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

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. 6
Original: English

COMMENTS BY GOVERNMENTS AND INTERNATIONAL ORGANISATIONS

(*Comments by the Government of the United States of America)*

The United States is pleased to respond to the request of the Secretariat of UNIDROIT for comments on the issues selected in the proposed agenda, and to participate in its second intergovernmental meeting on the preliminary draft Protocol on finance for outer space activities.

We are in accord with the views expressed in paragraph 2 of the Explanatory Note to the draft Agenda (C.G.E./Space Pr./2/W.P. 2). Expansion of commercial activities in outer space in a manner that can bring benefits to States at all levels of economic development is a goal that we support. A successful space finance Protocol to the Cape Town Convention can facilitate that goal and make available new and reliable sources of finance at lower cost for outer space activities through modern secured financing. For that to take place the preliminary draft Protocol must enhance the legal framework for secured finance, since space-based activities are currently too high-risk to support that type of financing internationally. Absent such a treaty-based system for securing lenders' rights, space activities will not benefit from the current expansion of modern finance in other sectors, including airspace, which will result from the Cape Town Convention's provisions.

With regard to the six items proposed for discussion under the draft Agenda recommended by the Secretariat, our preliminary views are as follows:

First, the concept of "space assets" needs to be formulated so as to promote effective financing under the preliminary draft Protocol and the underlying Cape Town Convention. It should neither rely on nor affect concepts of space objects for any other purpose, including the Outer Space treaty system. In line with this view, we believe the first intergovernmental meeting correctly extended the scope of that term to include, in addition to satellites and other assets already in orbit, identifiable components such as transponders, objects manufactured in space, assets under manufacture intended to be placed in outer space and reusable launch vehicles or other assets that are placed in space and returned to Earth. Suggestions to include ground control assets such as satellite dishes or telemetry, tracking and control equipment, and facilities as well as land were not supported, since coverage of those would implicate national real property and other laws which are beyond the purpose of, and the likely achievability of this preliminary draft Protocol.

Secondly, we welcome the initiative of the Space Working Group set out at the first intergovernmental meeting and reflected in document C.G.E./Space Pr./2/WP.4, which would extend the provisions on financing to include project finance concepts widely employed for infrastructure financing. This extends financing provisions so as to be able to cover pre-launch phases and allows more flexible financing for ongoing satellite operations. That initiative will make this preliminary draft Protocol fit the space finance field and match modern financing mechanisms with the needs of the new age of space-based services. We note that its provisions will need to be reflected in our work on the new notice-filing registry as well.

Thirdly, we believe Article IX(4) is sufficient as drafted and is in accord with existing commercial space financing practice. All space financing to-day necessarily takes into account related interests in vehicles and in components. Inter-creditor agreements are required for space finance and their enforcement is of course important to give markets the assurances needed. However, there is no single model and no general priority given either to interests in the vehicle or to components; instead, these are worked out depending on the circumstances of each operating satellite, the extent of separately financed interests and the weight accorded those interests, etc., which are then reflected in the appropriate inter-creditor agreements. All parties are on notice of their relative rights in the event of the default of another party. Seeking to impose a general default rule is not needed and would be counter-productive, regardless of which way it went, since it would introduce a presumption at odds with space financing practices.

Fourthly, we believe providing an option for States to permit additional financial assurances pending determinations of national authorities as to transferability of rights to secured interest holders is a highly important factor in making the preliminary draft Protocol competitive in capital markets. It was properly recognised that national regulatory regimes would need to be satisfied prior to transferability and that the preliminary draft Protocol clearly preserves such regimes. In order to balance the negative credit effects of possible delay and uncertainty associated with application of national regulatory regimes (e.g. technology transfer regulations, regulations concerning orbital position and associated radio frequency use, or licence transfer and assignment proceedings), however, alternative protections for creditors are needed. The most important is assurance of the contractual rights to performance and payment, including repatriation, generated by space assets pending determination by national regulatory authorities and an optional declaration whereby States can choose to limit the periods of time for such decisions. Secondary assurances can include optional use of powers of attorney to initiate requests for transfer of rights, comparable to that set out in the Aircraft Finance Protocol and optional assurances on procedures, if any, for pre-approval of backup operators and transferees, including the deposit of satellite access codes with a mutually agreeable escrow agent.

Fifthly, Article X(5) as drafted allows parties to exclude the application of Article 13(2) of the Convention. Article 13(2) allows a court or other authority to take into account alleged breaches by a creditor of obligations owed to the debtor in considering whether to grant special or expedited relief under Article 13. We can be informed by prevailing practice in the aircraft finance field, where excluding that possibility is often an important negotiated term of mobile equipment financing arrangements. Aircraft not only have a higher credit risk profile than ground-based equipment: their very mobility creates yet more risk and, left by itself, would require much higher credit costs. Those costs can be lowered and brought within the reach of many more borrowers by negotiated exclusion of common bases for substantially delaying initial recovery by a creditor, although adjustment of those rights may take place in other causes of action at a later time. To fail to allow this, and other, often negotiated and cost-critical optional exclusions would not only run counter to existing space finance practices but actually reduce the likelihood of credit extension into what is already a risky market.

Sixthly, whilst Article XVI as redrafted was intended to preserve national regulatory approval prior to the transfer of rights, carving out a broad special priority for "public services", the meaning of which can vary widely, is inconsistent with any effort to bring secured finance to the field of outer space activities. Since secured finance lenders rely on the use of the assets covered to overcome otherwise high risks, a special open-ended obligation of this nature would effectively convert secured lenders into being guarantors of the first operator's obligations. Such an approach would sharply limit the preliminary draft Protocol's effectiveness in bringing commercial secured financing to outer space activities. A possible alternative would be, as suggested at the first intergovernmental meeting, to limit that requirement to certain specified life-saving functions. Another possible alternative would be to provide that a State imposing such a requirement at the time transfer is requested must acquire that satellite capacity through purchase or a legal mechanism that compensates the secured lender at market value for it. It should be noted that the Aircraft Finance Protocol carefully avoided such a broad public service obligation, because of the highly negative effect it would have on the viability of that Protocol. Since airspace commerce is far less risky than space-based commerce, that concern is even greater for a space finance Protocol.

In addition, we note that, while not presently listed by the Secretariat as a recommended agenda item, the subject of insolvency effects on creditor's and debtor's rights needs to be discussed and progress made on that as soon as possible. The corresponding provisions in the Aircraft Finance Protocol, Articles XI and XII, are amongst the most important provisions in that text as far as concerns the viability of that Protocol in capital markets. Article XI, Alternative A would need to be examined as to its adequacy to assure, subject to national regulatory approval processes, where applicable, sufficient entitlement to constructive possession and new alternatives may need to be examined. We note that Article XII, which calls for cross-border co-operation, will likely be even more important in space finance than airspace finance and consideration should be given to strengthening it.

Finally, we look forward to continuing the examination of notice-filing registry requirements at a meeting of the *ad hoc* registry task force during the upcoming October session, with a view to consideration of those issues at the future third intergovernmental meeting in 2005.