



**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
Third session
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ALTERNATIVE TEXT OF THE PRELIMINARY DRAFT SPACE PROTOCOL
AS PREPARED, AT THE REQUEST OF THE STEERING COMMITTEE, FOR
PRESENTATION TO THE COMMITTEE OF GOVERNMENTAL EXPERTS

**Explanatory Memorandum on provisions of the alternative text implementing
policy issues referred to and examined by the Steering Committee**

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

Introduction

1. This Explanatory Memorandum and the accompanying alternative text (policy) are confined to the policy issues referred to and examined by the Steering Committee established by the UNIDROIT Secretariat with the approval of the General Assembly at its meeting in November 2007. These were five in number:

- (1) the sphere of application of the preliminary draft Protocol to the Cape Town Convention on Matters specific to Space Assets ("the Space Protocol"), with particular reference to the definition of "space asset";
- (2) the treatment of debtor's rights and related rights, explained later in this Explanatory Memorandum;
- (3) the criteria for the identification of space assets;
- (4) the exercise of default remedies in relation to a component where this could adversely affect the interests of a different creditor in another component or in the satellite as a whole; and
- (5) the restriction of remedies in relation to space assets fulfilling a function of public importance.

The fourth issue is the subject of informal negotiations with a view to the presentation by the Governments of Germany and the United States of America of a joint proposal to the Committee of governmental experts. This issue is therefore not discussed here. On the remaining issues we have taken into account not only the deliberations of the Steering Committee but also helpful responses to an earlier alternative text ("the first alternative version") prepared by us and circulated for

comment in July 2008. A separate Explanatory Memorandum and alternative text (technical) have been prepared incorporating additional provisions and amendments of a technical nature (some of which were included in the first and second alternative versions referred to below but have been omitted from the present text), together with a proposed revised sequence of Articles, for consideration by the Committee of governmental experts and, if so agreed, its Drafting Committee, of which Canada and the United Kingdom are co-Chairmen and we are their representatives.

I. A BRIEF UPDATE

2. The Space Protocol was considered at the first meeting of the UNIDROIT Committee of governmental experts in December 2003 and a revised version prepared at the conclusion of that session to reflect the Committee's discussions. At that meeting the Space Working Group (S.W.G.) strongly urged the extension of the concept of international interest to embrace the assignment of "debtor's rights" and related rights. By debtor's rights were meant rights to payment or other performance owed by third parties to the debtor with respect to a space asset, for example sums payable to a debtor as lessor under a lease of the space asset or under a grant of capacity or a licence conferring an indefeasible right of use. These were considered to represent a valuable part of the security given by the debtor to its creditor - more valuable, indeed, than the physical assets, since it was difficult to repossess these or change their function. Debtor's rights are to be distinguished from associated rights as defined in Article 1(c) of the Cape Town Convention ("the Convention") and regulated by Chapter IX of the Convention in that associated rights are rights of the *creditor* to payment or other performance by the *debtor*, whereas debtor's rights are rights of the *debtor* to payment or other performance by a third party. "Related rights" were Government and other permits and licences granted to the debtor to manufacture and launch and operate a space asset.

3. The text of the Space Protocol contained definitions of debtor's rights and related rights but no substantive provisions, these being left to be worked up by the S.W.G. At the second session of the Committee of governmental experts held in October 2004 key issues were examined and identified as matters to be pursued in intersessional work, and comments on them were made by Government representatives and representatives of the space industry. The Committee also established a sub-committee to develop proposals relating to the international registration system. For reasons which will appear, the new alternative text does not contain provisions governing related rights.

4. There have been many developments since the second meeting of the Committee of governmental experts, and a proposal by Professor Sir Roy Goode for an alternative version of the 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.

5. 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 Government of the United Kingdom) would draft a first alternative version reflecting the decisions taken by the Steering Committee and would circulate this 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.

