

INFORMATION MEETING OF THE COUNCIL OF THE INTERNATIONAL TELECOMMUNICATION UNION

(Geneva, 13 October 2011):

NOTE

for the attention of those attending the information meeting on the implications of the International Telecommunication Union acting as Supervisory Authority of the international registration system for space assets to be established pursuant to the future Space Assets Protocol

(prepared by the UNIDROIT Secretariat)

I. INTRODUCTION

1. The Secretariat of the International Institute for the Unification of Private Law (UNIDROIT) is grateful to the Secretariat of the International Telecommunication Union (I.T.U.) for its kind invitation to address members of the I.T.U. Council at the information meeting that it has organised for 13 October 2011. This Note is intended to provide background information for those attending that meeting on:

(a) *the draft Protocol to the Convention on International Interests in Mobile Equipment on Matters specific to Space Assets* (hereinafter referred to as the *draft Protocol*), prepared by a UNIDROIT Committee of governmental experts, that has been submitted for adoption - following a decision taken by the UNIDROIT Governing Council at its 90th session, held in Rome from 9 to 11 May 2011 - to a diplomatic Conference to be hosted by the Government of the Federal Republic of Germany in Berlin from 27 February to 9 March 2012; and

(b) given the interest manifested by the I.T.U. Secretariat both during the intergovernmental consultation process to date and at the 90th session of the UNIDROIT Governing Council in the I.T.U. being considered as a potential candidate to assume the functions of Supervisory Authority of the international registration system for space assets to be established pursuant to the future Space Assets Protocol, the implications of the I.T.U. in fact acting in that capacity, both in terms of the functions that would devolve on it under the combined effect of the Convention on International Interests in Mobile Equipment (hereinafter referred to as the *Convention*) and the draft Protocol and the process to be set in train for the establishment of a future International Registry for space assets.

II. THE BASIC CONVENTION REGIMEN

2. The draft Protocol is designed to implement the Convention, opened to signature in Cape Town on 16 November 2001, for space assets. The Convention sets out the overall framework for an international legal regimen that provides for the registration and enforcement of international interests in high-value mobile equipment of a type that either moves across or beyond national borders in the ordinary course of business. The term “international interest” introduced by the Convention covers an interest in such equipment granted by the chargor under a security agreement, vested in a person who is the conditional seller under a title reservation agreement or vested in a lessor under a leasing agreement.¹ The cross-border mobility of such equipment may, through the different legal regimes potentially applicable to disputes concerning such equipment, the source of legal uncertainty and risk for prospective creditors, which will normally cause an increase in the cost of financing, which may often be prohibitive, particularly for small operators and start-up companies. The Convention regimen is, therefore, intended to help these companies in particular to find the investment capital needed to launch

¹ Cf. Article 2(2) of the Convention.

new enterprises by using the mobile assets being financed as security for potential investors and, at the same time, giving creditors the legal assurances they need to extend this investment capital at a reasonable and affordable rate.

3. The Convention - which has, at present, 49 Contracting Parties, including one Regional Economic Integration Organisation² - is designed primarily to apply to three categories of high-value asset through separate Protocols: aircraft objects, railway rolling stock and, now, space assets.³ Each Protocol deals with the specific technical needs of the category of asset to which it applies and, in this way, ensures that the Convention regimen has sufficient flexibility to adapt to industry needs, wherever necessary.⁴ The first Protocol adopted was the highly successful Protocol on Matters specific to Aircraft Equipment (hereinafter referred to as the *Aircraft Protocol*), also opened to signature in Cape Town on 16 November 2001. This instrument has 41 Contracting Parties, again including a Regional Economic Integration Organisation.⁵ The second

