – that had proven to lend themselves to different interpretations from one legal system to another, in particular with a view to assisting the Committee of governmental experts to reach overall consensus on the key outstanding issues.

In the light of the progress made by the Steering Committee on these and other issues, the Steering Committee indicated that, whilst aware that a decision on this matter would fall to be taken by the Secretariat in consultation with the Chairman after the meeting, it considered the time ripe for the resumption of the intergovernmental consultation process. In response to an enquiry as to the Secretariat's thoughts on a possible timetable for completion of the process, *Mr Stanford* suggested that the Committee of governmental experts might be reconvened for a third, one-week session in Rome in December 2009 and for a final one-week session, again in Rome, in Spring 2010, for finalisation of a preliminary draft Protocol capable of being laid before the Governing Council for advice and consent to a diplomatic Conference for adoption of a draft Protocol. In this connection, it was recalled that, at the 60th session of the UNIDROIT General Assembly, held in Rome on 1 December 2006, a member State had expressed its willingness to consider hosting such a Conference, provided that the preliminary draft Protocol was concluded successfully. That State would thus have the opportunity of confirming whether or not it was willing

⁴⁰ Ms Meredith's report is reproduced as Appendix VI to this report.

to host the Conference at the final session of governmental experts, which ought to enable the Conference, in principle, to be held either towards the end of 2010 or early in 2011.

It was recalled that, should the decision be taken to reconvene the Committee of governmental experts, it would be necessary to convene a meeting of the Sub-committee on registration in advance of such a third session.

LIST OF PARTICIPANTS

REPRESENTATIVES OF GOVERNMENTS

CANADA	Mr Jean-Michel DESCHAMPS Attorney McCarthy Tétrault <i>Montréal</i>
CHINA (PEOPLE'S REPUBLIC OF)	Ms ZHANG Huiling Section Chief Department of Treaty & Law Ministry of Commerce <i>Beijing</i> Mr LI Bingzhuo Official Department of Treaty & Law Ministry of Foreign Affairs <i>Beijing</i>
FRANCE	Mr Alexandre DE FONTMICHEL Avocat à la Cour Darrois Villey Maillot Brochier ; <i>representative of the Ministry of Justice</i> <i>Paris</i> Mr Jean-Baptiste BOUSQUET Juriste Service Juridique Centre national d'études spatiales <i>Paris</i>
GERMANY	Mr Hans-Georg BOLLWEG Head of Division Federal Ministry of Justice; member of the UNIDROIT Governing Council <i>Berlin</i> Mr Simon SCHULTHEISS Division for Compensation Law Law of Civil Aviation Federal Ministry of Justice <i>Berlin</i> Mr Karl F. KREUZER Emeritus Professor of Law University of Würzburg <i>Würzburg</i>

ITALY	Mr Sergio MARCHISIO Professor of Law; Director Institute of International Legal Studies University of Rome I; Chairman of the UNIDROIT Committee of governmental experts; Chairman of the Steering Committee <i>Rome</i>
MEXICO	Mr José F. POBLANO Ministre Affaires économiques et de coopération Embassy of Mexico in France <i>Paris</i>
NIGERIA	Mr E. A. OTEPOLA Director and Special Assistant to the Director- General on International Co-operation, National Space Research and Development Agency <i>Abuja</i>
RUSSIAN FEDERATION	Mr Alexander KOSTYIKOV Legal Department Russian Federal Space Agency <i>Moscow</i> Mr Dmitry V. GOROBETS Department of International Co-operation Russian Federal Space Agency <i>Moscow</i> Mr Igor B. POROKHIN First Deputy Director Inspace Consulting (Russia) L.L.C. Law Offices <i>Moscow</i> Ms Anna DONCHENKO Counsellor Trade Representation of the Russian Federation in France <i>Paris</i>
SOUTH AFRICA	Ms Ingrid PONI Counsellor: Communications South African Embassy in France <i>Paris</i>
SPAIN	Mr Juan LUEIRO GARCÍA Consul General of Spain in Lagos <i>Lagos</i>

UNITED KINGDOM

Sir Roy GOODE
Emeritus Professor of Law
University of Oxford;
Honorary member of the UNIDROIT Governing
Council;
*representing the British National Space Centre
Oxford*

UNITED STATES OF AMERICA

Mr Harold S. BURMAN
Executive Director
Office of the Legal Adviser
Department of State
Washington, D.C.

Mr Steven L. HARRIS
Professor of Law
Chicago-Kent College of Law
Illinois Institute of Technology
Chicago, Illinois

Mr K. Koro NURI
Senior Finance Counsel
Office of the General Counsel
Import-Export Bank of the United States of
America
Washington, D.C.

REPRESENTATIVES OF INTERNATIONAL ORGANISATIONS

EUROPEAN SPACE AGENCY

Mr Peter HULSROJ
Director of Legal Affairs and External Relations
Paris

EUROPEAN CENTRE FOR SPACE LAW

Ms Mélanie VINCENT
Executive Secretary
Paris

REPRESENTATIVES OF INTERNATIONAL COMMERCIAL SPACE AND FINANCIAL COMMUNITIES

Mr Marc BORELLO

General Counsel
Thales Alenia Space
Cannes la Bocca

Ms Armance CHASSAIGNE

Service Juridique
Coface
Paris La Défense

Mr Vittorio COLELLA ALBINO

General Counsel
Telespazio S.p.A.
Rome

Mr Thierry COLLIOT	Managing Director SpaceCo <i>Paris</i>
Mr Mathias CREYDT	Legal Adviser EADS Astrium <i>Munich</i>
Mr Romain DARDE	Legal Counsel Legal Department Contracts and International Affairs Arianespace <i>Evry-Courcouronnes</i>
Mr David J. DEN HERDER	Counsel Space Exploration Technologies ("SpaceX") <i>Washington, D.C.</i>
Mr Sylvain DEVOUGE	Contract Adviser Aviation & Space Department Marsh S.A. <i>Paris</i>
Ms Claude Jeanne DUBREUIL	General Counsel EADS Astrium <i>Paris</i>
Ms Cécile GAUBERT	Head of Contracts Aviation and Space Department Marsh S.A. <i>Paris</i>
Mr Olaf GEBLER	Partner Baker & McKenzie <i>Frankfurt am Main</i>
Mr Robert W. GORDON	Vice-President Space & Defense Boeing Capital Corporation <i>El Segundo, California</i>
Ms Martine LEIMBACH	Responsable conformité juridique et contrôle interne Direction des affaires juridiques Crédit Agricole S.A. <i>Paris</i>
Ms Pamela MEREDITH	Co-Chair Space Law Practice Group Zuckert Scoutt Rasenberger LLP <i>Washington, D.C.</i>