The first alternative version

6. The first alternative version largely followed Sir Roy's proposal in updating the December 2003 text to reflect decisions on the key outstanding issues 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. There were a number of responses to the first alternative version which were collated by the UNIDROIT Secretariat.

The second alternative version

7. 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-committee on public service was not due to meet until immediately before the second meeting of the Steering Committee and informal consultations were continuing with a view to permitting the Governments of Germany and the United States of America to agree on a joint proposal on default remedies in relation to components, and since the responses to the first alternative version, though helpful in identifying matters thought to require clarification, were for the most part not such as to necessitate changes in the text, we confined ourselves to a second alternative version *ad interim* containing only a few minor amendments that were essentially of a technical nature, accompanied by an Explanatory Memorandum. This was circulated in March 2009 as one of the documents sent out for the second meeting of the Steering Committee held in May 2009.

The meetings of the sub-committees and Steering Committee

8. The Sub-committee of the Steering Committee on default remedies relating to components met in Berlin on 31 October and 1 November 2008 and agreed that the Governments of Germany and the United States should produce a text for consideration at the informal consultations held in Paris on 12 and 13 May 2009 and by the Steering Committee at its meeting in Paris on 14 and 15 May. Representatives of the two Governments, together with Sir Roy and the UNIDROIT Secretariat, met informally in Paris on 12 and 13 May, but despite considerable endeavours agreement could not be reached in Paris. It is, however, planned that this will be done in Geneva in October 2009.

9. The Sub-committee of the Steering Committee on public service also met in Paris on 13 May and produced an agreed report proposing the inclusion in the Space Protocol of a range of options from which Contracting States could make a choice. These options were 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 intervenes 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.

10. The Sub-committee of the Committee of governmental experts on certain aspects of the future registration system, whose remit is to address identification of space assets and related issues, the practical operation of the future International Registry for space assets and the role of the Supervisory Authority, is to meet in Rome in October 2009.

11. At its meeting the Steering Committee endorsed the report from the public service sub-committee with two additional options, namely a provision for the arbitration of disputes concerning the maintenance of a public service being performed by a space asset and the solution offered by Article XXV of the Protocol to the Cape Town Convention on Matters specific to Railway Rolling Stock ("the Luxembourg Protocol"). The Steering Committee also reached the following conclusions and asked that these be incorporated in a revised alternative text to be presented to the Committee of governmental experts at its meeting in Rome in December 2009:

- (1) While it was accepted that the decision to drop uniquely identifiable components (other than transponders, etc.) as a distinct category was correct, the definition of space assets was too limited in its reference to assets capable of being independently controlled. There were means of control other than physical - for example, the termination of contractual rights held by a defaulting debtor - and the definition should be extended to cover assets which, even if not capable of independent control, were capable of being independently owned or used.
- (2) Since Government licences were almost invariably non-transferable the concept of assignable related rights - that is, rights to Government and other official licences and permits - was fundamentally flawed and should be replaced by a duty on the debtor or other assignor to co-operate with its assignee in procuring a termination of the licence granted to the assignor and the issue of a new licence to the assignee.

In addition, a few amendments of a drafting nature were proposed.

The position of leading satellite operators and E.S.O.A.

12. The responses we received included a detailed letter from three leading satellite operators SES S.A., Intelsat Ltd and Eutelsat S.A. (referred to below as "the satellite operators") and the European Satellite Operators' Association (E.S.O.A.). 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.

13. The satellite operators and E.S.O.A. 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, the above letter also raised specific issues which we found useful in crystallising certain key points and which we address below. Shortly before the second meeting of the Steering Committee the satellite operators wrote again to UNIDROIT expressing concern that it was proceeding with the project despite their prior communication. This second letter was reported to the Steering Committee, which nevertheless strongly endorsed the decision to proceed. A response was sent similar to that given to the first letter.

