INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW
INSTITUT INTERNATIONAL POUR L'UNIFICATION DU DROIT PRIVE

COMITE D'EXPERTS GOUVERNEMENTAUX D'UNIDROIT POUR LA PREPARATION D'UN PROJET DE PROTOCOLE PORTANT SUR LES BIENS SPATIAUX A LA CONVENTION RELATIVE AUX GARANTIES INTERNATIONALES PORTANT SUR DES MATERIELS D'EQUIPEMENT MOBILES
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CONSULTATIONS INTERSESSIONS AVEC DES REPRESENTANTS DES COMMUNAUTES FINANCIERES ET COMMERCIALES INTERNATIONALES DANS LE DOMAINE SPATIAL

(Rome, 18 octobre 2010)

RAPPORT

(préparé par le Secrétariat d'UNIDROIT)

I. ANTECEDENTS

1. À sa quatrième session, tenue à Rome du 3 au 7 mai 2010, le Comité d'experts gouvernementaux d'UNIDROIT pour la préparation d'un projet de Protocole portant sur les biens spatiaux à la Convention relative aux garanties internationales portant sur des matériels d'équipement mobiles (ci-après désigné *le Comité*) a été saisi des observations [1] présentées par un certain nombre de représentants des communautés financières et commerciales internationales dans le domaine spatial qui exprimaient des inquiétudes à l'égard de certains aspects du texte d'avant-projet révisé de Protocole portant sur les questions spécifiques aux biens spatiaux à la Convention relative aux garanties internationales portant sur des matériels d'équipement mobiles préparé par Sir Roy Goode (Royaume-Uni) et M. M. Deschamps (Canada), en tant que Co-Présidents du Comité de rédaction, visant à refléter les conclusions auxquelles était parvenu le Comité d'experts gouvernementaux à sa troisième session, tenue à Rome du 7 au 11 décembre 2009, et revu par le Comité de rédaction (ci-après désigné *l'avant-projet révisé de Protocole*) [2].

2. Ces inquiétudes ont fait l'objet de toute l'attention requise durant la quatrième session du Comité et ont été reflétées, dans la mesure estimée appropriée, dans le texte de l'avant-projet révisé de Protocole tel qu'amendé durant ladite session, en mettant en œuvre les décisions prises par le Comité (ci-après désigné *l'avant-projet révisé de Protocole*) [3]. À la lumière de la décision

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1 Cf. C.E.G./Pr. Spatial/4/W.P. 4 rév. Ce document ainsi que tous les autres documents cités dans le présent document sont accessibles sur le site Internet d'Unidroit à la page suivante: http://www.unidroit.org/french/workprogramme/study072/spaceprotocol/etude72j-archive-f.htm#NR2.

2 C.E.G./Pr. Spatial/4/W.P. 3 rev.

3 C.E.G./Pr. Spatial/4/Rapport, Annexe VIII.

prise, à l'approche de la conclusion de la session, de convoquer des réunions intersessions de deux organes du Comité, le Groupe de travail informel sur les mesures en cas d'inexécution concernant les composants (ci-après désigné *le Groupe de travail informel sur les composants*) et le Groupe de travail informel sur les limitations des mesures en cas d'inexécution, certaines délégations ont également suggéré de saisir cette opportunité pour organiser des consultations intersessions avec des représentants des communautés financières et commerciales internationales dans le domaine spatial, notamment en vue d'aller de l'avant sur la base des progrès accomplis par le Comité à la session et d'assurer l'achèvement rapide du Protocole spatial envisagé [4]. Il en a été décidé ainsi.

II. OUVERTURE DES CONSULTATIONS ET PARTICIPATION ; DESIGNATION DES MODERATEURS

(a) Ouverture des consultations et participation ; désignation des modérateurs

3. Les consultations avec des représentants des communautés financières et commerciales internationales dans le domaine spatial qui ont précédemment participé dans l'élaboration de l'avant-projet révisé de Protocole se sont tenues à Rome, au siège d'UNIDROIT, le 18 octobre 2010, immédiatement avant la réunion du Groupe de travail informel sur les composants, qui s'est tenue les 19 et 21 octobre 2010 [5] et de celle du Groupe de travail informel sur la limitation des mesures en cas d'inexécution, qui s'est tenue les 20 et 21 octobre 2010 [6]. Ont participé à ces consultations des représentants des Gouvernements des pays suivants : Allemagne, Canada, États-Unis d'Amérique, Fédération de Russie, République populaire de Chine, République tchèque, Italie, Japon et Royaume-Uni, ainsi que des représentants de Crédit Agricole S.A., EADS, la *European Satellite Operators Association*, l'agence spatiale allemande, la *Satellite Industry Association* des Etats-Unis d'Amérique et *Thales Alenia Space*, et enfin un observateur [7].

4. Les consultations ont été ouvertes par *M. J.A. Estrella Faria*, Secrétaire Général d'UNIDROIT, à 9.40 h. Il a rappelé aux participants que les consultations se déroulaient en vue de la préparation de la cinquième session du Comité qui se tiendra à Rome du 21 au 25 février 2011: étant donné que celle-ci serait la dernière session du Comité, le Secrétariat espérait être en mesure de présenter le texte de l'avant-projet révisé de Protocole qui sera issu de cette session au Conseil de Direction d'UNIDROIT à sa 90ème session, qui se tiendra à Rome du 9 au 12 mai 2011, afin que celui-ci se prononce sur l'état d'avancement de l'avant-projet et consente le cas échéant à ce qu'il soit présenté à une Conférence diplomatique pour adoption. Il a en outre rappelé aux participants que l'objet des consultations n'était pas de débattre de l'opportunité de l'avant-projet révisé de Protocole tel qu'amendé, mais de rechercher des solutions aux questions clés qui restaient en suspens, en particulier les questions de définition des biens spatiaux, des mesures en cas d'inexécution concernant les composants et des limitations des mesures en cas d'inexécution. Il a invité les participants à envisager cet objectif avec un esprit de compromis approprié permettant de parvenir à un produit final commercialement viable, susceptible également de satisfaire les préoccupations fondamentales de caractère politique des Etats.

5. Les consultations ont été modérées conjointement par *Mme A. Veneziano (Italie)* et *M. M. Borello (Thales Alenia Space).*

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4 Cf. C.E.G./Pr. Spatial/4/Rapport, §149.
5 Cf. C.E.G./Pr. Spatial/5/W.P.6.
6 Cf. C.E.G./Pr. Spatial/5/W.P.7.
7 Cf. la liste des participants reproduite en Annexe I au présent rapport.

(b). Adoption de l'ordre du jour

6. Le projet d'ordre du jour, tel que préparé par le Secrétariat [8], a été adopté [9].

(c). Documents pour les consultations

7. Le document de travail de base des consultations était le texte de l'avant-projet révisé de Protocole tel qu'amendé. Outre le projet d'ordre du jour et les propositions soumises par le Gouvernement de l'Allemagne au Groupe de travail sur les composants [10], les documents suivants ont été soumis pour les consultations :

- Note explicative sur le projet d'ordre du jour (préparée par le Secrétariat) [11] et

- Observations (soumises par des Gouvernements et des représentants des communautés financières et commerciales internationales dans le domaine spatial) [12].

III. PREOCCUPATIONS SOULEVEES DURANT LES CONSULTATIONS ET LES DISCUSSIONS

(a) Observations générales

8. Le représentant d'un Gouvernement, tout en exprimant la préoccupation de sa délégation à l'égard des questions qui restaient en suspens dans l'avant-projet révisé de Protocole tel qu'amendé, particulièrement à la lumière des inquiétudes exprimées par des représentants des communautés financières et commerciales internationales dans le domaine spatial qu'il avait consultées, a indiqué néanmoins que ses Autorités étaient prêtes à affronter ces questions en vue de trouver des solutions commercialement viables. Des représentants d'autres Gouvernements ont observé tout à la fois que des représentants des communautés financières et commerciales internationales dans le domaine spatial qu'ils avaient consultés avaient exprimé des opinions extrêmement positives concernant les avantages potentiels que devrait produire le Protocole envisagé. Ils ont également noté qu'il était important de garder à l'esprit les intérêts des Etats et de maintenir un dialogue constructif afin de trouver des solutions aux inquiétudes qu'exprimaient les communautés financières et commerciales internationales dans le domaine spatial. Exprimant leur soutien pour l'avant-projet révisé de Protocole tel qu'amendé, un certain nombre d'autres Gouvernements ont indiqué qu'ils étaient eux aussi préparés à poursuivre la recherche de solutions commercialement viables aux questions restées en suspens.

9. Un représentant des communautés financières et commerciales internationales dans le domaine spatial a exprimé l'inquiétude que l'avant-projet révisé de Protocole tel qu'amendé, dans sa forme actuelle, loin d'atteindre l'objectif d'augmenter les disponibilités en capital du secteur spatial commercial, risquait plutôt d'inhiber le financement spatial commercial. Il a expliqué que pour être pleinement justifié, le Protocole envisagé devrait répondre aux besoins du secteur spatial commercial, tandis que du point de vue des représentants des communautés financières et commerciales internationales de l'espace qu'il représentait, il n'existait pas de nécessité impérieuse d'un tel instrument international, compte tenu que le financement spatial commercial était déjà

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8 C.G.E./Space Pr./Inters'l meetings/Consultns/W.P. 1 (*en anglais seulement*)

9 L'ordre du jour tel qu'adopté est reproduit en Annexe II au présent rapport.

10 C.G.E./Space Pr./Inters'l meetings/I.W.G. Components/W.P. 3 (reproduit en Annexe III au présent rapport (*en anglais seulement*).

11 C.G.E./Space Pr./Inters'l meetings/Consultns/W.P. 2 (reproduit en Annexe IV au présent rapport (*en anglais seulement*).

12 C.G.E./Space Pr./Inters'l meetings/Consultns/W.P. 3 (reproduit en Annexe V au présent rapport et Addenda 1-4 (reproduit en Annexes VI à IX au présent rapport, respectivement (*en anglais seulement*).

réalisé sans le recours à un tel régime international, et que l'introduction du nouveau régime ne rendrait pas nécessairement le financement plus facile.

10. Une autre représentante des communautés financières et commerciales internationales dans le domaine spatial, qui a noté en particulier que la raison d'être de son Organisation était de stimuler la concurrence et un marché spatial ouvert, a indiqué que plusieurs membres des communautés financières et commerciales internationales dans le domaine spatial qu'elle représentait s'inquiétaient du fait que l'avant-projet révisé de Protocole tel qu'amendé n'atteindrait pas son objectif parce qu'il n'existait pas de demandes de financement basé sur l'actif dans le domaine spatial commercial. Soulignant que ses membres n'avaient pas à ce jour vu d'arguments de fond à l'appui du Protocole envisagé, elle a appelé à ce que l'on identifie les raisons qui pourraient en vérité permettre à ses membres de se montrer plus enthousiastes à l'égard du Protocole envisagé. En revanche un autre représentant des communautés financières et commerciales internationales dans le domaine spatial a fait remarquer que, si le financement sur actif n'avait pas jusqu'à présent été considéré comme une forme alternative de financement viable dans le contexte de l'espace commercial, cela se devait essentiellement à l'absence de régime juridique clair et certain pour régir de telles opérations, tandis qu'une fois que le Protocole envisagé serait ratifié par les Etats, il n'y aurait pas de raison que des parties dans le secteur spatial commercial ne choisissent pas le financement sur actif comme moyen possible d'obtenir du financement. Cette position a été soutenue par un autre représentant des communautés financières et commerciales internationales dans le domaine spatial.

11. Un représentant des communautés financières et commerciales internationales dans le domaine spatial a indiqué que selon la pratique actuelle du financement spatial commercial, c'est sur l'ensemble du satellite que porte le financement octroyé par un syndicat de banques, plutôt qu'un financement portant sur les différentes parties du satellite par des financeurs distincts. Pour cette raison, il était d'autant plus important que le cadre du Protocole envisagé soit conçu comme aussi simple que possible, de façon à ne pas porter atteinte aux accords entre les parties à ces syndicats. Les représentants de certains Gouvernements ont confirmé que leurs propres consultations avec les communautés financières et commerciales internationales dans le domaine spatial avaient montré la nécessité d'accéder à des financeurs multiples pour le financement des biens spatiaux, les risques étant trop élevés pour la capacité d'un seul prêteur – particulièrement dans le cas des sociétés nouvellement crées, et c'était là un domaine dans lequel, de l'avis des représentants de ces communautés qu'ils avaient sondées, le Protocole envisagé serait certainement très utile.

(b) Observations portant sur des questions spécifiques

(i) Définition de "bien spatial"

12. Le représentant d'un Gouvernement a noté qu'il était apparu des consultations avec les communautés financières et commerciales internationales dans le domaine spatial que le Protocole envisagé serait particulièrement utile pour le co-financement de biens spatiaux, ce qui revêt une importance particulière pour les parties sans lequel il ne leur serait pas possible d'acquérir en propre un bien spatial, cet avis ayant été confirmé par différents représentants des communautés financières et commerciales internationales dans le domaine spatial qui ont participé aux consultations. L'un de ces représentants a ajouté qu'il était essentiel que le Protocole envisagé réponde aux besoins de participants individuels pour le financement d'un bien spatial donné, particulièrement ceux qui souhaiteraient financer de façon séparée la charge utile ou des transpondeurs. Il a été convenu dans ce contexte qu'il serait essentiel d'énoncer une définition précise de "bien spatial".

