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**STEERING COMMITTEE  
to build consensus around the provisional  
conclusions reached by the  
Government/industry meeting regarding the  
preliminary draft Space Assets Protocol held  
in New York on 19 and 20 June 2007  
Launch meeting  
Berlin, 7/9 May 2008**

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## **SUMMARY REPORT**

**(prepared by the UNIDROIT Secretariat)**

### **I. INTRODUCTION**

#### *(a) Origins of the establishment of the Steering Committee*

At its second session, held in Rome from 26 to 28 October 2004, the UNIDROIT Committee of governmental experts for the preparation of a draft Protocol to the Convention on International Interests in Mobile Equipment on Matters specific to Space Assets (hereinafter referred to as the *Committee of governmental experts*) referred a number of key issues to intersessional work.<sup>1</sup>

These issues were essentially three: first, examination of the issues arising out of extension of the Convention on International Interests in Mobile Equipment (hereinafter referred to as the *Convention*) as applied to space assets to cover debtor's rights and related rights,<sup>2</sup> secondly, examination of the treatment of public service under national law and in practice and consideration of possible solutions to the problem as to how best to balance the need of Governments to guarantee the continuation of a public service performed by a space asset where the debtor was in default with the rights of the creditor upon such default under the Convention as applied to space assets<sup>3</sup> and, thirdly, examination of certain issues relating to the future international registration system for space assets.<sup>4</sup> The last of these issues was referred to a special Sub-committee of the Committee of governmental experts (hereinafter referred to as the *Sub-committee*).

Progress with the carrying out of these assignments in the manner envisaged by the Committee of governmental experts having proven to be problematic, the UNIDROIT Secretariat, in co-operation with the Space Working Group (S.W.G.), organised two special Government/industry meetings designed to consider the outstanding key issues remaining to be dealt with in respect of the preliminary draft Protocol to the Convention on Matters specific to Space Assets (hereinafter

<sup>1</sup> Cf. C.G.E./Space Pr./2/Report.

<sup>2</sup> Cf. *idem*, § 23.

<sup>3</sup> Cf. *idem*, § 41.

<sup>4</sup> Cf. *idem*, § 51.

referred to as the *preliminary draft Protocol*)<sup>5</sup> and the most appropriate means of bringing the planned Protocol to timeous completion.

At the first of these meetings, hosted by the Royal Bank of Scotland in London on 24 April 2006 (hereinafter referred to as the *London meeting*), a representative cross-section of the Governments of key space-faring nations and the international commercial space and financial communities, after recalling the key outstanding issues to be dealt with and acknowledging the limited response of Governments to the Secretariat's inquiries pursuant to the second session of the Committee of governmental experts, recognised the crucial importance of the preliminary draft Protocol being completed as timeously as possible, especially if the international commercial space and financial communities were to continue supplying their expertise to the project. This was seen as particularly important in view of the significant presence at the meeting of representatives of all the key sectors in the space industry.<sup>6</sup>

In the light of the urgency recognised in London, the Secretariat subsequently set about seeking to move forward resolution of the key outstanding issues on its own. First, Sir Roy Goode, acting as adviser to the Secretariat on the Committee of governmental experts, analysed what would be necessary, in terms of textual amendments to the preliminary draft Protocol, to bring about extension of the Convention as applied to space assets to debtor's rights and related rights.<sup>7</sup> Secondly, on the basis of a questionnaire circulated among financial institutions and those advising such institutions, the Secretariat complemented the information it had been able to garner from Governments on the question of public service and drew up an interim report.<sup>8</sup> Thirdly, judging the question of the identification of space assets for the purpose of their registration in the future International Registry for space assets as being, arguably, the most important of the issues referred to the Sub-committee, the Secretariat circulated a questionnaire on this subject among manufacturers, launch service providers and financial institutions to complement the information that had been supplied by Governments and, on the basis of the information obtained by these two routes, drew up a further interim report.<sup>9</sup>

As agreed at the London meeting, a further Government/industry meeting was held in New York on 19 and 20 June 2007 (hereinafter referred to as the *New York meeting*), hosted by Milbank

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<sup>5</sup> Cf. Study LXXIIJ - Doc. 13 rev / C.G.E./Space Pr./2/W.P. 3.

<sup>6</sup> Cf. The crucial role of industry in finalising an expansion of the Cape Town Convention to cover space assets: a Government/industry Forum on the Space Assets Protocol to the Cape Town Convention on International Interests in Mobile Equipment (London, Monday, 24 April 2006) – summary report (prepared by the UNIDROIT Secretariat).

<sup>7</sup> Cf. The views of industry and Government on how best to finalise an expansion of the Cape Town Convention to cover space assets: a special joint meeting of Government and industry representatives to consider the outstanding key issues remaining to be dealt with in respect of the planned Space Assets Protocol to the Cape Town Convention on International Interests in Mobile Equipment and the most appropriate means of bringing said Protocol to timeous completion (New York, 19/20 June 2007) – proposed revisions to the Space Protocol with explanatory memorandum (prepared by Professor Sir Roy Goode) (hereinafter referred to as *Proposed revisions to the Space Protocol*).

<sup>8</sup> Cf. The views of industry and Government on how best to finalise an expansion of the Cape Town Convention to cover space assets: a special joint meeting of Government and industry representatives to consider the outstanding key issues remaining to be dealt with in respect of the planned Space Assets Protocol to the Cape Town Convention on International Interests in Mobile Equipment and the most appropriate means of bringing said Protocol to timeous completion (New York, 19/20 June 2007) – interim report on the extent to which Article XVI(3) of the preliminary draft Protocol to the Cape Town Convention on Matters specific to Space Assets should provide limitations on the exercise of creditors' remedies in respect of space assets performing a public service (prepared by the UNIDROIT Secretariat) (hereinafter referred to as the *Interim report on public service*).

<sup>9</sup> Cf. The views of industry and Government on how best to finalise an expansion of the Cape Town Convention to cover space assets: a special joint meeting of Government and industry representatives to consider the outstanding key issues remaining to be dealt with in respect of the planned Space Assets Protocol to the Cape Town Convention on International Interests in Mobile Equipment and the most appropriate means of bringing said Protocol to timeous completion (New York, 19/20 June 2007) – interim report on the criteria for the identification of space assets to be employed in the preliminary draft Protocol to the Convention on International Interests in Mobile Equipment on Matters specific to Space Assets (prepared by the UNIDROIT Secretariat) (hereinafter referred to as the *Interim report on the criteria for the identification of space assets*).

Tweed Hadley & McCloy L.L.P. (New York), to consider the extent to which the efforts accomplished by the Secretariat since the London meeting provided a sound basis for resumption of the intergovernmental consultation process. This meeting was also seized of other documentation on the aforementioned issues, notably a memorandum on public service prepared by Messrs Jacques Bertran de Balanda, Denis Bandet and Bertrand Fournier-Montgieux, Herbert Smith L.L.P. (Paris),<sup>10</sup> a memorandum on national restrictions on the transfer and operation of space assets prepared by Mr Paul B. Larsen, Adjunct Professor, Georgetown University Law Center (Washington, D.C.)<sup>11</sup> and a paper containing proposals to increase the credit value of the preliminary draft Protocol submitted by the Government of the United States of America.<sup>12</sup> A number of provisional conclusions were reached at this meeting. In particular, there was recognition that, if the objective of timeous completion identified as crucial in London were to be realised, it was desirable that the sphere of application of the preliminary draft Protocol, hitherto delimited broadly so as to encompass likely future developments in the financing of space assets, be narrowed so as to concentrate essentially on the satellite, in its entirety, acknowledged as representing 80% of the space assets covered by the preliminary draft Protocol currently the subject of the type of financing envisaged by the Convention. Secondly, there was recognition that, while the intersessional work presented to the meeting as amplified by the discussions there constituted a sound basis for resumption of the intergovernmental consultation process, it would be prudent first to build broader consensus around the provisional conclusions reached in New York, so as not to prejudice the chances of success of such resumption. Thirdly, the representatives of the international commercial space and financial communities, again present in significant numbers in New York, called upon Governments to give a lead in the next stages of moving the process forward, as a justification for their continuing involvement.

(b) *Establishment of the Steering Committee*

In the wake of the New York meeting, the Secretariat conducted wide-ranging consultations with representatives of the Governments of the key space-faring nations and leading representatives of the international commercial space and financial communities having participated in that meeting with a view to seeking, first, confirmation as to their support for following up on the work begun in London and New York and, secondly, their opinion as to the most appropriate means of doing so. There was overwhelming support among those sounded by the Secretariat for the work begun in London and New York being carried through to its conclusion and it was on the basis of these consultations that the Secretariat proposed to the UNIDROIT General

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<sup>10</sup> Cf. The views of industry and Government on how best to finalise an expansion of the Cape Town Convention to cover space assets: a special joint meeting of Government and industry representatives to consider the outstanding key issues remaining to be dealt with in respect of the planned Space Assets Protocol to the Cape Town Convention on International Interests in Mobile Equipment and the most appropriate means of bringing said Protocol to timeous completion (New York, 19/20 June 2007) – memorandum on the extent to which Article XVI(3) of the preliminary draft Protocol to the Cape Town Convention on Matters specific to Space Assets should provide limitations on the exercise of creditors' remedies in respect of space assets performing a public service (prepared by Messrs Jacques Bertran de Balanda, Denis Bandet and Bertrand Fournier-Montgieux, Herbert Smith L.L.P., Paris) (hereinafter referred to as the *Memorandum of Messrs Bertran de Balanda, Bandet and Fournier-Montgieux*).

<sup>11</sup> Cf. The views of industry and Government on how best to finalise an expansion of the Cape Town Convention to cover space assets: a special joint meeting of Government and industry representatives to consider the outstanding key issues remaining to be dealt with in respect of the planned Space Assets Protocol to the Cape Town Convention on International Interests in Mobile Equipment and the most appropriate means of bringing said Protocol to timeous completion (New York, 19/20 June 2007) – memorandum on national restrictions on the transfer and operation of space assets (prepared by Mr Paul B. Larsen, Adjunct Professor, Georgetown University Law Center, Washington, D.C.).

<sup>12</sup> Cf. The views of industry and Government on how best to finalise an expansion of the Cape Town Convention to cover space assets: a special joint meeting of Government and industry representatives to consider the outstanding key issues remaining to be dealt with in respect of the planned Space Assets Protocol to the Cape Town Convention on International Interests in Mobile Equipment and the most appropriate means of bringing said Protocol to timeous completion (New York, 19/20 June 2007) – proposals to increase the credit value of the Space Protocol (submitted by the U.S. Government) (hereinafter referred to as the *Proposals to increase the credit value of the future Space Protocol*).

Assembly, at its 61<sup>st</sup> session, held in Rome on 29 November 2007, that it establish a Steering Committee, under the auspices and control of the Secretariat and open to both the Governments and the representatives of the international commercial space and financial communities that had participated in the two Government/industry meetings, for the purpose of building consensus around the provisional conclusions reached by the New York meeting in such a way as to permit early resumption of the intergovernmental consultation process and timeous completion of the preliminary draft Protocol. This proposal was endorsed by the General Assembly and the Government of Germany kindly offered to host a launch meeting of the Steering Committee (hereinafter referred to as the *Committee*).

## II. HOLDING OF THE COMMITTEE'S LAUNCH MEETING

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

The launch meeting of the Committee was held in Berlin from 7 to 9 May 2008. Representatives of 11 of the Governments serving on the Committee of governmental experts and 18 representatives of the international commercial space and financial communities, as well as three observers, *inter alia* representing one other Government serving on the Committee of governmental experts, participated in its deliberations.<sup>13</sup>

The meeting was opened by *Mr Hans-Georg Bollweg*, who welcomed all participants on behalf of the Government of Germany. *Mr Lutz Diwell* (State Secretary, Ministry of Justice of the Federal Republic of Germany) subsequently recalled the importance of, and success achieved by the Convention and the Protocols thereto opened to signature to date, notably in improving the conditions for the financing of aircraft equipment and railway rolling stock. He hoped that it would be possible to extend these benefits also to space assets and encouraged participants to do all necessary to ensure timeous completion of the preliminary draft Protocol, which represented a unique opportunity for the international community.

*Mr Martin Stanford* (Deputy Secretary-General of UNIDROIT) recalled the genesis of the Committee and expressed the keen appreciation of UNIDROIT to the Government of Germany for its heeding the call issued to Governments by certain representatives of the international commercial space and financial communities in New York to give a lead as regards their commitment to moving this project forward to timeous completion. He recalled the auspicious background against which the Committee was meeting, notably, first, the statement made by the representative of the Government of the Russian Federation at the 60<sup>th</sup> session of the UNIDROIT General Assembly, held in Rome on 1 December 2006, that his Government was favourably considering hosting the diplomatic Conference for adoption of the preliminary draft Protocol to emerge from the Committee of governmental experts in the event of the latter's work being concluded successfully and, secondly, the interest expressed at the New York meeting by the Registrar of the International Registry for aircraft objects, *Aviareto*, in also running the future International Registry for space assets. He recognised that there was still some way to go before the intergovernmental consultation process could be resumed but submitted that the intersessional work conducted to date provided the Committee with a clear idea as to the most appropriate route to be taken in order to complete the preliminary draft Protocol timeously, namely by seeking to resolve the key outstanding issues in such a way as to lessen the difficulties inherent therein as far as possible, notably by looking at every possible way of simplifying the preliminary draft Protocol. He noted that the Committee was particularly fortunate in having valuable guidance in its task, in the shape of working papers prepared by the Government of Germany, the German Space Agency, *Sir Roy Goode* and *Finmeccanica*. With a view to facilitating progress, he suggested that the Committee concentrate on reaching agreement on the substance of the issues down for discussion and leave the implementation of such agreement, in the shape of precise drafting solutions, to the co-

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<sup>13</sup> Cf. List of participants reproduced in Appendix I to this report.

chairmen of the Drafting Committee of the Committee of governmental experts, Canada and the United Kingdom, which were both represented. He also suggested that the Committee concentrate on resolving the technical issues before it and not set its ambitions unduly high with regard to the pre-eminently political question of public service. He stressed the novel structure of the Committee, as a bridge between Government and the international commercial space and financial communities, which he believed gave it a unique opportunity to craft creative solutions to the special problems raised by the ever-increasing activity of the private sector in outer space. He commended the participation of so many representatives of Government and the international commercial space and financial communities as a demonstration of the vision necessary to overcome indifference and chart a new course, recognising the global potential of a project capable of making such a difference to the lot of mankind, in particular in helping space-based services to reach the more disadvantaged parts of the world.

Mr Stanford expressed UNIDROIT's particular appreciation to Sir Roy Goode for the U.K. Foundation on International Uniform Law's generosity, which had enabled him to recruit Mr Daniel Porras, to assist him in moving the project forward, in particular in the context of the consensus-building work that lay ahead, within the Secretariat – Mr Porras had been appointed Associate Officer of UNIDROIT and would be assisting him on the Secretariat to the Committee – and to Mr Bernhard Schmidt-Tedd for the German Space Agency's generosity, which had enabled him to secure the external collaboration of Mr Oliver Heinrich in the consensus-building work that lay ahead, in particular with the international commercial space and financial communities.

*(b) Election of the Chairman*

*Mr Stanford*, on behalf of UNIDROIT, proposed Mr Sergio Marchisio (Italy) as Chairman of the Committee, in particular given that the work of the Steering Committee was designed to move the intersessional work forward in such a way as to permit an early reconvening of the Committee of governmental experts, of which Mr Marchisio was also Chairman. This proposal, as seconded by the Governments of the United States of America and Greece, was carried.

*(c) Adoption of the Agenda*

The draft Agenda, prepared by the UNIDROIT Secretariat, was adopted.<sup>14</sup>

*(d) Documentation for the meeting*

Draft Agenda (prepared by the UNIDROIT Secretariat);

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

Appendix I: Interim report on the criteria for the identification of space assets to be employed in the preliminary draft Protocol (prepared for the New York Government/industry meeting by the UNIDROIT Secretariat)

Appendix II: Proposed revisions to the Space Protocol, with explanatory memorandum (prepared for the New York Government/industry meeting by Sir Roy Goode)

Appendix III: Interim report on the extent to which Article XVI(3) of the preliminary draft Protocol should provide limitations on the exercise of creditors' remedies in respect of space assets performing a public service (prepared for the New York Government/industry meeting by the UNIDROIT Secretariat)

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<sup>14</sup> A copy of the Agenda as thus adopted is reproduced in Appendix II to this report.

Appendix IV: Dispute resolution in matters related to international interests in space assets (prepared for the New York Government/industry meeting by Mr Juan Lueiro García)

Appendix V: Memorandum on the extent to which Article XVI(3) of the preliminary draft Protocol should provide limitations on the exercise of creditors' remedies in respect of space assets performing a public service (prepared for the New York Government/industry meeting by Messrs Jacques Bertran de Balanda, Denis Bandet and Bertrand Fournier-Montgieux, Herbert Smith L.L.P., Paris)

Appendix VI: Memorandum on national restrictions on the transfer and operation of space assets (prepared for the New York Government/industry meeting by Mr Paul B. Larsen, Adjunct Professor, Georgetown University Law Center, Washington, D.C.)

Appendix VII: Proposals to increase the credit value of the Space Protocol (prepared for the New York Government/industry meeting by the Government of the United States of America)

Appendix VIII: The preliminary draft Protocol – the need to include insurers' salvage interests (prepared by Zuckert, Scoutt and Rasenberger, L.L.P., on behalf of leading space insurers) (hereinafter referred to as the *Proposal to include salvage interests*);

Provisional order of business (prepared by the UNIDROIT Secretariat);

The way forward: an explanatory note to the provisional order of business (prepared by the UNIDROIT Secretariat);

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

A proposal for an alternative text of the preliminary draft Space Protocol in the light of the provisional conclusions reached at the Government/industry meeting held in New York on 19 and 20 June 2007: explanatory memorandum (prepared by Sir Roy Goode) (hereinafter referred to as the *Proposal for an alternative text*);<sup>15</sup>

Working paper on the sphere of application and default remedies relating to components (prepared by the Government of Germany and the German Space Agency) (hereinafter referred to as the *Working paper on sphere of application and default remedies relating to components*);<sup>16</sup>

Working paper on application to debtor's rights and related rights (prepared by the Government of Germany and the German Space Agency) (hereinafter referred to as the *Working paper on debtor's rights and related rights*);<sup>17</sup>

Memorandum on the application of the Cape Town Convention and the preliminary draft Protocol to debtor's rights and related rights (prepared by the UNIDROIT Secretariat) (hereinafter referred to as the *Secretariat memorandum*);<sup>18</sup>

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<sup>15</sup> Reproduced in Appendix III to this report.

<sup>16</sup> Reproduced in Appendix IV to this report.

<sup>17</sup> Reproduced in Appendix V to this report.

<sup>18</sup> Reproduced in Appendix VI to this report.

