INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW
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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
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REVISED PRELIMINARY DRAFT PROTOCOL TO THE CAPE TOWN CONVENTION ON MATTERS SPECIFIC TO SPACE ASSETS

(as amended by the Committee of governmental experts at its fourth session, held in Rome from 3 to 7 May 2010)

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 revised preliminary draft Protocol to the Convention on International Interests in Mobile Equipment on Matters specific to Space Assets as amended by the Committee of governmental experts at its fourth session, held in Rome from 3 to 7 May 2010 (C.G.E./Space Pr./5/W.P. 3) (hereinafter referred to as the *revised preliminary draft Protocol*), the UNIDROIT Secretariat received additional comments and proposals from the Governments of Italy and Japan. This paper reproduces these additional comments hereunder.

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COMMENTS AND PROPOSALS SUBMITTED BY GOVERNMENTS

Italy

At its fourth session, held in Rome from 3 to 7 May 2010, the Committee of governmental experts decided to draw up three alternative formulations of Article I(3) of the revised preliminary draft Protocol.

Article I (3) seeks to provide a connecting factor by which to identify the Contracting State in which "the space asset is situated" or "from which the space asset may be controlled" for the purposes of Articles 1(2)(n), 43 and 54(1) of the Cape Town Convention and Article XXIII of the revised preliminary draft Protocol. The Contracting State referred to in Article I(3) of the revised preliminary draft Protocol is that State the courts of which would have the power to hear actions brought under the Cape Town Convention and the future Space Protocol between private parties.

The three Alternatives which the Committee of governmental experts came up with at its fourth session have to be seen against the background of the rule on this point as it stood at the beginning of that session: this rule had taken the State of registry as defined in the 1975 United Nations Convention on Registration of Objects Launched into Outer Space (REG) as the connecting factor for these purposes.

This criterion, however, was considered to be incomplete at the fourth session of the Committee, first, because the REG has only been ratified by 51 States, which was not considered to cover a sufficient number of the States regularly engaging in the relevant types of transaction and, secondly, because there are other international legal instruments that also refer to the "State of registry".

Two of the Alternatives proposed in the current text of Article I(3) employ *de facto* criteria, namely "the territory [where] a mission operation centre for the space asset is located" (Alternative A) and "the territory [from which] the space asset may be controlled" (Alternative B), while the third Alternative refers once again to a legal criterion, namely "the registry [on] which the space asset is carried for the purposes of the 1967 United Nations Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies". None of these alternatives has yet emerged as an ideal solution.

In the light of the foregoing, the Government of Italy would propose that, in addition to the three alternative formulations of Article I(3) currently found in the revised preliminary draft Protocol, a fourth alternative should be offered, making reference to all those legal instruments permitting the identification of the State of registry and, to cover those cases where the State of registry will not be identifiable because the space object has not been registered, also containing a *de facto* criterion. This is intended as an additional Alternative and not as a total replacement of the three Alternatives already contained in the text of the revised preliminary draft Protocol. The text of such a fourth Alternative might read as follows:

> *"In Articles 1(2)(n), 43 and 54(1) of the Convention and Article XXIII of this Protocol, references to a Contracting State on the territory of which an object or space asset is located or situated shall, as regards a space asset when not on Earth, be treated as references to a Contracting State on the registry of which the space asset is carried for the purposes of:*
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> *(a) the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, signed at London, Moscow and Washington, D.C. on 27 January 1967;*
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> *(b) the Convention on Registration of Objects Launched into Outer Space, signed at New York on 14 January 1975; or*
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> *(c) United Nations General Assembly Resolution 1721 (XVI) B of 20 December 1961.*
>
> *When the State of registry is not identifiable under the mentioned international legal instruments, references to a Contracting State on the territory of which an object or space asset is located or situated shall, as regards a space asset when not on Earth, be treated as references to a Contracting State on the territory of which a mission operation centre for the space asset is located".*

Japan

1. The Government of Japan welcomes the outcome of the productive discussions at the intersessional meetings of the Informal Working Groups on default remedies in relation to

components and limitations on remedies held in October 2010 and, while reserving its official position on the proposals made in footnotes 1 and 5 to C.G.E./Space Pr./5/W.P. 3, would like to make some brief comments on certain issues for the time being.

2. The Government of Japan has, on several occasions during the course of the discussions on the revised preliminary draft Protocol, stated that the future Protocol must be a commercially viable instrument. Otherwise, the goal of facilitating the financing of space assets and promoting the commercial use of outer space would not be achieved. The Government of Japan reiterates this basic understanding of the planned Protocol.

In this respect, not a small concern remains with regard to Article XXVII *bis* on limitations on remedies in respect of public service. Fully acknowledging the importance of maintaining public service, this Government believes that this issue is better left to be developed by practice, through which a practical solution acceptable to all the relevant parties will emerge. Therefore, it is preferred that neither Alternative A, Alternative B nor the proposed new Alternative C be adopted.

3. As regards the proposed new Alternative C of Article XXVII *bis*, the Government of Japan notes the remark in the footnote to this Article denoted by a single asterisk that "[i]t was proposed by the Informal Working Group that this or any other rule on the subject that might be included in the planned Protocol should be subject, on the one hand, to the possibility for States […] to opt into the rule and, on the other, to the possibility for the parties to the agreement providing for the public service to contract out."

In the light of the requirement that the planned Protocol be commercially viable and conducive to the space business, as repeatedly confirmed by so many delegations on so many occasions, the Government of Japan finds the double flexibility suggested by this footnote to be important and, in the event that Alternative C is ultimately adopted, strongly supports its incorporation in the Article. Incorporation of the opting-in mechanism would be in line with the basic idea that has proven successful with the Aircraft Protocol and, therefore, has good reason to be adopted here as well. It is added that such flexibility would benefit the States making use of this Article, because the public service to be provided by the space asset could be protected by the Article when it was desirable to do so, while the owner of the space asset located in the State could still benefit from more advantageous financing conditions by contracting out of the protection when such protection was found unnecessary.

4. Of the three Alternatives suggested for Article I(3), the Government of Japan believes that the general reference to the "Contracting State from the territory of which the space asset may be controlled" in Alternative B is the most appropriate.

Article I(3) is relevant for the purposes of Articles 1(2)(n) (internal transaction), 43 (jurisdiction in the case of relief pending final determination) and 54(1) (types of relief available) of the Cape Town Convention. Therefore, a reference to the physical mission operation centre, as in Alternative A, may not be appropriate. Further, a space asset could have more than one mission operation centre, which could raise difficulties in practice.

On the other hand, because the Cape Town Convention in general and the revised preliminary draft Protocol in particular are private law instruments, references to public law instruments, as in Alternative C, are better avoided.

5. The Government of Japan hopes for the early completion of the work of UNIDROIT on the revised preliminary draft Protocol and confirms its willingness to contribute to the discussions at the fifth session of the Committee of governmental experts on the abovementioned and other issues.