² These Parties are as follows: Afghanistan (date of accession: 25 July 2006), Albania (date of accession: 30 October 2007), Angola (date of accession: 30 April 2006), Bangladesh (date of accession: 15 December 2008), Belarus (date of accession: 28 June 2011), Cameroon (date of accession: 19 April 2011), Cape Verde (date of accession: 26 September 2007), the People's Republic of China (date of ratification: 3 February 2009), Colombia (date of accession: 19 February 2007), Costa Rica (date of accession: 26 August 2011), Cuba (date of ratification: 28 January 2009), Ethiopia (date of ratification: 21 November 2003), the European Union (date of accession: 28 April 2009), Fiji (date of accession: 5 September 2011), Gabon (date of accession: 16 April 2010), India (date of accession: 31 March 2008), Indonesia (date of accession: 16 March 2007), Ireland (date of accession: 29 July 2005), Jordan (date of ratification: 31 August 2010), Kazakhstan (date of accession: 21 January 2009), Kenya (date of ratification: 13 October 2006), Latvia (date of accession: 8 February 2011), (Luxembourg (date of accession: 27 June 2008), Malaysia (date of accession: 2 November 2005), Malta (date of accession: 1 October 2010), Mexico (date of accession: 31 July 2007), Mongolia (date of accession: 19 October 2006), the Netherlands (for the Netherlands Antilles and Aruba) (date of accession: 17 May 2010), New Zealand (date of accession: 20 July 2010), Nigeria (date of ratification: 16 December 2003), Norway (date of accession: 20 December 2010), Oman (date of accession: 21 March 2005), Pakistan (date of accession: 22 January 2004), Panama (date of ratification: 28 July 2003), the Russian Federation (date of accession: 25 May 2011), Rwanda (date of accession: 28 January 2010), Saudi Arabia (date of ratification: 27 June 2008), Senegal (date of ratification: 9 January 2006), the Seychelles (date of accession: 13 September 2010), Singapore (date of accession: 28 January 2009), South Africa (date of ratification: 18 January 2007), Syria (date of accession: 7 August 2007), Tajikistan (date of accession: 31 May 2011), Togo (date of accession: 25 January 2010), Turkey (date of ratification: 23 August 2011), the United Arab Emirates (date of accession: 29 April 2008), the United Republic of Tanzania (date of ratification: 30 January 2009), the United States of America (date of ratification: 28 October 2004) and Zimbabwe (date of accession: 13 May 2008).

³ Cf. Article 2(3) of the Convention. However, Article 51(1) of the Convention gives UNIDROIT, as Depositary, the right to consider the case for extending the application of the Convention to other categories of mobile equipment too.

⁴ In the event of a conflict between a provision of the Convention and a provision of a Protocol, the Protocol will prevail (cf. Article 6(2) of the Convention).

⁵ These Parties are as follows: Afghanistan (date of accession: 25 July 2006), Albania (date of accession: 30 October 2007), Angola (date of accession: 30 April 2006), Bangladesh (date of accession: 15 December 2008), Cameroon (date of accession: 19 April 2011), Cape Verde (date of accession: 26 September 2007), the People's Republic of China (date of ratification: 3 February 2009), Colombia (date of accession: 19 February 2007), Cuba (date of ratification: 28 January 2009), Ethiopia (date of ratification: 21 November 2003), the European Union (date of accession: 28 April 2009), India (date of accession: 31 March 2008), Indonesia (date of accession: 16 March 2007), Ireland (date of accession: 23 August 2005), Jordan (date of ratification: 31 August 2010), Kazakhstan (date of accession: 1 June 2011), Kenya (date of ratification: 13 October 2006), Latvia (date of accession: 8 February 2011), Luxembourg (date of accession: 27 June 2008), Malaysia (date of accession: 2 November 2005), Malta (date of accession: 1 October 2010), Mexico (date of accession: 31 July 2007), Mongolia (date of accession: 19 October 2006), the Netherlands (for the Netherlands Antilles and Aruba) (date of accession: 17 May 2010), New Zealand (date of accession: 20 July 2010), Nigeria (date of ratification: 16 December 2003), Norway (date of accession: 20 December 2010), Oman (date of accession: 21 March 2005), Pakistan (date of accession: 22 January 2004), Panama (date of ratification: 28 July 2003), the Russian Federation (date of accession: 25 May 2011), Rwanda (date of accession: 28 January 2010), Saudi Arabia (date of ratification: 27 June 2008), Senegal (date of ratification: 9 January 2006), Singapore (date of accession: 28 January 2009), South Africa (date of ratification: 18 January 2007), Tajikistan (date of accession: 31 May 2011), Turkey (date of ratification: 23 August 2011), the United Arab Emirates (date of

Protocol adopted is the Protocol on Matters specific to Railway Rolling Stock, opened to signature in Luxembourg on 23 February 2007; this has not, however, yet come into force.

4. The principal means by which the Convention enhances legal certainty and transparency in the type of financing which it is designed to promote, namely asset-based financing, is through an electronic international registry which can be accessed on-line at any time by parties wishing to enquire about existing interests created under the Convention as implemented by a Protocol (a separate Registry needing to be established under each Protocol). The key feature of each Registry is its incorporation of the first-in-time priority principle: the priority established by the registering of an international interest in a Registry must be honoured by the courts of each Contracting State. Each registry is operated by a Registrar, who, in turn, is overseen by a Supervisory Authority. The first Registry to enter into operation, on 1 March 2006, was, pursuant to the entry into force of the Aircraft Protocol (and, thus, the Convention as applied to aircraft objects), the International Registry for aircraft objects. The Registrar of the International Registry for aircraft objects is Aviareto, an Irish company, and the Supervisory Authority is the International Civil Aviation Organization (ICAO). As of 1 August 2011, the International Registry for aircraft objects (namely, those categories of equipment covered by the Aircraft Protocol, that is airframes, aircraft engines and helicopters) boasted more than 265,000 registrations against more than 77,000 aircraft objects.