II. THE NEW ALTERNATIVE TEXT

General

14. As stated above the new alternative text which accompanies this Explanatory Memorandum (hereinafter "the alternative text") is confined to those provisions introduced or amended in response to views on the policy issues referred to the Steering Committee. The principal changes made to the 2003 Space Protocol issued by the Committee of governmental experts relate to the definition of space assets, the sphere of application of the Space Protocol, the identification criteria and the development of the rules relating to debtor's rights, which in the December 2003 draft had featured only in a fragmentary way in the definitions and the provision on the sphere of application.

Definition of space assets

15. 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 (in the sense of components other than transponders and other listed items) 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, ownership or use they cannot be reached by the creditor financing them and cease to be of value to that creditor,

so that there is no point in allowing interests in them to be registered in the International Registry.

- (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.

16. However, there was force in the criticism that limitation of space assets to objects capable of independent control was too limiting, a point also made at the second meeting of the Steering Committee, and as stated above the definition has now been expanded in accordance with the recommendations of the Steering Committee to read as follows:

“space asset” means any man-made uniquely identifiable satellite, satellite bus, satellite transponder, payload, space station, space vehicle, reusable launch vehicle, reusable space capsule or any module or other object, in each case only where capable of being independently owned, used or 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.

17. The following further points arise from the above definition. First, “space asset” is confined to man-made objects so as to exclude celestial objects such as the Moon. Second, the phrase “other object, in each case only where capable of being independently owned, used or controlled,” is intended to accommodate future developments in space technology, for example, the construction of a space hotel. Third, the definition covers interests in space objects while still on the ground. One could leave assets prior to launch to be governed by the relevant territorial law, but this would probably not be effective, as it would always be open to a creditor to register a prospective international interest and thereby secure retrospective priority once the international interest had come into existence. Moreover, it would be awkward to have two different regimes governing the same asset, one for the pre-launch phase, the other post-launch. For the proposed rule for the case where the space asset is never launched, see Article XXXI(3) of the alternative text with proposals for technical amendments (C.G.E./Space Pr./3/W.P. 8 rev.), which has been placed in square brackets.

Other definitions

18. The following definitions have been added to those in the 2003 text or amended or deleted:

“Debtor’s rights” (Article I(2)(a))	- definition amended
“Launch vehicle” (Article I(2)(e))	- definition added
“Licence” (Article I(2)(f))	- definition added
“Related rights”	- definition deleted
“Rights assignment” (Article I(2)(h))	- definition added
“Rights reassignment” (Article I(2)(i))	- definition added
“Space” (Article I(2)(j))	- definition added
“Space asset” (Article I(2)(k))	- defined term is now “space asset” in the singular and the definition is amended

Hosted and other shared payloads

19. The question has been raised whether the Convention and the alternative text of the Space Protocol are adequate to cover hosted and other shared payloads. 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.

20. A hosted payload is a payload specially designed for Governments, the military or other public bodies for placement on a commercial satellite which is being used for other commercial purposes by the operator. This reduces costs because the bus, the payload, the launch, etc., are planned into the original commercial project instead of having to be developed internally by the Government, etc. The payload thus consists of a mixture of the hosted payload (secondary payload) and the commercial operator's own payload. In effect hosted payloads are a form of outsourcing by the public sector to the private sector but involve close collaboration between the Government or military and the commercial operator. It is also common to have shared ownership of certain components of transponders as well as fractional ownership of portions of the satellite structure.

21. Interests in hosted and other shared payloads are readily accommodated within the Convention and the alternative text. Under the Convention an international interest may be held and registered by two or more parties, whether as joint creditors holding a single international interest or as creditors holding joint and several claims (*créances conjointes*) or as separate holders of fractional interests each of which may be held and registered separately and which rank *pari passu*.¹ Indeed, the International Registry for aircraft objects has long accepted such registrations as well as registrations of multiple holdings or fractional interests acquired under contract of sale. So there is no obstacle to registration of shared or fractional interests in a transponder or other parts of a satellite. Moreover, registrations may be effected in the name of a trustee, lead bank or agent, for example under a secured loan syndication or a securitisation of receivables. Moreover, where an international interest is held by two or more creditors, then under Article V of the alternative text rights to payment or other performance due to the debtor, for example, rentals under leasing or lease capacity agreements, may be assigned to the creditors by way of security and under Article VIII of the alternative text such assignments may be recorded against the registration of the related international interest.