Some general remarks on how best to achieve an appropriate balance between creditors' legitimate interests in space assets, on the one hand, and the interests of States in the uninterrupted delivery of public service, on the other (prepared by the Finmeccanica Group, including Finmeccanica, Telespazio and Thales Alenia Space) (hereinafter referred to as the *Finmeccanica proposal*);<sup>19</sup> and

Working paper submitted by the French Ministry of Justice.<sup>20</sup>

(e) *Organisation of the meeting*

*The Chairman* identified the primary function of the Committee as being to build consensus around the provisional solutions reached at the New York meeting. He stressed the fact that representatives of Government and the international commercial space and financial communities were participating in the work of the Committee on an equal footing, in line with the decision taken by the UNIDROIT General Assembly; this, he pointed out, was crucial if the Committee were to reach solutions on the key outstanding issues in a way likely to ensure a commercially viable end-product. The importance of the consensus-building exercise entrusted to the Committee was to ensure that the solutions to be proposed would command broad support within the Committee of governmental experts once reconvened. It was clear that the current text of the preliminary draft Protocol as established by the Committee of governmental experts would, necessarily, form the basic focus of that body's attention once reconvened; it was, however, the intention that the work of the Committee should produce an alternative draft, reflecting the provisional conclusions reached in New York as amplified by the Committee's work, that could be laid before the Committee of governmental experts once reconvened, alongside the current text.

*A representative of one Government* drew attention to the importance of the issue of public service and it, therefore, being properly discussed within the Steering Committee, notably with a view to preparing different options that might then be laid before the Committee of governmental experts, once reconvened, with a good chance of commanding broad support.

*The Chairman* endorsed this approach, explaining that the Secretariat's suggestion in this respect was merely designed to avoid the Steering Committee getting involved in a political debate on the merits of the different approaches to this issue, of a kind that was best reserved to the Committee of governmental experts.

### III. THE COMMITTEE'S CONSIDERATION OF THE KEY OUTSTANDING ISSUES

(a) *Sphere of application: definition of space assets in general and components in particular*

(i) Background

Article I(2)(g) of the preliminary draft Protocol defined "space assets" as:

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

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

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

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<sup>19</sup> Reproduced in Appendix VII to this report.

<sup>20</sup> Reproduced in Appendix VIII to this report.

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

Already at its second session the Committee of governmental experts addressed the concern that the definition of space assets found in Article 1(2)(g) might be too broad as it included “any separately identifiable component intended to be launched into space”.<sup>21</sup> This posed the problem of having parties potentially registering interests in an indeterminate number of components that might or might not have a significant contribution to the overall space asset.

Then, one of the sets of comments submitted to the Sub-committee, referring to the issue of the identification of space assets, submitted that one reason why there were difficulties in the identification of space assets was because the definition of “space assets” was too broad, covering *anything* that was intended to be launched into outer space, whereas the Convention had originally envisaged only covering high-value assets.<sup>22</sup>

These comments were, to a certain extent, borne out by the responses received to the Secretariat’s questionnaire on the subject of the criteria for the identification of space assets sent out among satellite manufacturers, launch service providers and financiers. All three respondents who addressed the issue as to whether the inclusion of assets assembled or manufactured in space, one of the categories of asset currently covered by the preliminary draft Protocol, was warranted felt that such assets should not be covered by the preliminary draft Protocol, on the grounds that they raised complex issues of intellectual property rights in space and that the practical need for asset-based financing in respect of such assets over the next decade had to be viewed as limited.<sup>23</sup>

All three respondents who addressed the issue as to whether the inclusion of expendable launch vehicles (hereinafter referred to as *E.L.V.’s*), another category of assets currently covered by the preliminary draft Protocol, was warranted likewise recommended their exclusion from the sphere of application of the latter, *inter alia* on the ground that E.L.V.’s were not directly financeable, in that they were never “sold” and the only asset available for asset-based financing in this context would be the contract itself and in almost all cases this contract would have no value unless supported by the launching company, and then only if the latter had a robust backlog.<sup>24</sup>

Of the three respondents who addressed the issue as to whether the inclusion of components was warranted only one, the representative of a major satellite manufacturer, recommended their exclusion, on the ground that the overwhelming majority of satellite finance focussed on the satellite as a whole and addressing the issues raised by the inclusion of components could extend considerably the time needed for the preliminary draft Protocol’s completion.<sup>25</sup> On the other hand, another respondent, the representative of a major financial institution, cautioned that, while excluding components from the sphere of application would accelerate the preliminary draft Protocol’s completion, it was a fact that satellites were made up of components and it would not, therefore, be justified to exclude components simply for the sake of avoiding further delay.<sup>26</sup>

These and the other responses received by the Secretariat were duly reflected in the interim report on the criteria for the identification of space assets that it prepared for the New York meeting and, doubtless, played a part in reinforcing the conviction of those attending that meeting that, if the preliminary draft Protocol were to be capable of timeous completion, then it was desirable that the scope of the problems that it raised be simplified as far as possible and that the

<sup>21</sup> Cf. C.G.E./Space Pr./2/Report, § 12.

<sup>22</sup> Cf. Interim report on the criteria for the identification of space assets, § 5.

<sup>23</sup> Cf. *idem*, § 20.

<sup>24</sup> Cf. *idem*, § 21.

<sup>25</sup> Cf. *idem*, § 23.

<sup>26</sup> Cf. *idem*, § 24.

sphere of application, therefore, be narrowed so as to concentrate essentially on the satellite, in its entirety, acknowledged to represent 80% of the space assets covered by the preliminary draft Protocol currently the subject of the type of financing envisaged by the Convention.

(ii) Discussion

In his proposal for an alternative text of the preliminary draft Protocol, Sir Roy Goode had proposed narrowing the definition of space assets to those objects that were independently identifiable, including the satellite as a whole, transponders and certain types of other object, referred to as “principal objects”.<sup>27</sup> His view was that this proposal would resolve the difficulties surrounding identification criteria and avoid the registration of an interest in an indeterminate number of components. To cover additional identifiable parts, he suggested that an interest should only be registrable where there was an agreement with the satellite owner that a component should retain its separate identity after being attached to the larger space asset, thus ensuring that only the holders of interests in components which were considered to be of sufficient importance to merit the negotiation of such an agreement would be able to register an international interest therein. With a view to permitting the registration of future complex space developments, such as “space hotels”, Sir Roy had also proposed adding the words “or other object capable of independent control”<sup>28</sup> to the definition of space asset, these additional words being designed to act as an overall label for future developments that did not appear in the enumerated list of space assets. His view was that the continual addition of objects to the list of “principal objects” identified in the future Protocol should be avoided.

This proposal was endorsed by the representatives of a number of Governments and the international commercial space and financial communities. One Government representative feared, however, that this solution might leave third parties with an interest in independent components of a space asset, such as a transponder, exposed to negative effects as a result of a creditor exercising remedies, thus creating a conflict of interests. Another Government representative responded that the existence of the future International Registry for space assets would cure this legal difficulty by putting third parties on notice of any prior international interests in the space asset concerned.

Certain Government representatives expressed concern over the proposed elimination of “components”, noting that such a reduction in the categories of asset covered might be prejudicial to the future Protocol’s capacity to anticipate future developments in space technology. On the other hand, representatives of both Government and the international commercial space and financial communities suggested that a broader definition of space assets with more flexibility would be preferable to an enumerated list. Otherwise, it was suggested that a mechanism be incorporated into the definition of space assets to enable the future Protocol to be updated from time to time so as to permit the taking into account of future space developments.

A representative of the international commercial space and financial communities suggested a mixed approach made up of both an enumerated list of the specific space assets covered and an additional clause capable of broader interpretation. The possible elements of such an additional clause were included in the working paper submitted by the German Government and the German Space Agency on the sphere of application and default remedies relating to components, where, in addition to an enumerated list of “principal objects”, it was suggested that “space assets” also be defined as “any other uniquely identifiable item capable of being independently operated and commanded attached to, or intended to be attached onto the satellite, space station, space

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<sup>27</sup> Cf. Proposed revisions to the Space Protocol, § 2.

<sup>28</sup> Cf. *idem*, Appendix I: Article I(2)(l) of the proposal for an alternative text of the preliminary draft Protocol.

vehicles, launch vehicle, reusable space capsules”.<sup>29</sup> This approach was endorsed by a number of representatives of Government and the international commercial space and financial communities, who agreed that the additional requirements of “uniquely identifiable” and “capable of independent control” would limit the sphere of application to a reasonable number of high-value assets while not excluding the possibility of the future Protocol also catering for future space developments.

In this context, one Government representative, noting the link between the list of space assets to be covered by the preliminary draft Protocol and the requirements which would establish the classes of space asset in which an international interest might be registered in the International Registry, suggested that additional flexibility could more easily be built into the preliminary draft Protocol by the incorporation of a method permitting the updating of such registration requirements so that it would not be necessary to update the future Protocol each time such a new development occurred.

(iii) Conclusions

It was agreed that the proposals of both Sir Roy Goode and the Government of Germany and the German Space Agency were fundamentally compatible. Thus it was recommended that the categories of space asset to be covered by the preliminary draft Protocol should be defined on the basis of both an enumerated list of “principal objects” and the additional requirement that a space asset to be capable of coverage must be “uniquely identifiable” and “capable of independent control”. Additionally, it was recommended that a procedure be incorporated in the preliminary draft Protocol permitting the updating of registration requirements so as to allow for future space developments.

(b) *Default remedies: components*

(i) Background

Article IX(4) of the preliminary draft Protocol, which was in square brackets, provided that:

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

The text of Article IX(4) was accompanied by a footnote indicating that “[t]his paragraph needs further consideration by the Committee of governmental experts as to whether the protection provided is sufficient or needs extending, especially in order to protect a user of components who is neither in default nor insolvent”.

(ii) Discussion

In the light of the Committee’s recommendation on the definition of “space assets” in relation to components in the context of its discussion of the question of the sphere of application of the preliminary draft Protocol, the Government of Germany and the German Space Agency proposed, by way of addressing the problem of conflicts between creditors seeking to exercise their respective default remedies in respect of a space asset and an independent component which was either physically or functionally linked to that space asset, that Article IX(4) of the preliminary draft Protocol be amended so as:

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<sup>29</sup> Cf. Working paper on sphere of application and default remedies relating to components, §§ 3-10 and 16.

- first, to limit the possibility for a creditor to exercise its default remedies where this would impair ownership rights in such independent components, an amendment that they considered necessary if the sphere of application were to be extended to independent components;
- secondly, on the other hand, to allow a creditor freely to exercise any default remedies where it had previously obtained the consent of those possessing an interest in an independent component or where the party whose ownership rights would be impaired was fairly compensated by the creditor; and
- thirdly, to prevent a creditor from exercising its default remedies during the launch phase, a complex period during the life of a space asset in both technical and financial terms, when its exercise of such remedies could, therefore, severely impair the rights of third parties, both technically and financially.

Both representatives of Government and the international commercial space and financial communities expressed deep concern over the proposed limitations on default remedies, on the ground that, by creating the possibility that creditors with senior interests could have their rights impaired by junior interests, the financing of space assets would be deterred. The view was expressed that sufficient protection was already provided for junior interests by the priority rule found in Article 29 of the Convention and the notice of prior interests that would be provided by the future International Registry for space assets, with the result that a junior creditor would have a sufficient opportunity to assess the risk involved in financing an independent component of a larger space asset.

In reply, one Government representative pointed out that the issue being addressed was not only that of senior and junior interests in the same asset but rather the conflict of interests that could arise between interests in completely separate assets, such as a satellite and an independent component attached to that same satellite, as envisaged by the new definition of space asset agreed upon by the Committee. It was further noted that the priority rule found in Article 29 of the Convention only applied to different international interests in the same asset, not to different international interests in different assets. The same Government representative added that some of the default remedies available in Chapter III of the Convention would not affect ownership rights in independent components (such as the taking of profits being generated by a space asset) but that other remedies would have a great impact on independent components and potentially render ownership rights (such as the taking of control over a satellite and the changing of its orbit) economically valueless. A representative of the international commercial space and financial communities reinforced the validity of these arguments by reference to the impact that exercise of the current default remedies in respect of a satellite would have for the operation of a constellation of satellites.

A number of representatives of the international commercial space and financial communities observed, however, that the problem of conflicting interests in components was a risk which was already assessed and provided for by creditors of both space assets and components by way of inter-creditor agreements, which prevented the impairment of ownership rights through the enforcement of default remedies. A concrete example given, drawn from actual practice, was that of an agreement relating to the financing of a satellite by the Government of Malaysia where the transponders were financed by separate owners. In that case, an inter-creditor agreement was arranged whereby the operator promised not to interfere with the signals being broadcast from any of the on-board transponders. Another representative of the international commercial space and financial communities added that, very typically, in a situation where a creditor saw potential conflicts of interest between the space asset as a whole and the components, the creditor would simply choose to finance the entire space asset and thus forgo any potential conflicts. It was further stressed by representatives of the international commercial space and financial

communities that the preliminary draft Protocol should not become entangled in a problem that was already resolved in practice.

One Government representative, nevertheless, submitted that, while an inter-creditor agreement might provide the best solution to the problem, this was no reason for not developing a default rule designed to protect parties unable to reach such an agreement.

In the interest of finding a compromise solution, one representative of the international commercial space and financial communities suggested that the proposed new provisions could be included in the preliminary draft Protocol, with the contracting parties simply agreeing to exclude the application of these proposed provisions in an inter-creditor agreement if they preferred alternative protection for international interests in independent components.

One Government representative, however, voiced concern at the idea of granting default provisions for the protection of creditors of components via the preliminary draft Protocol, as this might provide an incentive not to reach an inter-creditor agreement with the creditor of the larger space asset. Such provisions, that representative added, would give negotiating power to parties who did not possess such power in a free market-place and could reduce the overall financing of space assets.

It was further suggested that the issues involved in the question of default remedies for components physically attached to a space asset were quite different from those involved in the question of default remedies for components that were functionally linked, such as in a constellation, and that it might, therefore, be better to deal with the two questions separately.

### (iii) Conclusions

In the absence of general consensus as to how best to resolve the issue of default remedies in regard to components, the Committee decided that a Sub-committee should be invited to seek a commercially viable and agreeable solution.

### (c) *Sphere of application: debtor's rights, related rights and the transfer of related rights*

#### (i) Background

During the second joint session of the UNIDROIT Committee of governmental experts for the preparation of a draft Convention on International Interests in Mobile Equipment and a draft Protocol thereto on Matters specific to Aircraft Equipment and the Sub-Committee of the ICAO Legal Committee on the study of international interests in mobile equipment (aircraft equipment), held in Montreal from 24 August to 3 September 1999, a memorandum was submitted on the importance for space assets of the inclusion of debtor's rights and related rights (confusingly referred to in that memorandum as "associated rights"<sup>30</sup>) within the sphere of application of what was to become the Convention as applied to space assets.<sup>31</sup> In this memorandum it was explained that, owing to the unique characteristics of, and jurisdictional issues concerning space assets and, in particular, the satellite, it was crucial for a creditor seeking timeous constructive repossession to have access to such debtor's rights and related rights. These rights included Government licences

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<sup>30</sup> "Associated rights" were defined in Article 1(c) of the Convention as meaning "all rights to payment or other performance by a debtor under an agreement which are secured by or associated with the object".

<sup>31</sup> Cf. Preliminary draft UNIDROIT Convention on International Interests in Mobile Equipment: memorandum on the importance for space property of the inclusion of associated rights within the sphere of application of the proposed Convention and the proposed Space Property Protocol, prepared by Mr D.A. Panahy, Associate, Milbank, Tweed, Hadley & McCloy L.L.P., on behalf of Mr P. D. Nesgos, co-ordinator of the Space Working Group (ICAO Ref. LSC/ME/2-WP/7 and UNIDROIT CGE/Int.Int./2-WP/7) and reproduced as Appendix I to the Secretariat memorandum.

and permits under local law, those intangible rights necessary to control the satellite, contractual rights relating to the launch and operation of the satellite and, finally, rights to the proceeds and revenues derived from the operation of the satellite. It was submitted that, because the satellite and the debtor's rights and related rights were an inter-related commodity, the exclusion of such rights could result in significant delays in obtaining relief in the event of default, particularly owing to the wide variety of national jurisdictions in which a creditor might have to seek such relief.

Following a proposal made by the S.W.G.,<sup>32</sup> it was, accordingly, decided to include debtor's rights and related rights in the sphere of application of the preliminary draft Protocol at the first session of the Committee of governmental experts, held in Rome from 15 to 19 December 2003.

Article I(2)(a) of the preliminary draft Protocol defined "debtor's rights" as:

"debtor's rights' means all rights to performance or payment due to a debtor by any person with respect to a space asset".

This definition was, however, included with a footnote indicating that further work was needed to determine how the Convention and the preliminary draft Protocol would apply to "debtor's rights".

Article I(2)(f) of the preliminary draft Protocol defined "related rights" as:

"related rights' means any permit, licence, authorisation, concession or equivalent instrument that is granted or issued by, or pursuant to the authority of, a national or intergovernmental or other international body or authority to manufacture, launch, control, use or operate a space asset, relating to the use of orbits positions and the transmission, emission or reception of electromagnetic signals to and from a space asset".

This definition was, however, included with a footnote indicating that further work was needed to determine how the Convention and the preliminary draft Protocol would apply to "related rights".

The key consequence of the Committee of governmental experts' decision to include "debtor's rights" and "related rights" in the sphere of application of the preliminary draft Protocol, subject to the carrying out of such further work, was to permit registration of such rights in the future International Registry for space assets. Notwithstanding that this would represent a fundamental departure from the concept of an asset-based registry, it was recognised that, without such provisions, the satellite would prove to have very limited value for security purposes, particularly since it could not be repossessed in the traditional sense, as one could repossess other classes of mobile equipment, such as aircraft or railway rolling stock. By way of response to the concerns expressed by the Committee of governmental experts, and in particular its feeling that more work, however, needed to be done on this issue, the S.W.G. drafted a new proposal for consideration by that Committee at its following session, proposing new definitions for inclusion in Article I as well as a new Article IV dealing with the application of the Convention to debtor's rights and related rights.<sup>33</sup>

At its second session, on the basis of the new proposal prepared by the S.W.G.,<sup>34</sup> the Committee of governmental experts gave further consideration to the issues involved in extending the application of the Convention as applied to space assets to "debtor's rights" and "related rights". While there was general recognition of the need for the preliminary draft Protocol to

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<sup>32</sup> Cf. C.G.E./Space Pr./1/W.P. 8.

<sup>33</sup> Cf. C.G.E./Space Pr./1/Report, § 24.