Ms Daniela NIESSEN	Legal Consultant German Space Agency <i>Bonn</i>
Ms Maria Luisa PROSPERI MANGILI	General Counsel Thales Alenia Space Italia <i>Rome</i>
Mr Vincent RAVIER	Manager Financing and Insurance Department Arianespace <i>Evry-Courcouronnes</i>
Mr Bernhard SCHMIDT-TEDD	Head of Legal and Business Support German Space Agency <i>Bonn</i>
Mr Cedric WELLS	Senior Legal & Claims Manager SCOR Global P & C Claims & Commutations <i>Paris</i>

OTHERS

Mr Oliver HEINRICH	Attorney <i>Cologne</i>
Mr Armel KERREST	Professeur de droit Institut de droit des espaces internationaux et des télécommunications Faculté de droit, des sciences économiques et de gestion Université de Bretagne occidentale <i>Brest</i>
Mr Souichirou KOZUKA	Professor of Law Sophia University <i>Tokyo</i>
Mr Paul LARSEN	Adjunct Professor Georgetown University Law Center <i>Washington, D.C.</i>
Mrs Olga S. STELMAKH	Chief Specialist International Relations Department National Space Agency of Ukraine <i>Kyiv</i>
Mr Kevin THOMAS	Head of Operations Aviareto Limited <i>Dublin</i>

Mrs Giedre VALENTAITE

Legal Officer
Directorate-General TREN, G-5
European Commission
Brussels

UNIDROIT

Mr Martin STANFORD, Deputy Secretary-General

Mr Daniel A. PORRAS, Associate Officer

AGENDA

1. Opening of the meeting
2. Adoption of the agenda
3. Organisation of work for the meeting
4. Consideration of the progress made since the launch meeting of the Steering Committee (Berlin, 7 / 9 May 2008) in the building of consensus, within the Steering Committee and its Sub-committees, around the provisional conclusions reached at the special Government/industry meeting held in New York on 19 and 20 June 2007 in the light, in particular, of:
 - (a) the conclusions of the Sub-committee on default remedies in relation to components as expressed in the summary report on its meeting (Berlin, 31 October / 1 November 2008) (Study LXXIIJ – Doc. 15, p. 7);
 - (b) the conclusions of the Sub-committee on public service to be reported in the light of its meeting (Paris, 13 May 2009); and
 - (c) the second alternative version of the preliminary draft Space Protocol prepared by Mr Michel Deschamps (Canada) and Professor Sir Roy Goode (United Kingdom) at the request of the Steering Committee.
5. Next steps to be taken in respect of the preliminary draft Space Protocol
6. Any other business.

*CONVENTION ON INTERNATIONAL
INTERESTS IN MOBILE EQUIPMENT:*

*PRELIMINARY DRAFT PROTOCOL
ON MATTERS SPECIFIC TO SPACE ASSETS^{1 2}*

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*)³ as it relates to space assets, in the light of the purposes set out in the preamble to the Convention,

¹ 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. Nsgos, Esq., with the assistance of Dara A. Panahy, Esq., and revised, pursuant to a decision taken by the UNIDROIT Governing Council at its 80th 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).

² 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*).

³ 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,^{4 5}

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”⁶ means all rights to performance or payment due to a debtor by any person with respect to a space asset;⁷

(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,

⁴ 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”).

⁵ 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*.

⁶ 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.

⁷ 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;⁸

(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;^{9 10}

(g) “space assets” means¹¹:

(i) any identifiable¹² asset that is intended to be launched and placed in space or that is in space;

(ii) any identifiable¹² asset assembled or manufactured in space;

(iii) any identifiable¹² launch vehicle that is expendable or can be reused to transport persons or goods to and from space; and

(iv) any separately identifiable¹² 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).

⁸ 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.

⁹ 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)).

¹⁰ 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.

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

¹² 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.¹³

Article III bis – Sphere of application

The return¹⁴ 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:

¹³ 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.

¹⁴ 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.¹⁵

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 identify¹⁶ 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.

¹⁵ 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.

¹⁶ “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].¹⁷

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.]¹⁸

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.

¹⁷ 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).

¹⁸ 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.] ¹⁹

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.

¹⁹ 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.²⁰

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:

²⁰ 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,]²¹ co-operate to the maximum extent possible with foreign courts and foreign insolvency administrators in carrying out the provisions of Article XI.²²

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.

²¹ One delegation did not agree with the addition of the words in square brackets.

²² 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,]²³ 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.

²³ 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.]²⁴

[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.]²⁴

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

Article XVII – The Supervisory Authority

1. – The Supervisory Authority shall be designated²⁵ 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.^{26 27}

²⁴ 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).

²⁵ 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.

²⁶ 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 42nd 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.

²⁷ 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 entity²⁸ 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.

²⁸ 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 immunity²⁹ 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 Union³⁰

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.]³¹

²⁹ 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.

³⁰ 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.

³¹ 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 ³²*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. ³³

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 ³⁴

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.

³² 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.

³³ 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.

³⁴ 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]³⁵ 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.

³⁵ 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.³⁶

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].³⁷

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.³⁸ 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.

³⁶ But see footnotes 19 and 20, *supra*.

³⁷ 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.

³⁸ 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 Depository.

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 Depository 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 Depository. 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 Depository.

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 Depository. 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 Depository.

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.]

*SECOND ALTERNATIVE VERSION OF THE PRELIMINARY DRAFT SPACE PROTOCOL
AS PREPARED, AT THE REQUEST OF THE STEERING COMMITTEE, IN THE
LIGHT OF THE COMMENTS RECEIVED IN RESPECT OF THE FIRST ALTERNATIVE VERSION
OF THE SAME PREPARED FOLLOWING THE FIRST MEETING OF THAT COMMITTEE*

Explanatory Memorandum

by Mr Michel Deschamps (Canada) and Professor Sir Roy Goode (United Kingdom)

Introduction

1. The preliminary draft Protocol to the Cape Town Convention on Matters specific to Space Assets (“the Space Protocol”) was completed at the first meeting of the UNIDROIT Committee of governmental experts in December 2003. There have been many developments since that time, and a proposal by Professor Sir Roy Goode for an alternative text was discussed at the first meeting of the Steering Committee held in Berlin from 7 to 9 May 2008 and was favourably received. The Steering Committee reached a number of conclusions on the issues referred to it and established two sub-committees, one to examine the question of limitation of remedies with respect to space assets used for public services (for which the first alternative version had made provision in Article XXVII) and the other to consider the exercise of default remedies in relation to components.