Assignment of debtor's rights

Definition of debtor's rights

22. Article I(2)(a) defines debtor's rights as "all rights to payment or other performance due to a debtor by any person with respect to a space asset." The rights must relate to a space asset, reflecting the principle that the Convention and the Space Protocol are concerned exclusively with space assets and rights relating to them (see paragraph 23). Subject to this, any kind of right vested in the debtor is covered.

No independent registration of a rights assignment

23. It had originally been envisaged by the S.W.G. that assignments to the creditor of debtor's rights and related rights would themselves be registrable as international interests. However, there were seen to be serious drawbacks to extending the concept of an international interest to intangibles. This went against the whole thrust of the Convention, which was concerned with interests in tangible and uniquely identifiable assets. To make the assignment of debtor's rights independently registrable as international interests would extend the Convention from physical assets to receivables, which are not themselves susceptible to asset-based registration and would not be revealed by a search against the physical asset. Accordingly, Articles V to IX of the new

¹ Roy Goode, *Official Commentary on the Convention on International Interests in Mobile Equipment and Protocol thereto on Matters specific to Aircraft Equipment* (revised edition 2008), paras 2.33, 3.55.

alternative text follow previous drafts of the alternative text in providing instead for the recording of debtor's rights and related rights as part of the registration of an international interest or a prospective international interest, either at the time of that registration or subsequently. The recorded assignment will then be governed by registration and priority rules similar to those governing the international interest itself and will be inextricably linked to registration of the international interest, so that a rights assignment recorded in the registration of a prospective international interest will be treated as unrecorded unless and until the prospective international interest became an international interest and if a registration of an international interest were discharged the record would likewise be discharged. This will ensure that debtor's rights could not be the subject of an independent registration, which would intrude into the area of general receivables financing covered by the 2001 U.N. Convention on the Assignment of Receivables in International Trade.

Definition of rights assignment

24. The alternative text refers to the assignment of the debtor's rights to the creditor as a "rights assignment." This is defined in Article I(2)(h) as:

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 to secure the performance of, or in reduction or discharge of, any existing or future obligation of the debtor to the creditor which under the agreement creating or providing for the international interest is secured by or associated with the space asset to which the agreement relates.

It will be noted that this definition does not cover all assignments, only those typically effected pursuant to a debtor-creditor relationship, namely assignments by way of security and outright assignments in reduction or discharge of the debtor's existing or future obligations. The definition therefore does not cover the sale of debtor's rights. Moreover, the obligations in question must be obligations secured by or associated with the space asset to which the agreement creating or providing for the international interest relates. This restriction is necessary to maintain the linkage with the international interest. If the definition were extended to cover obligations of the debtor to the creditor not linked to the space asset one could have a situation in which the international interest was discharged by payment but the assignment would continue as a free-standing security interest for other obligations. That would destroy the linkage, and, indeed, would be incompatible with Article VIII(5). Similarly if the definition were to cover assignments to secure the obligations of a third party the link with the international interest would be lost. However, it is not necessary that the obligations themselves should arise under the agreement constituting the international interest. It suffices that they are secured by or associated with the asset under that agreement, even if arising under another agreement ("secured by" covers an international interest created by a security agreement, "associated with" an international interest arising in respect of a title reservation or leasing agreement; cf. the definition of "associated rights" in Article 1(c) of the Convention). For example, a conditional sale agreement relating to a transponder is made under which ownership is to pass to the conditional buyer only on payment of the price under that agreement and any other agreement between the parties. The conditional seller makes a loan to the conditional buyer under a subsequent loan agreement. The conditional buyer's assignment to the conditional seller of rights of the conditional buyer against third parties is a rights assignment within the definition because the effect of the conditional sale agreement is that the obligations under both agreements are associated with the transponder.