13. Présentant la phase de construction dans la vie d'un satellite, en particulier l'équipement de la plate-forme satellitaire avec sa charge utile de communication, un représentant des communautés financières et commerciales internationales dans le domaine spatial a noté que la plate-forme satellitaire serait dans la plupart des cas construite par un fabricant (habituellement un fabricant de satellites) tandis que la charge utile serait produite par un autre fabricant (habituellement un spécialiste de l'application concernée, qu'il s'agisse de télécommunications, d'observation de la Terre ou autre). Cela a amené le représentant d'un Gouvernement à se demander quelles techniques seraient utilisées lorsqu'une plate-forme satellitaire et une charge utile sont financées séparément.

14. Un représentant des communautés financières et commerciales internationales dans le domaine spatial a souligné que le but de la définition de "bien spatial" était d'identifier les biens qui sont envisagés comme susceptibles d'être financés, notant en particulier qu'il ne serait pas logique de financer une plate-forme satellitaire séparément de la charge utile, parce que si la charge utile ne produisait pas de revenus, la plate-forme satellitaire aurait une valeur négligeable. Il a indiqué que, actuellement, les besoins de financement des communautés financières et commerciales internationales dans le domaine spatial concernaient les satellites dans leur ensemble ou les sous-systèmes satellitaires, notamment pour ce qui était des Gouvernements et des exploitants qui ne sont pas en mesure d'acquérir en propre l'ensemble d'un satellite. Dans ce contexte, il a noté le recours accru aux charges utiles hébergées, comme moyen utilisé par de nombreux Gouvernements à économie en développement ou en transition pour acquérir des services basés dans l'espace extra-atmosphérique. Il a confirmé la nécessité d'anticiper les progrès à venir en matière technologique et de financement. Il a souligné l'importance de garder à l'esprit que ce point, comme du reste d'autres questions en discussion au sein du Comité, était déjà habituellement envisagé par les accords conclus entre créanciers, et qu'il faudrait en particulier assurer que le Protocole projeté respecte les solutions qui ont été forgées par les parties à ces accords.

15. Le représentant d'un Gouvernement a présenté sa proposition de nouvelle définition de "bien spatial", selon laquelle il n'y aurait plus que deux catégories de base de bien spatial, à savoir un "module de ressource" et une "charge utile", termes susceptibles d'être appliqués à toutes les catégories de biens spatiaux [13]. Le représentant d'un autre Gouvernement a exprimé des réserves concernant l'applicabilité universelle de cette nouvelle définition proposée, indiquant sa préférence pour la nouvelle définition supplémentaire du concept de "bien spatial" proposée par un autre Gouvernement qui, tout d'abord, définit le bien spatial comme un tout et, deuxièmement, établit une distinction entre un tel bien et les composants susceptibles d'identification pouvant être financés individuellement, une telle approche fournissant à son avis une souplesse supplémentaire qui permettrait d'intégrer des progrès technologiques futurs [14].

16. Dans ce contexte, le représentant d'un Gouvernement a suggéré qu'une façon de tenir compte des progrès technologiques futurs dans la définition de "bien spatial" serait de prévoir un mécanisme par lequel l'Autorité de surveillance du futur Registre international pour les biens spatiaux pourrait actualiser les catégories de biens spatiaux couverts par le Protocole envisagé, dans le Règlement qui serait adopté en vertu du Protocole.

17. Le représentant d'un Gouvernement a estimé qu'une définition générale de "bien spatial" serait plus utile pour le moment qu'une définition détaillée, et les représentants de certains autres Gouvernements ont soutenu cette idée, ces derniers étant d'avis qu'il était important de s'accorder sur une définition concrète sur laquelle l'Autorité de surveillance pourrait ensuite se baser.

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13 Cf. C.G.E./Space Pr./Inters'l meetings/I.W.G. Components/W.P. 3, p.5.
14 Cf. C.G.E./Space Pr./Inters'l meetings/Consultns/W.P. 3 Add. 1, Annexe 1, p. i.

18. Concernant le terme de "transpondeur", les représentants de certains Gouvernements ont suggéré qu'il n'était pas nécessaire de définir ce concept dans la définition de "bien spatial", notamment parce qu'un tel composant serait susceptible d'identification par référence aux contrats portant sur ce bien. D'autres participants ont soutenu cet avis, quoiqu'un représentant des communautés financières et commerciales internationales dans le domaine spatial ait souligné que les satellites n'opèrent pas seulement avec des transpondeurs et qu'il serait donc nécessaire de tenir compte aussi bien des composants discrets que des composants communs, un composant discret étant par excellence un transpondeur individuel et des composants communs ceux qui sont nécessaires pour que tous les transpondeurs fonctionnent sur un satellite donné et sur lesquels les propriétaires des différents transpondeurs ont une propriété conjointe. Dans ce contexte, le représentant d'un Gouvernement a rappelé qu'il est possible de constituer des garanties partagées et des garanties fractionnées sur un bien couvert par la Convention du Cap.

19. Le représentant d'un Gouvernement a souligné l'importance de garder à l'esprit le financement préalable au lancement dans le contexte de la définition la plus appropriée de "bien spatial", en particulier parce qu'en règle générale la fabrication du bien ne commence qu'au moment où le débiteur a obtenu le financement, de telle sorte qu'il est crucial pour le créancier de pouvoir inscrire sa garantie internationale à un moment aussi précoce que possible. On a noté que la question de savoir si le Protocole envisagé devrait s'appliquer aux biens "en cours de fabrication" devait encore être décidée et que, si l'on décidait finalement d'inclure de tels biens, cela risquerait de conduire à des conflits entre le Protocole envisagé et des droits nationaux. La plupart des délégations ont exprimé des préoccupations analogues, et un représentant des communautés financières et commerciales internationales dans le domaine spatial a souligné qu'un bien spatial passerait probablement par de nombreux pays entre la phase de la construction et celle du lancement et qu'il serait nécessaire de protéger les droits du créancier durant tout ce temps. Pour traiter le problème de la protection des créanciers dans la période pré-lancement, le représentant d'un Gouvernement a soutenu la proposition présentée par un autre Gouvernement qu'un tel droit avant le lancement puisse être inscrit comme garantie internationale future, et acquérir le plein statut de garantie internationale une fois que le bien est lancé ou placé sur orbite, la priorité étant alors déterminée à compter de la date de son inscription initiale [15].

(ii) Exercice des mesures en cas d'inexécution concernant les composants

20. Le représentant d'un Gouvernement, qui reconnaissait que la principale fonction du Protocole envisagé devrait être d'éviter les situations où une garantie internationale de rang supérieur soit primée par une garantie internationale inférieure, a fait remarquer qu'il était tout aussi important de prévoir une règle supplétive assurant que les garanties internationales portant sur des biens séparés et distincts qui sont physiquement reliés ne se trouveraient pas affectées par l'exercice des mesures en cas d'inexécution portant sur l'un de ces biens [16]. Il a expliqué qu'une telle règle supplétive serait destinée à s'appliquer seulement lorsque les parties concernées n'ont pas conclu d'accord entre créanciers. Le représentant d'un autre Gouvernement craignait qu'une telle approche puisse amoindrir la valeur du Protocole envisagé en réduisant le niveau de certitude auquel un créancier pourrait s'attendre au moment où il constitue une garantie internationale sur un bien pour ce qui est des mesures à sa disposition, simplement parce qu'il existe la possibilité qu'un autre bien séparé soit physiquement relié au premier bien à un moment ultérieur, surtout du fait qu'il pourrait ne pas avoir été consulté concernant l'assemblage des biens. Le représentant d'un autre Gouvernement encore a observé qu'au contraire une telle solution augmenterait le niveau de certitude qu'une partie et/ou un créancier non défaillant pourrait avoir concernant ses/leurs mesures potentielles à l'égard du bien physiquement relié, en assurant que la mise en œuvre des

[15] Cf. C.G.E./Space Pr./Inters'l meetings/Consultns/W.P. 3 Add. 1, pp. 2-3.
[16] Cf. C.G.E./Space Pr./Inters'l meetings/I.W.G. Components/W.P. 3, pp. 5-6

mesures en cas d'inexécution concernant les biens physiquement reliés n'affecte pas au plan technique le fonctionnement du bien, et de ce fait ne porte pas atteinte aux revenus produits par le bien pour un tiers non défaillant.

(iii) Critères d'identification des biens spatiaux aux fins de l'inscription

21. Un représentant des communautés financières et commerciales internationales dans le domaine spatial a fait remarquer que, même si l'on considérait que le Protocole envisagé vise à s'appliquer à tous les biens que la communauté financière serait disposée à financer, de tels biens pourraient être pourvus de l'identification du fabricant et de numéros de série, mais ces données pourraient changer après la vente du bien. Il a également déclaré qu'il n'existait pas à ce jour de critères d'identification universellement reconnus qui pourraient être utilisés pour la constitution de garanties – ou des fins semblables – portant sur des biens spatiaux du type que se propose de couvrir le Protocole envisagé, notant que les seuls critères comparables existant à ce jour, à savoir les critères utilisés pour l'inscription de satellites en vertu de la Convention des Nations unies de 1975 sur l'immatriculation des objets lancés dans l'espace extra atmosphérique, étaient conçus dans la perspective de la responsabilité. Il a ajouté que les nouveaux critères devraient donc être conçus au regard des besoins particuliers des créanciers. Un autre représentant des communautés financières et commerciales internationales dans le domaine spatial a indiqué toutefois que l'identification des satellites par des numéros de série ne présente pas de problèmes, puisque les fabricants et les exploitants assortissent habituellement les satellites d'une somme d'informations détaillées qui pourraient être utilisées spécifiquement pour identifier des satellites en orbite.

22. Le représentant d'un Gouvernement a attiré l'attention sur les observations soumises par deux représentants des communautés financières et commerciales internationales dans le domaine spatial [17], à savoir que les biens spatiaux pourraient être spécifiquement identifiés par les numéros de série conférés par les fabricants et qui permettent habituellement le suivi et le contrôle par les stations au sol, qu'il est relativement simple d'identifier les numéros de série par la documentation pertinente et que les numéros de série pourraient donc servir de critères d'identification efficaces pour les biens spatiaux, pouvant être complétés par le nom du fabricant et la désignation du modèle [18]. Le représentant d'un Gouvernement se demandait comment une partie commerciale pourrait obtenir l'information nécessaire pour confirmer qu'un bien spatial donné est le même que celui qui est identifié par un numéro de série et dans la documentation. Un représentant des communautés financières et commerciales internationales dans le domaine spatial a indiqué que les autorités étatiques qui délivrent les licences disposent toutes de moyens leur permettant d'identifier et de suivre les biens dans l'espace, et que cette information pourrait être rendue accessible aux parties intéressées.

23. Dans ce contexte, un autre représentant des communautés financières et commerciales internationales dans le domaine spatial a souligné qu'il était cependant crucial que le Protocole envisagé n'ajoute pas des charges et des obligations aux partenaires privés qui auraient pour effet d'augmenter les coûts et d'ajouter en confusion à une activité déjà coûteuse et compliquée.

(iv) Limitations des mesures en cas d'inexécution (service public)

24. À la lumière des consultations que sa délégation avait eues avec des représentants des communautés financières et commerciales internationales dans le domaine spatial, le représentant

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[17] Cf. C.G.E./Space Pr./Inters'l meetings/Consultns/W.P. 3, p. 4 and C.G.E./Space Pr./Inters'l meetings/Consultns/W.P. 3 Add. 4.

[18] C. C.G.E./Space Pr./Inters'l meetings/Consultns/W.P. 3 Add. 4, p. 1.

d'un Gouvernement, notant que l'objet du Protocole envisagé était de faire affluer des capitaux au secteur commercial de l'espace, a indiqué que sa délégation ne voyait pas comment l'introduction de limitations de service public aux mesures pour inexécution pourrait avoir d'autres effets que ceux d'augmenter les coûts du financement et de créer une incertitude accrue pour les créanciers. Dans ce contexte, il a souligné que les autorités nationales pouvaient déjà individuellement prévoir des limitations de service public dans leurs accords de licence et par conséquent, il se demandait si le Protocole envisagé était l'instrument approprié pour mettre en œuvre de telles limitations.