2. The Steering Committee agreed that the co-chairmen of the Drafting Committee of the Committee of governmental experts (Mr Michel Deschamps, representative of the Government of Canada and Sir Roy Goode, representative of the United Kingdom) would draft a first alternative version reflecting the decisions taken by the Steering Committee and would circulate these for comment. In the light of the comments received and any reports from the sub-committees they would then prepare and circulate a revised second alternative version.

Progress to date

3. The first alternative version largely followed Sir Roy’s proposal in updating the December 2003 text to reflect, among other things, policy-based changes concerning the definition of space assets and the incorporation of provisions on debtor’s rights and related rights, while also incorporating certain further amendments to reflect the discussion at the meeting of the Steering Committee. It was circulated with an accompanying Explanatory Memorandum dated 22 July 2008 which summarised the nature of the changes made and the reasons for them.

4. The Government of Germany circulated a questionnaire designed to facilitate the work of the Sub-committee on default remedies in relation to components and various responses were received. The Sub-Committee met in Berlin on 31 October and 1 November 2008 at Commerzbank under the auspices of the Government of Germany, when it was agreed, among other things, that a new Article IX(4), based on the proposal submitted by the Government of Germany and the German Space Agency but designed to take account of the Sub-Committee’s discussions, should be drafted and incorporated into the second alternative version of the preliminary draft Protocol. Professor

Steven Harris (United States) agreed to draft the new Article IX(4) for consideration by the Governments of Germany and United States and, subject to any agreed amendments, transmission to the UNIDROIT Secretariat.

5. The Steering Committee is holding its second meeting in Paris on 14 and 15 May 2009. This will be preceded by a meeting of the sub-committee on limitation of remedies in Paris on 13 May 2009.

The second alternative version

6. It had been intended that the second alternative version, apart from reflecting any changes thought to be desirable in the light of responses to the first alternative version, would also embody provisions to give effect to the recommendations of the two Sub-committees. However, since the Sub-Committees have not yet reported we have prepared a second alternative version *ad interim* which is annexed to this Explanatory Note and contains only a few minor amendments that are essentially of a technical nature. When the recommendations of the two Sub-Committees have been received a revised second alternative version will be prepared and circulated. Accordingly this Explanatory Note, while drawing attention to the amendments made, is devoted primarily to the issues raised in the responses to the first alternative version, including questions on interpretation of the Cape Town Convention on International Interests in Mobile Equipment ("the Convention") and the Space Protocol.

Amendments to the first alternative version

7. Five amendments have been made. In Article I(k) the definition of "space" has been amended to exclude the Earth; in Article I(l) the definition of "space asset" has been refined to make it even clearer that only objects capable of independent control are space assets; in Article II(1) the phrase "debtor's rights and related rights" has been removed consequent on the decision not to allow debtor's rights and related rights to be registered as international interests but instead to provide for them to be recorded against the registration of an international interest; in Article XII(1)(b) the word "charge", which was too narrow, has been replaced by "agreement creating or providing for the international interest" so as to cover title reservation and leasing agreements, in conformity with the definition of "rights assignment" in Article I(i); and in Article XIX(1) "chargor" has been replaced by "debtor" for consistency with subsequent provisions and the rest of the Article has been more closely aligned with Article 34 of the Convention dealing with the assignment of associated rights.

Responses to the first alternative version

8. Responses to the first alternative version were received from Governments, representatives of the international commercial space and financial communities, two specialist academics, the three leading satellite operators SES SA, Intelsat Ltd and EUTELSAT SA (referred to below as "the satellite operators") and the European Satellite Operators' Association (ESOA). The responses were very helpful in identifying matters thought to require clarification, though for the most part they were not such as to lead to any change in the text of the Space Protocol. While the satellite operators queried the utility of the project (see below), most of the general comments welcomed the first alternative version as a valuable means of carrying the project forward.

The utility of the draft Space Protocol

9. The three satellite operators and ESOA raised the basic question whether there was any compelling need for the Space Protocol and whether it will be of benefit to the industry. Their views were carefully considered by the UNIDROIT Secretariat which, while acknowledging the concerns raised and the fact that the operators concerned might feel less need of the Space Protocol than others, pointed out that all those engaged in the ongoing work, in particular satellite manufacturers and financial institutions, were clear that the Space Protocol would serve a vital need and should be brought to a successful conclusion expeditiously. However, in a letter to UNIDROIT on behalf of the satellite operators Messrs John Purvis, Phillip L Spector and Philippe McAllister also raised specific issues which we found useful in crystallising certain key points and which we address below.

Definition of space assets

10. The satellite operators considered that definitions such as "satellite", "transponder", "payload" and "space vehicle" lacked clarity. We had thought that these terms were well understood in the space industry but if this is not the case we would welcome suggestions for refinement. More significantly, the satellite operators felt that the removal of separately identifiable components would limit the utility of the Space Protocol. As to this we can only repeat the three reasons we advanced previously for such removal which were accepted by the Steering Committee, namely:

- (1) Neither of the other Protocols provides for the separate registration of interests in components, and there seems little reason to adopt a different treatment for components of satellites.
- (2) While components are on Earth, dealings in them can be adequately regulated by domestic law. Once they are in space and incapable of independent control they cannot be reached by the creditor financing them and cease to be of value to that creditor.
- (3) To allow separate registration of interests in components opens the way for a very large number of registrations and raises considerable problems in distinguishing satellite components from other components and in prescribing workable identification criteria.

11. Two Governments expressed concern that the definition of "space asset" might include objects that were not capable of independent control. We have refined the definition to make it clear that none of the objects listed is a space asset unless it is capable of being independently controlled. But as we stated in paragraph 10 of our earlier Explanatory Memorandum:

"It is for consideration whether all the items in the list of space assets are of sufficient economic significance to merit inclusion and whether the criterion of independent control suffices to capture types of space asset not yet developed."

Sphere of application

12. One Government suggested that there was no need for a reference to debtor's rights and related rights in Article II(1). We agree. Debtor's rights and related rights were originally included only because at the time it was envisaged that they would be registrable as international interests in themselves. The proposal to that effect was dropped, so that, as noted in paragraph 7 above, the reference has been deleted.

