



**DIPLOMATIC CONFERENCE FOR THE ADOPTION  
OF THE DRAFT PROTOCOL TO THE CONVENTION  
ON INTERNATIONAL INTERESTS IN MOBILE  
EQUIPMENT ON MATTERS SPECIFIC TO  
SPACE ASSETS**

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

*as established by the UNIDROIT Committee of governmental experts for the preparation of a draft Protocol to the Convention on International Interests in Mobile Equipment on Matters specific to Space Assets at the conclusion of its fifth session, held in Rome from 21 to 25 February 2011, and authorised for transmission to a diplomatic Conference, for adoption, by the UNIDROIT Governing Council at its 90<sup>th</sup> session, held in Rome from 9 to 11 May 2011:*

**COMMENTS**

*(submitted by Governments, Organisations and representatives of the international commercial space, financial and insurance communities)*

**INTRODUCTION**

Subsequently to the comments on the text of the draft Protocol to the Convention on International Interests in Mobile Equipment on Matters specific to Space Assets (DCME-SP – Doc. 3) (hereinafter referred to as the *draft Protocol*) contained in DCME-SP – Doc. 6, the UNIDROIT Secretariat received additional comments from the Governments of Canada and the United States of America. This paper reproduces these additional comments hereunder. It should be noted that the comments of the Government of the United States of America also refer to the draft Final Provisions capable of embodiment in the draft Protocol (DCME-SP – Doc. 5) (hereinafter referred to as the *draft Final Provisions*).

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**COMMENTS AND PROPOSALS SUBMITTED BY GOVERNMENTS**

***Canada***

As we approach the diplomatic Conference that will be seeking to adopt a Space Assets Protocol to the Convention, Canada is concerned that there may not be sufficient clarity on the

implications of the draft Protocol from a treaty law perspective. We wish to address one issue in particular: the potential for conflicts with domestic law.

#### *Application of Vienna Convention on the Law of Treaties*

There seems to be a perception that the obligations in the draft Protocol will not actually affect how countries apply domestic law. The perception seems to be that, since one deals with private international law and the other is domestic law, the likelihood of any conflicts between the two is remote. It has also been suggested that, to the extent that a State believes that there might be a conflict between the two, this should not pose a problem in a practical sense since domestic law will automatically prevail. The delegations that have put forward this assessment have indicated that they would not consider themselves to be bound by Article 27 of the Vienna Convention on the Law of Treaties (hereinafter referred to as the *Vienna Convention*), which specifically addresses this scenario by specifying that compliance with domestic law shall not be a reason to avoid treaty obligations. These delegations have asserted that this provision would not apply because the Vienna Convention does not apply to treaties in the area of private international law.

Canada's understanding is that any international agreement intended to bind its Parties and governed by international law (i.e. for which no other system of applicable rules has been identified) would constitute a treaty under the Vienna Convention. The Vienna Convention does not make a distinction between treaties dealing with matters under public international law and those dealing with private international law. Accordingly, Article 27 of the Vienna Convention would apply to private international law treaties to the same degree that it applies to any other treaties. Suggesting that the draft Protocol would not be subject to Article 27 or the Vienna Convention more broadly would be, in Canada's view, a misinterpretation of international law.

This means that, if what is being negotiated here is meant to be a treaty rather than mere guidelines or a model law, Parties to the proposed Protocol could not, without specific allowances to the contrary, simply ignore the obligations without putting themselves in breach. Parties to the proposed Protocol would be under an obligation, under international law, to do what the proposed Protocol requires. For some States, these obligations will automatically be incorporated into domestic law upon ratification. For others, like Canada, obligations in a treaty must be given effect through domestic implementing legislation. In both cases, however, any obligations contained in the proposed Protocol would be fully binding in international law and, in accordance with Article 27 of the Vienna Convention, a Party could not invoke its domestic law to avoid having to abide by its international obligations.

#### *Potential conflict with domestic law*

The binding nature of a treaty means that the possibility of a conflict with a Party's domestic law is very real. Should the treaty require a Party to act in a way that would be contrary to its domestic law, the choice would be to breach either one or the other. The result would be either a violation of the Party's domestic law or a violation of international law.