25. Un représentant des communautés financières et commerciales internationales dans le domaine spatial a également noté que la question des limitations de service public était déjà prévue dans les accords entre créanciers et dans les négociations entre les parties, une telle pratique ayant démontré son efficacité dans le passé ; en outre, c'était là un risque que les parties pouvaient tempérer en exerçant une diligence appropriée lors de l'évaluation des risques impliqués dans l'opération de financement d'un bien spatial. Dans le contexte spécifique des activités militaires, il a noté que de nombreux satellites fournissent de larges gammes de services qui pourraient être interprétés ou non comme des services publics, depuis la fourniture directe de télécommunications à des fins stratégiques entre unités militaires par un opérateur de satellite, à la fourniture de télévision à des troupes sur le terrain par un client d'un opérateur de satellite. C'était là, a-t-il remarqué, une situation dans laquelle un créancier pourrait n'avoir aucune connaissance préalable d'une telle utilisation et serait en conséquence incapable de prédire à quel moment une exemption de service public pourrait être appliquée. Dans ces conditions, si l'on considérait approprié d'incorporer une exemption de service public dans le Protocole envisagé, alors un créancier potentiel devrait obtenir des garanties juridiques que la future utilisation d'un bien spatial donné ne serait pas qualifié de service public, ce qui serait extrêmement coûteux et difficile à réaliser. Le représentant d'un Gouvernement a toutefois noté dans ce contexte qu'il était certes important de garder à l'esprit les intérêts des communautés financières et commerciales internationales de l'espace, mais qu'il était également important d'envisager l'intérêt de l'État à la continuité des services publics, intérêt qui est considéré comme relevant d'une fonction fondamentale du Gouvernement.

26. En réponse à la question de savoir comment un Etat qui est le bénéficiaire du service public mais n'est pas l'Etat qui délivre la licence – et ne serait donc pas en mesure d'assurer la protection du service public au moment où la licence est octroyée – pourrait protéger ce service au moment où se produit la défaillance, un représentant des communautés financières et commerciales internationales dans le domaine spatial a indiqué qu'un concept aussi large que celui de "service public" n'était jamais utilisé mais que des clauses étaient souvent insérées dans les contrats de services qui prévoyaient la fourniture de services dans des situations d'urgence, notant en outre que les opérateurs de satellites ne concluraient probablement jamais un contrat qui exigerait la continuité du service public, compte tenu de leur réticence à permettre à des parties extérieures d'interférer avec la façon dont ils conduisent leurs opérations.

27. Les représentants de plusieurs Gouvernements ont suggéré que, compte tenu des complexités des règles de droit international privé et public qui régissent le service public, il n'existait pas de solution universelle, et qu'un compromis pourrait encore être trouvé.

(v) Droits du débiteur

28. Un représentant des communautés financières et commerciales internationales dans le domaine spatial, soulignant l'importance cruciale de traiter les droits du débiteur dans l'avant-projet révisé de Protocole tel qu'amendé, a suggéré qu'actuellement les dispositions correspondantes prêtaient à confusion et étaient peu claires, et que si elles pouvaient être précisées, l'utilité du Protocole envisagé serait accrue. Le représentant d'un Gouvernement,

s'exprimant en qualité de co-président du Comité de rédaction, s'est dit prêt à fournir les éclaircissements nécessaires.

(vi) Autres avantages économiques

29. Le représentant d'un Gouvernement a présenté plusieurs propositions qui, selon sa délégation, augmenteraient l'utilité économique du Protocole envisagé [19]. L'une de ces propositions consistait dans une disposition *opt-in* prévoyant l'approbation préalable par l'autorité de licence d'un exploitant substitué du satellite. De l'avis général toutefois, un tel mécanisme ne fonctionnerait pas, car il serait impossible pour les Autorités de licence de prévoir à l'avance les nombreux facteurs qui conditionneraient une telle décision alors que la situation pourrait changer radicalement dans un court laps de temps.

(vii) Assurance pour le sauvetage

30. Un représentant des communautés financières et commerciales internationales dans le domaine spatial a exprimé l'avis que les dispositions sur les droits de sauvetage contenues dans l'avant-projet révisé de Protocole tel qu'amendé étaient totalement dépourvues d'utilité et que, telles qu'elles étaient rédigées, elles accorderaient une priorité indue aux droits des assureurs et de cette façon réduirait la valeur du Protocole envisagé pour les créanciers. Se ralliant à la suggestion formulée par le représentant d'un Gouvernement, il a reconnu toutefois que le problème pourrait tenir à un libellé excessivement large, et qu'il pourrait de ce fait être résolu par une reformulation appropriée.

IV. CONCLUSION DES CONSULTATIONS

31. Aucun autre point n'ayant été soulevé, *Mme Veneziano* a conclu en remarquant que de bons progrès avaient été réalisés durant les consultations sur les questions en suspens concernant l'avant-projet révisé de Protocole tel qu'amendé. En réponse à une question de *M. Borello* concernant la suite qui serait donnée aux consultations, *M. Estrella Faria* a indiqué qu'en premier lieu le Groupe de travail informel sur les composants et le Groupe de travail informel sur les limitations des mesures en cas d'inexécution, durant les réunions qui allaient suivre, tireraient les conclusions des consultations et décideraient de la façon ils traiteraient les questions qui leur sont soumises, et qu'ensuite le Comité, auquel le rapport des consultations serait envoyé en vue de sa cinquième session, tirerait ses propres conclusions. Après avoir remercié tous les participants, et en particulier les co-modérateurs, pour leur contribution à la discussion, *M. Estrella Faria* a déclaré les consultations closes à 17.45 h.

[19] Cf. C.G.E./Space Pr./Inters'l meetings/Consultns/W.P. 3 Add. 1, p. 8.

ANNEXE I

LISTE DES PARTICIPANTS

MEMBRES

ALLEMAGNE	Mr Simon SCHULTHEISS Legal Adviser Federal Ministry of Justice *Berlin*
	Mr Karl KREUZER Emeritus Professor University of Würzburg *Würzburg*
CANADA	Mr Roderick J. WOOD Professor of Law Faculty of Law University of Alberta *Edmonton*
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	Mr Martin JACOBSON Office of the Legal Adviser Department of State *Washington, D.C.*
	Mr K. Koro NURI Senior Finance Counsel Office of the General Counsel Import-Export Bank of the United States of America *Washington, D.C.*
	Mr Steven L. HARRIS Professor of Law Chicago-Kent College of Law Illinois Institute of Technology *Chicago, Illinois*
FEDERATION DE RUSSIE	Mr Igor POROKHIN President Inspace Consulting (Russia) L.L.C. *Moscow*
	Ms Olga VOLSKAYA Federal State Unitary Enterprise Organisation "Agate" *Moscow*
	Mr Valery FEDCHUK Legal Adviser Trade Representation of the Russian Federation in Italy *Rome*
ITALIE	Mrs Anna VENEZIANO Professor of Comparative Law Faculty of Law University of Teramo; *Co-moderator of the consultations* *Rome*
	Mr Vittorio COLELLA ALBINO Head of Legal and Corporate Affairs Telespazio S.p.A. *Rome*
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ROYAUME-UNI	Sir Roy GOODE Emeritus Professor of Law University of Oxford *Oxford*

REPRESENTANTS DES COMMUNAUTES FINANCIERES ET COMMERCIALES INTERNATIONALES DANS LE DOMAINE SPATIAL

Mr Marc BORELLO	General Counsel Thales Alenia Space; *Co-moderator of the consultations* *Cannes La Bocca*
Mrs Aarti HOLLA-MAINI	Secretary-General European Satellite Operators Association *Brussels*
Mme Martine LEIMBACH	Chargée de mission Direction des affaires juridiques Crédit Agricole S.A. *Paris*
Mr Peter D. NESGOS	Partner Milbank Tweed Hadley & McCloy; *representing the Satellite Industry Association of the United States of America* *New York*
Mr Bernhard SCHMIDT-TEDD	Head of Legal Support German Space Agency *Bonn*
Mr Jean-Claude VECCHIATTO	Vice President Head of Corporate and Project Finance EADS Legal Department *Paris*

OBSERVATEUR

Mr Olivier M. RIBBELINK	Senior Researcher Research Department T.M.C. Asser Instituut *The Hague*

ANNEXE II

ORDRE DU JOUR

1. Adoption de l'ordre du jour

2. Organisation des travaux

3. Examen de l'avant-projet révisé de Protocole portant sur les questions spécifiques aux biens spatiaux à la Convention relative aux garanties internationales portant sur des matériels d'équipement mobiles, tel qu'issu de la quatrième session du Comité d'experts gouvernementaux d'UNIDROIT pour la préparation d'un projet de Protocole portant sur les biens spatiaux à la Convention relative aux garanties internationales portant sur des matériels d'équipement mobiles, tenue à Rome du 3 au 7 mai 2010 (C.E.G./Pr. Spatial/4/Rapport, Annexe VIII)

4. Divers.

ANNEXE III

PROPOSALS

submitted by the Government of Germany
to the Informal Working Group on default remedies in relation to components

Introduction

In recent discussions about the definition of space assets, the terms "component" and "transponder" played a major role - unfortunately, without finding a viable definition. The current definition in Article I(2)(l) lists a number of objects and contains an opening clause for other objects not explicitly listed. A conclusive definition enumerating all assets would not be acceptable because it would exclude future developments with regard to space objects. It was agreed that a more structured definition should be found.

After intensive consultations with industry and with legal and financial experts, a new definition concept has been developed. This concept focuses on the key elements of every space asset by avoiding enumerative examples and problematic terms.

The new definition is limited to only two categories: "resource module" and "payload". All space assets are describable using just these two generic terms, because every space asset is either a "resource module" (its function is to support and maintain the payload) or a "payload" (its function is to provide a certain service).

This concept applies to all existing categories of space object, like satellites, space stations and space vehicles. Though the new concept requires a separate registration of every asset, it is in line with the concept of the Aircraft Protocol, under which "airframe" and "engine" must be registered separately too.

A satellite consists of a resource module (satellite bus) plus payload(s) (optical, telecommunication, radar- or scientific payload). A space station consists of the resource module which is also constructed to carry payloads (experimental racks). Space vehicles are usually resource modules too, because they have a supporting function with respect to the transported assets. This paper contains further elaboration of the different space assets.

These examples demonstrate that, in spite of the simplicity of the definition concept, all possible space assets are covered with only two generic terms "resource module" and "payload".

PART 1 THE DEFINITION OF THE SECURED OBJECT UNDER THE PLANNED SPACE ASSETS PROTOCOL

I. Preliminary remarks

Taking security over certain individual components of satellites and space stations, and thus separate commercialisation of these components, is one of the objectives that the planned Space Assets Protocol is supposed to achieve - so far as the problems involved can be solved. But the planned Protocol will only be able to do justice to this objective if the secured object is defined in such a way that it corresponds to technical and functional reality.

II. Technical considerations

(a) Satellites

Satellites usually consist of the resource module and the payload installed thereon, the components of which differ according to the satellite's function.

1. Here the resource module, i.e. the "satellite bus", constitutes a functional unit that is uniquely identifiable and is clearly distinguishable, in technical terms, from the remaining items.

2. The payload, too, is a uniquely identifiable functional unit and clearly distinguishable from the remaining items because its individual parts, as specified by the function indicated below,

- are physically linked to each other;
- are indispensable for the functioning of the precise payload concerned; and
- do not take over any function with respect to other payloads or to the satellite bus.

(i) communications satellites

The payload of a communications satellite usually consists of the following hardware components: receive antenna, receiver, switchbank, high-power amplifier, output multiplexer und transmit antenna.

(ii) navigation satellites

The payload of a navigation satellite usually consists of the following hardware components: time generator (e.g. atomic clock), signal coding processor, high-power amplifier, downlink antenna.

(iii) earth observation satellites/weather satellites

The payload of an earth observation satellite/weather satellite usually consists of the following hardware components: sensor(s)/camera(s), data processor, high-power amplifier, downlink antenna (usually an antenna for more then one sensor).

(iv) scientific satellites

The payload of a scientific satellite usually consists of the following hardware components: sensor(s) instrument(s) data processor, high-power amplifier, downlink antenna (usually an antenna for more than one sensor).

3. Transponders

The transponder, on the other hand, which so far has been conceived to be an independent secured object, is not uniquely identifiable as a functional unit and is not clearly distinguishable from the remaining items over which security can be taken. On the contrary, transponders are themselves items (high-power amplifier) of a payload. It is true to say that transponders, as part of a construction unit, are physically linked to each other and that they are indispensable for the functioning of a payload. Nevertheless, several transponders jointly depend on specific hardware of the communications payload (receive antenna, receiver, switchbank, output multiplexer und transmit antenna etc.).

(b) Space stations

Space stations usually consist of a resource module and the payloads, which are the operational elements integrated in the resource module (e.g. laboratory equipment).

1. In functional terms, the resource module corresponds to the satellite bus (e.g. E.P.S., stabilisation, pressurisation, data module) and it thus constitutes a functional unit that is uniquely identifiable and is clearly distinguishable, in technical terms, from the remaining items.

2. An operational element is equivalent to a segment of the payload and, being a functional unit, is uniquely identifiable and clearly and physically distinguishable from the remaining items of the space station, i.e. it can be installed and removed easily.

An operational element is usually a standardised experiment locker (e.g. a 19-inch rack) and it does not perform any function with respect to other operational elements or to the resource module. Although experiments can be configured in every conceivable form in the space station, they are nonetheless always clearly and physically distinguishable.