Multiple holdings

13. A question was raised as to whether it was possible under the Convention to register a jointly held interest or an international interest in a share held by an operator. This question is not, of course, confined to space assets but applies equally to aircraft objects covered by the Aircraft Protocol and railway rolling stock covered by the Luxembourg Protocol. Sir Roy's Official Commentary on the Convention and Aircraft Protocol and parallel Official Commentary on the Convention and Luxembourg Protocol state expressly that while there is no provision in the Convention for multiple creditors there is nothing to preclude two or more parties from sharing an international interest as joint creditors holding a single interest or as creditors holding joint and several claims (*créances conjointes*), international interests in fractional holdings of an object or separate claims ranking *pari passu*, e.g. under a loan agreement in favour of a syndicate of lenders. As pointed out in the Official Commentaries the International Registry for aircraft objects already registers multiple holdings, including fractional interests.

Rights reassignment

14. A question was raised about the meaning of Article X(2). This provides as follows:

"The Convention and this Protocol do not apply to a rights reassignment unless and until the international interest in the space asset to which the rights reassignment relates has been assigned to the same assignee."

The purpose of this provision is to ensure that the Convention and Protocol cannot apply to debtor's rights or related rights in isolation from the international interest out of which they arise. Suppose, for example, that Debtor grants an international interest to Creditor and assigns Debtor's rights as lessor under a leasing agreement to Creditor, who reassigns them to Assignee while retaining the international interest. It would be inappropriate for this to be covered by the Convention and the Space Protocol, for this would extend the instruments to cover general receivables financing, whereas their focus is on tangible movables. There is a separate U.N. Convention on the assignment of receivables in international trade. Article 32(3) of the Convention, which provides that the Convention does not apply to an assignment of associated rights (rights to payment, etc., under the agreement creating the international interest) which is not effective to transfer the related international interest. So Article X(2) tracks Article 32(2) and its effect is that the reassigned rights and the assigned international interest must be vested in the same person if the Convention and the Space Protocol are to apply.

Exercise of default remedies

15. The satellite operators have expressed concern about the proposal by the German Government that creditors should not exercise default remedies if this would impair ownership rights in a functionally linked component. They have suggested that this question should be left to inter-creditor agreement. We detected some support for this approach but have made no drafting proposals pending receipt of a report and recommendations by the Sub-Committee on default remedies relating to components.

16. Concern was also expressed about the uncertainty generated by the proposed public service restriction on remedies currently provided in alternative forms in Article XXVII(3). Again, we have

not felt able to draft any new proposal until receipt of the report and recommendations from the Sub-Committee on the public service restriction.

Salvage interests

17. Salvage insurers had requested that the Space Protocol be revised to permit registration of salvage interests and prospective salvage interests and to make creditors' remedies subject to these. The satellite operators considered this would create unacceptable priority situations and we believe that others may have shared this concern. We understand, however, that salvage insurers are no longer seeking to create a new type of international interest but merely to provide for a limited right of subrogation to the international interest held by the creditor whose claim has been discharged by the salvage insurer, in which case the problem presented by the satellite operators will not arise. As the question is outside the purview of the Steering Committee and will have to be decided by the Committee of governmental experts we say no more about it.

Identification of space assets

18. The satellite operators considered that the approach on identification criteria adopted in the first alternative version would be confusing. We do not see why this should be so. The draft follows the Luxembourg Protocol in distinguishing the identification needed for the constitution of an international interest and that required for registration. For the purposes of the former it is not necessary to require unique identification, because the creation of an international interest concerns only the parties to the agreement creating or providing for the international interest. It ought therefore to be open to them to make an agreement covering after-acquired assets without the need for a separate agreement each time an asset is acquired, which imposes an unnecessary burden. Any description which enables the asset to be identified as falling within the scope of the agreement should suffice. That is the effect of Article XVI, which should perhaps be brought forward to appear immediately after Article IV. In a Contracting State such means of identification will be adequate even if under that State's domestic law the concept of security in after-acquired property was not recognised. By contrast when it comes to registration, which affects third parties, unique identification is essential, since the International Registry is asset-based. This should allay the concern expressed by another respondent about the identification criteria in an asset-based registration system. We felt that as a minimum these should be the identification criteria set out in Article XVI(3), which include the orbital parameters specified in Article IV(1)(d) of the 1975 U.N. Convention on Registration of Objects Launched into Outer Space, but that in case any additional criteria were found to be necessary when the registration system is established or in the light of other subsequent developments it should be open to the Supervisory Authority to prescribe these in the regulations. Accordingly for the time being we have left Article XVI(3) unchanged.

Choice of law

19. Article XVII(2) provides that the parties to an agreement can agree on the law which is to govern the agreement. One respondent asked whether Article XVII(2) should not refer to "the law or rules of law" so as to permit reference to the legal rules of a non-State body, such as the UNIDROIT Principles of International Commercial Contracts, as he suggested was permitted under the Rome I regulation (see recital 13). However, Rome I does not permit the selection of non-State law *as the applicable law* (see Article 3), it merely makes it clear that the parties can incorporate

“rules of law” as contractual terms. Moreover, neither of the other two Protocols allows the parties to select non-State rules.

20. Another respondent wondered how Article XVII(3), which explains what is meant by a reference to the law chosen by the parties, relates to “primary insolvency jurisdiction”, a phrase defined in Article I(g). The answer is that “primary insolvency jurisdiction” relates to jurisdiction and has no relevance to choice of law.

Default remedies as regards rights assignments and reassignments

21. Two respondents asked for a commentary on Article XIX. This indicated that the current formulation of Article XIX was too compressed and we have modified it so as to align it more closely with Article 34 of the Convention dealing with the comparable position as regards associated rights. The purpose of this Article is to avoid repeating all the provisions on default remedies available under Chapter III of the Convention to a chargee under a security agreement creating or providing for an international interest. The technique is simply to confer the same default remedies on a creditor to whom debtor’s rights and related rights are assigned and on an assignee to whom such rights are reassigned so far as those remedies are applicable to intangibles. The remedies of physical repossession or the grant of a lease are plainly not applicable to intangibles. However, debtor’s rights to payment are reducible to possession by payment or by being placed under the control of the creditor or assignee under a reassignment through a notice of assignment or reassignment, or alternatively may be sold; the income from such payments can be collected or received; the rights can be vested in the creditor or assignee in total or partial satisfaction of the secured obligations. Similarly there is no difficulty in applying Articles 11 to 14 of the Convention to debtor’s rights. The application of the default remedies is more restricted as regards related rights because the creditor or assignee typically has no ability to take steps against the grantor of the rights but it can take steps to compel co-operation by the debtor or assignor.