The practical options in this scenario are limited. Where a country knows that certain elements of a treaty conflict with certain aspects of its domestic law, it could: (a) choose not to bind itself (e.g. by not ratifying) to avoid the conflict altogether; (b) change its domestic law before ratification to bring itself in full compliance with the treaty; or (c) qualify its obligations under the treaty with appropriate reservations, where permitted.

In this case, neither the Convention nor the draft Protocol permits reservations. They do permit, however, declarations that allow countries to "opt in" or "opt out of" certain provisions. The

draft Protocol can also be drafted to provide Parties with the ability not to apply certain obligations in certain cases. The difference, from a practical perspective, is that declarations apply only to those Parties that make them. By contrast, exceptions written into the draft Protocol, itself, do not require a Party to do anything to avail itself of this flexibility and they apply equally to all Parties rather than just those that make a declaration. As we are still in negotiations, both are still possible, though there could be preferences for one or the other. Canada emphasises, however, that to avoid conflicts without creating a breach of the draft Protocol or domestic law, such recourse should be provided in the draft Protocol itself to give Parties the ability to make a declaration or invoke an exception.

Canada raises this issue not in a hypothetical sense but because we see the potential for actual conflicts. We have noted, for instance, that the exercise of the default remedies could be prohibited, in some cases, by our export controls. Similarly, the exercise of these remedies could be prohibited, in certain scenarios, by our criminal law or by the licensing requirements applicable to telecommunications. We offer these here as examples, as there are other instances in which the obligations in the draft Protocol could conflict with Canadian law. We believe these should resonate, at least to some degree, with other countries involved in these negotiations, as we expect there would always be an interest in respecting criminal law, export controls and licensing requirements. It is not the purpose of this communication to delve into the more subjective question of whether the draft Protocol sufficiently addresses these. Canada merely wishes to explain the basis for its concern and set out our interpretation of what we believe the draft Protocol is meant to be from a treaty law perspective.

As a final point, our understanding is that the draft Protocol is meant to create binding obligations on States under international law. In particular, we understand the draft Protocol to bind its Parties legally, even though its substantive content may address private international law matters with effects on non-State actors. We interpret such provisions as creating an obligation on the Parties to the future Protocol to ensure that their domestic law allows for the exercise of these rights and obligations. We would welcome the views of other delegations on this question, including whether there are different views on the applicability of the Vienna Convention.

### ***United States of America***

- I. General comments: defer final action*
  - II. Second stage: Preparatory Commission*
  - III. Selected issues*
- I. General comments*

We thank the Government of Germany and the Ministry of Justice and the German Space Agency as well as UNIDROIT and its Secretariat and others who have made this meeting possible and have provided documentation for consideration by participating States, industry and others.

The general comments of our Government are largely in the same direction as those that we set out at the outset of the intergovernmental meetings at UNIDROIT in May 2010 and February 2011.

The Convention on International Interests in Mobile Equipment (hereinafter referred to as the *Convention*) and its first Protocol on aircraft finance (hereinafter referred to as the *Aircraft Protocol*), as well as the operation of the Registry set up to implement that Protocol, have evidenced the beneficial effect that modern secured finance can produce, if based on an effective

Protocol regime. We recognise the active role of our host Government and others in the development and implementation of that Protocol, as well as the finalisation of the second Protocol to the Convention on the financing of railroad equipment (hereinafter referred to as the *Rail Protocol*). Critical to the success of both those efforts was the broad support for those initiatives by the respective commercial sectors in those industries.

The United States has a clear policy supporting the development of economic and commercial uses of outer space. While we recognise the original interest in bringing to the space finance sector the benefits created by the prior Protocol for commercial airspace, our Government remains very concerned that important participants within the space commerce sector, including the diverse membership of the Satellite Industry Association (SIA) as well as companies in other countries that have expressed similar concerns, continue to adhere to the view that the approach taken in the draft Protocol does not achieve such benefits and that it should not now be concluded. We believe this necessitates further study and elaboration of the economic effects of the draft Protocol. In the absence of sufficient support from industry stakeholders, it is premature to adopt this draft Protocol. The United States supported that view at the May 2010 and February 2011 meetings and continues to do so.

In order to achieve economically useful goals, if in the future it is timely to conclude this draft Protocol, it would be important whenever possible to adhere to the approach that made the previous Aircraft Protocol successful. It is also important to avoid adopting Protocol provisions that apply disincentives to secured finance that are not applied to other financing methods in the space sector.