3. The I.S.S. and its predecessor SpaceLab provide examples of usage in relation to space stations.

The Columbus module is an independent resource module with its own experimentation apparatus, i.e. operational elements. After docking to the I.S.S., the Columbus resource module shares the E.P.S. with the I.S.S. resource module.

(c) Space vehicle

Here the classification under (b) above - by division into "resource module" and "payload/operational elements" - also applies.

An instance of usage with regard to space vehicles is the Space Shuttle or the Automatic Transfer Vehicle (A.T.V.). Space vehicles are used for independent experimental or repair missions, and they are also used for transporting infrastructure parts and resources to space stations.

(d) Launch vehicle

Launch vehicles comprise the bus and the asset requiring transportation (i.e. usually the satellites). In contradistinction to (a) 2., the payload in this case is, for example, the satellite itself that has to be transported – and not part of a satellite.

1. Here the bus constitutes a functional unit that is uniquely identifiable and clearly distinguishable, in technical terms, from the payload.

2. The payload is clearly distinguishable from the remaining items of the bus.

3. In future, parts of the bus, too, could be susceptible to economic re-use.

III. Legal considerations

(a) Satellites

The objective of creating a security interest as a means of credit protection necessitates clear and unequivocal designation of the objects to which such an interest may relate. At the same time,

the creditor must be certain that the object he is financing corresponds exactly to the object to which the security interest relates. The reference to the satellite bus and the payload as the secured objects of a satellite takes account of both these aspects.

By itself the **satellite bus** is a clearly defined and distinguishable technical unit and, therefore, suitable as a secured object. It also falls under the conceptual heading "resource module".

Following the technical descriptions in Section II, a **payload** consists of hardware components jointly assigned to a specific service (mission) provided by the space asset concerned. These hardware components are used solely for this service, which means that, on the basis of their mission, they are clearly distinguishable from other hardware components installed on the satellite bus. At the same time, the sum total of these components constitutes the hardware needed in order to implement the services/business venture, thus entailing a need for credit financing, where applicable.

In view of the fact that an individual **transponder** shares the infrastructure of the same payload (receive und transmit antenna, receiver etc.) with other transponders, a transponder as such is not suited to constitute an independent secured object. Where there is a division of ownership / security (collateralisation) among the transponders embraced by one payload, conflicts would arise under property law (rights *in rem*) concerning the components used jointly by the transponders concerned. It is true to say that a legal construction would be conceivable here via "joint and several ownership" or via indivisible (ownership) shares for the respective owners/creditors; nevertheless, such a complicated construction would also need to be justifiable in economic terms - after all, it would lead to difficult conflicts on the compulsory execution level as well (e.g. regarding the adjustment of an antenna). But – as already explained – this is not possible here.

By referring to the secured objects of a "resource module" here, the "satellite bus" and a "payload", two concepts have been found which are abstract enough to avoid also ruling out anticipated future developments from the realm of susceptibility to security (collateralisation); these concepts are, at the same time, precise enough to meet the certainty requirements applying to a secured object. Moreover, taken together, both concepts define a satellite in its entirety, because each component is functionally assignable either to the satellite bus or to the payload. Components not falling within these categories are not additionally conceivable.

(b) Space stations, space vehicles and launch vehicles

Space stations and space vehicles also consist of technically distinguishable and functionally clearly assignable individual components, as described under II (b) above. The resource module and the payloads are conceivable as an independent object over which security can be taken.

Launch vehicles will also fall under the term "space vehicles". They consist of the bus (resource module) and the asset requiring transportation. At present, only the resource module with respect to launch vehicles can be the subject of an international interest, because the "payload", usually comprising a satellite in its entirety, can in its components already form the subject of separate rights - as set out under III (a) above.

Even though reusability of launch vehicles does not currently present a realistic scenario, these objects should be seen as being susceptible to the international interest. If future developments allow the reuse of launch vehicles, payloads in the meaning of the definition below might be thinkable. Therefore, the phrase "payloads with respect to space vehicles" can be justified, even with respect to launch vehicles.

IV. Proposed new definition of "space asset"

Article I(2)(l) of the revised preliminary draft Protocol as amended could read as follows:

> **"Space asset" means resource modules and payloads with respect to satellites, space stations and space vehicles, in space or intended to be launched into space. The Supervisory Authority shall describe technical details of space assets in the regulations.**

PART 2 LIMITATIONS ON DEFAULT REMEDIES IN RESPECT OF PHYSICALLY LINKED ASSETS

I. Explanation

The default remedies under the Cape Town Convention are to take possession or control of an object, to sell or grant a lease of any object or to collect or receive any income or profit arising from the management or use of the object (see Article 8(1) of the Convention). The value of the international security interest suffers where the default remedies are limited. Thus, it is absolutely essential to keep creditors' default remedies as unlimited as possible. On the other hand, the value of an international security interest suffers too where the use of the international interest in, or other rights related to the space asset are possibly and unlimitedly impaired by others. Therefore, **creditors must be authorised freely to exercise those of their default remedies which only have an impact on their secured asset**, (e.g. to collect or receive any income or profit arising from the management or use of the asset.)

In cases where the impact of a default remedy would not be limited to the secured asset but would have an effect on other physically linked assets, a considerable conflict of interest must be resolved.

A general rule is that a creditor exercising its remedies can only invoke its rights against the object it has rights in. Because of this rule, that the international security interest solely encumbers the asset in which it is registered, default remedies can only be exercised as far as that asset is concerned. Thus, it is basically not acceptable that a creditor holding a registered interest in only one asset impairs another asset (in which he does not hold any right). Therefore, to extend the impact of a default remedy to other parties (who have rights and interests in the impaired physically linked asset) should only be permitted where the impaired party consents thereto. Taking into account the fact that the defaulting debtor has still to agree with the relevant default remedy (see Article 8(1) of the Convention), it is even more logical that uninvolved parties have to agree too. All limitations on default remedies solely concern relations between the creditor and other involved parties. In relations between the creditor and its debtor no restriction shall take place.

II. Proposed new provision on limitations on default remedies in respect of physically linked assets

Article XVIII

1. ***Unchanged***

2. ***Unchanged***

3. The creditor shall only exercise default remedies against its secured asset in accordance with Chapter III of the Convention in so far as this does not

[technically] affect the current use of international interests in, and other rights relating to other space assets physically linked to the secured space asset.

4. Other default remedies than those referred to in paragraph 1 may be exercised against the secured space asset where

(a) the user or holder of an international interest in, and other rights relating to other space assets physically linked to the secured asset consents to it as far as he/she/it is impaired, or

[(b) the creditor offsets the impairment of the current use of the physically linked space asset by taking equivalent technical measures.]

ANNEXE IV

EXPLANATORY NOTE ON THE DRAFT AGENDA

(prepared by the UNIDROIT Secretariat)

I. INTRODUCTION

(a) *Origins of the consultations*

1. At its fourth session, held in Rome from 3 to 7 May 2010, the UNIDROIT Committee of governmental experts for the preparation of a draft Protocol to the Convention on International Interests in Mobile Equipment on Matters specific to Space Assets (hereinafter referred to as the *Committee*) was seised of comments [1] formulated by a number of representatives of the international commercial space and financial communities expressing concerns regarding certain aspects of the text of the revised preliminary draft Protocol to the Convention on International Interests in Mobile Equipment on Matters specific to Space Assets prepared by Sir Roy Goode (United Kingdom) and Mr J.M. Deschamps (Canada), as Co-chairmen of the Drafting Committee of the Committee, to reflect the conclusions reached by the Committee at its third session, held in Rome from 7 to 11 December 2009, and reviewed by the Drafting Committee. [2]

2. These concerns were the subject of due attention during the fourth session of the Committee and were, accordingly, reflected, to the extent considered appropriate, in the text of the revised preliminary draft Protocol as amended during that session by way of implementation of the decisions taken by the Committee (hereinafter referred to as the *revised preliminary draft Protocol as amended*). In the light of the decision taken, toward the close of the session, to convene intersessional meetings of two organs of the Committee (the Informal Working Group on default remedies in relation to components (hereinafter referred to as *the Informal Working Group on components*) and the Informal Working Group on limitations on remedies, certain delegations also suggested that this opportunity be taken to organise intersessional consultations with representatives of the international commercial space and financial communities in particular with a view to building on the progress achieved by the Committee during the session and ensuring timeous completion of the planned Protocol. [3]

(b) *Organisation of, and participation in the consultations*

3. The UNIDROIT Secretariat has, therefore, taken the opportunity of prefacing the meeting of the Informal Working Group on components due to be held in Rome on 19 and the morning of 20 October 2010 and that of the Informal Working Group on limitations on remedies due to be held in Rome on the afternoon of 20 and on 21 October 2010 by consultations with representatives of the international commercial space and financial communities having to date participated in the development of the planned Space Protocol, to be held on 22 October 2010, at the seat of UNIDROIT in Rome. The Governments participating in the work of the two Informal Working Groups will also be invited to attend the consultations.

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[1] Cf. C.G.E./Space Pr./4/W.P. 4 rev. This and all the other documents referred to in this document are available on the UNIDROIT web site, at the following address: http://www.unidroit.org/english/workprogramme/study072/spaceprotocol/study72j-archive-e.htm#NR1.

[2] C.G.E./Space Pr./4/W.P. 3 rev.

[3] Cf. C.G.E./Space Pr./4/Report, § 149.

II. SOME CONSIDERATIONS REGARDING THE STRUCTURE AND POTENTIAL SUBJECT-MATTER OF THE CONSULTATIONS

(a) Structure of the consultations

4. The Secretariat would propose that the essential focus of the consultations be on broad, general issues arising under the revised preliminary draft Protocol as amended, of the sort raised in the concerns submitted prior to the fourth session of the Committee by certain representatives of the international commercial space and financial communities, as opposed to technical aspects of the drafting of individual provisions of the revised preliminary draft Protocol as amended. Clearly, however, to the extent that the discussion of such general issues also raises technical aspects of the drafting of the revised preliminary draft Protocol as amended, then it is both right and necessary that any proposals that representatives of the international commercial space and financial communities may care to formulate on such technical details also be capable of consideration during the consultations.

5. The Secretariat believes that the consultations will be facilitated by the use of co-moderators, one to be drawn from among the representatives of Government and the other from among the representatives of the international commercial space and financial communities. It would submit that such a structuring of the proceedings will have the advantage of facilitating the emergence of consensus, the co-moderators being able to act as filters for, and contribute to the achieving of common ground on behalf of their respective constituencies. The Secretariat would, therefore, propose that the co-moderators jointly present the conclusions to be drawn from the consultations, thus not only contributing to the bringing together of the different strands of the discussions but also showing the way forward for further possible dialogue.

6. The Secretariat would propose that the revised preliminary draft Protocol as amended, set out in Appendix VIII to the Report on that session, [4] be taken as the basic point of reference for the consultations, and in particular any comments or proposals that those invited to participate may care to formulate for consideration during the consultations.

(b) Potential subject-matter of the consultations

7. It would be invidious for the Secretariat to delimit the subject-matter of consultations which, as mentioned above, are intended to be capable of ranging across the whole spectrum of the matters dealt with in the revised preliminary draft Protocol as amended of concern to the international commercial space and financial communities.

8. The Secretariat, nevertheless, considers that it might be helpful for it not only to share with those considering participating in the consultations its thoughts concerning the fundamental objective capable of being pursued through the consultations but also to recall the key issues outstanding in respect of the revised preliminary draft Protocol as amended. The two are, moreover, it would submit, closely related.

(i) Objective of the consultations

9. Taking first what might be considered to be the fundamental objective capable of being pursued through the consultations, the Secretariat would submit that it is important to bear in mind that, if the Committee was able, at its fourth session, to make substantial progress - sufficient for it to recommend that the UNIDROIT Governing Council authorise the convening of a fifth session to finalise the revised preliminary draft Protocol as amended, a recommendation that was duly endorsed by the Council at its 89th session, held in Rome from 10 to 12 May 2010 - this was in large measure thanks to the valuable contribution made to its work by representatives of

[4] C.G.E./Space Pr./4/Report.

the international commercial space and financial communities, whether in the shape of the comments submitted in advance of the session or in the expertise provided during the session on issues of a quintessentially technical dimension.

10. The Secretariat has, throughout the intergovernmental consultation process - and, indeed, even before that process was engaged - signalled its firm commitment to the Institute's work on this project resulting in an instrument that will be commercially viable, thus an instrument that will, while being in line with international space law, respond to the reasonable business needs of the parties to the transactions potentially covered by the proposed Protocol: this is in line with the way in which UNIDROIT always works when preparing international commercial law instruments.

11. The consultations are, in this perspective, to be seen as affording representatives of the international commercial space and financial communities an invaluable opportunity to set forth any concerns that they may still have with regard to the revised preliminary draft Protocol in an open, informal dialogue with representatives of the Governments of the key space-faring nations serving on the Committee, unconstrained by the formal confines of the intergovernmental negotiations. This opportunity is particularly important given the crucial point that has been reached in the negotiations, especially as regards the key outstanding issues, and the possibility that the informal nature of the consultations may be expected to offer for frank discussion and the narrowing of divergences of opinion.