Insolvency remedies: Alternatives A and B

22. One respondent raised questions about Article XXII. The provisions of this Article track those of Article XI of the Aircraft Protocol. Article XXII applies only if the Contracting State that is the primary insolvency jurisdiction (as defined by Article I(g)) has made a declaration under Article XXIX(4). A Contracting State has three options. It may select Alternative A or Alternative B (but in each case only in its entirety) or it may make no declaration and apply its domestic insolvency law. Alternative A is one which requires certain action on the part of the insolvency administrator, failing which the creditor is entitled to take possession of the object and the court has no discretion to interfere. Alternative B leaves the recovery of possession in the discretion of the court. In the case of aircraft financing Alternative A has been considered to reduce creditor risk so strongly that in certain conditions a foreign buyer of large aircraft in a Contracting State that has made a declaration under Alternative A may qualify for a substantial discount from the exposure fee for officially supported export credits. Similar considerations may or may not apply to satellite financing.

The public service restriction

23. Provisions on this await the recommendations of the report from the Sub-Committee on default remedies in relation to components.

Waiver of immunity

24. One respondent wondered whether ratification of the Space Protocol would not of itself waive immunity under Article XXX1(1). The answer is that it would not. The waiver is given by a State in its capacity as party to an agreement within the Convention and the Space Protocol, not in its capacity as a Contracting State, and it must be given in writing and contain a description of the space asset. Another respondent asked whether the effect of Article XXX(1) was that, contrary to the general rule of international law, waiver of immunity from jurisdiction would also constitute waiver of immunity from enforcement. Again the answer is no. The language must be read distributively. So the phrase "effective to confer jurisdiction" relates back to "from the jurisdiction of the courts", while the phrase "and permit enforcement" refers back to "relating to enforcement."

Speedy interim relief

25. A respondent asked why it was the Contracting State and not the legal jurisdiction for financing that was referred to in Article XXXIX(3), relating to the making of a declaration as to the time within which a court is to grant an application for interim relief. The answer is that the Convention and the Space Protocol apply as between Contracting States, and it is for each Contracting State to decide what declaration to make.

Responses

26. We suggest that further responses be deferred until after reports from the two Sub-Committees and the circulation of the revised second alternative version based on the recommendations contained in those reports.

Roy Goode
Michel Deschamps
31 March 2009

*TEXT OF A SECOND ALTERNATIVE VERSION OF THE PRELIMINARY DRAFT PROTOCOL
TO THE CONVENTION ON INTERNATIONAL INTERESTS IN MOBILE EQUIPMENT
ON MATTERS SPECIFIC TO SPACE ASSETS,
PREPARED BY MR MICHEL DESCHAMPS AND PROFESSOR SIR ROY GOODE
AT THE REQUEST OF THE STEERING COMMITTEE*

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*) as it relates to space assets, in the light of the purposes set out in the preamble to the Convention,

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,

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) “controlled”, in relation to goods, technology, data or services to which Article XXVII(2) applies means that their transfer is subject to governmental requirements or restrictions;

(b) “debtor’s rights” means all rights to payment or other performance due to a debtor by any person with respect to a space asset;

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

(d) “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, gives or issues a suretyship or demand guarantee or standby letter of credit or other form of credit insurance;

(e) “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;

(f) “launch vehicle” means a vehicle used or intended to be used to transport persons or goods to or from space;

(g) “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;

(h) “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, when acting in a regulatory capacity, to manufacture, launch, control, use or operate a space asset, *or* relating to the use of orbits positions or the transmission, emission or reception of electromagnetic signals to and from a space asset;

(i) “rights assignment” means a contract by which the debtor confers on the creditor an interest (including an ownership interest) in or over the whole or part of existing or future debtor’s rights or related rights to secure the performance of, or in reduction or discharge of, any existing or future obligation of the debtor under the agreement creating or providing for the international interest;

(j) “rights reassignment” means a contract by which the creditor transfers to the assignee, or an assignee transfers to a subsequent assignee, the whole or part of its rights and interest under a rights assignment;

(k) “space” means outer space, including the Moon and other celestial bodies but excluding the Earth; and

(l) “space asset” means any man-made uniquely identifiable satellite, satellite transponder, payload, space station, space vehicle, launch vehicle, reusable space capsule or other object, in each case only where capable of being independently controlled, in or intended to be launched in or into space or used or intended to be used as a launch vehicle, including any such asset in course of manufacture or assembly, together with all modules and other installed, incorporated or attached accessories, parts and equipment and all data, manuals and records relating thereto.

3. – An object which is a space asset as defined by sub-paragraph (l) of the preceding paragraph shall not constitute an aircraft object for the purposes of the Convention as applied to aircraft objects, whether the object is on earth or in air or space.

Article II – Application of the Convention as regards space assets, debtor’s rights and related rights

1. – The Convention shall apply in relation to space assets, ~~debtor’s rights and related rights~~ as provided by the terms of this Protocol.

2. – The law pursuant to which related rights are granted or issued determines the extent to which those rights are transferable or assignable.

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 XXIV), 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.

Article IV – Return of a space asset

The return of a space asset from space does not affect an international interest in that asset.

Article V – Formal requirements for rights assignment

An assignment is constituted as a rights assignment where it is in writing and enables:

- (a) the debtor's rights and related rights the subject of the agreement to be identified;
- (b) the space asset to which those rights relate to be identified; and
- (c) the obligations secured by the agreement to be determined, but without the need to state a sum or maximum sum secured.

Article VI – Assignment of future rights

A provision in a rights assignment by which future debtor's rights or related rights are charged operates to confer on the chargee a security interest in the charged rights when they come into existence without the need for any new charge or act of transfer.

*Article VII – Recording of rights assignment
as part of registration of international interest*

1. – The holder of an international interest or prospective international interest in a space asset to whom the debtor has granted an interest in or over debtor's rights or related rights under a rights assignment may, when registering the international interest or prospective international interest or subsequently by amendment to such registration, request that the rights assignment be recorded as part of the registration. Such request may identify the assigned rights either

specifically or by a statement that the debtor has assigned all or some of the debtor's rights or related rights, without further specification.

2. – Articles 18, 19, 20(1) – (4) and 25(1), (2) and (4) of the Convention apply in relation to a record made in accordance with the preceding paragraph as if:

- (a) references to an international interest were references to a rights assignment;
 - (b) references to registration were references to recording of the rights assignment;
- and
- (c) references to the debtor were references to the grantor of the debtor's rights or related rights.

3. – A search certificate issued under Article 22 of the Convention shall include the particulars recorded.

4. – Discharge of the registration of an international interest also discharges any record forming part of that registration under paragraph 1.

Article VIII – Priority of recorded rights assignment

1. – Subject to paragraph 2, a recorded rights assignment has priority over any other rights assignment subsequently recorded and over an unrecorded rights assignment.

