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*BASIC FEATURES
OF THE PROPOSED INTERNATIONAL REGISTRY
CONTEMPLATED BY THE CAPE TOWN CONVENTION ON INTERNATIONAL
INTERESTS IN MOBILE EQUIPMENT AS IMPLEMENTED BY
THE PRELIMINARY DRAFT PROTOCOL ON MATTERS SPECIFIC TO SPACE ASSETS*

(prepared by the UNIDROIT Secretariat)

Rome, June 2003

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This document sets out the basic features of the International Registry (hereinafter referred to as the *International Registry*) contemplated by the Convention on International Interests in Mobile Equipment opened to signature in Cape Town on 16 November 2001 (hereinafter referred to as the *Convention*) as implemented by the preliminary draft Protocol thereto on Matters specific to Space Assets (hereinafter referred to as the *preliminary draft Protocol*). It has been based on the document “Basic Features of the proposed International Registry contemplated by the Convention as modified by the Aircraft Equipment Protocol” submitted as an appendix to the second Report submitted by the International Registry Task Force to the Secretariats of UNIDROIT and the International Civil Aviation Organization (I.C.A.O.) on 20 February 2001.

I. BASIC FEATURES OF THE INTERNATIONAL REGISTRY

1. The International Registry will be organised according to the criteria set out in Article VII of the preliminary draft Protocol. This Article provides multiple criteria for the identification of a space asset. It provides that it will be necessary and sufficient for the purposes of the identification of a space asset if the description of such asset:

- (a) provides the name of the debtor and the creditor;
- (b) provides an address for the debtor and for the creditor;
- (c) contains a general description of the space asset indicating the name of the manufacturer (or principal manufacturer, if more than one manufacturer exists), its manufacturer’s serial number (if one exists) and its model designation (or comparable designation, if a model designation does not exist) and indicating its intended location;
- (d) provides the date and location of launch;
- (e) in the case of a separately identifiable component forming a part of the space asset or attached to or contained within the space asset, provides a description of such separately identifiable component, the space asset of which it forms a part, to which it is attached or within which it is contained and each of the other identification criteria specified in Article VII with respect to such space asset; and
- (f) such additional identification criteria as may be specified in the regulations referred to in Article XVIII of the preliminary draft Protocol.

Regarding instruments of ratification, acceptance, approval or accession and the declarations made by Contracting States under the preliminary draft Protocol, the International Registry will be organised by Contracting State.

Note

Registrations and searches will be made and their results issued with reference to the multiple criteria indicated above. The Convention and the preliminary draft Protocol further contemplate the International Registry giving publicity to instruments of ratification, acceptance, approval or accession and declarations made by Contracting States under the preliminary draft Protocol. These will be organised and searchable by Contracting State.

2. The International Registry will be wholly electronic.

Note

Registrations and searches will be made solely by electronic means.

3. The International Registry will serve the sole purpose of establishing priorities among competing valid claims. The act of registration neither presupposes nor is an aspect of that essential validity.

Note

The act of registration establishes first-in-time priority, should the interest notified in the registration exist or, in the case of prospective interests, be created.¹ Registration does not presuppose a validly existing underlying interest nor does it constitute a step in the process of creating an interest. It simply provides an objective rule-of-decision in the case of competing valid claims.

4. Priority will be established on a first-in-time basis. The term “first-in-time” refers to the time when an interest is searchable in the International Registry.

Note

This permits searching parties to rely on the results of their searches, thus enhancing the overall utility of the International Registry. Those registering interests can protect themselves by searching for their own registrations prior to advancing funds or relinquishing possession, as the case may be. An advanced electronic system, coupled with the ability to register prospective interests, permits registering parties to protect themselves.

5. The International Registry will be a minimalist, notice-based system.

¹ The criteria for valid creation are set out in the Convention (Articles 7 (formal requirements) and 32 (formal requirements of assignment) and the preliminary draft Protocol (Article V (formalities, effects and registration of contracts of sale), as supplemented by the applicable law, to the extent required by the Convention (Article 5(2)).

Note

The registration information to be required will be the absolute minimum needed to put all searching parties on notice of the asserted or contemplated existence of interests, that is:

- (a) names of parties;
- (b) contact details of those parties;
- (c) type of registration (for example, “international interest” or “contract of sale”) and duration; and
- (d) description of asset.

Documents may not be registered.

6. The role of the Registrar will be administrative, not interventionist, with risk management being addressed through system design.

Note

The Registrar will not be expected to assess the accuracy of the information submitted for registration nor the authority of the registering party to act. However, the system will be designed with a view to:

- (a) minimising the risks of unauthorised registrations, bearing in mind the minimalist nature of the system; and
- (b) preventing registrations which are manifestly implausible or which otherwise do not contain the required information.