(ii) Key issues outstanding in respect of the revised preliminary draft Protocol as amended

12. Without prejudice to any other issues that may be of concern to the international commercial space and financial communities, the Secretariat would submit that the key issues outstanding in respect of the revised preliminary draft Protocol as amended may be considered as being essentially three in number, the first the matter referred to the Informal Working Group on components, the second the matter referred to the Informal Working Group on limitations on remedies and the third the testing of the criteria for identification of space assets, for registration purposes, proposed in Article XXX of the revised preliminary draft Protocol as amended.

(a) Components

13. The Informal Working Group on components was established at the third session of the Committee, held in Rome from 7 to 11 December 2009. It was given the task of finding a solution to a problem which, in its essence, comes down to the most appropriate way of resolving those conflicts that may arise at the level of the exercise of default remedies where the action of the holder of an international interest in one space asset might otherwise adversely affect the international interest held by another creditor in a space asset physically linked to that asset, conflicts typically likely to arise in respect of components of a satellite, such as transponders. The remit of the Informal Working Group on components was delimited by reference to the definition of space assets as this related to components and the related question of default remedies in relation to components. [5]

14. To quote from the Report of the Informal Working Group on components to the Committee on the work accomplished by it during the Committee's third session, [6] "[c]onsiderable progress [had been] made … , notably in exploring the divergent points of view on the most appropriate solution to this problem. Time, however, did not permit the reaching of a definite conclusion." The Informal Working Group on components, accordingly, continued with its task at the fourth session of the Committee. As the Secretary-General of UNIDROIT reported to the Committee at the conclusion of that session, "significant progress had been made, though no solution had yet been

[5] C.G.E./Space Pr./3/Report rev., § 18.
[6] C.G.E./Space Pr./3/W.P. 24.

reached". [7] However, he "indicated his belief that this progress was such as to serve as a firm basis for the finding of an acceptable solution in future. In particular, he pointed out that the Informal Working Group had agreed that, while the future Protocol had to provide legal certainty, it was not desirable for it to become locked into a particular system for the determination of those assets that should qualify for registration in the future International Registry for space assets; in this connection, he noted that the Informal Working Group saw the regulations to be made or approved by the Supervisory Authority pursuant to the future Protocol as being able to play a part in providing the desirable measure of flexibility regarding the establishment of identification criteria for the purposes of the registration of international interests in assets that might become valuable to creditors in the future. He indicated, in addition, that the Informal Working Group had agreed that for individual components to be registrable in the future Registry, it would be necessary that the sum total of such components should correspond to the entirety of the space asset as a whole and not allow for an inflation of international interests in such assets without value, so as to avoid gaps in the information available in the future Registry to creditors". [8] Significantly, "[s]everal delegations that had served on the Informal Working Group noted their satisfaction at the progress made and indicated that they shared the views expressed by [the Secretary-General]". [9]

(β) Limitations on remedies

15. The Informal Working Group on limitations on remedies was established at the third session of the Committee, held in Rome from 7 to 11 December 2009. It was given the task of finding a solution to a problem which, in its essence, comes down to the appropriate balance to be struck in the planned Protocol between, on the one hand, the interests of a creditor seeking to exercise remedies against a space asset performing a "public" service in the event of its debtor's default, and, on the other, those of one or more organs of the State anxious to ensure the continuity of the performance of the particular "public" service, notwithstanding the debtor's default. [10]

16. The work accomplished by the Informal Working Group at that session was reflected in a discussion paper setting out a proposal for a new provision on limitations on remedies prepared by the Secretariat, on the basis of informal proposals submitted by the representative of Germany. [11] In presenting this paper to the Committee at the conclusion of that session, the Secretary-General noted, however, that it had neither been approved by the Informal Working Group nor reviewed by the Drafting Committee but was rather intended as the basis for further consultations. [12] Significantly, though, a number of delegations welcomed the discussion paper as providing an important step forward in the development of a balanced solution. [13]

17. The consultations continued at the fourth session of the Committee, where the Informal Working Group came up with a new discussion proposal, couched in two technical approaches - one a rights approach and the other a remedies approach - to the achieving of the conceptual goal of ensuring that contractual obligations for the provision of public services be maintained both where a creditor was exercising its rights under the Convention on International Interests in Mobile

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7 C.G.E./Space Pr./4/Report, § 145.
8 *Idem.*
9 *Idem.*
10 C.G.E./Space Pr./3/Report rev., §§ 27-33.
11 C.G.E./Space Pr./3/W.P. 23.
12 C.G.E./Space Pr./3/Report rev., § 34.
13 *Idem*, § 37. One delegation, though, noted that paragraph 5 of the discussion paper did not take account of its proposal that the requirement of prior notice be treated as unnecessary in the event that the State had exercised an option pursuant to paragraph 3. It was agreed that, given the nature of the discussion paper as a basis for further consultations, this matter could be dealt with at the following session of the Committee (C.G.E./Space Pr./3/Report rev., § 35). Another delegation sought clarification that the ability of a State, under paragraph 5 of the discussion paper, to register a notice recording that a space asset was used for the provision of a public service in the vital interest of that State within six months after the launch of that asset did not prohibit a State from filing such a notice after the six-month period but that any previously recorded interests would not be affected by such a notice (*idem*, § 36). This point was agreed (*idem*).

Equipment (hereinafter referred to as *the Convention*) as applied to space assets and where the ownership of a space asset was being transferred. [14] Several delegations viewed the new discussion proposal as a positive step toward the goal of finding an acceptable solution on public service and indicated that they would be happy to make it the subject of further consideration by their Governments and consultations with their commercial space sectors. [15]

18. Following discussion, it was decided that the discussion paper that had emerged from the work accomplished by the Informal Working Group during the third session of the Committee and the discussion proposal having emerged from the Informal Working Group's work during the Committee's fourth session should be presented as Alternatives A and B of Article XXVII *bis* of the revised preliminary draft Protocol as amended respectively, as options for further consideration. [16] Some delegations noted that the retention of the discussion paper that had emerged from the work accomplished by the Informal Working Group during the third session of the Committee alongside the later discussion proposal need not preclude amendment of the former. [17]

19. Article XXVII *bis* of the revised preliminary draft Protocol as amended, which appears in square brackets, reflecting the fact that the Committee has not to date taken a decision on the matter, accordingly reads as follows:

> [*Article XXVII* bis – *Limitations on remedies in respect of public service*
>
> [Alternative A
>
> 1. – A State has the right to object to the exercise of default remedies, as provided in Chapter III of the Convention and Articles XVIII to XXIII of this Protocol, in respect of a space asset needed for the provision or maintenance of a public service which is in the vital interest of that State if the exercise of those remedies would cause interruption in the provision or maintenance of that service.
>
> 2. – Within twenty days from the date on which the State has notified the creditor of its objection to the exercise of remedies under the preceding paragraph, the creditor may exercise the right to step in and assume responsibility for the provision or maintenance of the relevant service in the State concerned or appoint a substitute entity for that purpose, with the consent of that State and of the licensing State.
>
> 3. – If the creditor chooses not to exercise its rights under the preceding paragraph, the State that objects to the exercise of default remedies by the creditor under paragraph 1 shall have the option of:
>
> (a) curing the default by the debtor by paying to the creditor all sums outstanding for the entire period of default; or
>
> (b) taking or procuring possession, use or control of the space asset and assuming the debtor's obligations by stepping into the obligations of the debtor for the provision of a public service in the State concerned.
>
> 4. – A State that objects to the exercise of default remedies by the creditor under paragraph 1 shall exercise its rights under the preceding paragraph within ninety days. After such period, the creditor shall be free to exercise any of the remedies provided in Chapter III of the Convention and in Articles XVIII to XXIII of this Protocol, in respect of the relevant space asset.

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14 C.G.E./Space Pr./4/W.P. 13.
15 C.G.E./Space Pr./4/Report, § 137.
16 *Idem*, § 139.
17 *Idem*, § 138.

5. – A State may only invoke the right to object to the exercise of default remedies in accordance with this Article if it has registered in the International Registry a notice recording that the space asset is used for providing a public service in the vital interest of that State prior to the registration of an international interest in that space asset by a creditor [or if it has registered such notice within six months of the launch of a space object, even if after the registration of an international interest by the creditor]. [18]

[Alternative B

Concept

Contractual obligations for the provision of public services should be maintained both where a creditor is exercising its rights under the Convention as applied to space assets and where the ownership of a space asset is being transferred.

Two technical approaches to achieve this goal

I. Rights approach

Article …

1. – A lease of a space asset for the provision of public services which is so acknowledged by the parties may be registered by notice in accordance with Article 16 of the Convention.

2. – The registration of a notice of a public services lease made within a six-month period after the date of launch of a satellite prevails over other rights previously registered.

3. – Any transfer of ownership of a space asset, either through a sale or through the exercise of the remedies provided in Chapter III of the Convention and Chapter II of this Protocol, is subject to the previously registered lease notice. The transferee is bound by the obligations of the lessor under the lease.

4. – Any lease registered by notice under paragraph 2 which is in breach of a previously registered financing contract may be struck from the International Registry at the request of the creditor.

II. Remedies approach

Article …

1. – The creditor may not exercise the remedies provided in Chapter III of the Convention and Articles XVIII to XXIII of this Protocol in respect of a space asset which is used for the provision or maintenance of a public service, to the extent that this could interfere with the contractual obligations of the debtor concerning the provision or maintenance of the public service.

[18] A footnote to the text of Alternative A indicates that it constitutes a discussion proposal that emerged from the Informal Working Group on limitations on remedies during the third session of that Committee.

2. – The preceding paragraph shall only apply if a notice is registered in the International Registry recording that the debtor is contractually obliged to provide or maintain public service through that space asset

(a) prior to the registration of the international interest in that space asset by the creditor exercising remedies or

(b) within [six months] from the date of launch of the space asset, even if after the registration of the international interest by the creditor.

Such a notice can be registered by the parties to the contract or by the State to which the public service is provided.] [19]]

(γ) The testing of the criteria proposed for identifying space assets

20. Under the Convention, unique identification of a space asset is required for the constitution of an international interest and for the registration of such an interest. [20]

21. The provisions of the revised preliminary draft Protocol as amended dealing with the identification of space assets are to be found in Article XXX, which is worded as follows:

Article XXX – Identification of space assets for registration purposes

1. – With respect to a space asset that has not been launched, a description of the space asset that contains the name of its manufacturer, its manufacturer's serial number, and its model designation, 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. After launch of the space asset the creditor may add to its registration data all or any of the additional data specified in paragraph 2 but failure to do so or the addition of incorrect data shall not affect the validity of the registration.

2. – With respect to a space asset that has been launched, a description of the space asset that contains the date and time of its launch, its launch site, the name of its launch provider and […] 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.

22. These provisions reflect the recommendations that came out of the meeting of the Sub-committee of the Committee to examine certain aspects of the future international registration system for space assets held in Rome on 26 and 27 October 2009 [21] as endorsed by the Committee at its third session, [22] the idea being that there should be, first, three *mandatory* identification criteria for *all* space assets for the purposes of registration, namely the name of the manufacturer of the asset, a unique serial number and the model/category of that asset - all information to be supplied by the manufacturer to the Registrar of the future International Registry - and, secondly, that certain additional *optional* criteria, such as the name of the asset, its orbital slot, the country of administration in respect of that asset, its ground station or the date of its launch, could also be used to supplement the mandatory criteria in respect of assets *having been launched* - however, with such additional criteria only being used for evidentiary purposes and only so long as they did

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[19] A footnote to the text of Alternative B indicates that it constitutes a discussion proposal that emerged from the Informal Working Group on limitations on remedies during the fourth session of that Committee.
[20] Cf. Articles 7(1)(c) and 32(1)(b) of the Convention.
[21] Cf. C.G.E./Space Pr./3/W.P.7 rev.
[22] Cf. C.G.E./Space Pr./3/Report rev., § 52.

not contradict the mandatory criteria. [23] It should be noted that there was, moreover, general support within the Sub-committee for these additional criteria being mandatory in cases where a space asset had been launched without there being any registered international interest therein [24] and that there was also consensus within the Sub-committee that the Supervisory Authority of the future International Registry for space assets should be able to impose additional identification criteria for space assets that would not otherwise be sufficiently identifiable. [25]

23. At the close of the third session of the Committee the question was raised as to the way in which Article XXX was intended to apply in the case of a space asset in respect of which a first international interest had been registered prior to launch and then a second international interest had been registered after launch. [26] This is an example of a matter that is still open, in particular as a result of the discussion that took place during the fourth session of the Committee, where the question was raised whether it might not be more appropriate to have a single set of identification criteria for registration purposes, the idea being to avoid creating difficulties for those searching the future International Registry: it was pointed out that the possibility of different criteria being employed to search against the same asset could lead to separate registrations against the same asset each with the same priority ranking. [27]

24. It is worth noting that, independently of the question whether a dual or a single set of identification criteria should be required for registration purposes under the revised preliminary draft Protocol, there was a suggestion at the fourth session of the Committee that the names of the parties to the agreement under which the international interest was created should be added to the mandatory criteria listed in Article XXX. [28]

25. Before proceeding further with the question as to the most appropriate solution to be adopted in the revised preliminary draft Protocol as amended on this issue, the Committee at its fourth session, nevertheless, decided that additional technical information, in particular concerning the practical feasibility of the employment of particular criteria, should first be sought from those observers representing the international commercial space, financial and insurance communities. [29]

26. Without prejudice to the Secretariat's own efforts in this direction, there can be no doubt that the consultations could provide an excellent forum to hear the views of the international commercial space and financial communities as regards the practical feasibility of the different criteria proposed in Article XXX.