2. – Where a rights assignment is recorded in the registration of a prospective international interest it shall be treated as unrecorded unless and until the prospective international interest becomes an international interest, in which event the rights assignment has priority as from the time it was recorded.

Article IX – Rights grantor's duty to assignee

1. – To the extent that the debtor's rights or related rights have been assigned to the creditor under a rights assignment, the person from whom payment or other performance of the debtor's rights is due or the grantor of the related rights is bound by the rights assignment and has a duty to make payment or give other performance to the creditor, if but only if:

- (a) such person or grantor has been given notice of the rights assignment in writing by or with the authority of the debtor; and
- (b) the notice identifies the debtor's rights or related rights.

2. – For the purposes of the preceding paragraph, a notice given by the creditor after the debtor defaults in performance of any obligation secured by a rights assignment is given with the authority of the debtor.

3. – Irrespective of any other ground on which payment or performance by the grantor discharges the grantor from liability, payment or performance shall be effective for this purpose if made in accordance with paragraph 1.

4. – Nothing in this Article shall affect the priority of competing rights assignments.

Article X – Formal requirements for rights reassignment

1. – A reassignment is constituted as a rights reassignment which is in writing and:
 - (a) enables the reassigned rights and the space asset to which they relate to be identified; and
 - (b) in the case of a reassignment by way of security, enables the obligations secured by the reassignment to be determined, but without the need to state a sum or maximum sum secured.
2. – The Convention and this Protocol do not apply to a rights reassignment unless and until the international interest in the space asset to which the rights reassignment relates has been assigned to the same assignee.

Article XI – Rights reassignment of future interests in rights

A provision in a rights reassignment by which the creditor's future interest in debtor's rights or related rights is assigned operates to transfer that interest to the assignee when it comes into existence without the need for any new act of transfer.

Article XII – Effect of assignment or reassignment of registered international interest

1. – Where a rights assignment has been recorded as part of the registration of an international interest and the international interest is subsequently assigned, the assignee acquires:
 - (a) all the rights of the creditor under the rights assignment;
 - (b) all the interests and priorities of the creditor under the Convention and this Protocol arising from the [agreement creating or providing for the international interest](#)~~charge~~ ;
 - (c) the right to be shown in the record as assignee under the rights assignment; and
 - (d) priority over the right of another creditor to collect or receive income or profits under Article 8 of the Convention in respect of debtor's rights.
2. – The provisions of Articles VII and VIII and the preceding paragraph apply to a rights reassignment.
3. – Article IX(1) and (2) apply in relation to the grantor's duty to the assignee under a rights reassignment as if the references to the creditor and debtor were references to the assignee and assignor respectively as they apply to a rights assignment.
4. – Where there are competing rights reassignments relating to the same international interest, a recorded rights reassignment has priority over a rights reassignment subsequently recorded and over an unrecorded rights reassignment.

Article XIII – Derogation

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

Article XIV – Formalities, effects and registration of contracts of sale

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

Article XVI – Identification of space assets

1. – For the purposes of Article 7(c) of the Convention and Article XIV of this Protocol, a description of a space asset is sufficient to identify the space asset if it contains:

- (a) a description of the space asset by item;
- (b) a description of the space asset by type;
- (c) a statement that the agreement covers all present and future space assets; or
- (d) a statement that the agreement covers all present and future space assets except for specified items or types.

2. – For the purposes of Article 7 of the Convention, an interest in a future space asset identified in accordance with the preceding paragraph shall be constituted as an international interest as soon as the chargor, conditional seller or lessor acquires the power to dispose of the space asset, without the need for any new act of transfer.

3. – A description of a space asset that contains the name of the manufacturer, the model, the launch site, the launch date, the orbital parameters (including inclination, nodal period, apogee and perigee), and the general function of the space asset, and satisfies such other requirements as may be established in the regulations is necessary and sufficient to identify the space asset for the purposes of registration in the International Registry.

Article XVII – Choice of law

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

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 XVIII – Modification of default remedies provisions as regards space assets

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

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. – Insert any provision considered appropriate as regards enforcement against a space asset functionally linked to another space asset in which another creditor has an interest].

Article XIX – Default remedies as regards rights assignments and reassignments

1. – In the event of default by the ~~debtor~~~~chargor~~ under a rights assignment Articles 8, 9 and 11 to 14 of the Convention apply in the relations between the assignor and the assignee (and in relation to debtor's rights and related rights, apply in so far as those provisions~~so far as the same~~ are capable of application to intangible property) as if references:

(a) to the secured obligations and the security interest were references to the obligations secured by the rights assignment and the security interest created by that assignment;

(b) to the chargee or creditor and chargor or debtor were references to the assignee and assignor;

(c) to the holder of the international interest were references to the assignee; and

(d) to the object were references to the assigned debtor's rights and related rights.-

2. – In the event of default by the assignor in performance of any obligation secured by a rights reassignment made by way of security the preceding paragraph applies as if references to the assignment were references to the reassignment. ~~the provisions of Article 34 apply with the substitution of "debtor's rights and related rights" for "associated rights"-.~~

Article XX – Placement of data and materials

The parties to an agreement may specifically agree for the placement of command codes and other 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.

Article XXI – 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 XXXIX(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.]

Article XXII – 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 XXXIX(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.

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.

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 XVIII 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 XXXIX(4) whether it will:

(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 XXIII – Insolvency assistance

1. – This Article applies only where a Contracting State has made a declaration pursuant to Article XXXIX(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,] co-operate to the maximum extent possible with foreign courts and foreign insolvency administrators in carrying out the provisions of Article XXII.

Article XXIV – 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.

2. – A buyer of a space asset under a registered sale acquires its interest in that asset subject to an interest previously registered.

Article XXV – 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 XXVI – 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 XXIV(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 XXIV(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 XXVII – Limitations on remedies

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

2. – A Contracting State [, in accordance with its laws and regulations,] 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 command codes and other data and materials pursuant to Article XX, 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.

[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 XVIII to XXIII 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 Depositary.]¹

¹ The text of Article XXVII(3) is subject to the work to be carried out by the Sub-committee set up by the Steering Committee to prepare options for a solution to the problem of public service that might be laid before the Committee of governmental experts, once reconvened.

[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 XVIII to XXIII 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.]²

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

Article XXVIII – The Supervisory Authority

1. – The Supervisory Authority shall be designated 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.

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 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 XXIX – 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 XXX – 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 XVI 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.

² The text of Article XXVII(3) is subject to the work to be carried out by the Sub-committee set up by the Steering Committee to prepare options for a solution to the problem of public service that might be laid before the Committee of governmental experts, once reconvened.