<sup>34</sup> Cf. C.G.E./Space Pr./2/W.P. 4.

address debtor's rights and related rights, this was matched by acknowledgement of the need for the S.W.G.'s proposal to be further examined and for its drafting to be further refined.<sup>35</sup> The S.W.G. was, accordingly, invited to revise its proposal in close co-operation with interested Governments and taking into account the policy issues raised and the drafting suggestions made by the Committee of governmental experts and to submit such a revised proposal to the following session of that Committee.<sup>36</sup>

In the light of the general problems that arose in performance of the assignments handed out at the conclusion of the second session of the Committee of governmental experts, not least in this area, Sir Roy Goode, assisted by Mr S. Harris, a member of the delegation of the Government of the United States of America serving on the Committee of governmental experts, and Mr M. Sundahl (Cleveland Marshall College of Law), kindly provided the Secretariat with a revised proposal concerning debtor's rights, related rights and the transfer of rights.<sup>37</sup> This proposal, which was laid before the New York meeting, sought, *inter alia*, to ensure linkage of debtor's rights and related rights to the physical asset and that related rights were only transferable according to the national laws under which they were granted or issued. Those participating in the New York meeting recognised this proposal as providing a balanced solution to the issues involved, not least with regard to the application of local national law in respect of transfers of related rights.

(ii) Discussion

Sir Roy Goode's proposal for an alternative text of the preliminary draft Protocol submitted to the Committee<sup>38</sup> again included the proposals that he had laid before the New York meeting for dealing with the extension of the application of the Convention as applied to space assets to debtor's rights and related rights. In their working paper on the subject, the Government of Germany and the German Space Agency had taken exception to this proposal, which they adjudged inconsistent with the Convention for a number of reasons.<sup>39</sup> First, they noted that the Convention only permitted the registration of an interest *in rem* and not the registration of a "subjective right". Secondly, they noted that the creation of an international interest in debtor's rights and related rights would have to be effected under an assignment by way of security, whereas the creation of an international interest under Article 2 of the Convention was only permitted under a security agreement, a title reservation agreement or a leasing agreement. Thirdly, because related rights were granted by national, intergovernmental or international authorities, it was not reasonable to expect a transfer of such rights, through the creation of an international interest, being allowed, in particular for reasons of national policy and security. Finally, it was noted that Article 8(1)(c) of the Convention already granted debtor's rights to a creditor in the event of default. Thus, the inclusion of such rights in the sphere of application of the preliminary draft Protocol would not strengthen the position of a creditor but, rather, might weaken the position of a creditor in the event that such rights were granted to multiple creditors. For these reasons, they submitted that debtor's rights and related rights should be excluded from the sphere of application of the preliminary draft Protocol and that the relevant provisions should be deleted from the text.

A number of representatives of Government and the international commercial space and financial communities expressed concern over this proposal, reminding the Committee that without the inclusion of debtor's rights and related rights an international interest taken in a space asset, notably in satellites, would be of little value, eliminating virtually all interest that the finance industry might have in the preliminary draft Protocol: the inclusion of such rights was needed to enable a creditor either to move or sell a satellite, failing which there would be no effective remedy

<sup>35</sup> Cf. C.G.E./Space Pr./2/Report, § 19.

<sup>36</sup> Cf. *idem*, § 23.

<sup>37</sup> Cf. Proposed revisions to the Space Protocol.

<sup>38</sup> Cf. Proposal for an alternative text, § 4.

<sup>39</sup> Cf. Working paper on debtor's rights and related rights.

for creditors in regard to an international interest taken in a space asset, given the virtual practical impossibility or economic pointlessness of bringing such an asset back to earth.

A representative of one Government recalled, à propos of the concerns that had been raised regarding the extent to which the inclusion of debtor's rights and related rights in the Convention as applied to space assets was to be perceived as an unacceptable departure from the principle of an asset-based registry, how the Convention/Protocol system had been specifically devised to permit the unique characteristics of the different classes of mobile equipment covered by the Convention to be addressed in each equipment-specific Protocol and submitted that this was just one such special feature of space assets that needed to be duly reflected in the preliminary draft Protocol. Moreover, he recalled that, under Article 6(2) of the Convention, to the extent of any inconsistency between the latter and a Protocol, the relevant Protocol would prevail.

The Committee was reminded that Sir Roy Goode's proposal was in no way designed to permit the registration of an international interest in debtor's rights and related rights. Rather it was designed inextricably to link the registration of debtor's rights and related rights to the physical space asset in order to avoid independent registration of "subjective rights" and extending the sphere of application of the Convention as applied to space assets to receivables financing. It proposed doing this by recording debtor's rights and related rights as part of the registration of an international interest, either at the time of that registration or subsequently, so that the record would then be governed by registration and priority rules similar to those governing the international interest itself. Moreover, with regard to the last argument adduced by the German Government and the German Space Agency in support of their proposal, it was pointed out that, in the event of an assignment of debtor's rights or related rights independent of the physical space asset being made to another creditor, the Convention as applied to space assets would cease to apply to that asset.

With regard to the doubts expressed by the Government of Germany and the German Space Agency regarding the transferability of related rights, it was recalled that Sir Roy Goode's proposals on this subject were not designed to provide for the transfer of such rights under the applicable national law: they simply provided that the transferability of such rights was to be determined by the law pursuant to which they had been granted.

One representative of the international commercial space and financial communities pointed out that, whilst it was not to be expected that a Government would surrender its right to control its natural resources (such as orbits, licences to operate a satellite and the allocation of radio communication bandwidths), a creditor would, nevertheless, seek assurances that a Government would treat its request for a transfer of related rights fairly and timeously and that legal certainty would be enhanced by the inclusion of such rights in the preliminary draft Protocol.

In regard to the final argument adduced by the Government of Germany and the German Space Agency in support of their proposal, it was pointed out that, unless the creditor had the right to ensure public notice of the fact that its international interest in a space asset extended to such debtor's rights or related rights as it held in relation to that asset, there was the danger that another creditor, when receiving an assignment of receivables arising in respect of that same asset, would take free of the first creditor's interest upon the exercise of default remedies; the first creditor would thus be left with an asset he could neither control nor from which he could collect receivables. This point was supported by one Government representative who likened the situation to that of a mortgage extending rights to rentals and leases in respect of real property; he pointed out that it was common practice to extend an interest in such real property to the receivables generated under a lease.

## (iii) Conclusions

There was consensus with the approach taken in Sir Roy Goode's proposal and it was recognised that, in so far as, under this proposal, it was not a question of permitting the registration of international interests in debtor's rights and related rights but rather of such rights being inextricably tied to the space asset and recorded as part of the registration, it was appropriate for the application of the Convention as applied to space assets to extend to these rights. Additionally, there was consensus with the approach taken in Sir Roy's proposal for the transferability of such rights to be determined by the law pursuant to which they were granted.

(d) *Identification of space assets for the purposes of registration*

## (i) Background

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.<sup>40</sup>

Article VII of the preliminary draft Protocol as considered by the Committee of governmental experts at its first session provided that:

"It shall be necessary and sufficient to identify the space asset for the purposes of Articles 7(c) and 32(1)(b) of the Convention and Article V(1)(c) of this Protocol if the description of such space asset: (i) provides the name of the debtor and the creditor; (ii) provides an address for the debtor and for the creditor; (iii) contains a general description of the space asset indicating the name of the manufacturer (or principal manufacturer, if more than one manufacturer exists), its manufacturer's serial number (if one exists) and its model designation (or comparable designation, if a model designation does not exist) and indicating its intended location; (iv) provides the date and location of launch; (v) in the case of a separately identifiable component forming a part of the space asset or attached to or contained within the space asset, provides a description of such separately identifiable component, the space asset of which it forms a part, to which it is attached or within which it is contained and each of the other identification criteria specified in this Article with respect to such space asset; and (vi) such additional identification criteria as may be specified in the regulations referred to in Article XVIII of this Protocol."<sup>41</sup>

The text of this Article was accompanied by a footnote explaining the role of identifiability in the context of the Convention system as follows:

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

It was also accompanied by a footnote recalling that, at the fifth session of the S.W.G., held in Rome on 30 and 31 January 2002, it had been agreed that the inclusion of multiple search criteria would increase the reliability of searches in the computerised registration data base contemplated for the future International Registry for space assets.

<sup>40</sup> Cf. Articles 7(1)(c) and 32(1)(b) of the Convention.

<sup>41</sup> Cf. Study LXXIJJ - Doc. 10.

However, at its first session, the Committee of governmental experts had decided to delete this Article and refer the question of the identification of space assets to the regulations of the future International Registry.<sup>42</sup> At the second session of that Committee, though, several delegations had noted that the preliminary draft Protocol needed to include some identification criteria for space assets, since otherwise the scope of the preliminary draft Protocol itself would be left unclear, one delegation suggesting that the future Protocol include any criteria that could be identified at the time of adoption, with the possibility of the Supervisory Authority developing further criteria in consultation with a preparatory commission and the adviser to the UNIDROIT Secretariat suggesting the development of general identification criteria and leaving the future Supervisory Authority the task of developing identification criteria to be used solely for the purpose of registration.<sup>43</sup>

The examination of the question of the identification of space assets under the preliminary draft Protocol was one of the issues relating to the future international registration system for space assets referred by the Committee of governmental experts at its second session to the Sub-committee with a view to the submission of a report to the following session of that Committee.<sup>44</sup>

In the light of the general problems that arose in performance of the assignments handed out at the conclusion of the second session of the Committee of governmental experts, not least in the Sub-committee's performance of the tasks referred to it, the Secretariat took it upon itself to complement the limited comments submitted by Government members of the Sub-committee by the questionnaire that it circulated among satellite manufacturers, launch service providers and financial institutions, designed to ascertain, first, on the basis of their experience, the most appropriate identification criteria to be employed in respect of the four classes of space asset listed in Article I(2)(g) of the preliminary draft Protocol, secondly, if there were any unique identification criteria for these classes of asset and, if not, which alternatives might work for the class of asset in question, in particular in the light of the function that such criteria were intended to have under the future international registration system, and, thirdly, whether these criteria could be considered "necessary and sufficient" to identify the particular asset for the purposes of that system.

As indicated above in the context of the definition of space assets,<sup>45</sup> comments from Governments and the responses to the Secretariat's questionnaire took the exercise a step further, in the sense of querying the case for the inclusion of certain of the categories of space asset currently covered by the preliminary draft Protocol. These responses did, nevertheless, contain valuable information on possible technical criteria to be employed for the identification of those categories the coverage of which under the preliminary draft Protocol was felt to be warranted, reference to which has already been made elsewhere in this report.<sup>46</sup>

At the same time, though, one Government member of the Sub-committee raised fundamental questions about, on the one hand, the concept of identifiability for the purposes of the sphere of application of the preliminary draft Protocol - noting that the term "identifiable" was employed therein without any regard to the value of the assets concerned, whereas it was proclaimed in the preamble to the Convention that the Convention system was designed to apply to the acquisition and use of "mobile equipment of high value or particular economic significance" - and, on the other hand, the justification for the ouster of national law rules in respect of assets that were not actually in space.

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<sup>42</sup> Cf. C.G.E. Space Pr./1/Report, §45.

<sup>43</sup> Cf. C.G.E. Space Pr./2/Report, § 24.

<sup>44</sup> Cf. *idem*, § 51.

<sup>45</sup> Cf. p. 8, *supra*.

<sup>46</sup> Cf. *idem*.

Another Government member of the Sub-committee indicated his preference for general identification criteria being laid down in the preliminary draft Protocol and the task of developing identification criteria to be employed solely for the purposes of registration being left to the Supervisory Authority of the future International Registry for space assets, for promulgation in the future regulations.

As mentioned above, these comments and the responses to the Secretariat's questionnaire were duly reflected in the Interim report on the criteria for the identification of space assets that it prepared for the New York meeting<sup>47</sup> and, doubtless, played a part in the recommendation that emerged from that meeting for the sphere of application of the preliminary draft Protocol to be narrowed so as to concentrate essentially on the satellite, in its entirety.

(ii) Discussion

In his proposal for an alternative text of the preliminary draft Protocol, Sir Roy Goode had included a number of proposals on the identification of space assets.<sup>48</sup> He recalled, in particular, that, at the diplomatic Conference at which the Protocol to the Convention on Matters specific to Railway Rolling Stock (hereinafter referred to as the *Luxembourg Protocol*) had been opened to signature, in Luxembourg on 23 February 2007, it had been agreed that there was no need for unique identification to be provided in the agreement between the contracting parties but that all that was needed was that the asset could be identified as falling within the scope of the agreement. This would enable a class of assets or future assets to be covered by the same agreement and avoid the necessity of a separate agreement each time the debtor acquired a new asset. The Luxembourg Protocol, in this way, distinguished between the identification requirements for the constitution of an agreement - for which a generic description of the asset was simply required - and the requirements for registration - for which unique identification was required.<sup>49</sup> He believed that this approach was equally valid for the preliminary draft Protocol. Given the importance of having uniquely identifiable criteria for the registration of space assets, he further believed that such criteria should not be left solely to be spelled out in the future regulations; he, accordingly, proposed the inclusion of basic identification criteria in the preliminary draft Protocol, to be supplemented by the future regulations.

In response to a query raised regarding where the work of the Sub-committee stood, the UNIDROIT Secretariat recalled that, to date, unfortunately, there had been all too little activity by the Sub-committee. Following the London meeting, the issue of the identification criteria for space assets had been singled out by the UNIDROIT Secretariat for priority treatment among the intersessional assignments handed out at the second session of the Committee of governmental experts, on the basis that this was probably the most important of the issues referred to the Sub-committee. The other main issue so referred, namely the question of the Supervisory Authority of the future International Registry, was still unresolved, of course, but potentially great significance attached in this context to the interest expressed at the New York meeting by Aviareto, the

<sup>47</sup> Cf. Interim report on the criteria for the identification of space assets.

<sup>48</sup> Cf. Proposal for an alternative text, §§ 10 and 11.

<sup>49</sup> Article V (Identification of railway rolling stock in the agreement) of the Luxembourg Protocol provided as follows:

1. For the purposes of Article 7(c) of the Convention and Article XVIII(2) of this Protocol, a description of railway rolling stock is sufficient to identify the railway rolling stock if it contains:
  - (a) a description of the railway rolling stock by item;
  - (b) a description of the railway rolling stock by type;
  - (c) a statement that the agreement covers all present and future railway rolling stock; or
  - (d) a statement that the agreement covers all present and future railway rolling stock except for specified items or types.
2. For the purposes of Article 7 of the Convention, an interest in future railway rolling stock identified in accordance with the preceding paragraph shall be constituted as an international interest as soon as the chargor, conditional seller or lessor acquires the power to dispose of the railway rolling stock, without the need for any new act of transfer".

Registrar of the International Registry for aircraft objects, in also running the future International Registry for space assets.<sup>50</sup> The Secretariat noted that it intended seeking to convene the Sub-committee for what could well have to be a face-to-face meeting in advance of the following session of the Committee of governmental experts – in view of the failure of the electronic method of work decided upon for the Sub-committee – but submitted that, with all the other issues to be resolved by the Committee in order to permit timely resumption of the intergovernmental consultation process, this was something that should be deferred until a time closer to the following session of the Committee of governmental experts.

In the general context of the creation of the future international registration system for space assets, one Government representative, drawing on the experience he had acquired in the development of the International Registries for aircraft objects and railway rolling stock, advised that the development of the regulations and procedures for the future International Registry for space assets should be developed concurrently so as to avoid the necessity for subsequent redrafting of one or the other.

Another Government representative drew attention to the desirability of such terms as “orbital parameters”, if employed among the criteria for the identification of space assets, being illustrated in an official commentary on the future Protocol, since the meaning of such terms was likely to change from time to time. In this connection, it was pointed out that the meaning of such terms was already explained in the United Nations Convention on Registration of Objects Launched into Outer Space.

(iii) Conclusions

There was consensus with the approach taken in Sir Roy Goode’s proposal. It was noted that it was the UNIDROIT Secretariat’s intention, moreover, to refer the results of the Committee’s work in this respect, together with the other issues referred to the Sub-committee by the Committee of governmental experts, to the Sub-committee in time for the following session of the Committee of governmental experts.

(e) *Public service*

(i) Background

The issue of the balance to be struck in the preliminary draft Protocol between a creditor seeking to exercise remedies against the space asset in the event of its debtor’s default, on the one hand, and one or more organs of the State anxious to ensure the continuity of the performance of a particular “public” service secured by the space asset in question, notwithstanding the debtor’s default, on the other, was dealt with in Article XVI(3). This paragraph was set forth in alternative formulations, the alternative nature of which was indicated by the employment of square brackets:

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

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<sup>50</sup> Cf. The views of industry and Government on how best to finalise an expansion of the Cape Town Convention to cover space assets: a special joint meeting of Government and industry representatives to consider the outstanding key issues remaining to be dealt with in respect of the planned Space Assets Protocol to the Cape Town Convention on International Interests in Mobile Equipment and the most appropriate means of bringing said Protocol to timeous completion (New York, 19/20 June 2007) – Background to the meeting (memorandum prepared by the UNIDROIT Secretariat and the Space Working Group), Appendix IV.

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

Article XVI(3) was introduced into the preliminary draft Protocol for the first time at the first session of the Committee of governmental experts. Up to that time it had been considered that, in much the same way as under the Protocol to the Convention on Matters specific to Aircraft Equipment (hereinafter referred to as the *Aircraft Protocol*) (Article XXIV(1) of which provides that the Convention shall, for Contracting States that are Parties to the Convention for the Unification of Certain Rules Relating to the Precautionary Attachment of Aircraft, signed in Rome on 29 May 1933, supersede that Convention as it relates to aircraft, as defined in the Protocol), the question of public service in relation to space assets was one best left to the applicable law and the parties' agreement.

The two alternative versions of Article XVI(3) introduced during the first session of the Committee of governmental experts<sup>51</sup> reflected the divergent views that emerged within that Committee on this issue, at both its first and second sessions. Alternative I reflected the views of those States the opinion of which was that Contracting States should be able, in all circumstances, via the lodging of declarations, to impose limitations on the exercising of creditors' default remedies under the preliminary draft Protocol in order to preserve the continuity of public service. Alternative II, on the other hand, was introduced into the text to address the concerns of those States that felt that the problem of public service was one that already existed independently of the preliminary draft Protocol and that it could, therefore, continue to be resolved on the basis of the well-honed solutions, contractual or otherwise, employed for this purpose but that, if the concept of public service did have to be introduced into the Convention as applied to space assets, it needed to be defined more narrowly so as not to defeat the economic benefits that the preliminary draft Protocol was intended to confer.

A significant number of States, however, still remained undecided as to which of the Alternatives to support at the end of the second session of the Committee of governmental experts and made it clear that they would require further information on the prevailing rules of law and practice in this field before being in a position to reach a decision. The S.W.G., moreover, indicated the complete opposition of the international commercial space and financial communities to the introduction of the concept of public service in the preliminary draft Protocol.

In the absence of consensus, the Committee of governmental experts, at the conclusion of its second session, decided that all participating Governments and the S.W.G. should provide the Secretariat with additional information and comments regarding the services which constituted "public services" and how such services were protected in their countries.<sup>52</sup>

The general problems that arose in performance of the assignments handed out at the conclusion of that session affected this subject too. This explained why it was one of the areas focussed on by Mr Alexandre de Fontmichel, a member of the French delegation on the Committee of governmental experts, in the paper that he prepared for the London meeting on the view of his Government concerning the importance of the preliminary draft Protocol.<sup>53</sup> In this paper he

<sup>51</sup> Cf. C.G.E. Space Pr./1/Report, § 90.