III. THE DRAFT PROTOCOL: HOW IT IMPLEMENTS THE CONVENTION

5. The draft Protocol is designed to implement the Convention for space assets: it is designed to provide those special equipment-specific rules necessary to adapt the rules of the Convention to the practical needs of space financing. Two examples serve to illustrate this principle.

6. First, the sphere of application of the Convention, through the future Space Protocol, to space assets has been drawn as broadly as possible, consistently with the requirements of legal certainty, in particular anticipating future developments in the classes of space asset that may be the subject of separate financing. It applies to any man-made uniquely identifiable asset in space or designed to be launched into space and, specifically, any “spacecraft”, any payload or any part of a spacecraft or payload, such as a transponder.⁶ The term “spacecraft” is intended to cover any satellite, space station, space module, space capsule, space vehicle or reusable launch vehicle. The term “payload” is intended to cover any telecommunications, navigation, observation, scientific or other payload in respect of which a separate registration may be made in the future International Registry for space assets, in accordance with the regulations to be promulgated, pursuant to the future Protocol, by the future Supervisory Authority.

7. Secondly, the sphere of application has been broadened to cover debtor’s rights, understood as “rights to payment or other performance due or to become due to a debtor by any person with respect to a space asset”,⁷ with the creditor being entitled to record such rights as part of its international interest registered in the space asset in question. The importance of this decision lies in the fact that, under Article 8(1)(a) of the Convention, one of the creditor’s remedies in the event of default by the debtor is to take possession or control of any object charged. Apart from the physical difficulties inherent in taking possession of an asset in outer space, it is not the value of a space asset as such that a creditor will be looking to in such a situation but rather the revenue stream generated by use of that asset.⁸ Upon taking control of a space asset, the creditor can, thus, be sure that it will not be a space asset generating revenue for a third party and this will reduce the amount of legal protection otherwise needed by potential creditors and enable them to pass on the resultant savings to their clients, as well as, in turn,

accession: 29 April 2008), the United Republic of Tanzania (date of ratification: 30 January 2009) and the United States of America (date of ratification: 28 October 2004).

⁶ Cf. Article I(2)(l) of the draft Protocol.

⁷ Cf. Article I(2)(a) of the draft Protocol.

⁸ Cf. D.A. Panahy: *The preliminary draft Protocol on Matters specific to Space Assets: an overview of its objectives and key provisions* (C.G.E. Space Pr./1/W.P.5), p. 4.

reducing the high cost of commercial space financing for those smaller, less established players who would ordinarily be disadvantaged by reason of the risk involved in extending credit to them.

8. In keeping with UNIDROIT's practice of involving industry experts in the elaboration of its instruments from the very outset, it is significant to note that the first draft of what has now become the draft Protocol was prepared by an industry working group organised at the invitation of the President of UNIDROIT.⁹ Following the UNIDROIT Governing Council's decision to forward this first draft to Governments for finalisation, a UNIDROIT Committee of governmental experts has held five sessions, the most recent of which in February of this year. 57 States,¹⁰ including a representative cross-section of the industrialised, emerging and developing worlds, and a considerable number of intergovernmental and international non-governmental Organisations, including the I.T.U., as well as leading representatives of the commercial space, financial and insurance communities,¹¹ participated in the work of the Committee. The Committee was chaired by Mr S. Marchisio (Italy), the three deputy Chairmanships being held by Mexico, South Africa and the Czech Republic.

9. It may, therefore, safely be said that the draft Protocol is the result of close co-operation between representatives of Governments and leading experts from the commercial space sector. At the end of its fifth session, the Committee of governmental experts was able to recommend that the text was ripe for transmission to a diplomatic Conference for adoption.¹² As has been seen, this recommendation was endorsed by the UNIDROIT Governing Council and, on 28 June 2011, the Government of the Federal Republic of Germany announced that it would host such a diplomatic Conference in Berlin from 27 February to 9 March 2012. Invitations for the Conference, in particular to all members of the United Nations, international Organisations, such as the I.T.U., and representatives of the commercial space sector, went out on 6 and 7 September 2011.