7. The Supervisory Authority will supervise the Registrar and the operation of the International Registry in accordance with the basic principles of the Convention and the preliminary draft Protocol as summarised below.

Note

The Supervisory Authority, following consultations, is to promulgate the regulations which will govern the day-to-day running of the International Registry. Upon request, it may provide the Registrar with guidance. It is to establish administrative procedures for dealing with complaints concerning the operation of the International Registry. The Supervisory Authority is to ensure that an efficient notice-based electronic registration system exists to implement the objectives of the Convention and the preliminary draft Protocol.

II. BASIC FEATURES OF THE CONVENTION AND PRELIMINARY DRAFT PROTOCOL RELATING TO THE INTERNATIONAL REGISTRY

1. Various interests² in space assets³ are accorded priority⁴ on a “first-in-time” registration basis,⁵ by virtue of the basic priority rules⁶ of the Convention and the preliminary draft Protocol. These rules are objective and not dependent on a registering party’s lack of knowledge of other interests. Parties searching the International Registry will be able to rely on the results of their searches. The only other rights or interests that may affect such priority are certain non-consensual rights and interests⁷ that may be declared by a Contracting State as being preferential in nature and recorded as such in the International Registry.⁸

2. An interest is registered by means of electronic entry into the International Registry,⁹ operated by a Registrar appointed and supervised by a Supervisory Authority,¹⁰ that in turn has the duty of reporting periodically to Contracting States. The responsibilities of the Supervisory Authority include the issuing of binding operational regulations, the establishment of administrative complaint procedures and the provision of guidance to the Registrar, where requested by that party.¹¹

3. In view of time differences and the need to avoid preferred regions, the International Registry will be operated on a 24-hour, seven-days-a-week basis.¹²

² International interests and related subrogations, subordinations and assignments, together with non-consensual rights and interests, notices of national interests and contracts of sale; cf. Article 16(1) of the Convention and Articles III and V of the preliminary draft Protocol.

³ As defined by Article I(2)(f) of the preliminary draft Protocol.

⁴ If an interest was not validly created in accordance with the Convention and the applicable law (cf. Note 1, *supra*) it cannot be the subject of a priority dispute. For example, if the debtor lacked title or did not have the authority of his company to enter into the transaction, it would not have the “power to dispose” of the asset, as required by the Convention (cf. Article 7(b)). Thus the fact that a creditor’s international interest was registered in such a case would have no legal significance.

⁵ This includes “prospective” interests, that is intended future interests (cf. Article 1(x), (y) and (z) of the Convention), which do not exist at the time of registration. For example, if a prospective international interest is registered and subsequently becomes an international interest, its priority is determined from the date of initial registration provided that the registration is still current immediately before the international interest is constituted in accordance with Article 7 of the Convention (cf. Article 19(4) of the Convention). To ensure fairness in this regard a debtor can require a creditor to discharge a prospective interest at any time prior to that creditor giving or committing to give value (cf. Article 25(2) of the Convention).

⁶ Cf. Article 29 of the Convention and Article XIII of the preliminary draft Protocol. In addition, registration of international interests and contracts of sale prior to the commencement of insolvency proceedings will ensure that they will be effective in such proceedings (cf. Article 30 of the Convention and Article III of the preliminary draft Protocol).

⁷ Cf. Article 1(s) of the Convention (any right or interest “conferred under the law of a Contracting State which has made a declaration under Article 39 to secure the performance of an obligation”). A decision was made not to attempt to unify priority rules in this sensitive area, thus avoiding the parallel problems encountered in several other international treaties.

⁸ Cf. Article 23 of the Convention.

⁹ Created on the legal authority of the Convention and the preliminary draft Protocol and its contemplated establishment by the Supervisory Authority; cf. Articles 1(p), 16(1) and 17(2)(a) of the Convention.

¹⁰ As regards the designation of the Supervisory Authority cf. Article 17(1) of the Convention and Article XVII of the preliminary draft Protocol.

¹¹ As regards the responsibilities of the Supervisory Authority cf. Article 17(2) of the Convention. Intentionally omitted from these responsibilities is any power to require or permit the Registrar to change any data relating to a registration.

¹² Cf. Article XIX(4) of the preliminary draft Protocol.

4. Multiple criteria are provided for the making of registrations and searches. These criteria may be supplemented, as necessary, in the regulations.¹³

5. The term “first-in-time” refers to the time when a registration is “searchable”, that is, when it has been assigned a sequentially ordered file number by the International Registry and the registration information, including the file number, is stored and may be electronically accessed at the International Registry.¹⁴

6. The Convention specifies who is legally entitled to submit registrations.¹⁵ Thus, if a party not so entitled submits a registration, whilst it may appear on a search result it will have no legal effect. Whether a party is entitled to submit a registration is a matter to be decided by the competent court.¹⁶ This matter is not intended to be determined by either the Registrar or the Supervisory Authority prior to the registration’s entry into the International Registry data base.¹⁷

7. The implications of the previous sentence – that the proposed electronic registry does not contemplate human vetting of registrations – extend to other legal and factual issues. These include whether

- (a) the Convention and preliminary draft Protocol apply at all;¹⁸
- (b) a party has the rights that it purports to dispose of;¹⁹ and
- (c) the submissions were made by a party with internal power to act.²⁰

In the event of a dispute, it will be for the courts to settle these matters: they are not intended to be settled by the Registrar as part of its administrative functions.