III. ACTION TO BE TAKEN IN RESPECT OF THE OUTCOME OF THE CONSULTATIONS

27. As mentioned above, [30] the consultations are to be followed by meetings of the Informal Working Group on components and the Informal Working Group on limitations on remedies. The outcome of the consultations will, therefore, be considered by the Informal Working Groups at those meetings.

28. As also mentioned above, [31] the holding of the consultations was decided upon by the Committee at its fourth session and, as such, their outcome will also be referred to the Committee at its fifth session, to be held in Rome from 21 to 25 February 2011.

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23 Cf. C.G.E./Space Pr./3/W.P.7 rev., p. 7.
24 *Idem*, pp. 7-8.
25 *Idem*, p. 8.
26 Cf. C.G.E./Space Pr./3/Report rev., § 69.
27 Cf. C.G.E./Space Pr./4/Report, § 51.
28 *Idem*, § 52.
29 *Idem,* § 53.
30 § 3, *supra*.
31 § 2, *supra.*

ANNEXE V

COMMENTS

(submitted by Governments and representatives of the international commercial space and financial communities)

COMMENTS AND PROPOSALS SUBMITTED BY REPRESENTATIVES OF THE INTERNATIONAL COMMERCIAL SPACE AND FINANCIAL COMMUNITIES

SKY Perfect JSAT Corporation

1. RE THE PUBLIC SERVICES EXEMPTION

As shown in our previous comments, in the light of the concerns expressed regarding the public service exemption from default remedies, the issue of limitations on remedies is significant among the key issues outstanding in respect of the revised preliminary draft Protocol as amended.

SKY Perfect JSAT Corporation submits the following comments and hopes that these comments will be favourably considered at the consultations.

I. Framework of the Convention on International Interests in Mobile Equipment (hereinafter referred to as the *Convention*)

The Convention establishes an international regimen introducing the following new regimen and concepts.

The new regimen and concepts are well accepted, in particular, in the context of aircraft finance and, as a result, the Convention and the Protocol to the Convention on Matters specific to Aircraft Equipment (hereinafter referred to as the *Aircraft Protocol*) entered into force on 1 March 2006.

(a) Realisation of transparency in the relationship between rights and duties

- Constitution of an international interest (Article 2);
- Establishment of the international registration system (Article 16);
- Priority of competing interests (Article 29)

(b) Realisation of swift default remedies

- Remedies of chargee (Article 8);
- Remedies of conditional seller or lessor (Article 10)

(c) Realisation of effects in insolvency proceedings

- Effects of insolvency (Article 30);
- Jurisdiction in respect of insolvency proceedings (Article 45).

II. Extension of the Convention to space assets

Based upon the broad understanding that it is desirable to implement the Convention as it relates to space assets, in the light of the purposes set out in the Convention, the preliminary draft

Protocol as amended is being discussed intensively with a view to adapting the Convention to meet the particular demand for space assets and to finance their acquisition and use as efficiently as possible.

In this context, the necessary concepts to adapt the Convention have been agreed, through the introduction of new terms such as "debtor's rights", "licence" and "rights assignment" and of provisions relating to the recording of rights assignment as part of the registration of an international interest, the priority of recorded rights assignments and the duty of the debtor assignor as to licences.

We understand how the benefits from expanded space-based services which the planned Space Protocol together with the Convention may yield are to be enjoyed by all Contracting States. It is significant to ensure the benefits by carefully avoiding incorporating inconsistent concepts into the revised preliminary draft Protocol as amended.

III. Concerns regarding the public services exemption

As noted in its previous messages of 14 October 2009 and 7 April 2010, SKY Perfect JSAT Corporation shares the concerns expressed at the idea of giving Contracting States a right to limit the exercise of default remedies in respect of public services that did not exist before, as this might negatively affect the benefits to be derived from the revised preliminary draft Protocol as amended.

Article XXVII *bis* of the revised preliminary draft Protocol as amended, presented as a discussion proposal, might virtually give Contracting States a right to limit the exercise of default remedies in respect of a space asset for the provision or maintenance of a public service. We note that Alternative A stipulates that a Contracting State would have the right to object to the exercise of default remedies in respect of a space asset needed for a public service and that the rights approach of Alternative B would make the transferee bound by the obligations of the lessor under the public service lease. Under the remedies approach of Alternative B, the creditor might not exercise the remedies in respect of a space asset which was used for the provision or maintenance of a public service.

Looking back upon the past, we do not think sufficient and extensive discussion took place for the introduction of such a new right. For example, it should be noted that, after the second session of the Committee, only eight Governments responded to the request from the UNIDROIT Secretariat for information on the treatment of public services in their jurisdictions.

It should also be noted that the Aircraft Protocol carefully avoided a broad public service exemption in view of the possible negative effect. Since space-based financing is more risky, the likely negative effect it would have on the revised preliminary draft Protocol as amended is, therefore, even greater.

Careful consideration should be given to the question of balancing the need of Contracting States to guarantee the continuation of a public service with the rights of creditors. We have to be careful not to introduce a premature international right and obligation.

The question as to how best to arrange this balance is best left to the development of business practice in the coming years. Legislation-based solutions can also, alternatively, be worked out in contracts, on the basis of agreements resulting from intensive negotiations among the parties. It is important to understand the dynamics of the commercial and financial communities and to respect the agreements made by the parties concerned, including Contracting States.

IV. Conclusions

On the based of the aforementioned considerations, SKY Perfect JSAT Corporation has reached the following conclusions:

1. The proposed Article XXVII *bis* might create a new right and, as a result, seriously impair the core concepts originally intended to be brought in by the revised preliminary draft Protocol as amended together with the Convention, which are the realisation of transparency in the relationship between rights and duties, the realisation of swift default remedies and the realisation of effects in insolvency proceedings.

2. Concern at the idea of giving Contracting States a right to limit the exercise of default remedies is to be broadly shared, if the intention of the revised preliminary draft Protocol as amended together with the Convention is to meet the particular demand for space assets and to finance their acquisition. We have to be careful in introducing a premature international right and obligation without sufficient and extensive discussion among the parties concerned.

3. The question as to how best to balance the need of Contracting States with the rights of creditors should not be dealt with in the revised preliminary draft Protocol as amended but, instead, be left to the development of business practice, on the understanding that it is important to respect the agreements reached among the parties concerned.

2. RE IDENTIFICATION CRITERIA

It is appropriate to have a single set of identification criteria for registration purposes, because use of different criteria to search for the same asset might lead to separate registrations being made over the same asset having the same degree of priority.

In this connection, Article XXX(1) proposes that a description of the space asset that contains the name of its manufacturer, the manufacturer's serial number and its model designation be employed as the only mandatory identification criteria for the registration of an international interest in an asset prior to launch.

On the basis of the practice of Japanese manufacturers, there is supposedly no concern as to the lack of a uniform system for the generating and assigning of such serial numbers. Such practice is reported to be carried out by Japanese manufacturers regardless of whether or not an international interest is to be constituted.

For the registration of an asset after launch, the proposal is that the same description of the space asset, containing such elements as the manufacturer's serial number, should be employed as well. For a space asset which could not have received a serial number at the time it was launched into space, certain additional criteria, such as the date and time of its launch, its launch site, the name of its launch provider could also be used to supplement the mandatory criteria. It is, however, important to seek the possibility of such an asset being assigned a serial number so as to avoid the need for two distinct sets of identifying criteria.

In the case of a space asset in respect of which a first international interest had been registered prior to launch and then a second international interest was registered after launch, the same mandatory identification criteria such as the manufacturer's serial number should also be employed.

ANNEXE VI

COMMENTS

(submitted by Governments and representatives of the international commercial space and financial communities)

COMMENTS AND PROPOSALS SUBMITTED BY GOVERNMENTS

United States of America

1. ISSUES AND STATUS

I. Overview and timing

The U.S. Government's position from the outset has been and remains that the purpose of the planned draft Protocol is to make financing more available or available on more favourable terms to expand commercial activities in outer space. This requires that the proposed draft, as was the case with the Aircraft and Rail Protocols, recognise applicable industry and financing practices necessary to attract private capital. Any efforts to create further obligations on secured financing parties, greater than exist now absent the planned draft Protocol, will reduce its value and make it unattractive to industry. This is especially the case given the already greater risk for investment and finance in the space sector as compared to commercial airspace. It is for these reasons that the U.S. Government has supported the concerns of key industry interests and will continue to do so.

The U.S. Government at the May 2010 session of governmental experts in Rome raised substantial issues on its behalf and on behalf of the Satellite Industry Association (S.I.A.), noting that, without the support of key space industry sectors, the planned draft Protocol could not achieve its objective. This was accommodated at the May 2010 session of the UNIDROIT Governing Council and the original time schedule, which contemplated a final conference at the end of 2010, was altered so as to allow additional time to seek agreement between participating States and industry.

The next session of governmental experts will now be in February 2011 and, if then approved by the UNIDROIT Governing Council, a diplomatic Conference could take place at the end of 2011 or early in 2012.

Note that the conclusion of a Protocol does not imply acceptance of the text. States would have to ratify the Protocol as a treaty instrument, along with the Cape Town Convention, in order to implement its terms.

II. Issues

There follows a summary of issues, together with comments on the status of these (i.e. any changes resulting from the May 2010 Rome session of governmental experts), and other issues:

(a) Scope of the revised preliminary draft Protocol as amended - pre-launch financing

Important cross-cutting issue. See point No. 5 of the S.I.A. comments circulated at the May 2010 session of governmental experts. [1]

Current status: still an open issue.

The potential economic benefits of developing Protocol provisions which would permit pre-launch financing (which has been emphasised by some delegations) need to be weighed against the potential problems and detriments (outlined in the S.I.A. comments) in developing a workable interface between the planned Protocol and existing national laws governing secured financing. A new revised definition of the term "space assets" might mitigate to some extent these problems.

It is clear that substantially more work needs to be done in this area if the revised preliminary draft Protocol as amended is to cover pre-launch phase interests as Convention interests. Concerns have been expressed about the complex issues that may arise if the planned Protocol applied directly to interests that would simultaneously be subject to national secured financing law.

A workable alternative would be to allow the prospective filing of pre-launch interests, which would ripen into Convention interests once launched or inserted into orbit, but then having effect from the date of the prospective filing. That structure would provide assurance to financing parties that they maintain priority once the space asset is beyond the reach and scope of national laws applicable during the manufacturing and launch phases.

Another structure would be to cover only post-launch interests. Some have supported that approach on the ground of simplicity, i.e. the planned Protocol would take effect at a point where national laws might not apply. Others have said that, in view of the fact that most space development finance is set in place at the manufacturing phase, it would be necessary to recognise such pre-launch interests.

Each position has pros and cons but the prospective filing approach has been adopted in the Aircraft and Rail Protocols. It has worked very effectively in the Aircraft Protocol, which is already in operation. That said, one view is that it may be more productive to defer a decision on this until we have a clearer definition that we can agree to of "space asset" and further consideration of what information would be required for registration.

(b) Non-disturbance or quiet enjoyment provisions

See point No. 2 of the S.I.A. comments circulated at the May 2010 session of governmental experts. [2]

Current status: still an open issue, nothing resulting from the May 2010 session of governmental experts. The U.S. Government has recommended against any rule that would constrain enforcement of senior rights, subject to the normal limits of secured financing law, and recommended at the outset that the relationship between the various secured parties be left to inter-creditor agreements. Given the preference by some others for a default rule, the focus at the last session was on whether a workable default rule can be agreed to.

This issue involves the non-disturbance or quiet enjoyment rights of owners (and their creditors) of components. Basically, the issue involves the right of an enforcing creditor having an

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1 C.G.E./Space Pr./4/W.P. 4 rev., 12-13.
2 *Idem*, 10.

international interest in a whole, entire space asset to interfere with or disturb the quiet enjoyment of the owner (and its creditors) of component parts.

The initial proposal of another delegation extending this issue to functionally linked assets was dropped at the May 2010 session of governmental experts, which leaves on the table proposals concerning physically linked assets (e.g. components within a particular satellite). The U.S. Government and many industry interests have recommended that, since it is standard in the space sector for inter-creditor agreements to resolve related rights issues before accepting placement into a satellite of any components, the planned Protocol can best achieve its objectives by recognising such agreements. Some delegations, however, are pushing for a default rule to be set forth in the text of the revised preliminary draft Protocol as amended. A default rule may be useful to protect senior creditors but it should be made subject to agreements among the parties.