In addition, the U.S. considers it important that the draft Protocol avoid constraints on national regulatory and licensing regimes as well as on the control of exports and technology transfer.

In the context of our Government's general position on the draft Protocol, we will offer technical comments with a view to improve the credit finance effectiveness of the instrument for use at such time as broad industry support would warrant its adoption.

## *II. The second stage: Preparatory Commission*

We believe it is important to recognise the process employed to bring the Aircraft Protocol to a very successful result, which would presumably be applied to this draft Protocol as well. The Aircraft Protocol and the Rail Protocol, taken together with the Convention, provided a workable framework for a second phase, set out in Resolutions of the respective diplomatic Conferences. Those Resolutions provided for the establishment of a formal Preparatory Commission of States (commonly around 20 States with opportunities for others also to participate) with industry advisers to bring to a conclusion the second phase, i.e. designing and activating a new Registry system and the appointment of a Supervisory Authority for the Registry.

A Supervisory Authority can either be designated by the diplomatic Conference or chosen by the Preparatory Commission in accordance with Resolutions of the Conference (the latter is likely since whatever entity might be preferred may have its own approval cycle and that is not likely to be determined at the time the diplomatic Conference is concluded). The Preparatory Commission established for the Aircraft Protocol, for example, selected a Supervisory Authority (ICAO) which then confirmed the selection of a Registrar based on the selection process conducted by the Commission.

The Preparatory Commission process would include States participating in the negotiation as well as registry, industry and transactional experts, and would spell out the details for a Registry

system that would implement the general provisions and definitions of both the Convention and the Protocols. The general definitions need detailed elaboration in the second stage compatible with computer programming that are functional from a finance point of view.

As a practical matter, the equipment Registry can only be effective at any point in time as to those aspects of the equipment category covered by a Protocol for which filing and searching computer descriptions are workable. The flexibility necessary for the second phase was previously necessary for the Aircraft Registry and would be necessary as well for the Space Asset Registry so that it can incorporate changes in filing, technical descriptive, transaction and finance practices.

It is thus not until completion of the second phase and the new Registry system that most States and industry can gauge the effectiveness as well as costs of the new financing system and determine whether to support and implement the Protocol.

### *III. Selected issues*

#### *(a) Definitions*

Terms such as "space asset" (Articles 1(2)(l), VII and XXX) need to remain general for the purposes of the draft Protocol so that more detailed definitions which support registration and search criteria can be worked out when the Registry system and computer capability for financing purposes are established in the second phase. See II above.

#### *(b) Scope*

On balance, we support extending the coverage of the draft Protocol back to a point where the asset is sufficiently identifiable so that registration and search criteria can be effective before launch. This, coupled with registration of prospective interests, as is done under both prior Protocols, can provide flexibility to accommodate future financing practices. The existence of two or more potentially applicable systems of financing law has not proven to be a problem in aircraft finance under the Aircraft Protocol. Transactional parties to-day may file interests in multiple registry systems as is done for other secured financing. That said, we remain open to further elaboration of this issue.

#### *(c) Component financing - Article XVII*

For the draft Protocol to enlarge its potential value, on balance we believe component financing should be provided for. The concept of secured rights and priority against competing interests based on first to file, once perfected through a registry, should be maintained both for financing of objects such as satellites and for financing components thereof which have sufficient value for the credit industry to seek secured rights therein.

Priority issues that may arise between interests in separate but physically connected assets, such as a satellite vehicle as against hosted payloads or components that provide communications capacity etc., are almost uniformly resolved to-day by inter-creditor agreements. There is no necessary reason in financing practice to unsettle this practice. During the consideration of this issue we have seen that a default standard would create unnecessary complexity and is unlikely to be acceptable to market participants.

We recommend that proposed Alternatives B and C of Article XVII(3) be deleted. In the unlikely event that parties would agree to the introduction of components and the financing of those components without inter-creditor agreements, those parties in those few cases would assume the risks of not clarifying those rights.

(d) *National licensing requirements, technology and export controls, and related regulatory system requirements – Article XXVI*

The drafting of Article XXVI and related Articles such as Article XX should be reviewed to ensure that national regulatory and licensing regimes are preserved, without the need for a declaration, and that the provisions of the draft Protocol are not a basis upon which to assert non-compliance rights as to those regimes.