<sup>52</sup> Cf. C.G.E. Space Pr./2/Report, § 41.

<sup>53</sup> Cf. The crucial role of industry in finalising an expansion of the Cape Town Convention to cover space assets: a Government/industry Forum on the Space Assets Protocol to the Cape Town Convention on International Interests in Mobile Equipment (London, Monday, 24 April 2006) – summary report (prepared by the Unidroit Secretariat), Appendix VII: The viewpoint of the Government of France, by Alexandre de Fontmichel, *Avocat à la Cour*, Darrois Villey Maillot Brochier, Paris; member of the French delegation on the UNIDROIT Committee of governmental experts.

submitted that the international laws governing proprietary expropriation would justify the remedy of compensation available under such laws also being available to a creditor unable to exercise its default remedies under the Convention as applied to space assets where a Government insisted on the maintenance of the public service function provided by the space asset, notwithstanding the debtor's default.<sup>54</sup> However, he saw regulating the question of public service in the preliminary draft Protocol as affecting the marketability of the future Protocol and, accordingly, favoured the question being left to be dealt with under municipal law, all the more so as this need not interfere with the necessary safeguards already in place for States to ensure the continuity of public service.<sup>55</sup>

Following the London meeting, the Secretariat circulated a questionnaire on this issue among financial institutions and those advising such institutions designed to complement the small number of responses received from Governments to the request for additional information and comments that had been addressed to them by the Committee of governmental experts. The responses to this questionnaire combined with the additional information received from Governments were duly reflected in the Interim Report on the extent to which Article XVI(3) of the preliminary draft Protocol to the Convention should provide limitations on the exercise of creditors' remedies in respect of space assets performing a public service<sup>56</sup> that the Secretariat prepared for the New York meeting.

In this report it was noted that most relevant national laws and regulations did not specifically define the term "public service,"<sup>57</sup> even if this term was addressed in general terms and, where applicable, Governments were able to protect the continuity of such services via two paradigms, which were, moreover, not mutually exclusive:

- the preventative national law paradigm, whereby substantive national laws or rules of procedure were employed to ensure the continuity of public services by imposing (or permitting the procedural imposition of) restrictions on individual assets so that the rights connected with those assets could not be exercised in a manner that would result in the discontinuance or interruption of public services; and
- the contractual safeguards paradigm, whereby specific provisions were incorporated into financial transactions, typically underwritten by the relevant Government, ensuring the debtor's permanent solvency and thus rendering default (and the exercise of default remedies) a near impossibility.<sup>58</sup>

Echoing the point made by Mr de Fontmichel, the Secretariat submitted that the interest of Governments in preserving public services had to be weighed against their corresponding duty to protect the fundamental right of ownership.<sup>59</sup> Several respondents to the Secretariat's questionnaire, moreover, had drawn attention to the various measures either already contemplated by financial institutions or that might be contemplated by such institutions to offset the risk of potential sovereign interference with their interests in cases where they would otherwise be at liberty to exercise their asset-based default remedies, including the undertaking of an independent analysis of, *inter alia*, the risks of potential sovereign interference with any default remedies and the subsequent negotiating of contractual provisions designed to ensure that they were "held harmless" in the event of Government requisition of, or interference with interests in space assets or the seeking of partial cover for such risks in the insurance market.<sup>60</sup>

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<sup>54</sup> Cf. *idem*, p. iv.

<sup>55</sup> Cf. *idem*, p. v.

<sup>56</sup> Cf. Interim report on public service.

<sup>57</sup> Cf. *idem*, p. 3.

<sup>58</sup> Cf. *idem*, p. 5.

<sup>59</sup> Cf. *idem*, p. 12.

<sup>60</sup> Cf. *idem*, p. 7.

The report concluded that the issue of public service was too important to be left unaddressed by the preliminary draft Protocol and, accordingly, proposed three possible solutions:

- a general affirmation of the sovereign duty to protect public services and explicit referral to national laws for the protection of private property;<sup>61</sup>
- the modification of Alternative II to include a unified compensation regimen;<sup>62</sup> and
- giving the State in question a priority lien or right of first refusal.<sup>63</sup>

This report provided the main focus of the discussions on this issue at the New York meeting, along with papers prepared by Messrs Jacques Bertran de Balanda, Denis Bandet and Bertrand Fournier-Montgieux (Herbert Smith L.L.P. (Paris))<sup>64</sup> and Mr Juan Lueiro García, representing the Government of Spain.<sup>65</sup>

The paper prepared by Mr Bertran de Balanda and his colleagues acknowledged the need for guaranteeing the continuity of essential public services taking precedence over the default remedies of a secured creditor but submitted that the preliminary draft Protocol might not be the most appropriate place in which to define the concept of public service, in that some States might wish to redefine their view of this concept at a later date.<sup>66</sup> They suggested that the providing of safeguards to ensure the continued operation of space-based public services should be the responsibility of the State which entrusted the operator with a public service mission, in such a way as to put creditors on notice of such limitations on their rights and thus place the risk of financial loss on the creditor;<sup>67</sup> conversely, it submitted that, where a creditor was not made aware of such limitations, the State in question should provide just compensation for the economic loss resulting from the limitations imposed by it on the creditor's exercise of its remedies.<sup>68</sup> Moreover, the limitations imposed by a State should, in the view of Mr Bertran de Balanda and his colleagues, be in proportion to the protection needed to ensure the continuance of the relevant space-based public service, so that the creditor might be able to enjoy the benefits accruing under its international interest to the greatest extent possible; for example, a creditor should be able to continue collecting all receivables from the satellite so long as the relevant public service was not interrupted.<sup>69</sup>

These considerations were reflected in an alternative formulation for Article XVI(3) submitted to the New York meeting by Mr Bertran de Balanda and his colleagues, worded as follows:

"Where a space asset is directly governed by national rules or is the subject of contract rights that are intended to, in the direct or indirect favour of one or more Contracting States, either ensure the asset's allocation to a specific activity in order to maintain that activity, or to govern the conditions for operating or holding the space asset in order to protect interests deemed essential by the Contracting States, the remedies provided in Chapter III of the

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<sup>61</sup> Cf. *idem*, p. 9.

<sup>62</sup> Cf. *idem*, pp. 9 and 10.

<sup>63</sup> Cf. *idem*, pp. 11 and 12.

<sup>64</sup> Cf. Memorandum of Messrs Bertran de Balanda, Bandet and Fournier-Montgieux.

<sup>65</sup> Cf. The views of industry and Government on how best to finalise an expansion of the Cape Town Convention to cover space assets: a special joint meeting of Government and industry representatives to consider the outstanding key issues remaining to be dealt with in respect of the planned Space Assets Protocol to the Cape Town Convention on International Interests in Mobile Equipment and the most appropriate means of bringing said Protocol to timely completion (New York, 19/20 June 2007) – Background to the meeting (memorandum prepared by the UNIDROIT Secretariat and the Space Working Group), Appendix II.

<sup>66</sup> Cf. Memorandum of Messrs Bertran de Balanda, Bandet and Fournier-Montgieux, Part 1, § 2.

<sup>67</sup> Cf. *idem*, Part 1, § 4.

<sup>68</sup> Cf. *idem*, Part 1, § 6.

<sup>69</sup> Cf. *idem*.

Convention and in Articles IX to XII of this Protocol may be implemented insofar as they do not [directly] contradict such rules or disregard such rights. Only the relevant State shall be entitled to invoke such rules or rights.

In the event that for a given space asset, such rights or rules are either (i) established subsequent to the establishment of an international interest under the Convention or (ii) used or interpreted in a way that is both inconsistent with the prior use or interpretation of such rights or rules and disproportionate with their primary objective, and failing any agreement to the contrary between the parties, the Contracting States benefiting from such rights or rules shall bear a duty to provide the creditor with fair and prior compensation commensurate with the prejudice suffered as a consequence of the limitation of such creditor's rights."<sup>70</sup>

The paper prepared by Mr Lueiro García included a proposal designed to fill what the author saw as a gap in the Cape Town regimen, namely the absence of a dispute resolution system, in the context of the preliminary draft Protocol. Given the way in which a conflict between States and secured creditors on the issue of public service could threaten the very viability of the future Protocol, his suggestion was for the establishment thereunder of a reliable dispute resolution system, in particular providing for the adjudication of disputes by an international arbitration panel to be set up under the auspices of the future Supervisory Authority.

At the New York meeting it was suggested that Article XXV of the Luxembourg Protocol<sup>71</sup> might also be considered as providing the basis for a solution to the problem of public service under the preliminary draft Protocol.

Reservations were expressed by representatives of the international commercial space and financial communities at the New York meeting regarding the feasibility of the first two of the three possible solutions suggested in the Interim report on public service.

<sup>70</sup> Cf. *idem*, Part 2.

<sup>71</sup> Article XXV (Public service railway rolling stock) of the Luxembourg Protocol provided as follows:  
 "1. A Contracting State may, at any time, declare that it will continue to apply, to the extent specified in its declaration, rules of its law in force at that time which preclude, suspend or govern the exercise within its territory of any of the remedies specified in Chapter III of the Convention and Articles VII to IX of this Protocol in relation to railway rolling stock habitually used for the purpose of providing a service of public importance ("public service railway rolling stock") as specified in that declaration notified to the Depositary.  
 2. Any person, including a governmental or other public authority, that, under rules of law of a Contracting State making a declaration under the preceding paragraph, exercises a power to take or procure possession, use or control of any public service railway rolling stock, shall preserve and maintain such railway rolling stock from the time of exercise of such power until possession, use or control is restored to the creditor.  
 3. During the period of time specified in the preceding paragraph, the person referred to in that paragraph shall also make or procure payment to the creditor of an amount equal to the greater of:  
 (a) such amount as that person shall be required to pay under the rules of law of the Contracting State making the declaration; and  
 (b) the market lease rental in respect of such railway rolling stock.  
 The first such payment shall be made within ten calendar days of the date on which such power is exercised, and subsequent payments shall be made on the first day of each successive month thereafter. In the event that in any month the amount payable exceeds the amount due to the creditor from the debtor, the surplus shall be paid to any other creditors to the extent of their claims in the order of their priority and thereafter to the debtor.  
 4. A Contracting State whose rules of law do not provide for the obligations specified in paragraphs 2 and 3 may, to the extent specified in a separate declaration notified to the Depositary, declare that it will not apply those paragraphs with regard to railway rolling stock specified in that declaration. Nothing in this paragraph shall preclude a person from agreeing with the creditor to perform the obligations specified in paragraphs 2 or 3 or affect the enforceability of any agreement so concluded.  
 5. Any initial or subsequent declaration made under this Article by a Contracting State shall not adversely affect rights and interests of creditors arising under an agreement entered into prior to the date on which that declaration is received by the Depositary.  
 6. A Contracting State making a declaration under this Article shall take into consideration the protection of the interests of creditors and the effect of the declaration on the availability of credit".

(ii) Discussion

Sir Roy Goode's proposal for an alternative text of the preliminary draft Protocol<sup>72</sup> included an alternative approach to the question of public service. Under this approach, a creditor intending to exercise its default remedies would need to give a certain period of notice to the grantor of the related rights, during which time the Contracting State under the laws of which such rights were granted would have the duty to ensure that the grantor of these rights or such other authority or person as designated:

- assumed or procured another competent body to assume the duties of the debtor under the agreement;
- permitted the creditor to exercise its remedies; or
- compensated the creditor for any loss suffered by it through its inability to exercise such remedies.

A second proposal<sup>73</sup> was moved by a representative of the international commercial space and financial communities, on behalf of the Finmeccanica Group: under this proposal, in the event of default, the creditor's remedies should include a "step-in" right to use the signals emitted by satellites under the same conditions as those granted to the debtor:

- exercisable by notice given to the relevant national authority and appropriate persons, such as the debtor;
- subject to the creditor committing to ensure the continuance of the public service in question;
- involving the appointment of an operator to be approved by the State concerned;
- with that State being able to use any approval mechanism provided by its law, subject to the creditor not being substantially impeded in the exercise of its step-in right by any unjustified or discriminatory measures; and
- with the State being entitled, in the event of any interruption or other malfunctioning of the public service caused, either directly or indirectly, by the creditor stepping in or in any way attributable to the operator appointed by the creditor, to take action against the creditor and the operator, which might include revocation of the step-in right in the most serious cases.

One Government representative submitted that the setting of limitations on the exercise of the creditor's default remedies under the Convention as applied to space assets would constitute a significant impediment to the secured financing of space assets, and in particular that any rules that would undermine transparency, the prompt enforcement of creditors' rights or the assurance that the priority rules of the Convention would apply would diminish creditors' confidence and increase legal uncertainty, both of which the preliminary draft Protocol set out to improve. This representative further feared lest the effect of leaving the regulation of the question of public service to national Authorities would be to diminish security and predictability for the creditor and suggested seeking a solution similar to that found in Article XXV of the Luxembourg Protocol.

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<sup>72</sup> Cf. Proposal for an alternative text, §§ 13-17.

<sup>73</sup> Cf. Finmeccanica proposal.

However, several representatives, both from Government and the international commercial space and financial communities, noted that the preliminary draft Protocol dealt with very different types of asset from those covered by the Luxembourg Protocol and that what was vital was that a Government be able to step into the shoes of the debtor in the event of default, which excluded any possible adaptation of Article XXV of the Luxembourg Protocol to serve the needs requiring protection under the preliminary draft Protocol. One representative of the international commercial space and financial communities saw the solution of granting the creditor a step-in right as being particularly attractive to such parties in a default situation, by virtue of the fact that it would encourage prompt action in relation to the creditor.

That element of Sir Roy Goode's proposal which consisted in compensation being awarded in the event of expropriation was seen by one Government representative as raising special problems for developing States, given the vital importance that the availability of space-based services had for such States, which might well be unable to pay such compensation and, to that extent, would be placed at a significant disadvantage in a default situation arising within its jurisdiction.

One representative of the international commercial space and financial communities insisted on the relationship between the question of the preservation of space-based services of a public nature in the event of default and the issue of the transfer of related rights.

(iii) Conclusion

It was agreed that a Sub-committee should be invited to develop options for a solution to the problem of public service that might be laid before the Committee of governmental experts, once reconvened. In developing such options, the Sub-committee should seek those most likely to generate consensus and thus bring about the timeous completion of the preliminary draft Protocol.

(f) *Other outstanding issues*

(i) How to increase the value of the future Space Protocol

(a) Background

At the first session of the Committee of governmental experts the Government of the United States of America proposed that provisions relating to categories of economic assurances be added either to Article IX or as separate new Articles.<sup>74</sup> The categories concerned were assurances relating to the protection of income, transparent public service obligations and pricing and other limitations, the assignability of payment rights and currency repatriation and processes for the pre-qualification of back-up operators and other transferees. The same Government indicated that other economic assurances worthy of possible coverage concerned Government buy-outs and the assumption of risk. The several delegations that commented on this proposal expressed great interest but stated that they would need to see a written proposal before being able to take a stand in relation thereto.<sup>75</sup>

The Government of the United States of America submitted two sets of proposals to the New York meeting designed to increase the security that the future Protocol would provide.<sup>76</sup> The first set of proposals was designed to facilitate the creditor's ability to receive performance due (including to collect amounts owing) to the debtor from third parties with respect to the space asset, while the second would reduce the deleterious effects that would otherwise arise from legal constraints on enforcement of an international interest, such as administrative processes regulating

<sup>74</sup> Cf. C.G.E. Space Pr./1/Report, § 65.

<sup>75</sup> Cf. C.G.E. Space Pr./1/Report, § 66.

<sup>76</sup> Cf. Proposals to increase the credit value of the future Space Protocol.

communications and national security as well as legal rules designed to preserve the public service function of space assets.

(β) Discussion

The same Government presented proposals designed to increase the overall creditworthiness of the preliminary draft Protocol. These proposals were designed, in particular, to enhance certainty for creditors against the background of the regulatory licensing authority vested in Governments to control the launching and operation of a satellite. It, accordingly, suggested that provisions be added to the preliminary draft Protocol that would reinforce both a creditor's right to the stream of income generated by a satellite, notwithstanding the fact that a procedure might be pending concerning the transfer of related rights, and its right to take the necessary steps to preserve the functioning of the satellite.

(γ) Conclusion

It was agreed that a paper setting forth and illustrating these proposals should be prepared by the Government of the United States of America for consideration by the Committee of governmental experts, once reconvened, at its following session.

(ii) Insolvency

(α) Discussion

The Government of the United States of America proposed that consideration be given to reviewing the insolvency-related provisions of the preliminary draft Protocol in the light of the provisions on insolvency found in the Aircraft Protocol and the Luxembourg Protocol.

(β) Conclusion

It was agreed that an informal consultative working group to look at insolvency options, external to the Steering Committee, be organised by the Government of the United States of America with the task of preparing a report to be laid before the Committee of governmental experts, once reconvened, at its following session.

(iii) Salvage Interests

(α) Background

Ms Pamela Meredith, Co-Chair of the Space Law Practice Group, informed the New York meeting of the interest of a number of major insurers working in the space sector in seeing salvage rights protected under the future Protocol. It was agreed that she should submit a written proposal on behalf of these insurers to the Secretariat. She duly presented this proposal.<sup>77</sup>

(β) Discussion

Ms Meredith introduced the proposal that she had submitted, on behalf of leading space insurers, for insurers' salvage interests to be covered under the Convention as applied to space assets. She stressed the importance of insurance in the obtaining of finance for a launch as well as in the obtaining of operational licences. She specified that, upon payment of a claim in respect of a space asset, an insurer became entitled either to title salvage (thus receiving title to the space asset in the event of a total loss) or, most commonly, revenue salvage (thus receiving a

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<sup>77</sup> Cf. Proposal to include salvage interests.

percentage of the revenue earned from a partially defective satellite). However, an insurer's interest was not considered an "international interest" or a "contract of sale" and was thus exposed to the risk of a junior buyer taking title to the space asset free of the insurer's interest; furthermore, an insurer would not be entitled to act under a subrogation of such junior buyer's interest.

By way of solution to these problems, she proposed a number of options: first, that the preliminary draft Protocol create a new category of interest for salvage rights, secondly, that it treat title salvage as a "contract of sale" (as reflected in Sir Roy Goode's proposal for an alternative text of the preliminary draft Protocol <sup>78</sup>), thirdly, that the assignment of debtor's rights apply under the preliminary draft Protocol to revenue salvage and, finally, that a salvage interest be treated as an international interest.

A number of Government representatives agreed that insurers' salvage interests were important and merited protection under the preliminary draft Protocol. On the other hand, it was pointed out that, in so far as revenue salvage interests involved the taking of an interest in receivables only, it would not be appropriate for such interests to be covered under the preliminary draft Protocol, which, all were agreed, should only apply to interests linked to a physical asset, given the asset-based nature of the Cape Town regimen.

#### (γ) Conclusion

It was agreed that an informal working group on salvage interests, external to the Committee, be set up to prepare a proposal to be laid before the Committee of governmental experts, once reconvened, at its following session.