The U.S. Government will pursue the point that seeking to dilute the value of senior interests would militate against attracting secured finance parties to the planned Protocol, particularly in the light of the general first-to-file priority system of the Cape Town Convention.

Consideration could also be given to a provision (similar to the Aircraft protocol as it relates to aircraft engines) which would displace any national laws that treat a component constituting a separate "space asset" as an accession to another "space asset" to which it is attached or installed.

(c) Salvage and related provisions

See point No. 4 of the S.I.A. comments circulated at the May 2010 session of governmental experts. [3]

Current status: the May 2010 session of governmental experts partially recognised the insurer's subrogation position. The U.S. Government had opposed, citing S.I.A. issues. How the general decision of the body will be worked out within the revised preliminary draft Protocol as amended has yet to be resolved.

Space insurance interests have sought to obtain recognition of salvor's rights beyond those contained in current U.S. law or the law of some other States, on the ground, amongst others, that they may pay out a total loss claim (which typically occurs after a specified percentage of loss of operational capacity) but fail under the planned Protocol to obtain priority over associated rights and claims as against a secured creditor holding an international interest in the space asset. Insurers have dropped earlier requests for recognition of their pre-launch interests by way of prospective filing. The insurance representatives have had support as to title salvage issues but not as much on other aspects.

The Drafting Committee of the Committee of governmental experts was directed at the May 2010 session of governmental experts to find a way to incorporate salvors into the revised preliminary draft Protocol as amended. A number of members of the Drafting Committee thought that a salvor's acquisition of title might be made registrable by including this within the revised preliminary draft Protocol as amended's definition of "sale." There was considerably less support for allowing salvors to be subrogated to the rights of secured creditors who are paid. U.S. participants argued that a salvor who wished to get a security interest could use the normal revised preliminary draft Protocol as amended's procedures and did not need special subrogation rights, a position that had some support. This issue will continue to be examined by the Drafting Committee.

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[3] *Idem*, 12.

The U.S. Government had raised the S.I.A. concern as to the potential adverse impact on financing that could result from diminishing the rights and priorities currently enjoyed by secured creditors in favour of those of insurers, even if limited. To the extent that insurers obtain subrogation rights greater than they would have otherwise under the Cape Town Convention, it is argued that they improve their position vis-à-vis remaining secured creditors compared to existing law in a number of countries, including the U.S. It was argued that this could also result in additional costs incurred by the need to resolve these issues at the early manufacturing stage when inter-creditor agreement negotiations generally are necessary for space asset financing.

A possible alternative approach might be considered of an optional declaration that would allow a ratifying State to elect to recognise certain salvage interests, which would apply when the law of that State, including the planned Protocol, was being applied.

(d) Limitation of remedies, including the public service exemption

See point No. 3 of the S.I.A. comments circulated at the May 2010 session of governmental experts. [4]

Current status: nothing resulted from the May 2010 session of governmental experts. A wide gap remains between the U.S. Government and supporters, including S.I.A., who have sought deletion of this provision, and those seeking maintenance of an as yet unspecified scope of public service obligations for user-contract countries. Proponents of the previous step-in rights proposal have withdrawn support for that but new alternatives have been tabled that are aimed at an enforcing creditor's obligation to continue certain undefined public services for user countries not in default, possibly for a limited time.

There is as yet no evidence that space financing interests would accept these or other modified proposals. Absent that, we expect to restate our initial position, i.e. the effort to constrain enforcement of remedies by regulating the provision of services beyond what may be required by a licensing authority is unworkable. Further compromise proposals may emerge with more narrow service obligations but willingness of financing interests to support such an approach would appear necessary for any agreement.

To place this in context, unlike the Aircraft and Rail Protocols, the revised preliminary draft Protocol as amended will already condition the exercise of remedies by enforcing creditors by recognising the primacy of national regulatory and licensing requirements. The U.S. Government has supported that limitation (Article 27(2)) based on regulators' concerns in countries participating in the sessions of governmental experts.

However, from the outset, the U.S. Government and like-minded States have not supported a further and additional limitation on the exercise of remedies resulting from a proposed public service exemption and have argued that such an exemption should be subsumed in the exemption for national licensing and regulation. This position has gathered a certain amount of support from other delegations but not enough so far to prevail. An earlier approach that attempted to limit any public service exemption to safety, navigation and similar matters has failed so far to gain substantial support but may resurface as a compromise. Proponents of a public service obligation have objected to leaving decisions as to the maintenance of public services in third countries which have contracted for such services with the initial licensing State. No agreement has been reached.

The initial public services draft proposal appears to be effectively off the table because step-in rights for third countries met significant opposition. Counter-proposals have now been

[4] *Idem*, 10-12.

made by the Canadian and German delegations that would provide a public service exemption to the extent of existing leases or contracts that are not in default and possibly for a limited period of time, to be determined. Essentially, this proposal would provide for a limited non-disturbance right in favour of such performing leases or contracts. *However, it is important to distinguish between a provision that amounts to a stay of a creditor's enforcement rights, which could be relevant to the scope of the revised preliminary draft Protocol as amended, and a guarantee of services, which would be outside the reach of the revised preliminary draft Protocol as amended.* The acceptability of this scaled down compromise has yet to be determined. An alternative approach might be to allow a ratifying State to elect a public service exemption as an optional declaration.

The related issue of the definition of "critical public services" remains. Absent agreement on a definition, it is not clear what options there are for a State contracting for public services itself determining whether the services qualify for the exemption.

(e) Debtor's rights and assignments

See point No. 6 of the S.I.A. comments circulated at the May 2010 session of governmental experts. [5]

Current status: at the May 2010 session of governmental experts it was agreed, in line with earlier proposals of the industry working group and with the support of the U.S. Government and others, to include provisions which would expand the scope of the revised preliminary draft Protocol as amended to cover contract rights, receivables and certain other intangibles (excluding licences and similar authorisations) associated with space assets.

This recognises the importance of associated contract rights and receivables and other intangibles in space asset financing, as compared to aircraft and rail financings, where this type of expansion was not included or included minimally in the relevant Protocols. The U.S. Government's position has been in support of a broader scope of the planned Protocol along these lines. However, as noted in the S.I.A. comments, there are important technical and drafting issues associated with the provisions of the revised preliminary draft Protocol as amended and they need to be addressed and reasonably resolved.

(f) Scope of the revised preliminary draft Protocol as amended - component financing

See points Nos 1 and 5 of the S.I.A. comments circulated at the May 2010 session of governmental experts. [6]

Current status: the inclusion of component financing is unresolved, with no change at the May 2010 session of governmental experts. The U.S. Government has supported inclusion to ensure flexibility to cover future financing developments. Some countries oppose the possibility of allowing for registration against a "whole" (e.g. the entire satellite) as well as against components of the whole (e.g. one or more transponders, a hosted payload, etc.). Efforts to meet these objections, while accommodating a more flexible registration system, continue.

The U.S. Government has been working towards a structure that would accommodate the financing of both whole space assets and also of substantial components on a stand-alone basis. However, some Civil law countries have pushed for agreement on definitions and rules which would preclude interests in both the whole and the components at the same time, i.e. the definitions of components, if such financing takes place, should, added together, equal the whole. Industry

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5 *Idem*, 13.
6 *Idem*, 9 and 12-13 respectively.

comments at that time favoured component financing as well as the more common financing to-day of the whole asset, so as to ensure that the revised preliminary draft Protocol as amended could accommodate changes in financing practices in this sector. The U.S. Government also raised the S.I.A. concerns concerning the practicality of defining components in terms of their independent ownership, use or control characteristics and these concerns had a fair amount of support.

(g) Additional issues

There follows a non-exclusive listing of additional issues, as to which preliminary positions need to be developed in the near future.

Current status: only minimal discussion of these took place at the May 2010 session of governmental experts. These are expected to be discussed at the October 2010 intersessional meeting and at the February 2011 session of governmental experts.

The first three are recurring issues in commercial law treaties but they raise important issues for each treaty. The goal is to be prepared to put on the table proposals at the informal meeting scheduled for October 2010.

(i) Transition provisions

This issue mainly concerns the treatment of rights and interests that exist prior to the date of effectiveness of the planned Protocol in a given country, including the issue of the protection of pre-existing priorities. One option is to recognise pre-existing interests which, whilst avoiding some issues, leaves uncertain for a period of time whether Convention interests are secure. Another is to allow refiling within a specified period of time to maintain priority positions.

The Aircraft Protocol allows both, depending on the choice made by a ratifying State, by providing for an optional declaration whereby a country may elect to specify a date, not later than three years after the Protocol becomes effective in that country, for the priority rules of the Protocol to become effective with regard to pre-existing rights and interests.

It is likely that the options with regard to transition provisions will be discussed at the October 2010 meeting.

(ii) Jurisdictional provisions

This issue under the Cape Town Convention and the existing Protocols concerns rules as to jurisdiction with respect to party choice of forum, the granting of interim relief and claims against the Registrar. The principal provisions involved are Article 1(3) of the revised preliminary draft Protocol, concerning the location of space assets, and Articles 42 (choice of forum), 43 (interim relief) and 44 (claims against the registrar) of the Cape Town Convention.

In the Cape Town Convention, except for the grant of interim relief (Article 43) or the making of an order against the registrar (Article 44), exclusive jurisdiction for any claim brought under the Convention is given to the courts of the jurisdiction chosen by the parties unless they agree on non-exclusive jurisdiction and the chosen forum need not have a connection with the parties or with the transaction. Absent party choice of forum and except for rules pertaining to the Registry and interim relief, the Convention has no rule and, given the wide range of potential issues, attempting to negotiate a general rule has not been seen as necessary or achievable. As to the Registrar, the Convention gives exclusive jurisdiction to the courts of the State in which the Registrar of the International Registry has its centre of administration to make orders against or recover damages from the Registrar. As these provisions appear unlikely to be differently resolved

in the planned Protocol, it is expected that the focus of discussions on jurisdictional matters will be on Article 43 of the Convention, which concerns the granting of interim relief under Article 13 of the Convention.

Generally, the assumption has been that the credit value of the revised preliminary draft Protocol as amended would be enhanced if more jurisdictional options were reasonably offered to creditors, especially for interim relief, and the prior Protocols have taken this approach. The first proposed text with respect to interim relief for the revised preliminary draft Protocol as amended was contained in the text distributed for the May 2010 session of governmental experts (see Article XXI of the revised preliminary draft Protocol as amended), which would modify the substantive rules in Article 13 of the Convention. As to jurisdiction to grant interim relief, a new provision was proposed in the text for the May 2010 session of governmental experts in Article I(3). That text was generally agreed to be insufficient and further discussions are expected at the October 2010 meeting. Proposals range from references to launching or registration States to States with ground control capacity, "central mission control" and others.

(iii) Insolvency

The revised preliminary draft Protocol as amended parallels the Aircraft Protocol in offering countries options, by means of alternative declarations which contain different insolvency rules or an option to apply the relevant national insolvency law, since, if no declaration is made, existing national insolvency law provisions would apply.

Alternative A draws upon U.S. bankruptcy law provisions applicable to aircraft and railroad rolling stock, which grant an enforcing secured creditor or lessor a right to take possession or control of a space asset after a waiting period, notwithstanding the pendency of a bankruptcy or insolvency proceeding, unless the relevant contract is being performed and paid in full on a current basis and the debtor or insolvency administrator, as the case may be, has agreed to perform all future obligations under the contract.

Another Alternative is more limited and in substance requires the insolvency administrator or the debtor, as applicable, upon the creditor's request, to state whether it will cure all defaults and perform all future obligations under the contract or give the creditor the opportunity to take possession or control of the space asset in accordance with the applicable law. If the insolvency administrator does not give the required statement or give up possession or control after stating it will do so, the court may permit the creditor to take possession or control of the space asset.

Alternative A, however modified to reflect particular issues relevant to space assets, is generally considered to have significantly greater credit potential than the others as drafted.

Consideration needs to be given to the appropriateness of these alternatives, taken largely from the Aircraft Protocol (the Rail Protocol has an additional alternative), for space asset financing. That should take into account the fact that no analogue to the U.S. bankruptcy law provisions applicable to aircraft and railroad rolling stock referred to above exists for space assets.

(iv) Economic enhancement provisions

In view of the substantial limitation on the exercise of remedies deriving from the revised preliminary draft Protocol as amended's exception for limitations imposed by national licensing and regulatory regimes, which is not contained in the Aircraft or Rail Protocols, consideration should be given to additional mechanisms for enhancing the credit value of the planned Protocol beyond those contained in the Aircraft and Rail Protocols. To be considered, any such proposals should be tabled at the October 2010 meeting.

One suggestion by the U.S. Government has been for a provision protecting an enforcing creditor's income stream interests, pending its ability to obtain rights to transfer operations or substitute operators.