With respect to sub-paragraph 2(a) of the alternative text of Article XXVI, and subject to resolving drafting issues, including an option for a State to regulate the creation of an interest as well as the enforcement of such an interest may be of value for States that chose that.

(e) *Public services - Article XXVII*

We continue to recommend deletion of this provision. The responsibility for providing for continuity of service generally falls on the entity procuring the service and/or a licensing State's regulatory authorities, as foreseen by Article XXVII(2) of the draft Protocol. We note that a definition of what may constitute "public services" still has not been formulated. Limitations on enforcement of rights of this nature do not generally exist for current sources of financing in this sector, which has not been an impediment to the development of commercial activities in space. For example, bank lending on the basis of corporate balance sheet and estimated income factors, a leading source of private sector financing for space activities to-day, would be unaffected by the draft Protocol. Thus it is likely that to load new types of enforcement obstacles on secured financing not applicable to alternative finance methods could render secured finance non-competitive. We recognise the efforts to formulate alternative approaches which will be considered but note that constraints would have to avoid materially decreasing or delaying recovery of loss.

(f) *Insurers' revenue salvage and title salvage interests*

We now join those who recommend that the provisions of paragraphs 4 and 5 of Article IV should be deleted. It would then parallel the Aircraft Protocol, which does not deal with the interrelationship between insurers' salvage rights and other interests. This would return those issues to the *status quo ante*, i.e. leaving the relative rights and priorities between those insurance interests and secured interests to be resolved by the applicable law, as is now the case absent the draft Protocol. We recommend then that a provision be added along the lines of nothing in this Protocol affects the rights of insurers under the applicable law relating to revenue salvage or title salvage, which we understand that space insurance interests have requested.

(g) *Entry into force and applicability of the Registry system*

Article C of the draft Final Provisions and provisions in the draft Protocol relating to the establishment of the Registry, as well as Resolutions of the diplomatic Conference regarding the Preparatory Commission, should clarify two related points. First, notwithstanding that the requisite number of States have become parties, until the Registry is certified by a specified entity as operational the future Protocol should not enter into force and, secondly, the future Protocol will only apply to those classes of interest and asset for which filing and searching criteria have already been approved and are operational. This is necessary to avoid a gap between the time when the future Protocol would apply and the time when transacting parties can file or search interests for any particular class of asset or interest with reliance thereon to provide a basis for priority. Removing the brackets from the language in Article I(2)(i) would be appropriate for that clarification.

These issues have been clarified in part for the Rail Protocol, for example by conditioning application of that Protocol upon certification by a body specified that the Registry is operational, and further qualified by requiring that the certification rest partly on a determination that a sufficient volume of transactions and filings was estimated to be likely to result from States ratifying the future Protocol so as to make the Registry economically feasible.

*(h) Definitional relationship with the Aircraft Protocol – Article II(3)*

The provision dealing with a potential overlap between the two Protocols should provide that, if the object qualifies for coverage under the Aircraft Protocol, that Protocol should govern. The Aircraft Protocol has now reached the level of over fifty States Parties, and the interests there represented are of a magnitude that require this certainty.

The future Commentary may be helpful by describing non-binding examples of assets which are commonly intended to fall within the scope of the draft Protocol and would not fall within that of the Aircraft Protocol, such as certain re-usable launch vehicles and vehicles capable of space operations independent of launch and re-entry but not capable of sustained flight in the atmosphere. The future Commentary can also clarify the fact that limited passage through airspace toward functional operation of a satellite in space does not trigger application of the Aircraft Protocol.

*(i) Remedies on insolvency – Article XXI*

Based on the resolution at the O.E.C.D. under the revised Aircraft Sector Understanding (A.S.U.) with regard to Convention financing, we now recommend that Alternative B of this provision be deleted. All States Parties to the future Protocol would still retain the option of applying their national law on the subject, since selecting the remaining Alternative A would remain optional.

It is instructive that the O.E.C.D. has limited permissible export agency finance discounts under the Convention to those recipient States only that select Alternative A. That is because the proposed Alternative B does not produce credit value. It is also instructive that virtually all States Parties to the Convention that seek financing benefits under that regime have selected Alternative A, which has become a standard. Similar provisions are set out in Alternative A of the draft Protocol.

The United States reserves the ability to extend these comments and to provide other substantive and drafting recommendations at the Conference as appropriate.