#### IV. THE WAY FORWARD

The overriding objective of the work of the Committee that lay ahead would be to continue the intersessional work conducted to date on or arising out of the three key outstanding issues referred to intersessional work by the Committee of governmental experts in such a way as to build consensus around the solutions that had emerged thereto; these were, first, the question of the identification of space assets and the related question of the definition of "space assets" for the purposes of the sphere of application of the preliminary draft Protocol, in particular the question of components, secondly, the question as to how best the Convention as applied to space assets might be extended to debtor's rights and related rights and, thirdly, the question of public service.

The Committee had achieved consensus on the identification of space assets, it being, nevertheless, recognised that this question would, of course, need to be looked at further in due course by the Sub-committee, this question included.

There was broad agreement within the Committee on the definition of space assets and components but the question of default remedies in relation to components, given the different views that had emerged on this issue, had been referred to a Sub-committee for resolution. This Sub-committee, the work of which would be co-ordinated by the Government of Germany, with organisational support being provided by the Secretariat, was composed of the Governments of Canada, Germany, the United Kingdom and the United States of America, Mr Olaf Gebler, Mr Francesco Giobbe, Mr Robert Gordon, Mr Ian Jarritt, Ms Martine Leimbach and Mr Schmidt-Tedd, supplemented by the Chairman.

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<sup>78</sup> Cf. Proposal for an alternative text, §§ 18 and 19.

The Committee had also achieved consensus on the question of debtor's rights and related rights.

The Committee had agreed to set up a Sub-committee, to work by electronic means and conference call and to be co-ordinated by the Secretariat, to prepare options for a solution to the problem of public service that might be laid before the Committee of governmental experts, once reconvened. This Sub-committee was composed of the Governments of China, Germany and the United States of America, supplemented, where agreed by the Governments in question, by such other Governments as those of Mexico and the Russian Federation, and representatives of Finmeccanica and Ms Leimbach (or alternatively, should she not be available another representative of Calyon), on behalf of financial institutions, the role of which in relation to a commercially viable solution of this issue was recognised as being crucial.

It was, however, agreed that participation in the work of the Sub-committees established by the Committee should be open to other members of the Committee.

The Committee invited the co-chairmen of the Drafting Committee of the Committee of governmental experts, Canada and the United Kingdom, in the persons of the representatives of those Governments participating in the Committee, namely Mr Michel Deschamps and Sir Roy Goode, to implement the conclusions that it had reached on the key outstanding issues, in an alternative version of the preliminary draft Protocol, to be prepared in English. The timetable for the preparation of this alternative version was for a first alternative version to be ready for the consideration of all members of the Committee by the end of June 2008, for this first alternative version to be circulated amongst all members of the Committee with an invitation for them to formulate such comments as they might see fit – notably as regards the extent to which it was considered faithfully to reflect the decisions reached by the Committee – by mid-September 2008 and for a second alternative version to be prepared by Mr Deschamps and Sir Roy, in the light of any such comments, by mid-November 2008, with the Sub-committees established by the Committee being invited to forward their conclusions by such time. It was essential that a decision on the reconvening of the Committee of governmental experts could be taken, on a sound basis, by that time.

It being essential for the Secretariat to be able to get to work as soon as possible on building consensus around the conclusions reached by the Committee as reflected in the alternative version, in line with the decision taken by the UNIDROIT General Assembly – among not only those Governments serving on the Committee of governmental experts not represented on the Committee but also key players in the international commercial space and financial communities likewise not involved in the Committee's work – it was recognised that it would be appropriate for the Secretariat to commence these consensus-building efforts as from July 2008, namely upon completion of the first draft of the alternative version. In this way, the Secretariat would be able to forward any comments emerging from this consultation procedure to Mr Deschamps and Sir Roy with a view to the preparation of a final alternative version.

In this connection, the intention was for such a final alternative version to be completed, on the basis of not only the comments submitted by members of the Committee and the conclusions of the work of its Sub-committees but also the outcome of reactions to the Secretariat's consensus-building exercise among those Governments and key representatives of the international commercial space and financial communities not represented on the Committee, by mid-January 2009 so as to permit invitations to go out for a third session of the Committee of governmental experts, which it was hoped could be convened for May 2009, in February 2009.

It was agreed that, to the extent possible, the Sub-committees established by the Committee should seek to carry out their work without the need for meetings that would involve travel.

The Secretariat announced that it would be commencing preparation of a French text of the alternative version of the preliminary draft Protocol already upon completion of Mr Deschamps and Sir Roy's first draft alternative version, in particular in view of the important role that such a French text was likely to have in the context of its consensus-building efforts, for instance with parties for whom neither English nor French was necessarily a mother tongue but for whom a French text was likely to be much more readily comprehensible.

Pursuant to the favourable reaction accorded to the proposal by one member of the Committee for enabling salvage interests to be registered under the planned Protocol, it was agreed that an informal working group on salvage interests, external to the Committee, should be set up, to be co-ordinated by the Government of the United States of America and on which Ms Meredith and Mr Sylvain Devouge would serve, to prepare a proposal that, albeit not concerning one of the four key outstanding issues within the remit of the Committee, could be laid before the Committee of governmental experts, once reconvened.

Subject to the concerns expressed by one Government regarding the need not to take up too many new issues at a time when it was important to focus on those issues already specifically referred to the Committee, it was further agreed, pursuant to a proposal tabled by one Government, that an informal consultative working group would look at insolvency options under the preliminary draft Protocol. This group would meet outside the Committee, with participation therein being open to all who might wish to take part. The Government of the United States of America would co-ordinate the work of this group the objective of which would be to prepare a report to be laid before the Committee of governmental experts once reconvened.

It was finally agreed that it would be essential for those involved in all work concerning the Sub-committees established by the Committee, the informal working group on salvage interests and the informal consultative working group to look at insolvency options at all times to keep the Secretariat fully informed so that it might properly discharge the functions of oversight and overall control conferred upon it by the UNIDROIT General Assembly in relation to the Committee.



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**STEERING COMMITTEE**

**to build consensus around the provisional conclusions reached as regards the preliminary draft Space Assets Protocol to the Cape Town Convention on International Interests in Mobile Equipment by the Government/industry intersessional meeting held in New York on 19 and 20 June 2007:**

**LAUNCH MEETING**

**(Berlin, 7/9 May 2008)**

*Agenda*

*(prepared by the UNIDROIT Secretariat)*

1. Opening of the meeting
2. Election of the Chairman
3. Adoption of the agenda
4. Organisation of work for the meeting
5. Consideration of the key outstanding issues in respect of the preliminary draft Protocol to the Convention on International Interests in Mobile Equipment (UNIDROIT 2004 Study LXXIIJ - Doc. 13 rev.), in particular in the light of the conclusions to be drawn from the Government/industry intersessional meetings held in London on 24 April 2006 and in New York on 19 and 20 June 2007 and, first, the alternative version of the preliminary draft Space Assets Protocol prepared by Sir Roy Goode to reflect his reading of the provisional conclusions reached at the New York Government/industry meeting, secondly, the paper under preparation by the Government of Germany and the German Space Agency on components and, thirdly, the paper under preparation by the Government of Germany on debtor's rights and related rights <sup>1</sup>
6. Future work of the Steering Committee
7. Any other business.

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<sup>1</sup> The two papers under preparation referred to in the draft agenda will be distributed shortly.



**STEERING COMMITTEE**

**to build consensus around the provisional conclusions reached as regards the preliminary draft Space Assets Protocol to the Cape Town Convention on International Interests in Mobile Equipment by the Government/industry intersessional meeting held in New York on 19 and 20 June 2007:**

**LAUNCH MEETING**

**(Berlin, 7/9 May 2008)**

*A PROPOSAL FOR AN ALTERNATIVE TEXT OF THE PRELIMINARY DRAFT SPACE PROTOCOL  
IN THE LIGHT OF THE PROVISIONAL CONCLUSIONS REACHED AT THE GOVERNMENT/INDUSTRY  
MEETING HELD IN NEW YORK ON 19 AND 20 JUNE 2007*

*Explanatory Memorandum<sup>1</sup>*

*(prepared by Professor Sir Roy Goode  
Adviser to the UNIDROIT Secretariat on 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)*

**Introduction**

1. In preparation for the meeting of governmental and industry experts at New York the UNIDROIT Secretariat circulated a draft revision of the Space Protocol I had prepared, together with an Explanatory Memorandum. It was agreed that this revised text, rather than the text of December 2003,<sup>2</sup> be taken as the basis for future discussion. The approach embodied in the revised draft received a general welcome, but a number of issues were raised and points made which I have sought to reflect in the new revision prepared for the forthcoming meeting of the Steering Committee in June 2008 set forth in Appendix I to this explanatory memorandum. I have taken the opportunity to introduce other changes, as shown in the brief annotations to the draft and described below, for consideration by the Steering Committee. In addition the Articles have been renumbered from Article III onwards to replace with cardinal numbers the ordinals previously inserted as intermediate numbers to avoid renumbering. A table of concordance between the old numbering and the new is attached as Appendix II to this explanatory memorandum. I have not attempted any revision of Article XXVII (Contracting State's limitation of remedies) as this depends on the outcome of a policy debate, but the present memorandum contains suggestions for the general approach.

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<sup>1</sup> In preparing the paper I have been greatly assisted by consultations with Professor Steven Harris and Mr Christopher Rees of Herbert Smith LLP. The new draft Protocol attached reflects a number of points they made, though they are not responsible for any shortcomings in the draft.

<sup>2</sup> C.G.E./Space Pr./W.P.3.

## Sphere of application

### *Components*

2. The draft discussed in New York sought to narrow the application of the Protocol as regards components by listing principal objects - satellites, transponders, etc. – that clearly ought to be registrable and limiting registrable components to those where the component supplier reached agreement with the owner of the principal object that the components should retain their separate identity after incorporation so as to be separately registrable. Nevertheless at the meeting in New York continuing concern was expressed about the complexities resulting from the separate treatment of components and the feasibility of retaining meaningful rights in them after incorporation. The new draft removes components as items capable of independent registration and follows the Aircraft Protocol and Luxembourg Protocol in incorporating them into the definition of the principal object. There are three reasons for this approach:

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

### *New forms of space asset*

3. Article 1(2)(l) seeks to cover the various categories of space asset currently in use. But with the advance of technology new types of asset may be manufactured. So at the end of the list I have inserted “or other object capable of independent control.” Space experts will be able to advise whether this is a workable description and, more generally, whether the definition as a whole is technically correct and sufficiently inclusive. The entire list is qualified by the words “man-made” so as to exclude celestial objects such as the Moon. An alternative is “artificial.”

### *Debtor's rights and related rights*

4. Considerable importance is attached by the space industry to what are described as “debtor's rights” and “related rights” respectively. These terms were introduced by a paper prepared by the Space Working Group.<sup>3</sup> “Debtor's rights” are defined in Article 1(2)(b) as “all rights to payment or other performance due to a debtor by any person with respect to a space asset.” Typically such rights take the form of contractual entitlements, for example, sums payable to a debtor as lessor under a lease of the space asset or under a licence conferring an indefeasible right of use. These represent a valuable part of the security given by the debtor to its creditor. They are to be distinguished from “associated rights”, which are rights to payment or other performance due by the debtor to the creditor (Convention, Article 1(c)), whereas debtor's rights are rights vested in the debtor itself. “Related rights” are in essence government or other official licences and permits granted to the debtor to manufacture, launch, etc, a space asset. It was originally envisaged that interests in debtor's rights and related rights would themselves be registrable as international

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<sup>3</sup> C.G.E./Space Pr./2/W.P.4, October 2004.

interests, but there were serious drawbacks to this approach<sup>4</sup> and it has been replaced by provision for recording of debtor's rights and related rights as part of the registration of an international interest, either at the time of that registration or subsequently (Article VII). The record would then be governed by registration and priority rules similar to those governing the international interest itself and would be inextricably linked to registration of the international interest, so that a rights assignment recorded in the registration of a prospective international interest would be treated as unrecorded unless and until the prospective international interest became an international interest (Article VIII(2)) and if a registration of an international interest were discharged the record would likewise be discharged (Article VII(4)). This ensures that debtor's rights and related rights cannot be the subject of an independent registration, which would intrude into the area of general receivables financing covered by the 2001 UN Convention on the assignment of interests in international trade.

#### *Transfer of related rights*

6. Article II(2) had provided that the Convention and Protocol did not determine whether debtor's rights or related rights were transferable or assignable. The new text makes two changes. First, it omits the reference to debtor's rights, since these will primarily be contractual and it goes without saying that their transferability or assignability is governed by the applicable law. Related rights, however, are licences and permits issued by governmental or other authority. For these it seems appropriate to move from the negative to the positive and state that their transferability or assignability is determined by the law pursuant to which they are granted or issued.

#### *Rights assignment/rights re-assignment*

7. The draft put forward by the SWG contained provisions for a "rights security agreement", in essence an agreement for a charge over debtor's rights and related rights. In New York the question was raised why outright assignments were not included. One answer to this might be that in general such assignments do not occur in a debtor-creditor relationship, where the intention is to give the creditor a security interest only. However, there may be a case for including an outright assignment of debtor's rights or related rights in reduction or discharge of an indebtedness, and the revised text accordingly replaces "rights security agreement" with "rights assignment", meaning an assignment by way of security or in reduction or discharge of an existing indebtedness. The original wording can always be restored if the Steering Group takes the view that this extension is not needed. Opportunity has been taken to relabel "rights assignment" as "rights re-assignment" in the interests of clarity.

8. Article V has been slightly reworded to refer to the manner in which a rights assignment is constituted rather than to say what it is, which is awkward, given that it has already been defined in Article I(2)(i). It is true that the earlier draft followed Article V of the Aircraft Protocol relating to contracts of sale, but the latter reflected the fact that "contract of sale" was not defined in the Aircraft Protocol, only in the Convention. In the new draft now presented Article V follows Article 7 of the Convention. A similar amendment has been made to Article X(1).

#### **Definitions**

9. The revised text makes certain changes to the definitions. Some of these have been mentioned above. Others are explained in the annotations to Article I(2).

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<sup>4</sup> See my earlier Explanatory Memorandum dated 20<sup>th</sup> July 2006.

### **Identification of space assets**

10. Under the Convention unique identification of the object is required both for the constitution of an international interest and for registration purposes. At the Diplomatic Conference in Luxembourg it was pointed out that for the purposes of the relationship between creditor and debtor there was no need for unique identification. All that was necessary was the asset, including an after-acquired asset, could be identified as falling within the scope of the agreement. On this basis there could be no objection to an agreement covering a class of assets or all present and future assets, and this would avoid the need for a separate agreement each time the debtor acquired a new asset. Accordingly the Luxembourg Protocol distinguishes the identification requirements for the constitution of an agreement from those applicable to registration, the former allowing generic descriptions (Article V) whilst the latter requires unique identification (Article XIV). I have therefore ventured to adopt this approach in Article XVI of the new draft, which combines the effect of Articles V and XIV of the Luxembourg Protocol. Article XI(2) follows Article 5(b) of the 1988 UNIDROIT Convention on International Factoring.

11. It seems desirable that the identification criteria should not be left exclusively to regulations. Article XVI(3) therefore contains some suggested basic criteria which can be supplemented by regulations.

### **Default remedies**

12. The provisions on default remedies have been re-arranged so as to bring them together in the same Chapter.

### **Public service exemption**

13. In view of the increasing practice of States to utilize the resources of the private sector to provide public telecommunication, air navigation and other services, there has been much debate about the importance of ensuring that these services should not be interrupted by the exercise of creditors' remedies. On the other hand, service providers and their financiers need to protect their investment. The question, then, is how best to balance the concerns of States with the legitimate interests of creditors. Article XVI of the earlier text, reproduced without amendment in Article XXVII of the draft revised text, offers one approach. This, however, is unsatisfactory in a number of respects. In particular:

- (1) for the reasons set out below it goes beyond what is needed to protect the continuity of services;
- (2) the alternative versions of paragraph 3 currently appear in conjunction with paragraph 2, whereas in reality they are alternatives to paragraph 2;
- (3) there is no protection for creditors in the shape of either the assumption of the defaulting debtor's obligations by a government or other authority taking control of the space asset or the payment of compensation.

14. The issues have been canvassed in informative papers from a number of governments and other parties and various alternatives have been propounded. Reference has also been made to Article XXV of the Luxembourg Protocol (the text of which is reproduced in Appendix III to this explanatory memorandum). Each of the proposals addresses some concerns but not others. On that basis none of them can be regarded as wholly satisfactory. This Paper is an attempt to simplify and clarify the issues and to suggest a way forward.

*How far need restrictions on remedies go?*

15. All the alternative versions would enable a Contracting State, under stated conditions, to limit or suspend the exercise of all remedies provided by the Convention and Protocol. This goes well beyond what is necessary. So long as the exercise of a particular remedy does not result in the interruption of public services there seems no good reason to interfere with creditors' remedies at all. It needs to be borne in mind that concerns over the identity and qualifications of a licence holder are not matters to be addressed in the Protocol at all; they are already adequately covered by existing licensing regimes which, being in the field of public law, take precedence over private rights, including Convention rights. Thus the assumption, whether through command codes or otherwise, of possession, control, management or use of a space asset by the creditor or a person to whom the creditor sells or leases the asset will already be regulated and needs no special treatment in the Protocol. The collection or receipt of income or profits is a remedy which in itself has no impact on the continuance of public services.

16. It follows from the above that the only power that needs to be reserved to a Contracting State by the Protocol is a power to restrict the exercise of remedies to the extent that these would result in the interruption of public services.

*Safeguarding the interests of creditors*

17. Where the debtor defaults and the creditor is precluded from exercising a remedy that would result in the interruption of public service it is reasonable that the creditor should be provided with safeguards against economic loss, particularly since suspension of the creditor's right to enforce its security could constitute direct or indirect expropriation in international law. One approach is to include a provision in the Protocol that a creditor intending to exercise such a remedy shall first give not less than [10] days notice of its intention to do so to the grantor of the related rights, during which time the Contracting State under the laws of which the related rights were granted shall procure the grantor of the related rights or other designated authority or person:

- (1) to assume or procure another competent body to assume the obligations of the debtor under the agreement; or
- (2) to permit the creditor to exercise the remedy in question; or
- (3) to compensate the creditor for any loss it suffers as the result of its inability to exercise the remedy in question.

This provides a simple form of safeguard which offers alternatives to the Contracting relevant State but does not involve a Contracting State's declaration. I have not sought to draft a provision to this effect because it depends on policy decisions and there may be technical and ancillary matters to be dealt with, for example, whether a Contracting State should be required to designate the authority by declaration at the time of ratification (with power to amend by a subsequent declaration) and whether a command control escrow account might provide a mechanism for handling matters relating to control of the asset.<sup>5</sup>

**Salvage interests**

18. At the meeting in New York those representing the satellite insurance industry drew attention to the fact that where an insurer covering the interests of creditor and debtor in a

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<sup>5</sup> See the UNIDROIT Secretariat's Interim Report of December 2006, pp 11-12.

satellite pays out on a total loss basis and acquires the satellite (which may still have substantial value) or the right to receive a percentage of the revenues generated from that satellite as salvage the salvage interest is not one which is registrable under the Convention. It is not an international interest and does not arise under a contract of sale. The insurer has no right of subrogation to the creditor's international interest because this has been discharged by payment and there can be no right of subrogation against the debtor as co-insured. This means that having paid out the claim in full and acquired salvage rights in the satellite the insurer has nothing it can register so as to protect itself against subsequent international interests, because ownership as such is not registrable under the Convention. The problem is identified in a detailed paper by Zuckert Scoutt & Rasenberger LLP, who suggest that salvage interests should constitute a distinct registrable category.