8. Accordingly the conditions to registration, namely the items to be satisfied prior to registration, are minimal. Completing the electronic application form²¹ and paying the required

¹³ Cf. Article VII of the preliminary draft Protocol.

¹⁴ Cf. Article 19(3) of the Convention. The effect of this provision is to permit searching parties to rely on the results of their searches. An undisclosed submitted entry will not constitute a “registered interest” for priority purposes.

¹⁵ Cf. Article 20 of the Convention and Article III of the preliminary draft Protocol. The general rule, applicable to international interests and contracts of sale, including prospective interests, assignments and prospective assignments, is that either party may register with the consent in writing of the other. Subordinations and discharges are to be made by the party divesting itself of its rights. Subrogations are to be made by the subrogee. Non-consensual rights and interests and notices of national interests are registrable by the holder.

¹⁶ A claim alleging that a registration was made by a party not entitled to do so would qualify as a “claim brought under this Convention” for the purposes of the jurisdiction provisions of the Convention; cf. Articles 42 and 44 of the Convention.

¹⁷ Cf. Article 18(2) of the Convention, providing that “[t]he Registrar shall not be under a duty to enquire whether a consent to registration ... has in fact been given or is valid”.

¹⁸ Whether an object meets the definition of a “space asset” (cf. Article I(2)(f) of the preliminary draft Protocol) and whether the Convention’s connecting factor has been satisfied (cf. Articles 3 and 4 of the Convention).

¹⁹ Whether, for example, the debtor has title to the object. If not, an international interest would not be constituted (cf. Article 7(b) of the Convention).

²⁰ Whether, for example, the debtor had received the requisite approvals of its company. If not, an international interest would not be constituted (cf. Article 7(b) of the Convention).

²¹ Limited additional information (that is, the initial registration file details) will be required on electronic forms for discharge and amendment.

fee²² are all that will be required. Registrations that do not comply with these requirements will be rejected electronically.

9. Registrations will remain effective until the earlier of either their discharge or the expiry of the period specified in the registration.²³ Discharge is the responsibility of the beneficiary of a registration,²⁴ where the underlying obligations have been fully performed.²⁵ In the case of discharge or amendment certain safeguards will be put in place to minimise the risk of unauthorised action by requiring, for example, matching of the electronic signature of the party making the initial registration and that of the party amending or discharging that registration.

10. The Supervisory Authority has the obligation to do all things necessary to ensure that an efficient notice-based electronic registration system exists.²⁶ It will own all proprietary rights in the data bases and archives of the International Registry.²⁷ It will have international legal personality²⁸ and, together with its officers and employees, enjoy such immunity from legal or administrative process as is specified in the preliminary draft Protocol.²⁹

11. The Registrar will be responsible for ensuring the efficient operation of the International Registry and for performing the functions assigned to it by the Convention and the preliminary draft Protocol³⁰ and the regulations.³¹ It will be liable for compensatory damages for losses suffered directly through errors or omissions on its part or on that of its officers and employees or through a malfunction of the international registration system, except where the malfunction was caused by an event of an inevitable and irresistible nature, which could not be prevented by using the best practices in current use in the field of electronic registry design and operation, including those relating to back-up and systems security and networking.³² The Registrar will not be liable for factual inaccuracy in registration information received by it or

²² A cost-recovery fee schedule is to be established by the Supervisory Authority; cf. Articles 17(2)(h) of the Convention and XIX(3) of the preliminary draft Protocol. The mechanism for making payment (debit arrangements and/or accounts) will be matters of system design and/or for the regulations.

²³ Cf. Article 21 of the Convention.

²⁴ This responsibility of the creditor is without prejudice to the debtor's right to seek the making of an *in personam* order against the creditor by a court with general jurisdiction under the Convention and preliminary draft Protocol or in the circumstances and by the court specified in Article 44 of the Convention relating to an order directly binding on the Registrar.

²⁵ Cf. Articles 20(3) (discharge by or with the consent of the party in whose favour the registration was made) and 25 (requiring discharge by the party entitled to do so in specified circumstances) of the Convention.

²⁶ Cf. Article 17(2)(i) of the Convention. This requirement is at the same time broad and restricted, broad in the sense that it provides the Supervisory Authority with plenary powers, subject to its obligation to report periodically to Contracting States, and restricted in the sense that those powers must be exercised with a view to providing an international registration system marked by certain characteristics, efficiency, notice-based and electronic.