Another suggestion has been for optional provisions for a process for pre-approval and substitution of operators in a default or termination scenario. These might be contained in optional declarations of ratifying States and would not be mandatory. Input as to whether these provisions add credit value is needed.

ANNEXE VII

COMMENTS

(submitted by Governments and representatives of the international commercial space and financial communities)

COMMENTS AND PROPOSALS SUBMITTED BY REPRESENTATIVES OF THE INTERNATIONAL COMMERCIAL SPACE AND FINANCIAL COMMUNITIES

Arianespace, EADS Astrium, Eutelsat Communications and Thales Alenia Space

Proposal for a new definition of "space asset"

> **"Space asset** means any type of spacecraft or human built satellite, intended or not to carry passengers, to be launched or already launched into space, including any of its two sub-assemblies, namely :
>
> (i) the infrastructure on which the payload will be assembled, often called "platform" or "service module", which supplies all means necessary for the payload to perform its mission in terms of transport, positioning and supply of energy;
>
> (ii) the payload, i.e. all equipment necessary for the spacecraft or satellite to carry out its mission.
>
> The Supervisory Authority shall describe the technical details of a space asset in the regulations."

ANNEXE VIII

COMMENTS

(submitted by Governments and representatives of the international commercial space and financial communities)

COMMENTS AND PROPOSALS SUBMITTED BY REPRESENTATIVES OF THE INTERNATIONAL COMMERCIAL SPACE AND FINANCIAL COMMUNITIES

Satellite Industry Association of the United States of America

The Satellite Industry Association (S.I.A.) is a consensus-based trade association that serves as the unified voice of the U.S. satellite industry on policy, regulatory and legislative issues affecting the satellite business. The S.I.A. represents leading global satellite operators, service providers, manufacturers, launch services providers, integrators, ground equipment suppliers and satellite radio and television providers.[1]

In many prior instances, the S.I.A. and its members have stated their concerns that the revised preliminary draft Protocol as amended [2] is not an effective instrument for increasing capital flow to commercial space projects. The S.I.A. considers that the revised preliminary draft Protocol as amended adds an unnecessary supra-national layer of law at a time when neither the S.I.A. nor the financial community that supports its members believes a new legal regime is needed to expand space-based services or facilitate asset-based financing.

The S.I.A. opposes the continuation of a drafting process seeking to resolve identified deficiencies when the rationale for the establishment of a structure intended to promote legal certainty and increased availability of capital for the space industry requires reconsideration. Moreover, there is no evidence that financings have failed or could have attracted more favourable pricing due to uncertainty over the granting and perfection of security interests in the satellites being financed. No compelling need for the revised preliminary draft Protocol as amended has been demonstrated, which explains why most of the space industry does not want it.

The specific issues the S.I.A. has identified below to support its position that the revised preliminary draft Protocol as amended will jeopardise or disadvantage space asset financing have not been presented as problems to solve or provisions to be refined but as examples of why the revised preliminary draft Protocol as amended must be reassessed.

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[1] As of October 2010, the executive members of the S.I.A. were as follows: ARTEL Incorporated, The Boeing Company, CapRock Government Solutions, DirecTV, Hughes Network Systems, ICO Global Communications, Integral Systems, Intelsat, Iridium Satellite LLC, Lockheed Martin, Loral Space & Communications, Northrop Grumman, Rockwell Collins, SES World Skies, SkyTerra and TerreStar Networks. As of the same date, the associate members of the S.I.A. were as follows: Arqiva Satellite & Media, Alliant Techsystems, Cobham SATCOM Land Systems, Cisco , Comtech EF Data, DRS Technical Services, Inc., EchoStar, Emerging Markets Communications, Inc., Eutelsat, GE SATELLITE, Glowlink, iDirect Government Technologies, Inmarsat, Marshall Communications Corp., Panasonic Avionics Corporation, Spacecom, Ltd., Spacenet , Stratos Global, TeleCommunication Systems, Inc. – Government Solutions , Telesat , Trace Systems, ViaSat and Wildblue Communications.

[2] Reference to the preliminary draft Protocol is as revised by the Drafting Committee established by the 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 on 3 May 2010.

1. SPHERE OF APPLICATION/DEFINITION OF SPACE ASSETS

The proposed definition of "space assets" (Article I(2)(l) of the revised preliminary draft Protocol as amended), which delineates the sphere of application of the revised preliminary draft Protocol as amended, raises many concerns. As defined, the same asset (and its subparts) may be independently owned, used or controlled by different debtors and buyers at different times. At what point in time is an asset that is "intended to be launched into space" identifiable as such "in course of manufacture or assembly"? And how can an international interest or a prospective interest in pre-launch assets clearly interact with the secured financing regime under applicable national law from the commencement of production and assembly, through storage, transportation and launch without losing its priority? Finally, how can pre-launch financing be within the sphere of the revised preliminary draft Protocol as amended if the principal value in a space asset (which cannot be individually identified until ready for delivery and launch) lies in the contract for its manufacture whereas the revised preliminary draft Protocol as amended requires that a rights assignment be recorded as part of the registration of an international interest in a space asset?

2. COMPONENTS

The inability of the Informal Working Group on default remedies in relation to components to reach a solution regarding enforcement against a space asset physically linked to another space asset in which another creditor has an interest (Article XVIII(3)) reflects a fundamental deficiency in the revised preliminary draft Protocol as amended. A clash in legal systems jeopardises the utility of the revised preliminary draft Protocol as amended, as the financing of hosted payloads, condosats and transponders will continue to expand as a cost-effective means of deploying satellites.

We are also concerned by the statement made by the Informal Working Group that it was not desirable for it to become locked into a particular system for the determination of those assets that should qualify for registration in the future International Registry for space assets.[3] In connection with this, the Informal Working Group saw the regulations to be prepared by the Supervisory Authority as being able to play a part in providing flexibility in the establishment of identification criteria for the registration of international interests in assets that might become valuable to creditors in the future. Such an approach would allow the Supervisory Authority unfettered discretion to alter and introduce criteria having an adverse impact on clarity and uniformity of what would constitute a space asset. This proposed approach to addressing component financing is all the more perplexing when the matter currently is adequately addressed through inter-creditor arrangements.

3. PUBLIC SERVICE EXEMPTION FROM DEFAULT REMEDIES

Perhaps the most controversial issue from the S.I.A.'s perspective is the limitation of default remedies against a space asset performing a "public" service. This became even more worrisome by the proposed introduction of Article XXVII(3). The ambiguity inherent in the term "service which is in the vital interest of that State" will discourage financing since it will not be possible to provide any legal assurance as to the scope of the language not only as to the nature of the service but also as to which States could be affected within the footprint coverage of any particular satellite.

In addition, the new proposal advanced by the Informal Working Group on limitations on remedies for "space assets needed for the public service which is in the vital interest of that State",

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[3] See in UNIDROIT Report C.G.E./Space Pr./4/Report, § 145.

added as Alternative B to the previously proposed Article XXVII *bis,* coupled with an elaborate cure mechanism involving any affected State, is cumbersome and time-consuming. As has been stressed on many previous occasions, this limitation on remedies will sharply undercut the level of predictability needed to foster asset-based satellite financing.

4. SALVAGE INTEREST IN SPACE ASSETS

We reiterate our concern that creating and elevating insurers' rights to salvage will result in significant impediments to satellite financing and a lack of clarity in the relative rights of creditors. Recognition of insurers' rights to salvage is wholly unnecessary to facilitate satellite financing and would be an unprecedented right that is currently unavailable in aircraft or rolling stock financing, where salvage rights are and should be subject and subordinate to rights of secured lenders. The Committee is not equipped to appreciate the consequences of acceding to the position of the proponents of salvage interests and its possible permutations, including partial and constructive total losses, security extending to more than one identifiable space asset, the multiplicity of insurers each having proportional interests in the salvage value of a space asset (each seeking to register its interests at different times) and the timing of insurance placement versus financing of a space asset. Persisting in extending the revised preliminary draft Protocol as amended to insurer salvage interests will compel satellite operators to require their insurers to forgo the registration of their salvage rights so as not to impede the financing of their satellites.

5. IDENTIFICATION OF SPACE ASSETS FOR THE PURPOSES OF REGISTRATION

Uncertainty continues as to appropriate identification criteria for space assets for purposes of registration. Many of the core identification criteria enumerated in Article XXX are meaningless in providing certainty or uniformity of identification both during manufacture and after launch. Moreover, our previously expressed concern regarding the need to satisfy "requirements as may be established in the regulations" merely postpones the inevitable quandary of establishing suitable criteria. The inability of the Sub-committee to examine certain aspects of the future international registration system for space assets to establish identification criteria for space assets is a telling indicator of the inherent impediments in promoting uniform and predictable rules governing the taking of security over indeterminate, evolving and disparate assets that all happen to be located in a particular, undefined medium.

Another issue of concern is the application of Article XXX to space assets in respect of which a first international interest is registered before launch and then a second international interest is registered after launch. The possibility of different search criteria against the same asset could lead to separate registrations against the same asset, each with the same priority ranking.

6. DEBTOR'S RIGHTS, ASSIGNMENTS AND REASSIGNMENT RIGHTS

While the thoughtful effort and intricate drafting undertaken to accommodate the prevalence in satellite financing of intangible rights appurtenant to space assets is impressive, the resulting complexity is extraordinary. The benefits of introducing rights assignments, rights reassignments, rights to payment or other performance including debtor's rights, registration of contracts of sale and contracts of prospective sale in Articles IV, V and IX to XV can no longer be viewed as outweighing the requisite complexity of the added concepts.

7. OTHER ISSUES OF CONCERN

In addition to these major issues of outstanding concern, there are additional aspects raised by other commentators, such as jurisdiction, transition provisions, insolvency and economic enhancement provisions, that are also problematic for the S.I.A..

Conclusion

The revised preliminary draft Protocol as amended fails to achieve its expressed goal of facilitating the financing of space assets through a uniform and predictable legal regime governing the taking of security over space assets. The S.I.A. is not alone in its opposition to the substance and direction of the revised preliminary draft Protocol as amended. Other industry participants representing a significant proportion of the space business in the U.S., Europe and Asia have all voiced their concerns. [4] This is not an environment that is conducive to the promulgation of a complex international treaty intended to foster the development of the global commercial space industry.

A Protocol that has no meaningful support or input from its principal stakeholders is counterproductive. Until UNIDROIT's members and the satellite industry can align their interests, endeavouring to conclude the drafting of an instrument that ignores fundamental concerns jeopardises its adoption by those States attuned to the needs and interests of their space industry. The S.I.A. again urges reconsideration of the need for the Protocol and expresses its serious concerns over its adverse consequences on the financing of space assets the world over.

[4] The European Satellite Operators Association (E.S.O.A.) (on behalf of its 10 members and 10 supporting members), the Asia-Pacific Satellite Communications Council (A.P.S.C.C.) (representing over 100 members from Asia, Europe and North America), Global VSAT Forum (comprising more than 200 companies from 100 countries in every major region of the world and from all sectors of the satellite industry), ING, Barclays Capital, ManSat, QuetzSat, Ciel Satellite, O3b Networks, Elseco, Marsh, Aon-ISB, SES, Intelsat, Eutelsat and Avanti Communications, among others, have each expressed their concerns about the revised preliminary draft Protocol as amended and its effect on space commerce.

ANNEXE IX

COMMENTS

(submitted by Governments and representatives of the international commercial space and financial communities)

COMMENTS AND PROPOSALS SUBMITTED BY REPRESENTATIVES OF THE INTERNATIONAL COMMERCIAL SPACE AND FINANCIAL COMMUNITIES

Japan Aerospace Exploration Agency (J.A.X.A.) [1]

Taking note of the fact that technical information concerning the feasibility of the employment of particular criteria for the identification of space assets is being sought (C.G.E./Space Pr./4/Report, § 54), I am pleased to provide you with my view as an expert in space engineering.

In practice, each component of spacecrafts has a stencil marking with the serial number or manufacturing number of the manufacturer inscribed on it in non-erasable ink, which is affixed on the component before launch. Thus, functional equipment, such as a transponder, can be identified by the manufacturer's serial number.

After the space asset is launched, it might appear that identification by reference to the serial number will no longer be possible, because the stencil cannot be physically seen when the space asset is in outer space. However, there is in fact no difficulty, because the launched space assets are tracked and controlled continuously by tracking facilities on the ground and the serial number of the components incorporated in the space asset can be traced by the relevant documents such as manufacturing drawings and parts lists. There is a possibility that, when the life of the space asset is expired or it goes out of operation due to an accident, the signal from the space asset stops and the ground tracking facility ceases to track the space asset. In such a case, the object will still be under continuous monitoring by other facilities in terms of space debris tracking.

In conclusion, it is my view, based on my experience, that space assets can be identified solely by the serial number of the manufacturer. I hope the consultations will consider this view favourably.

[1] Comments submitted by Dr Yasushi Horikawa, Technical Counsellor to J.A.X.A. and Chairman-elect of the United Nations Committee on the Peaceful Uses of Outer Space.