19. If it is accepted that salvage insurers do need protection this proposal as well as possible alternative ways of resolving the problem that do not involve creating an entirely new registrable interest should be considered. For example, since the draft Space Protocol, like the Aircraft Protocol, extends the Convention to cover outright sales, a paragraph could be added that for the purpose of Article III an interest in a satellite acquired by a satellite insurer as a salvage interest is deemed to have been acquired by way of sale, and any debtor's rights and related rights assigned to the creditor to have been the subject of a rights re-assignment by the creditor to the satellite insurer. That acquisition of title could then be registered, and the acquisition of the debtor's rights and related rights recorded ; and a prospective sale in respect of a prospective salvage interest could likewise be registered.

#### **Entry into force**

20. Article XXXVI is taken from Article XXIII of the Luxembourg Protocol. It is designed to ensure that the Protocol cannot come into force until the International Registry for space assets is fully operational.

#### **Sundry other drafting amendments**

21. These are explained in the annotations.

## APPENDIX I

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

THE STATES PARTIES TO THIS PROTOCOL,

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

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

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

MINDFUL of the established principles of space law, including those contained in the international space treaties under the auspices of the United Nations,

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

HAVE AGREED upon the following provisions relating to space assets:

CHAPTER I – SPHERE OF APPLICATION AND GENERAL PROVISIONS

*Article I – Defined terms*

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

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

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

**This provides a definition hitherto missing.**

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

**This would cover an indefeasible right of use.**

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

(d) “guarantor” means a person who, for the purpose of assuring performance of any obligations in favour of a creditor secured by a security agreement or under an agreement, gives or issues a suretyship or demand guarantee or standby letter of credit or other form of credit insurance;

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

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

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

(h) “related rights” means any permit, licence, authorisation, concession or equivalent instrument that is granted or issued by, or pursuant to the authority of, a national or intergovernmental or other international body or authority, *when acting in a regulatory capacity*, to manufacture, launch, control, use or operate a space asset, *or* relating to the use of orbits positions *or* the transmission, emission or reception of electromagnetic signals to and from a space asset;

**The words in italics are intended to exclude rights of a private law kind, such as intellectual property rights.**

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

**Covers outright assignments but only in reduction or discharge of an indebtedness.**

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

**In the original pair of defined terms “rights security agreement” and “rights assignment” the word “rights” had two different meanings, causing confusion because a security agreement is a form of assignment. Also “rights security agreement” did not cover outright assignments. In a debtor-creditor context an outright assignment would seem most likely to arise where what is assigned is in reduction or discharge of the debtor’s obligations, and the definition has been limited accordingly. The new terms clearly differentiate between the initial assignment by debtor to creditor and re-assignment by creditor to assignee and cover further assignments.**

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

(l) “space asset” means any *man-made* uniquely identifiable satellite, *satellite* transponder, *payload*, space station, space vehicle, launch vehicle, reusable space capsule *or other object capable of independent control*, in or intended to be launched in or into space or used or

intended to be used as a launch vehicle, including any such asset in course of manufacture or assembly, *together with all modules and other installed, incorporated or attached accessories, parts and equipment and all data, manuals and records relating thereto.*

**“Man-made” inserted to exclude celestial objects; “or other object capable of independent control” is an attempt to capture future types of space asset; “satellite” has been inserted before “transponder” to exclude other types of transponder, for example, those used in aviation or shipping; “together with ...” follows the pattern of the other Protocols. Components have been dropped as a separate category. They are not treated separately in either the Aircraft Protocol or the Luxembourg Protocol and having them as a separate category seems to serve no useful purpose, because prior to incorporation they can be adequately regulated by local law and after incorporation they cannot be reached anyway. Including them merely causes complications, particularly in regard to identification criteria. Hence in this draft they are simply treated as part of the space asset, in the same way as in the other Protocols.**

*3. – An object which is a space asset as defined by paragraph (2)(l) of this Protocol shall not constitute an aircraft object for the purposes of the Convention on International Interests in Mobile Equipment on matters specific to aircraft equipment, whether the object is on earth or in air or space.*

**This deals with a query raised in New York.**

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

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

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

**This states affirmatively what is the governing law and omits the reference to debtor's rights.**

*Article III – Application of the Convention to sales*

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

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

In addition, the general provisions of Article 1, Article 5, Chapters IV to VII, Article 29 (other than Article 29(3) which is replaced by Article XXIV), Chapter X, Chapter XII (other than

Article 43), Chapter XIII and Chapter XIV (other than Article 60) shall apply to contracts of sale and prospective sales.

*Article IV – Return of a space asset*

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

*Article V - Formal requirements for rights assignment*

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

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

**The wording of the Chapeau has been amended to follow Article 7 of the Convention.**

*Article VI - Assignment of future rights*

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

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

1. - The holder of an international interest or prospective international interest in a space asset to whom the debtor has granted an interest in or over debtor's rights or related rights under a rights assignment may, when registering the international interest or prospective international interest or subsequently by amendment to such registration, request that the rights assignment be recorded as part of the registration. Such request may identify the assigned rights either specifically or by a statement that the debtor has assigned all or some of the debtor's rights or related rights, without further specification.

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

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

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

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

#### *Article VIII - Priority of recorded rights assignment*

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

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

#### *Article IX - Rights grantor's duty to assignee*

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

(a) the grantor has been given notice of the rights assignment in writing by or with the authority of the debtor; and

(b) the notice identifies the debtor's rights or related rights.

**The amendment to paragraph 1 corrects what had been a reference to the wrong party.**

**Grantor" is here used rather than "obligor" because in the case of government licences there may be no obligation on the issuer at all.**

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

**"Chargor" has been changed to "debtor" for consistency with paragraph 1(a).**

**The previous text, referring to default "under" the assignment, does not seem correct, as the obligations are more likely to be in the primary agreement.**

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

4. - Nothing in this Article shall affect the priority of competing rights ~~re-~~assignments.

*Article X - Formal requirements for rights re-assignment*

**Heading changed to align it with heading to Article V.**

1. – *A re-assignment is constituted as a rights re-assignment which is in writing and:*

(a) enables the re-assigned rights *and the space asset to which they relate* to be identified; and

(b) in the case of a re-assignment by way of security, enables the obligations secured by the re-assignment to be determined, but without the need to state a sum or maximum sum secured.

2. – The Convention and this Protocol do not apply to a rights re-assignment unless and until the international interest in the space asset to which the rights re-assignment relates has been assigned to the same assignee.

**The Chapeau to be paragraph 1 has been aligned with Article 7 of the Convention and also absorbs the old sub-paragraph (a) and some other small drafting changes have been made.**

*Article XI - Rights re-assignment of future interests in rights*

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

*Article XII - Effect of assignment or re-assignment of registered international interest*

1. – Where a rights assignment has been recorded as part of the registration of an international interest and the international interest is subsequently assigned, the assignee acquires:

(a) all the rights of the creditor under the rights assignment;

(b) all the interests and priorities of the creditor under the Convention and this Protocol arising from the charge; and

(c) the right to be shown in the record as assignee under the rights assignment.

2. – *The provisions of Articles VII and VIII and the preceding paragraph apply to a rights re-assignment.*

3. – *Article IX(1) and (2) apply in relation to the grantor's duty to the assignee under a rights re-assignment as if the references to the creditor and debtor were references to the assignee and assignor respectively as they apply to a rights assignment.*

4. – *Where there are competing rights re-assignments relating to the same international interest, a recorded rights re-assignment has priority over a rights re-assignment subsequently recorded and over an unrecorded rights re-assignment.*

**New paras 2-4 fill gaps left by the previous version.**

*Article XIII – Derogation*

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

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

1. – For the purposes of this Protocol, a contract of sale is one which:
  - (a) is in writing;
  - (b) relates to a space asset of which the seller has power to dispose; and
  - (c) enables the space asset to be identified in conformity with this Protocol.

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

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

*Article XV – Representative capacities*

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

*Article XVI – Identification of space assets*

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

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

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

3. – A description of a space asset that contains *[the name of the manufacturer, the model, the launch site, the launch date, the orbital parameters,..., 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.

**Paras 1 and 2 are taken from the Luxembourg Protocol, reflecting the fact that there is no need for unique identification for the purpose of constituting the agreement. Paragraph 3 is intended to provide at least basic information in the Protocol itself instead of leaving everything to regulations.**

*Article XVII – Choice of law*

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

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

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

CHAPTER II – DEFAULT REMEDIES, PRIORITIES AND ASSIGNMENTS

*Article XVIII – Modification of default remedies provisions  
as regards space assets*

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

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

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

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

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

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

*Article XIX – Default remedies as regards rights  
assignments and re-assignments*

1. – In the event of default by the chargor under a rights assignment Articles 8, 9 and 11 to 14 of the Convention apply in so far as the same are capable of application to intangible property.

2. – In the event of default by the assignor *in performance of any obligation secured by a rights re-assignment made by way of security* the provisions of Article 34 apply with the substitution of "debtor's rights and related rights" for "associated rights".

**Phrase in italics substituted for "under" for the same reason as before.**

**Articles re-arranged to bring the different default remedies into the same Chapter.  
Paragraph re two space assets deleted consequential on deletion of components as separate space assets.**

#### *Article XX – Placement of data and materials*

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

**A specific reference has been inserted to command codes.**

#### *Article XXI – Modification of provisions regarding relief pending final determination*

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

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

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

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

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

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

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

#### *Article XXII – Remedies on insolvency*

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

*Alternative A*

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

(a) the end of the waiting period; and

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

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

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

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

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

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

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

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

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

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

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

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

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

*Alternative B*

2. – Upon the occurrence of an insolvency-related event, the insolvency administrator or the debtor, as applicable, upon the request of the creditor, shall give notice to the creditor within

the time specified in a declaration of a Contracting State pursuant to Article XXXIX(4) whether it will:

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

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

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

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

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

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

#### *Article XXIII – Insolvency assistance*

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

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

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

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

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

*Article XXV – Modification of assignment provisions*

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

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

*Article XXVI – Debtor provisions*

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

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

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

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

*Article XXVII – Limitations on remedies*

**See separate paper proposing an alternative approach.**

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

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

**A specific reference has been inserted to command codes.**

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

[3. – A Contracting State may, at the time of ratification, acceptance, approval of, or accession to this Protocol, declare any limitations to the exercise of remedies provided in Chapter III of the Convention and in Articles XVIII to XXII of this Protocol with respect to space assets designed and used for flight control and navigation of aircraft, maritime navigation, search and

rescue and similar public services as specified in its declaration or determined by a competent authority of that State notified to the Depository.]

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

#### *Article XXVIII – The Supervisory Authority*

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

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

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

#### *Article XXIX – First regulations*

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

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

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

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

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

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

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

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

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

#### CHAPTER IV – JURISDICTION

##### *Article XXXI – Waiver of sovereign immunity*

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

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

#### CHAPTER V – RELATIONSHIP WITH OTHER CONVENTIONS

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

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

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

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

## [CHAPTER VI – FINAL PROVISIONS

*Article XXXIV – Signature, ratification, acceptance, approval or accession*

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

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

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

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

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

*Article XXXV – Regional Economic Integration Organisations*

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

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

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

*Article XXXVI – Entry into force*

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

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

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

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

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

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

**This follows the Luxembourg Protocol, where reference to the International Registry having become operational was inserted to avoid the risk of the Protocol coming into before before the International Registry was up and running.**

#### *Article XXXVII – Territorial units*

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

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

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

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

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

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

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

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

*Article XXXVIII - Transitional Provisions*

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

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

(b) replace paragraph 3 with the following:

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

*Article XXXIX – Declarations relating to certain provisions*

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

(a) that it will not apply Article XVII;

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

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

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

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

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

*Article XL – Declarations under the Convention*

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

*Article XLI – Reservations and declarations*

1. – No reservations may be made to this Protocol but declarations authorised by Articles XXXVII, XXXIX, XL and XLII may be made in accordance with these provisions.

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

*Article XLII – Subsequent declarations*

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

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

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

*Article XLIII – Withdrawal of declarations*

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

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

*Article XLIV – Denunciations*

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

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

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

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

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

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

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

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

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

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

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

*Article XLVI – Depositary and its functions*

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

2. – The Depositary shall:

(a) inform all Contracting States of:

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

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

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

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

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

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

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

(d) perform such other functions customary for depositaries.

## APPENDIX II

## Preliminary draft Space Protocol:

## Revised numbering

**Old Article****New Article**

Article III bis	Article IV
Article III ter	Article V
Article III quater	Article VI
Article III quinquiens	Article VII
Article III sexiens	Article VIII
Article III septiens	Article IX
Article III octiens	Article X
Article III noviens	Article XI
Article III deciens	Article XII
Article III undeciens	Article XIII
Articles IV – IX	Articles XIV – XIX
Article IX bis	Article XX
Articles X – XXI	Articles XXI – XXXII
Articles XI bis	Article XXXIII
Articles XII – XXV	Articles XXIV – XXXVII
Article XXV bis	Article XXXVIII
Articles XXVI – XXXIII	Articles XXXIX - XLVI

## APPENDIX III

**Text of Article XXV of the Luxembourg Protocol to the Convention on International Interests in Mobile Equipment on Matters specific to Railway Rolling Stock****Article XXV — Public service railway rolling stock**

1. A Contracting State may, at any time, declare that it will continue to apply, to the extent specified in its declaration, rules of its law in force at that time which preclude, suspend or govern the exercise within its territory of any of the remedies specified in Chapter III of the Convention and Articles VII to IX of this Protocol in relation to railway rolling stock habitually used for the purpose of providing a service of public importance (“public service railway rolling stock”) as specified in that declaration notified to the Depository.

2. Any person, including a governmental or other public authority, that, under rules of law of a Contracting State making a declaration under the preceding paragraph, exercises a power to take or procure possession, use or control of any public service railway rolling stock, shall preserve and maintain such railway rolling stock from the time of exercise of such power until possession, use or control is restored to the creditor.

3. During the period of time specified in the preceding paragraph, the person referred to in that paragraph shall also make or procure payment to the creditor of an amount equal to the greater of:

- (a) such amount as that person shall be required to pay under the rules of law of the Contracting State making the declaration; and
- (b) the market lease rental in respect of such railway rolling stock.

The first such payment shall be made within ten calendar days of the date on which such power is exercised, and subsequent payments shall be made on the first day of each successive month thereafter. In the event that in any month the amount payable exceeds the amount due to the creditor from the debtor, the surplus shall be paid to any other creditors to the extent of their claims in the order of their priority and thereafter to the debtor.

4. A Contracting State whose rules of law do not provide for the obligations specified in paragraphs 2 and 3 may, to the extent specified in a separate declaration notified to the Depository, declare that it will not apply those paragraphs with regard to railway rolling stock specified in that declaration. Nothing in this paragraph shall preclude a person from agreeing with the creditor to perform the obligations specified in paragraphs 2 or 3 or affect the enforceability of any agreement so concluded.

5. Any initial or subsequent declaration made under this Article by a Contracting State shall not adversely affect rights and interests of creditors arising under an agreement entered into prior to the date on which that declaration is received by the Depository.

6. A Contracting State making a declaration under this Article shall take into consideration the protection of the interests of creditors and the effect of the declaration on the availability of credit.

**STEERING COMMITTEE**

**to build consensus around the provisional conclusions reached as regards the preliminary draft Space Assets Protocol to the Cape Town Convention on International Interests in Mobile Equipment by the Government/industry intersessional meeting held in New York on 19 and 20 June 2007:**

**LAUNCH MEETING**

**(Berlin, 7/9 May 2008)**

*WORKING PAPER ON THE SPHERE OF APPLICATION AND  
DEFAULT REMEDIES RELATING TO COMPONENTS*

*(prepared by the Government of Germany and the German Space Agency (D.L.R.))*

**I. Systematic nature of the Cape Town Convention and its Protocols**

1. The Aircraft Protocol and the Luxembourg Railway Protocol to the Cape Town Convention have a closely defined sphere of application. The Aircraft Protocol enables creation of an international interest in airframes, aircraft engines and helicopters and the Luxembourg Railway Protocol does the same for railway rolling stock. The enumeration given is conclusive.
2. With regard to items of these secured objects, the Cape Town Convention makes provision only to the extent that, pursuant to Article 29(7), the taking of security is to be possible under the relevant applicable law.

**II. Sphere of application of the Space Protocol**

3. The use of space equipment and the concomitant taking of security for the financing thereof is much more extensive and more complex than in the case of aviation and the railway sector; today it is already the case that there is a need for regulation in relation to a large number of different space assets and technological developments are not over yet.
4. To do justice to the needs resulting therefrom, in particular those connected with financing and the taking of security over such assets, the Space Protocol's sphere of application already has to be defined in broader terms than was the case with the parallel Protocols: besides covering satellites and space stations, the preliminary draft Protocol already includes numerous other assets in relation to which an independent international interest can be constituted under the Cape Town Convention.
5. Space assets can be the subject of an independent international interest only in so far as their differentiation and registration remains possible but above all only where securing and having recourse to such assets in the event of default does not impair ownership, rights in (particularly international interests) and the use of other independent space assets.

(a) *Results of the negotiations thus far*

6. Following the deliberations to date, agreement has manifestly been reached to the effect that security can be taken, under the Space Protocol, over at least satellites, space stations, space vehicles, launch vehicles, reusable space capsules in, or intended to be launched in or into, space or intended to be used as a launch vehicle.

7. The assets referred to share the common feature that – at least in relation to their fundamental purpose – they are capable of being independently operated, used and commanded. These properties at the same time enable operative accessibility to the asset over which security is taken and therefore a practicable chance of recourse in the event of default.

(b) *Further development of the present proposal to extend the sphere of application*

8. In addition to the space assets referred to, there are still a large number of other items linked to the individual space assets mentioned, which frequently have enormous commercial value and utility, which are regularly debt financed and in relation to which the possibility of the taking of security would therefore also be advantageous.

9. These other items can be classified into two categories: on the one hand, there are items (i) which can be operated, used and commanded solely in dependence on the linked space asset (e.g. propulsion devices and solar cell panels). On the other hand, there are those items (ii) whose dependence on the linked space asset is limited to the physical link and which can otherwise be operated, used and commanded independently (e.g. transponders and sensors). A decision on whether to include such items in the sphere of application is to be based on this distinction.

(i) The items referred to first would not – for want of operative access – be open to the possibility of recourse by a creditor who has been granted an interest in respect of such items. Furthermore, the problem would arise that an interest of this nature would be totally worthless if there were to be recourse to the linked space asset (and vice-versa). Hence, it makes no sense to include these items in the Protocol's sphere of application.