Formal requirements for rights assignment

25. Article VI sets out the formal requirements for a rights assignment. The assignment must be in writing and must enable both the debtor's rights and the space asset to which those rights relate to be identified. In addition, the assignment must enable any obligations secured by the agreement to be identified, though without the need to state the sum or maximum sum secured.

Assignment of future rights

26. Article VII, which provides for the assignment of future rights, is derived from Article 5(b) of the 1988 UNIDROIT Convention on International Factoring and is designed to be self-executing.

Recording of rights assignment

27. For the reasons given earlier, a rights assignment may be recorded only as part of the registration of an international interest or a prospective international interest, not independently. The purpose of the rights assignment provisions is to give additional protection to the creditor in whose name the related international interest is registered. Accordingly, until the international interest has been registered there can be no recording of the rights assignment (see Article VIII(1)), and the recorded assignee must be the same person as the registered holder of the international interest. As a corollary, discharge of the registration of the international interest also discharges any record forming part of that registration (Article VIII(5)). Article VIII(1) allows recording of a rights assignment either when the international interest or prospective international interest in the space asset is registered or subsequently by amendment to the registration, thus covering the case where the rights assignment is not made, or the debtor's rights do not arise, until after registration of the international interest or prospective international interest. The request for such recording may identify the assigned rights either specifically or by a statement that the debtor has assigned all or some of the debtor's rights, without further specification.

28. Under Article VIII(2) the registration provisions of the Convention are extended to cover the recording of rights assignments. However, a rights assignment recorded against a registered prospective international interest is treated as unrecorded unless and until the prospective international interest becomes an international interest, in which event the rights assignment has priority from the time it was recorded (Article IX(2)). This parallels the rule in Article 19(4) of the Convention relating to the priority of a prospective international interest upon its becoming an international interest.

Priority of recorded rights assignment

29. Article IX of the alternative text lays down priority rules for a recorded rights assignment which track those embodied in Article 29(1) of the Convention in relation to registered interests. So a recorded rights assignment has priority over any other rights assignment subsequently recorded and over an unrecorded rights assignment. This, however, is subject to the above-mentioned qualification in the case of recording against registration of a prospective international interest.

Grantor's duty to creditor

30. The effect of a rights assignment is to transfer to the creditor the debtor's rights against a third party with respect to the space asset. Article X sets out the conditions in which the third party (i.e. the grantor of the rights to the debtor) comes under a duty to give performance to the creditor. These conditions, requiring notice in writing to the grantor identifying the debtor's rights, parallel those set out in Article 33 of the Convention relating to the assignment of associated rights.

Reassignment of debtor's rights

31. Article XI of the alternative text also follows the S.W.G. proposal (albeit with slightly different terminology) in providing for the reassignment of debtor's rights by the creditor or a subsequent assignee and the recording of such reassignment. The provisions relating to a rights reassignment follow those relating to a rights assignment, substituting references to the assignee or subsequent assignee for references to the creditor or holder (of the international interest). However, in line with the principle that recording of an assignment must be in favour of the person shown in the International Registry as the current holder of the international interest a rights reassignment may be recorded only as part of the registration of the assignment of the international interest to the person to whom the rights reassignment was made (Article XI(2)). So, if the original creditor with a registered international interest and a recorded assignment of debtor's rights in its favour were to reassign the debtor's rights while retaining the international interest, the assignee under the rights reassignment would not be able to record the assignment in the International Registry.