[3. – Where a space asset in respect of which an interest has been registered is not in or launched into space within [one year] of such registration, the holder of such interest shall, without undue delay, procure the discharge of the registration after written demand by the debtor delivered to or received at the address stated in the registration].

3. [bis], – 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.

CHAPTER IV – JURISDICTION

Article XXXI – Waiver of sovereign immunity

1. – Subject to paragraph 2, a waiver of sovereign immunity 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 XVI, of the space asset.

CHAPTER V – RELATIONSHIP WITH OTHER CONVENTIONS

Article XXXII – 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 XXXIII – Relationship with the United Nations Outer Space Treaties and instruments of the International Telecommunication Union*]

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.]

[CHAPTER VI – FINAL PROVISIONS]

Article XXXIV – 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 XXXVI.

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.

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

Article XXXV – Regional Economic Integration Organisations

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.

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 XXXVI – Entry into force

1. – This Protocol enters into force between the States which have deposited instruments referred to in sub-paragraph (a) on the later of:

(a) the first day of the month following the expiration of three months after the date of the deposit of the [fifth] instrument of ratification, acceptance, approval or accession, and

(b) the date of the deposit by [the Secretariat] with the Depository of a certificate confirming that the International Registry is fully operational.

2. – For other States this Protocol enters into force on the first day of the month following the later of:

(a) the expiration of three months after the date of the deposit of its instrument of ratification, acceptance, approval or accession; and

(b) the date referred to in sub-paragraph (b) of the preceding paragraph.

Article XXXVII – 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.

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.

Article XXXVIII - Transitional Provisions

In relation to space assets Article 60 of the Convention shall be modified as follows:

(a) in paragraph 2(a), after “situated” insert “at the time the right or interest is created or arises”;

(b) replace paragraph 3 with the following:

“3. – A Contracting State may in its declaration under paragraph 1 specify a date, not earlier than three years after the date on which the declaration becomes effective, when Articles 29, 35 and 36 of the Convention as modified or supplemented by the Protocol will become applicable, to the extent and in the manner specified in the declaration, to pre-existing rights or interests arising under an agreement made at a time when the debtor was situated in that State. Any priority of the right or interest under the law of that State, so far as applicable, shall continue if the right or interest is registered in the International Registry before the expiration of the period specified in the declaration, whether or not any other right or interest has previously been registered.”

Article XXXIX – 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 XVII;

(b) that it will apply either or both of Articles XXIII and XXVII.

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

3. – A Contracting State may, at the time of ratification, acceptance, approval of, or accession to this Protocol, declare that it will apply Article XXI wholly or in part. If it so declares with respect to Article XXI(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 XXII 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 XXII.

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

Article XL – 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 XLI – Reservations and declarations

1. – No reservations may be made to this Protocol but declarations authorised by Articles XXXVII, XXXIX, XL and XLII 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 XLII – Subsequent declarations

1. – A State Party may make a subsequent declaration, other than the declaration made in accordance with Article XL 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 XLIII – Withdrawal of declarations

1. – Any State Party having made a declaration under this Protocol, other than a declaration made in accordance with Article XL 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 XLIV – 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 XLV – 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 XXXVI relating to its entry into force.

Article XLVI – 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.

*SUMMARY OF THE CONCLUSIONS OF THE INFORMAL CONSULTATIONS ON DEFAULT REMEDIES IN
RELATION TO COMPONENTS THAT TOOK PLACE IN PARIS ON 12 AND 13 MAY 2009*

(prepared by Sir Roy Goode)

Present:

Mr H.-G. Bollweg (Germany)
Mr S. Schultheiss (Germany)
Mr K.F. Kreuzer (Germany)
Mr H.S. Burman (United States of America)
Mr S. Harris (United States of America)
Mr K.K. Nuri (United States of America)
Sir Roy Goode (Co-draftsman of the alternative version of the preliminary draft Protocol)
Mr M.J. Stanford (UNIDROIT Secretariat)
Mr D.A. Porras (UNIDROIT Secretariat)

Introduction

1. The Sub-Committee on default remedies in relation to components had met in Berlin on 31 October and 1 November 2008 to discuss a proposal from the German Government that a creditor should not be entitled to exercise a default remedy in relation to a component of a satellite where this would adversely affect the interests of another creditor in a physically linked component. After a discussion in which some concern had been expressed about the possible impact of such a provision on the efficacy of a creditor's default remedies, the Sub-Committee had agreed to ask the Governments of Germany and the United States of America to draft a set of provisions based on the proposal of the German Government but adapted to take account of the interests of creditors in having effective default remedies.

2. Mr S. Harris had drafted, and had subsequently revised, a set of paragraphs to be inserted into what is now Article XVIII of the second alternative version of the preliminary draft Protocol, prepared by Sir Roy Goode (United Kingdom) and Mr J.M. Deschamps (Canada), the Co-Chairmen of the Drafting Committee established by the Committee of governmental experts. This text sought to maintain the essence of the proposal of the German Government but to treat the two creditors as having competing interests in a single asset and then allow the enforcing creditor to proceed if it would have priority under Article 29 of the Convention. The draft would also require the enforcing creditor to compensate the other creditor for damage caused to its component, but not for loss in value resulting from the removal of the enforcing creditor's component. Finally, the draft inserted a provision borrowed from the Aircraft Protocol to the effect that ownership of or another right or interest in a space asset should not be affected by its installation on or removal from another space asset. However, the German Government did not feel that this adequately reflected the views of the Sub-Committee.

3. Sir Roy had had discussions on the telephone with Mr Harris and Mr H.S. Burman. Later he and Mr M.J. Stanford, Deputy Secretary-General of UNIDROIT, had met Mr H.-G. Bollweg in Rome, to explore a solution based on three principles:

- a) Granting an international interest in satellites and physically linked transponders should, as far as possible, follow by analogy the concept embodied in the Aircraft Protocol of distinguishing between airframes and aircraft engines as separate objects of international interests.
- b) There was no problem about enforcement of a kind that did not affect the rights of the other creditor, e.g. the exercise of step-in provision without physical interference with the other creditor's asset.
- c) The starting point should be that action should not be taken which would adversely affect another creditor's rights in the linked asset. However, the creditor should be free to enforce its interest in asset A if this was registered before registration of the interest of another creditor in the physically linked asset B.