(ii) As regards the items referred to in the second place, there is, however, operative accessibility independent of the linked space asset, which makes recourse possible. Practicable possibilities of recourse are also conceivable where use of the linked asset is not impaired but there are other possibilities of recourse, under the Convention, which can impair the linked asset (and vice-versa).

10. The Protocol's sphere of application should therefore be extended only to those items that are capable of being independently operated and commanded. Items lacking in this capability should therefore remain excluded (new Article 1(2)(g)).

### **III. Balancing interests in the framework of the exercising of default remedies**

11. Where there is limited extension of the sphere of application to items that are capable of being independently operated and commanded, conflicts of interest can, however, develop between the parties involved in the event of default, especially between different creditors. Nevertheless, it may not be concluded, as a result of this risk of impairment of the rights in, or the use of an object through recourse to the other object linked thereto, that international interests can be allowed only in respect of one of these objects – for instance, in respect of the superordinate satellite or of the space station or also of the more valuable of the objects – and that the other linked parts are to be excluded as an independent secured object. This kind of categorical solution would not meet the

need for the taking of security over independently financed objects and it would also fail to take account of the fact that an impairment of the rights and the use of the other object will only occur where, in the event of default, steps are undertaken for the purpose of recourse.

12. A solution must rather be sought at the level where the problem of impairment of rights in the event of default is to be located in systematic terms and a regulation must be found in the domain of default remedies, being a regulation that reconciles the various interests. The UNIDROIT Committee of governmental experts also shared this view and has tried to find a corresponding solution in Art. IX(4), in conjunction with footnote 18, of the preliminary draft Protocol; this topic has not yet been definitively clarified.

(a) *Exercise of default remedies without impairment of the rights and interests of third parties*

(i) Physically linked space assets

13. Germany and the German Space Agency (D.L.R.), in its function as a member of the Space Working Group, therefore propose a provision to the effect that components are indeed to be included up to a certain extent as independent secured objects but that the avenues of recourse to such components are to be limited in such a manner that there is avoidance of impairments of ownership, rights in, and the use of other objects physically linked to the secured object (new Article IX(4)).

(ii) Functionally linked space assets

14. Such dependence of more than one space asset as is comparable to a physical link also exists where the space assets concerned are, of necessity, functionally synchronised. This can, for instance, be the case where several satellites are linked through an interposed orbital relay station and this entire constellation would no longer be able to function if an individual satellite were to be removed from the constellation. Here, too, recourse should only be possible to the extent that mutual impairment can be ruled out (new Article IX(5)).

(b) *Exercise of default remedies where third party rights and interests are safeguarded*

15. Restrictions on recourse must, however, meet their limit at the point where adequate account is otherwise taken of the interests of another protected creditor. It is therefore proposed that the restrictions on recourse should not take effect where the chargee taking recourse offsets the other chargee sustaining impairment as a result of the recourse taken, or where the parties agree on the recourse measure (new Article IX(6)).

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16. **Based on the foregoing considerations, the following proposals are made for adjustment of the text.**

**Article I(2)(g):**

**Space asset means**

**(i) satellite, space station, space vehicles, launch vehicle, reusable space capsules in, or intended to be launched in or into space or used, or intended to be used as a launch vehicle and**

(ii) any other uniquely identifiable item capable of being independently operated and commanded attached to, or intended to be attached onto the satellite, space station, space vehicles, launch vehicle, reusable space capsules.

**Article IX(4) - (6):**

(4) The creditor shall only exercise default remedies in accordance with Chapter III of the Convention in so far as this does not affect the use of, international interests in and other rights relating to other space assets physically linked to the secured space asset.

(5) The preceding paragraph shall apply with necessary modifications where space assets are not physically linked to each other but where the essential use of one such asset is not possible without the other asset.

(6) In the cases referred to in paragraphs 4 and 5, recourse shall be permitted where

- (a) the person impaired by recourse consents to the recourse or
- (b) the creditor offsets the impairment of the use of the international interest or of the other right in the space asset by taking equivalent technical measures.

**Additional proposal**

17. While this paper was being drafted, Germany and D.L.R. realised that – irrespective of the question of the taking of security over, and the having of recourse to components – there is a need for special temporary protection against recourse in respect of all secured objects during the launching phase, which represents a particularly delicate phase in both technical and financial terms, in order to keep them clear of all unnecessary disruptions. Otherwise, recourse to an individual secured object that is temporarily linked to other secured objects during this phase might, in certain circumstances, lead to a termination or postponement of the launch, so that assets are impaired on a much greater scale and extensive damage caused. Relative to the success of the entire project and the avoidance of immense total loss, short-term postponement of recourse seems reasonable. In this respect the following additional provision is proposed:

**Article IX(7)**

**The creditor shall not exercise default remedies in accordance with Chapter III of the Convention during the launching phase. The launching phase begins on arrival at the final launch position; it ends on arrival at the first orbital position or on departure from the final launch position on account of termination of the launch.**

STEERING COMMITTEE

**to build consensus around the provisional conclusions reached as regards the preliminary draft Space Assets Protocol to the Cape Town Convention on International Interests in Mobile Equipment by the Government/industry intersessional meeting held in New York on 19 and 20 June 2007:**

LAUNCH MEETING

**(Berlin, 7/9 May 2008)**

*WORKING PAPER ON APPLICATION TO DEBTOR'S RIGHTS AND RELATED RIGHTS*

*(prepared by the Government of Germany and the German Space Agency (D.L.R.))*

Unlike the cases of the Protocol on Matters specific to Aircraft Equipment and the Protocol on Matters specific to Railway Rolling Stock, provision has been made – in the version agreed at the first session of the Committee of governmental experts – for debtor's rights and related rights to be handled in the preliminary draft Protocol on Matters specific to Space Assets. As is apparent from footnotes 6 and 7 to the preliminary draft, the Protocol's handling of these rights goes back to a proposal made by the Space Working Group (UNIDROIT C.G.E./Space Pr./1/W.P. 13). However, at its first session, the Committee of governmental experts stated that further work would be needed to determine how the Convention and the preliminary draft Protocol were to be applied to these two new terms. This mandate will have to be complied with in the forthcoming deliberations.

Pursuant to Article 1(2)(a) of the preliminary draft Protocol, "debtor's rights" means all rights to performance or payment due to a debtor by any person with respect to a space asset; pursuant to Article 1(2)(f), "related rights" means any permit, licence, authorisation, concession or equivalent instrument that is granted or issued by, or pursuant to the authority of, a national or intergovernmental or other international body or authority to manufacture, launch, control, use or operate a space asset, relating to the use of orbits positions, and the transmission, emission or reception of electromagnetic signals to and from a space asset.

In the proposal referred to above, the Space Working Group suggested that it ought to be possible also to create an independent international interest in debtor's rights and related rights, in addition to an interest in "space assets". There are, however, considerable objections to such course of action:

(1) Under Article 2(2) of the Cape Town Convention on International Interests in Mobile Equipment, an international interest can only be created in a uniquely identifiable object of a category of objects listed in Article 2(3) and designated in the Protocol; the pertinent category under Article 2(3)(b) is the category of "space assets".

Consequently, in terms of the system followed therein, the Cape Town Convention, together with its Protocols, enables the taking of security only *in rem*, which means that security relates to an object ("asset-based"). But, in the case of debtor's rights and related rights, it is not objects in this sense that we are concerned with but rather subjective rights, which specifically do

not fall within a category referred to in Article 2 of the Convention. Hence, it would run counter to the system used if security were allowed to be taken over these rights, pursuant to the Protocol.

(2) The creation of an international interest in “debtor’s rights” and “related rights” would have to be effected in an assignment by way of security. But, under Article 2 of the Convention, an interest can be created only by virtue of a security agreement, a title reservation agreement or a leasing agreement. So, also from the perspective of creation through an assignment by way of security, a decision to allow an interest in debtor’s rights or related rights would run counter to the system followed.

(3) Related rights are, by virtue of the current definition, instruments that are granted or issued by, or pursuant to the authority of a national or intergovernmental or other international body or authority. As a general rule, these instruments (such as a permit, licence, authorisation or concession) are not transferable and therefore not negotiable. Creation of an international interest in these instruments would consequently be subject to the proviso of the granting/issuing authority actually being willing to allow a transfer for the purpose of the taking of security. This will generally not be the case. Moreover, recourse in the event of default - such as the use or sale of the instrument - will not, as a rule, be admissible.

(4) Under Article 8(1)(c) of the Convention, the chargee has, in the event of default, the right to collect or receive any income or profits arising from the management or use of the charged object, which means he has the right to exercise the debtor’s rights. A creditor who has had an interest in debtor’s rights granted to himself through an assignment by way of security would also not have more extensive rights.

On the one hand, it follows from this that, for systematic purposes, having access to debtor’s rights in the event of default is to be put on the level of recourse to, or exercising, an interest, and not on the level of interest creation. On the other hand, it is clear that there is no need to grant an interest in debtor’s rights, since this would not lead to any strengthening of the position of the chargee. The chargee’s position might actually be weakened where the space asset and the debtor’s right are given as security to different creditors. In order to secure the chargee’s overriding right of recourse or to prevent another overriding assignment of the debtor’s rights to third parties, it would – at most – be worth considering having priority provisions.

Hence, we propose that there be no application of the Protocol on Matters specific to Space Assets to “debtor’s rights” and “related rights” and that there be deletion of the relevant provisions from the text of the preliminary draft. Provisions to create an international interest in debtor’s rights or in related rights would run counter to the system followed in the Cape Town Convention with its principle of asset-based financing. No economic benefit is apparent that could justify this departure from the system followed.

**STEERING COMMITTEE**

**to build consensus around the provisional conclusions reached as regards the preliminary draft Space Assets Protocol to the Cape Town Convention on International Interests in Mobile Equipment by the Government/industry intersessional meeting held in New York on 19 and 20 June 2007:**

**LAUNCH MEETING**

**(Berlin, 7/9 May 2008)**

*MEMORANDUM*

*ON THE APPLICATION OF THE CAPE TOWN CONVENTION AND THE PRELIMINARY DRAFT  
PROTOCOL TO DEBTOR'S RIGHTS AND RELATED RIGHTS*

*(prepared by the UNIDROIT Secretariat)*

The Government of Germany and the German Space Agency (D.L.R.) have prepared a working paper on the application of the Cape Town Convention and the preliminary draft Protocol to debtor's rights and related rights. The conclusion of this paper is that the preliminary draft Protocol should not apply to debtor's rights and related rights and that the provisions related to such rights be, accordingly, deleted from the text of the preliminary draft Protocol.

The Secretariat, in the belief that, in considering such a proposal, the representatives of Governments and industry attending the forthcoming Steering Committee meeting might find it helpful to see how the current system established under the preliminary draft Protocol in this regard came into being, has appended to this memorandum a copy of three key documents:

- first, the memorandum on the importance for space assets of the inclusion of debtor's rights and related rights (then referred to as "associated rights") within the sphere of application of the Cape Town Convention (at the time still a preliminary draft Convention) and the proposed Space Protocol prepared by Mr D.A. Panahy, at the time assistant co-ordinator of the Space Working Group, for the second joint session of the UNIDROIT Committee of governmental experts for the preparation of a draft Convention on International Interests in Mobile Equipment and a draft Protocol thereto on Matters specific to Aircraft Equipment and the Sub-Committee of the I.C.A.O. Legal Committee on the study of international interests in mobile equipment (aircraft equipment), held in Montreal from 24 August to 3 September 1999;
- secondly, the proposal for the application of the Convention and the future Space Protocol to debtor's rights and related rights, tabled, following inclusion of these rights in the sphere of application of the preliminary draft Protocol during the first session of 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, held in Rome from 15 to 19 December 2003, during the second session of that Committee, held in Rome from 26 to 28 October 2004, by the Space Working Group; and

- thirdly, the diagram illustrating the issues involved in the extension of the Convention and the preliminary draft Protocol's application to debtor's rights and related rights under this proposal, submitted with the Space Working Group's original proposal in this regard submitted to 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 at its first session.

These materials are appended to this memorandum as Appendices I, II and III respectively.

## APPENDIX I



Sub-Committee of the ICAO Legal Committee on the study of international interests in mobile equipment (aircraft equipment)



UNIDROIT Committee of governmental experts for the preparation of a draft Convention on International Interests in Mobile Equipment and a draft Protocol thereto on Matters specific to Aircraft Equipment

ICAO Ref. LSC/ME/2-WP/7  
UNIDROIT CGE/Int.Int./2-WP/7  
(Original: English)

## SECOND JOINT SESSION

(Montreal, 24 August – 3 September 1999)

***PRELIMINARY DRAFT UNIDROIT CONVENTION ON INTERNATIONAL INTERESTS IN MOBILE EQUIPMENT:***

***MEMORANDUM ON THE IMPORTANCE FOR SPACE PROPERTY OF THE INCLUSION OF ASSOCIATED RIGHTS WITHIN THE SPHERE OF APPLICATION OF THE PROPOSED CONVENTION AND THE PROPOSED SPACE PROPERTY PROTOCOL***

*(prepared by Mr D.A. Panahy, Associate, Milbank, Tweed, Hadley & McCloy LLP, on behalf of Mr P.D. Nesgos, co-ordinator of the Space Working Group)*

## I. Overview

The preliminary draft UNIDROIT Convention on International Interests in Mobile Equipment (the "Convention") is designed first and foremost to create a uniform international system to register security interests in a variety of high-value mobile equipment including airframes, aircraft engines, oil rigs, containers, railway rolling stock, and space property and thereby reduce certain risks associated with asset-based financing of mobile equipment.

To address adequately the unique aspects of each category of mobile equipment, the Convention contemplates the formulation of individual protocols to govern each category of mobile equipment. A space property protocol will be particularly important because the nature of, and the jurisdictional issues involved with space property are quite different in many respects from other categories of mobile equipment. For example, space property is not within the territory of any

country once it is launched into space. Accordingly, the incorporation of “associated rights” with respect to space property remedy provisions is paramount to the operation of the future Space Property Protocol (the “Protocol”).

To clearly demonstrate the practical importance of “associated rights” and the unique characteristics of space property, the following discussion will examine the enforcement of security interests with regard to a satellite.

## **II. Importance of associated rights with respect to remedy provisions**

In the event of default, a creditor’s interest in “associated rights” to a satellite significantly aids the process of obtaining constructive repossession of such satellite. Although a satellite may be regarded as sophisticated mobile equipment, much of the value placed on a satellite is derived from various rights associated with the operation of that satellite. These “associated rights” include: (1) governmental licenses and permits the assignment of which is permissible under local law; (2) intangible rights necessary to control, operate or transfer ownership of, or rights in a satellite; (3) contractual rights relating to the launch and operation of a satellite; and (4) proceeds and revenues derived from the operation of a satellite. There is great significance in intangible rights and “control” in the context of “associated rights” such as governmental authorisations, intellectual property required to control, use and operate equipment, and contractual rights such as performance warranties. “Associated rights” are inextricably linked to a “physical” satellite and are integral to the commercial value of a satellite.

From a creditor’s standpoint, the most likely and effective remedy with respect to an orbiting satellite is the taking of constructive repossession (or control) through telemetry, tracking, and command (TT&C). The most expeditious means of taking control is by using the existing TT&C facility. As this may pose legal and practical difficulties, the obligee should be entitled to seek judicial relief in any country that would have “line of sight” of the satellite. Such exercise will be simplified if the obligee possesses “associated rights” such as governmental licenses, permits, intellectual property and other intangible or contractual rights necessary for control and operation of the satellite. As a practical matter, an obligee’s constructive repossession of a satellite cannot be assured without the appurtenant “associated rights” such as access to: (1) the relevant TT&C facility; (2) satellite command and control software; and (3) relevant satellite access codes.

The timeframe in which the above stated remedies can be enforced is of critical importance and may vary from one legal system to another. The effects of protracted justice and procedural delays are significant to obligees since equipment that requires immediate preservation, such as a satellite, necessitates speedy judicial relief. The Convention and Protocol contain a provision entitling an obligee that adduces *prima facie* evidence of default by an obligor to “speedy judicial relief” in the form of a variety of court orders. A Contracting State shall ensure that an obligee who adduces *prima facie* evidence of default by the obligor may, pending final determination of its claim and to extent that the obligor has so agreed, obtain speedy judicial relief in the form of such one or more of the following orders: (a) preservation of the object and its value; (b) possession, control or custody of the object; (c) immobilisation of the object; (d) sale, lease or management of the object; (e) application of the proceeds or income of the object. A creditor seeking to enforce remedies with respect to a satellite by means of the “speedy judicial relief” provision of the Convention and Protocol will benefit greatly from the “associated rights” to a satellite that allow such creditor promptly to effectuate a judicial order to obtain custody, possession, command and/or control of the asset.

From a creditor's or obligee's perspective, a satellite and its "associated rights" are inter-related commodities that function as a single asset. Exclusion of "associated rights" from a security interest in the satellite itself erodes the value of such satellite as collateral. For the aforementioned reasons, the inclusion of "associated rights" with respect to space property is vital to the future Space Property Protocol.

## APPENDIX II

**UNIDROIT COMMITTEE OF GOVERNMENTAL EXPERTS  
FOR THE PREPARATION OF A DRAFT PROTOCOL TO  
THE CONVENTION ON INTERNATIONAL INTERESTS IN  
MOBILE EQUIPMENT ON MATTERS SPECIFIC TO  
SPACE ASSETS  
Second session  
Rome, 26/28 October 2004**

UNIDROIT 2004  
C.G.E./Space Pr./2/W.P. 4  
Original: English

*PROPOSAL FOR THE APPLICATION OF THE CONVENTION  
AND THE SPACE ASSETS PROTOCOL TO DEBTOR'S RIGHTS  
AND RELATED RIGHTS*

*(by the Space Working Group)*

1. New definitions:

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

“related rights” means any permit, licence, authorisation, concession or equivalent instrument that is granted or issued by, or pursuant to the authority of, a national or intergovernmental or other international body or authority to manufacture, launch, control, use or operate a space asset, relating to the use of orbits and the transmission, emission or reception of electromagnetic signals to and from a space asset; \*

“rights assignment” means a contract which, by way of security, transfers to the assignee the chargee’s interest in debtor’s rights or related rights;

“rights security agreement” means an [agreement] [Ref. Art. 1(ii)] by which a chargor grants or agrees to grant to a chargee an interest (including an ownership interest) in or over debtor’s rights or related rights to secure the performance of any existing or future obligation of the chargor or a third person;

2. New provisions:

*Article IV – Application of the Convention to Debtor’s Rights and Related Rights*

IV. 1. As provided by the terms of this Protocol, the Convention provides for the constitution and effects of international interests in debtor’s rights and related rights, provided such rights are related to a space asset. [Ref. Art. 2]

IV. 2. For purposes of this Protocol, an international interest in debtor’s rights or related rights is an interest in debtor’s rights or related rights granted by the chargor under a rights security agreement and constituted under paragraph 3 [Ref. Art. 2(2)]

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\* The definitions of “debtor’s rights” and “related rights” included here are those reproduced in the text of the preliminary draft Protocol as revised by the Committee of governmental experts at its first session (C.G.E./Space Pr./2/W.P. 3).