Replacement of "related rights" by duty to co-operate

32. Draft provisions relating to the transfer of related rights (Government and other licences, etc.) were considered at the second meeting of the Steering Committee but were not supported, the principal reason being that in practice Government licences were not transferable, and the implication that they were might present Governments with difficulties. The procedure usually adopted was for the existing licence to be surrendered or withdrawn and a new licence granted to the creditor or other assignee. Accordingly the Steering Committee concluded that all references to related rights should be removed and endorsed a proposal to replace them with a duty on the debtor to co-operate in procuring the termination of its own licence and the grant of a new licence to the creditor. Article XII of the new alternative text so provides, imposing the duty to co-operate both on a debtor who makes a rights assignment and a creditor or subsequent assignee who makes a rights reassignment.

Identification of space assets

33. Under the Convention unique identification of the object is required both for the constitution of an international interest and for registration purposes. At the diplomatic Conference in Luxembourg it was pointed out that for the purposes of the relationship between creditor and debtor there was no need for unique identification, because the creation of an international interest concerns only the parties to the agreement creating or providing for the international interest and is not dependent on registration. All that was necessary was that the asset, including an after-acquired asset, could be identified as falling within the scope of the agreement. On this basis there could be no objection to an agreement covering a class of assets or all present and future assets, and this would avoid the need for a separate agreement each time the debtor acquired a new asset. By contrast when it comes to registration, which affects third parties, unique identification is essential, since the International Registry is asset-based. Accordingly the Luxembourg Protocol distinguishes the identification requirements for the constitution of an agreement from those applicable to registration, the former allowing generic descriptions (Article V) whilst the latter requires unique identification (Article XIV). We have adopted this approach in Article XVI of the alternative text, which combines the effect of Articles V and XIV of the Luxembourg Protocol.

34. Article XVI(1) sets out the various methods by which space assets may be described for the purposes of satisfying the formalities required for an agreement. As regards the identification criteria for registration, we felt that (a) these should not be left to be dealt with exclusively in regulations, (b) as a minimum the Space Protocol should contain 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, and (c) where 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. Space industry experts will be able to advise whether the stated criteria are adequate. These relate only to the entire satellite. Separate criteria will need to be formulated for each of the components included within the definition of space asset. These matters will no doubt be examined by the registration sub-committee at its forthcoming meeting in October.

Default remedies as regards rights assignments and reassignments

35. Article XIX, dealing with default remedies in relation to rights assignments and reassignments, is broadly aligned with Article 34 of the Convention dealing with the comparable position as regards associated rights. Article XIX, like Article 34, is designed 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 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.

Roy Goode
Michel Deschamps
30 June 2009

*ALTERNATIVE TEXT OF THE PRELIMINARY DRAFT PROTOCOL TO
THE CONVENTION ON INTERNATIONAL INTERESTS IN MOBILE
EQUIPMENT ON MATTERS SPECIFIC TO SPACE ASSETS*

*(prepared by Professor Sir Roy Goode and Mr Michel Deschamps
for the third session of the Committee of governmental experts)*

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

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

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

(f) "licence" 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;

(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) "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 to secure the performance of, or in reduction or discharge of, any existing or future obligation of the debtor to the creditor which under the agreement creating or providing for the international interest is secured by or associated with the space asset to which the agreement relates;

(i) "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;

(j) "space" means outer space, including the Moon and other celestial bodies; and

(k) "space asset" means any man-made uniquely identifiable satellite, satellite bus, satellite transponder, payload, space station, space vehicle, reusable launch vehicle, reusable space capsule or any module or other object, in each case only where capable of being independently owned, used or 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.

Article II – Application of the Convention as regards space assets and debtor's rights

1. – The Convention shall apply in relation to space assets and the assignment and reassignment of debtor's rights as provided by the terms of this Protocol.

2. – 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 – Effects of rights assignment

1. – Except as otherwise agreed by the parties, a rights assignment made in conformity with Article VI transfers to the creditor all debtor's rights.