Revised proposals

4. Following these discussions Sir Roy had prepared a revised draft which sought to align the two positions. This had been accompanied by an Explanatory Note setting out how the new text sought to achieve the desired outcome. The essence of the new text, to be inserted as paragraphs 4 to 6 of the second alternative version of the preliminary draft Protocol, was that the basic principle would be that proposed by Germany but with three exceptions: where the two creditors otherwise agreed; where the other creditor's interest in the linked space asset had not been registered; and where, if the two assets were to be treated as a single asset in which the two creditors had competing interests, the enforcing creditor would have priority under Article 29 of the Convention. The provision based on the Aircraft Protocol was moved to become paragraph 3 of Article XXIV, since it was not limited to default situations.

Discussion

5. In the lengthy discussion that ensued the informal group agreed that that this paper formed a useful basis for a solution. However, there remained certain concerns. Some of these were of a drafting nature, some were based on concerns to ensure that all typical situations were covered and some arose from differences in the approach of national laws. The following were the main points that arose:

- a) The drafting should cover not only the case where asset B became attached to asset A but the converse case where asset A became attached to asset B. So the provisions should work in both directions.
- b) One member of the group felt that the formulation of the priority rule could be made clearer.
- c) It was necessary to cover both the case where an interest in the entire satellite was granted at a time when components such as transponders in which another creditor had been granted an interest were already part of the satellite and cases where the transponder was incorporated into the satellite later when it was separately financed and the subject of an existing security interest in favour of a different creditor.
- d) Anglo-American law had no difficulty with the concept that an international interest could be given over the entire satellite, including components subsequently added, to A and separately an international interest in the part of the satellite comprising the components to B and from this perspective it was considered important to make it clear that the granting of an interest in the whole satellite did not preclude the

granting of separate interest in components. It appeared, however, that German law did not recognise such a possibility.

- e) It was agreed that to some extent the solution would depend on what assets other than the whole satellite would be covered in the definition of space assets.
- f) The informal group also discussed the question whether a creditor should be able to take an international interest that covers the satellite as a whole comprising other physically-linked assets or whether separate international interests should be required for each of the different physically-linked assets.
- g) The identification criteria set out in Article XVI(3) of the revised alternative version were criticised as inadequate.
- h) It was pointed out that the Aircraft Protocol did not embody the concept that an aircraft object could include another aircraft object but on the contrary treated airframes as entirely separate from aircraft engines. The comment was also made that whereas it was easy to separate airframes from aircraft engines, satellites did not readily lend themselves to this separation.
- i) Concern was also expressed that paragraph 1 of the draft setting down a basic position might cause concern to creditors, who might not appreciate this was the default position in the absence of an agreement. Sir Roy suggested recasting the two paragraphs so as to provide that the rights of the creditor seeking to enforce against a linked asset should be as provided by the agreement between them but that in default of such agreement the rules set out should apply. This would reflect the fact that in practice these matters were almost always dealt with by inter-creditor agreement. There was general agreement to this approach.

Conclusions

6. The group concluded that, although not all issues had been resolved, substantial progress had been made. In particular, it was agreed that:

- a) There was no difficulty where enforcement by creditor A did not adversely affect creditor B's interest in another asset, as where creditor B merely exercised a contractual right to substitute a new party for the defaulting debtor.
- b) The rules should be recast as default rules applicable in absence of agreement between the parties.
- c) The priority rule, if any, should be reformulated so as to remove any doubt as to its meaning.
- d) The identification criteria might be adequate for a complete satellite but needed to be expanded to embrace different criteria for the identification of transponders and other, components.
- e) It should be made clear whether an international interest in a transponder separately financed and granted prior to installation of the transponder on the satellite would have priority over another creditor's earlier interest in the satellite as a whole if such an interest could be taken.

7. Accordingly agreement was reached on a number of issues. Two points were outstanding. The first was whether it should be possible for one creditor to register an international interest in an entire satellite, including other physically linked assets or whether it should only be possible to register an interest separately in each physically linked asset. The second was whether, if an international interest were taken in the entire satellite (assuming this to be possible) and then registered an international interest subsequently taken by a transponder financier in a transponder later added to the satellite would continue to be effective after incorporation into the satellite so as to give the transponder financier priority over the holder of the international interest in the satellite.

8. The members of the group were confident that in the light of the substantial measure of agreement reached so far on other issues a solution could be found for this particular problem and for any subsidiary issues. To that end the informal group was willing to have a separate meeting in Geneva in October to follow immediately after the concluding stage of the UNIDROIT Diplomatic Conference in Geneva, and Sir Roy undertook to provide a revised text for such a meeting.

12 May 2009

SPACE PROTOCOL, INFORMAL WORKING
GROUP ON SALVAGE INTERESTS:
ISSUES UNDER CONSIDERATION

By

Pamela L. Meredith
Zuckert Scoutt & Rasenberger, LLP

UNIDROIT Steering Committee Meeting
Paris, May 2009

Insurers' Salvage Interests

- Upon payment of insurance proceeds after a loss, insurers become entitled to salvage. For example:
 - Title Salvage: Insurer takes title to the satellite
 - Revenue Salvage: Insurer receives a percentage of the revenue stream from the operation of the defective satellite
- Significance of Salvage: The defective satellite may have several years and significant value left

Salvage Not Protected in the Protocol

- No Registration: Under the current draft Protocol, a salvage interest cannot be registered: It is *not* an “international interest” or a “contract of sale”
 - Consequences:
 - Buyer takes title free and clear of salvage. (Conv., art. 29.1)
 - Salvage not protected against a subsequently registered international interest. (Protocol, art. XXIV.1, second alt. version)
 - *Applies even if buyer/creditor knows of the salvage interest*
- No Subrogation: No general subrogation to creditor’s international interest upon payment to creditor under a loss payable clause
 - Under U.S. law, such payment may be viewed as *extinguishing* the debt, leaving no interest to subrogate into

Solution Under Consideration

- Title Salvage: Treat salvage as a contract of sale, which allows for registration of title salvage as a sale
- Revenue Salvage: Permit insurer who pays proceeds to a creditor to subrogate into creditor’s international interest, to the extent of the salvage interest

Possible Addition to the Protocol

- Title Salvage:

For the purpose of Article III an interest in a satellite acquired by a satellite insurer as a salvage interest is deemed to have been acquired by way of sale. See Sir Roy Goode, Explanatory Memorandum, April, 2008, ¶ 19

- Revenue Salvage:

For the purpose of Article 16.1(c), when an insurer who is liable under an insurance policy for a space asset makes a payment of proceeds to a creditor, that payment is deemed not to have extinguished the obligations secured by the creditor's registered international interest and/or recorded debtor's rights to the extent of the insurer's salvage, and the insurer may be contractually subrogated to the creditor's rights and interests. Contractual subrogation is not limited to salvage when the insurer is not liable under the policy.