IV. 3. An interest in debtor's rights or related rights is constituted as an international interest under this Protocol where the rights security agreement creating or providing for the interest:

- (a) is in writing;
- (b) relates to a space asset;
- (c) enables the debtor's rights or related rights and the space asset to which it relates, to be identified in conformity with Article VII; and
- (d) enables the obligations secured by the interest created or provided for by the rights security agreement to be determined, but without the need to state a sum or maximum sum secured. [Ref. Art. 7]

IV. 4. Registration of international interest in debtor's rights and related rights

(1) An international interest in debtor's rights and related rights may be registered [in the International Registry] by either party with the consent in writing of the other, but only if and no earlier than an international interest or prospective international interest in the space asset to which it relates is registered in favour of the same chargee. [Ref. New and Art. 20(1)]

(2) Any international interest registered pursuant to paragraph (1) may be amended or extended prior to its expiry by either party with the consent in writing of the other. [Ref. Art 20(1)]

(3) The subordination of an international interest to another international interest may be registered by or with the consent in writing at any time of the person whose interest has been subordinated. [Ref. Art. 20(2)]

(4) A registration may be discharged by or with the consent in writing of the party in whose favour it was made. [Ref. Art. 20(3)]

(5) The acquisition of an international interest by legal or contractual subrogation may be registered by the subrogee. [Ref. Art. 20(4)]

IV. 5. The following provisions of the Convention shall apply in relation to debtor's rights and related rights:

Articles 29 and 30 [Ref. Arts. 29 and 30] [To be further reviewed]

IV. 6. Effects of rights assignment

A rights assignment made in conformity with paragraph 7 also transfers to the assignee:

- (a) all the interests and priorities of the assignor under the Convention; and
- (b) the international interest in the related space asset. [Ref. Art. 31(1)]

IV. 7. Formal requirements of rights assignment

(1) A rights assignment transfers the international interest in the debtor's rights and related rights only if it:

- (a) is in writing; and
- (b) enables the debtor's rights or related rights to be identified.

(2) The Convention does not apply to a rights assignment that is not effective to transfer the international interest in the related space asset and associated rights [Ref. Art. 32(1) and (3)].

IV. 8. Default remedies in respect of international interests in debtor's rights and related rights

In the event of default by the chargor under a rights security agreement constituting an international interest in debtor's rights or related rights and the international interest in the related space asset, Articles 8, 9 and 11 to 14 of the Convention apply in the relations between the chargor and the chargee as if references:

(a) to the secured obligation were references to the obligation secured by the rights security agreement;

(b) to the security interest were references to the interest created by that rights security agreement;

(c) to the creditor and debtor were references to the chargee and chargor; and

(d) to the object were references to debtor's rights or related rights and the related international interest. [Ref. Art. 34]

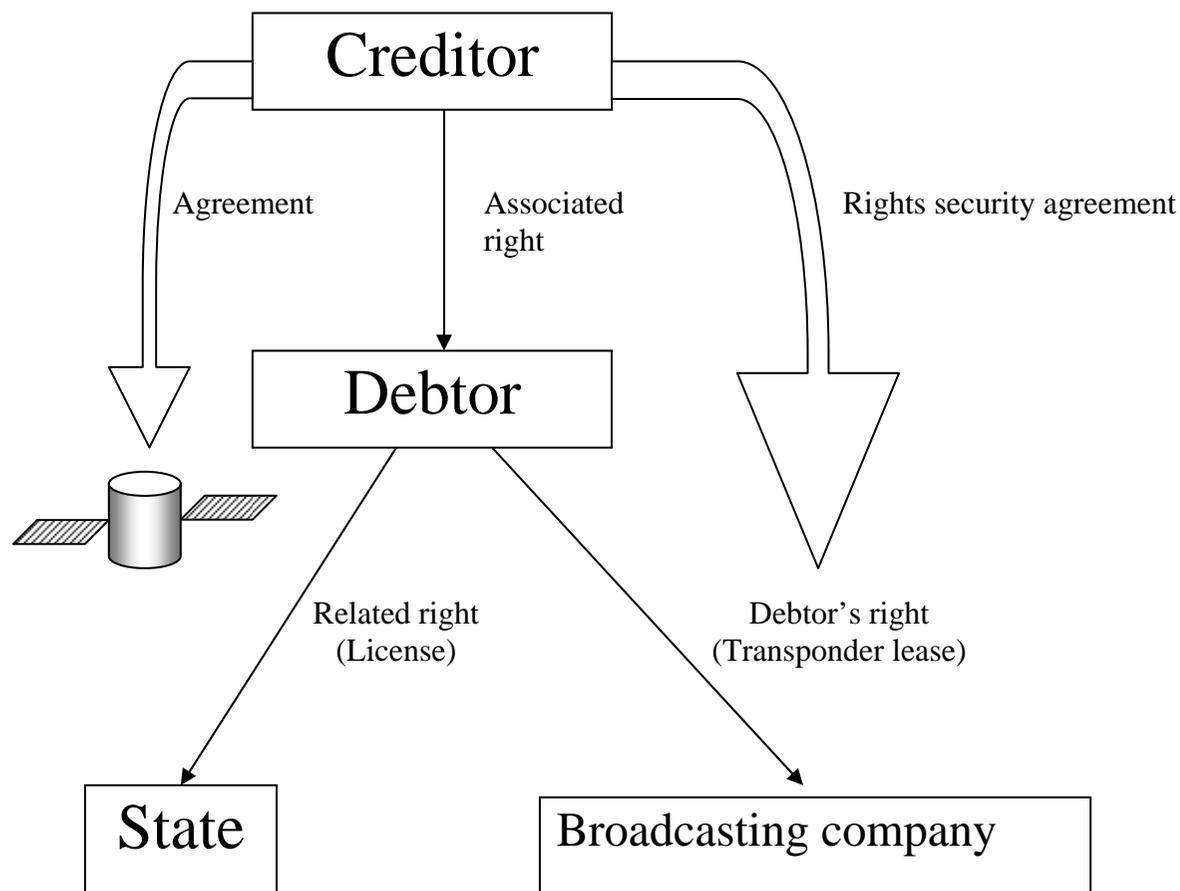
IV. 9. Relationship with the United Nations Convention on the Assignment of Receivables in International Trade

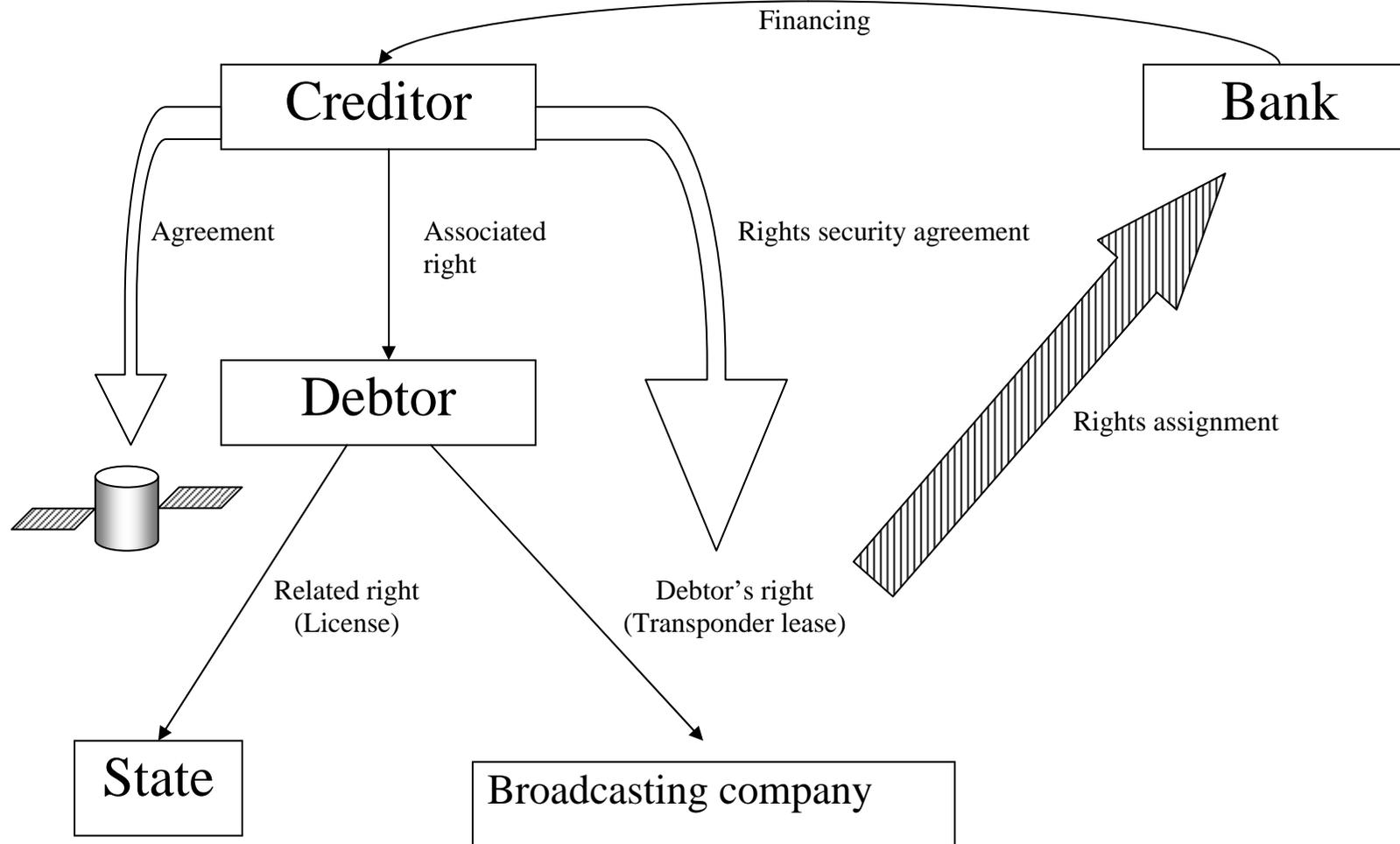
The Convention shall prevail over the United Nations Convention on the Assignment of Receivables in International Trade, open for signature in New York on 12 December 2001, as it relates to rights assignments. [Ref. Art. 45 bis]

Figure 1.

APPENDIX III

ATTACHMENT TO SPACE WORKING GROUP'S ORIGINAL PROPOSAL FOR APPLICATION OF CONVENTION AND SPACE PROTOCOL TO DEBTOR'S RIGHTS AND RELATED RIGHTS (UNIDROIT C.G.E./Space Pr./1/W.P. 13)





**STEERING COMMITTEE**

**to build consensus around the provisional conclusions reached as regards the preliminary draft Space Assets Protocol to the Cape Town Convention on International Interests in Mobile Equipment by the Government/industry intersessional meeting held in New York on 19 and 20 June 2007:**

**LAUNCH MEETING**

**(Berlin, 7/9 May 2008)**

*SOME GENERAL REMARKS ON HOW BEST TO ACHIEVE AN APPROPRIATE BALANCE BETWEEN CREDITORS' LEGITIMATE INTERESTS IN SPACE ASSETS, ON THE ONE HAND, AND THE INTERESTS OF STATES IN THE UNINTERRUPTED DELIVERY OF PUBLIC SERVICE, ON THE OTHER*

*(prepared by the Finmeccanica Group, including Finmeccanica, Telespazio and Thales Alenia Space)*

These remarks take their point of departure from the Interim Report, prepared by the UNIDROIT Secretariat, on the extent to which Article XVI (3) of the preliminary draft Protocol to the Cape Town Convention on Matters specific to Space Assets should provide limitations on the exercise of creditors' remedies in respect of space assets performing a public service.

1. *Right to use*

Among the remedies available to creditors having a legitimate interest in space assets, the step-in right (i.e. the right of a creditor to succeed to the position of a debtor) should be further qualified as granting the right to use the signals (in particular the signals emitted by satellites) with the same prerogatives granted to the debtor and under the same conditions of use.

2. *Direct protection under Protocol*

The step-in right of the creditor having a legitimate interest in space assets should be regulated by a sufficiently detailed set of provisions in the Protocol; only certain terms limited to the implementation of such a step-in right may be left to domestic legislation (e.g. identification of competent authority, proceedings).

3. *Step-in notice*

The exercise of the step-in right by the creditor should take effect automatically against the debtor, the State concerned and any third party upon notice by the creditor to the national authority (and the other identified entities, e.g. the debtor) of its stepping in, in accordance with the terms of the Protocol and any possible rules of its implementation provided for at national level.

4. *Warranty on the continuation of services*

By giving notification of stepping in, pursuant to the terms of implementation provided by domestic legislation, the creditor will commit to performing the services under the same conditions of use of the debtor; in particular, the creditor will commit vis-à-vis the State concerned to ensure the continuation of public services, also in the name and on account of the operator he will entrust with the performance of the services.

5. *Approved operator*

As a mandatory requirement of the notice of stepping in, and hence for the stepping in to be valid and effective, the creditor will have to appoint an operator who should be in possession of certain competencies and anyway be approved by the State concerned, in accordance with the terms of implementation provided for by national laws.

6. *Approval of operator by the State concerned*

Provided that the creditor is not substantially impeded in the exercise of his step-in right by discriminatory or unjustified measures, the State concerned should be able to implement any appropriate approval mechanism by its national legislation, which may contemplate a preventive authorisation prior to the signing of the financing contractual instruments or a subsequent authorisation at the time of execution by the creditor of such instruments (e.g. the appointment of an operator in the notice of stepping in may be required to be made in an official register of qualified operators, having technical and economic capacity, held under the responsibility of the competent authority).

7. *Sanctions for disruption*

Any interruption or other malfunctioning of the public services, that may be caused directly or indirectly by the creditor stepping in or anyway due to the operator appointed by him (including substantive violations of the national laws on the approval requirements, e.g. the loss of technical or economic capacity or cancellation from the register), should entitle the State concerned to take measures against the creditor and the operator, which may encompass the revocation of a step-in right in the most serious circumstances.

**STEERING COMMITTEE**

**to build consensus around the provisional conclusions reached as regards the preliminary draft Space Assets Protocol to the Cape Town Convention on International Interests in Mobile Equipment by the Government/industry intersessional meeting held in New York on 19 and 20 June 2007:**

**LAUNCH MEETING**

**(Berlin, 7/9 May 2008)**

*WORKING PAPER SUBMITTED BY THE FRENCH MINISTRY OF JUSTICE*

This Working Paper intends to present the French Ministry of Justice's preliminary views on the key outstanding issues in respect of the preliminary draft Space Protocol to the Convention on International Interests in Mobile Equipment.

This Working Paper cannot be seen as a binding or definitive position of the Government of France. Some internal discussions, on very important issues, are in process, particularly with the CNES (Centre National des Etudes Spatiales) and with the Ministry of Foreign Affairs.

It is understood that, at the Berlin Meeting, political issues such as the public service issue will not be discussed and will be left open for discussion within the Committee of Governmental Experts. The French Ministry of Justice is strongly in favour of such approach.

**1. Alternative version of the Preliminary Draft Space Protocol prepared by Sir Roy Goode**

The French Ministry of Justice wants to deeply thank Professor Sir Roy Goode for drafting this alternative version of the text. As a general comment, this new draft is more in line with the structure and the system set forth by the Cap Town Convention. This new draft also includes some of the preliminary conclusions (to the exception of certain issues i.e. the public service issue, which are not encompassed in this alternative version of the text) that have been reached through the different previous working sessions of the Steering Committee.

Subject to the opinion of the Secretariat of UNIDROIT, this new draft is certainly a very useful working document on the basis of which further drafting could be envisaged following this meeting of the Steering Committee as it is proposed by the Secretariat (i.e. *"the way forward: an explanatory note to the provisional order of business*, paper prepared by the UNIDROIT Secretariat).

**2. Debtor's Rights and Related Rights issue**

The French Ministry of Justice is of the opinion that:

- Debtor rights and Related rights cannot be governed by the same set of rules as per the Space Protocol since they are of a very different nature (private contractual rights on one hand/ rights given to a specific operator by a State on the other);

– Related rights are defined as *"any permit, licence, authorisation, concession or equivalent instrument that is granted or issued by, or pursuant to the authority of, a national or intergovernmental or other international body or authority to manufacture, launch, control, use or operate a space asset, relating to the use of orbits positions and the transmission, emission or reception of electromagnetic signals to and from a space asset"* (art. I. 2 (f) Space Protocol). These rights were given by a public entity to a clearly identified space operator and this public allocation was effected taking into consideration not only the private operator's capability and ability but also, broadly speaking, State interests (notably in terms of International liability). For that reason, it is difficult to admit that these rights, being part of the international interest could automatically be transferred to the holder of the international interest if the latter decides to implement his rights in case of default of the debtor. Hence, it is a reasonable approach to leave the question of cessibility and transferability of the related rights to domestic law (i.e. the law of issuance). On this specific issue, the French Ministry of Justice is very much in line with the approach followed by Professor Sir Roy Goode. In effect, a specific provision was drafted according to which: *"the Law pursuant to which related rights are granted or issued determines the extent to which those rights are transferable or assignable "* (art. II. 2. Alternative version of the SP drafted by Pr. Roy Goode).

– Debtor's rights are defined as *"all rights to payment or other performance due to a debtor by any person with respect to a space asset"* (Art. I. 2. (b) Space Protocol). Even though the inclusion of such rights in the security interest departs from thee mechanisms of asset based financing, the specificity of space assets as a guaranty pleads in favour of the inclusion within the scope of the Protocol of such rights. In effect, contrarily with aircraft or railway stocks, the economical value of the space asset is mainly composed by the debtor's contractual related rights, in particular, proceeds and revenues derived from the operation of a satellite. The French Ministry of Justice is of the opinion that the non-inclusion of the said rights would greatly undermine the usefulness of the UNIDROIT Space Protocol. However that does mean that such rights could as such and independently constitute a registrable International Interest. That only means that the holder on an International Interest on the space asset that has been registered, should also benefit, as a guarantee in case of default, from all the contractual rights which are derived from the operation of the satellite (an exception could be made for the IP rights which are given *"intuitui personae"* by a third party to the debtor).

### **3. Components**

It is to be recalled that the French Ministry of Justice is in favour of allowing a creditor to take an international security interest on a space asset under construction. It is believed that it is at this moment (i.e. the construction phase) that the availability of financing is crucial.

Subject to the results of further ongoing internal discussions, the French Ministry of Justice is, for the sake of practicability, in favour of narrowing the scope of application of the Space Protocol as regards components by listing principal objects - satellites, transponders, space stations, space vehicles etc...- that clearly are uniquely identifiable and registrable.

The French Ministry of Justice is currently reviewing the proposal made by Germany and DLR (*Working paper on the sphere of application and default remedies relating to components*). As a preliminary view, the solutions proposed by this paper appear to clarify the definition of space asset by putting forward technical criteria (operational independence and command). The other proposals (article IX (4)-(6)) are still under review, as well as the proposed article IX (7).