2. – Subject to paragraph 3, the applicable law shall determine the defences and rights of set-off available to the grantor of debtor's rights against the creditor.

3. – The grantor of debtor's rights may at any time by agreement in writing waive all or any of the defences and rights of set-off referred to in the preceding paragraph other than defences arising from fraudulent acts on the part of the creditor.

Article VI - 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 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 VII - Assignment of future rights

A provision in a rights assignment by which future debtor's rights are assigned operates to confer on the creditor an interest in the assigned rights when they come into existence without the need for any new act of transfer.

Article VIII - 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 under a rights assignment may, when registering the international interest or prospective international interest or subsequently by amendment to such registration, record the rights assignment as part of the

registration. Such record may identify the assigned rights either specifically or by a statement that the debtor has assigned all or some of the debtor's 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 the recording of the rights assignment; and
- (c) references to the debtor were references to the grantor of the debtor's rights.

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

4. – Where a rights assignment has been recorded as part of the registration of an international interest which is subsequently transferred in accordance with Articles 31 and 32 of the Convention, the transferee of the international interest acquires:

- (a) all the rights of the creditor under the rights assignment; and
- (b) the right to be shown in the record as assignee under the rights assignment.

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

Article IX - 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 X - Rights grantor's duty to creditor

1. – To the extent that the debtor's 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 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 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.

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 XI - Rights reassignment

1. – Articles V to X apply to a rights reassignment by the creditor or a subsequent assignee as if references to the creditor or holder were references to the assignee or subsequent assignee.

2. – A rights reassignment relating to an international interest in a space asset may be recorded only as part of the registration of the assignment of the international interest to the person to whom the rights reassignment was made.

Article XII - Duty of assignor as to licences

The assignor under a rights assignment or rights reassignment shall at the request of the assignee take all steps within its power to procure the transfer of its licence to the assignee or the termination of its licence and the grant of a new licence to the assignee, and shall fully cooperate with the assignee to that end.

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 satellite 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.

4. – [Insert separate identification criteria for each other category of space asset, incorporating a similar reference to additional criteria prescribed by the regulations].

Article XVII – Choice of law

1. – This Article applies unless a Contracting State has made a declaration pursuant to Article XXXVIII(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 XXXVIII(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 as regards enforcement against a space asset functionally linked to another space asset in which another creditor has an interest].²

Article XIX – Default remedies as regards rights assignments and rights reassignments

1. – In the event of default by the debtor 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 the debtor's rights apply in so far as those provisions 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 object were references to the debtor's 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.

Article XX – 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.

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 XXXVIII(3) and to the extent stated in such declaration.

² Pursuant to a decision of the Sub-committee on default remedies in relation to components, as endorsed by the Steering Committee at its meeting in Paris on 14 and 15 May 2009, informal negotiations are taking place between the Governments of Germany and the United States of America for the preparation of a joint proposal to be submitted to the Committee of governmental experts at its forthcoming session.

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 XXXVIII(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 XXXVIII(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 XXXVIII(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 acquires its interest in that asset subject to an interest registered at the time of its acquisition.

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 XXXVIII(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 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 a licence, or the grant of a new licence, to the creditor.

[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 Depository.]³

[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.]³

³ The Sub-committee on public service proposed a menu of nine options from which Contracting States could make a selection by declaration at the time of ratification or accession. Subject to further elaboration on precise wording these were:

- 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 intervenes 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.

The Steering Committee endorsed these proposals with two additional options, namely a provision for the arbitration of disputes concerning the maintenance of a public service being performed by a space asset and the solution offered by Article XXV of the Luxembourg Protocol.

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.

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.

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 on 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, 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 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 – 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 any one 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 XXXIX – 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 XL – Reservations and declarations

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

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

1. – Any State Party having made a declaration under this Protocol, other than a declaration made in accordance with Article XXXIX 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 XLIII – 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 XLIV – 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 XLV – 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.]