²⁷ Cf. Article 17(4) of the Convention. Questions relating to rights in the hardware and software will be taken care of during the process for the establishment of the International Registry.

²⁸ Cf. Article 27(1) of the Convention. That provision implicitly acknowledges that a potential Supervisory Authority may already have such international legal personality, as in the case of I.C.A.O. in respect of the International Registry for aircraft objects. Where that is the case, it will be acting under the Convention and the preliminary draft Protocol with such status.

²⁹ Cf. Article 27(2) of the Convention. It will be for governmental experts and ultimately the diplomatic Conference to determine whether that immunity is functional or absolute.

³⁰ This expressly includes the issuing of search results (cf. Article 22 of the Convention), which shall constitute *prima facie* proof of their issuance and contents (cf. Article 24 of the Convention).

³¹ Cf. Article 17(5) of the Convention.

³² This broad allocation of responsibility is designed to establish user confidence in the international registration system, especially in the start-up phase; cf. Article 28(1) of the Convention.

transmitted by it in the same form in which it had received it nor for acts or circumstances for which it and its officers and employees are not responsible and which arise prior to receipt of the registration information at the International Registry. ³³ The Registrar will be responsible for procuring full insurance or a financial guarantee covering its liability. ³⁴

12. Courts of the place of the Registrar's centre of administration ³⁵ have limited but exclusive ³⁶ jurisdiction over the Registrar. It is limited to

- (a) matters relating to the Registrar's liability;
- (b) requiring the discharging of registrations where the parties required to discharge no longer exist or cannot be found; and
- (c) situations where a person fails to comply with an order of a court having jurisdiction under the Convention and the preliminary draft Protocol. ³⁷

Otherwise, unless waived by the Supervisory Authority, the assets, documents, data bases and archives of the International Registry will be inviolable and immune from seizure or other legal or administrative process. ³⁸

III. CERTAIN OPERATIONAL ASPECTS THAT WILL HAVE AN IMPACT ON THE DESIGN OF THE INTERNATIONAL REGISTRY

1. In view of the importance of search results, descriptive, synoptic search certificates will be issued chronologically summarising all registrations, amendments and discharges ³⁹ concerning the searched asset.

2. The system will be designed to ensure the chronological processing ⁴⁰ and correspondingly sequential numbering of registrations. Precise timing information will be electronically incorporated in registrations and searches.

3. The wholly electronic, notice-based International Registry will produce significant benefits in terms of efficiency, including lower operating and insurance costs. The feasibility of multiple electronic signatures and consents will be explored and, in any event, appropriate access and tracing procedures will be employed. State-of-the-art preservation and back-up systems, error correction techniques and security precautions will be employed.

³³ Cf. Article 28(2) of the Convention.

³⁴ Cf. Articles 28(4) of the Convention and XIX(5) and (6) of the preliminary draft Protocol.

³⁵ Cf. Article 44(1) of the Convention. This is a functional rather than a formal requirement (for example, the statutory seat or place of incorporation), that will be selected in the light of the practicalities of the litigation in question.

³⁶ In this context, exclusive jurisdiction is required so as to avoid the prospect of inconsistent orders being issued by different national courts, each purporting to bind the Registrar; cf. Article 44(4) of the Convention.

³⁷ Cf. Article 44(1) - (3) of the Convention. The limited nature of this jurisdiction reflects the idea that it is more appropriate to have courts with jurisdiction under the Convention and the preliminary draft Protocol issue *in personam* orders against parties, requiring them to take action with regard to the International Registry, than to have courts issue orders binding upon the International Registry. The residual jurisdiction noted in Article 44 deals only with the specific problems identified in the Convention and preliminary draft Protocol.

³⁸ Cf. Article 27(4) and (6) of the Convention.

³⁹ Whether or not the discharged registration is archived. This approach will permit a complete history of registered interests in the asset, which may prove useful in the event of subsequent disputes.

⁴⁰ In line with Article 18(4) of the Convention.

4. There will be no need for the supplying of extraneous information in registrations, given the limited functions of the International Registry (notification and priority). The operational objectives of the International Registry will thus be achieved by only requiring the

- (a) names of parties;
- (b) contact details of those parties;
- (c) type of registration (for example, “international interest” or “contract of sale”) and duration; and
- (d) specific description of the asset (as provided under Article VII of the preliminary draft Protocol).

5. Electronic forms will be standardised and all registrations and searches will be made, and all certificates issued using such forms.

6. Particularly during the start-up phase, there will be a need for an assistance desk to help with procedural and technical enquiries.

7. As regards the question of the language or languages to be used by the International Registry, should a decision be taken to use more than one language then it will be necessary to have multilingual electronic forms with standardised translations.