IV. The role of the Supervisory Authority under the future Space Protocol

10. As mentioned earlier, the I.T.U. Secretariat has for some time now, and in particular at the most recent session of the UNIDROIT Governing Council, manifested interest in the I.T.U. being considered as a potential candidate to assume the functions of Supervisory Authority of the international registration system for space assets to be established pursuant to the future Space Protocol. This Note will now look at the implications for the I.T.U. of acting in that capacity, both in terms of the functions that would devolve on it under the combined effect of the

⁹ This working group brought together representatives of such major players as Alcatel, Alenia Spazio, ANZ Investment Bank, Argent Group, Arianespace, Assicurazioni Generali, Astrium, BNP Paribas, the Boeing Company, Crédit Lyonnais, Deutsche Morgan Grenfell, DIRECTV, EADS, FiatAvio, GE American Communications, Hughes Electronics Corporation, Hughes Space & Communications Company, ING Lease International Equipment Finance, Lockheed Martin Finance Corporation, Lockheed Martin Global Telecommunications, the Long Term Credit Bank of Japan, the Mitsubishi Trust and Banking Corporation, Motorola Satellite Communications Group, PanamSat, La Réunion Spatiale, Space Systems/Loral, SpaceVest and TelecomItalia.

¹⁰ Albania, Algeria, Argentina, Australia, Austria, Belgium, Brazil, Bulgaria, Burkina Faso, Canada, the People's Republic of China, Colombia, the Czech Republic, France, Germany, Greece, Hungary, India, Indonesia, the Islamic Republic of Iran, Ireland, Italy, Japan, Kazakhstan, Kenya, Latvia, Luxembourg, Malaysia, Mexico, Morocco, Nicaragua, Nigeria, the Islamic Republic of Pakistan, Paraguay, Peru, the Philippines, Portugal, the Republic of Korea, Romania, the Russian Federation, Saudi Arabia, Senegal, Slovakia, Slovenia, South Africa, Spain, Sudan, Sweden, Syria, Thailand, Tunisia, Turkey, Ukraine, the United Kingdom, the United States of America, Uruguay and Venezuela.

¹¹ Alcatel, Arianespace, the Boeing Capital Corporation, Calyon, EADS, EADS Astrium, EADS Space Transportation, the European Satellite Operators' Association, Eutelsat Communications, the German Space Agency, Groupe Crédit Agricole, Hermes, Intelsat, JSAT Corporation, KfW, Marsh S.A., Munich Reinsurance Company, SES S.A., SpaceX, Telespazio, Thales Alenia Space and Thuraya Satellite Telecommunications, as well as law firms advising such parties, including Baker & McKenzie, BHO Legal, Herbert Smith, Lovells, Milbank, Tweed, Hadley & McCloy, Mizrack & Gantt, White & Case and Zuckert Scoutt & Rasenberger.

¹² Cf. C.G.E./Space Pr./5/Report, § 134.

Convention and the draft Protocol and the process to be set in train for the establishment of a future International Registry for space assets.

(a) *Legal status of the Supervisory Authority*

11. Article 17(1) of the Convention provides that “[t]here shall be a Supervisory Authority as provided by the Protocol”. Article 27(1) of the Convention goes on to provide that “[t]he Supervisory Authority shall have international legal personality where not already possessing such personality”. And Article 27(2) specifically indicates that “[t]he Supervisory Authority and its officers and employees shall enjoy such immunity from legal or administrative purposes as is specified in the Protocol”.

12. Article XXVIII(2) of the draft Protocol provides that 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”.

13. To give an idea of what this means, it is worth noting that, as Supervisory Authority of the international registration system for aircraft objects, ICAO, as a specialised agency of the United Nations, enjoys the privileges and immunities set out in the standard clauses of the 1947 United Nations Convention on the Privileges and Immunities of the Specialized Agencies and Annex III to that Convention.¹³ Sections 4-6 of Article III of the 1947 Convention provide that the specialised agencies, together with their property, assets, premises and archives are inviolable and that they enjoy immunity from every form of legal process, except so far as in any particular case they have waived their immunity. Furthermore, ICAO enjoys similar immunity under its Headquarters Agreement with the Government of Canada. Under Article 27(3)(a) of the Convention, “[t]he Supervisory Authority shall enjoy exemption from taxes and such other privileges as may be provided by agreement with the host State”.

14. Article 27(4) of the Convention provides that “[t]he assets, documents and data bases of the International Registry shall be inviolable and immune from seizure or other legal or administrative process”. However, for the purposes of any claim against the Registrar under Article 28(1) of the Convention, dealing with compensatory damages for loss directly resulting from an error or omission of the Registrar and its officers and employees or from a malfunctioning of the international registration system, or under Article 44 of the same, dealing with the making of orders against the Registrar, under Article 27(5), “the claimant shall be entitled to access to such information and documents as are necessary to enable the claimant to pursue its claim”.¹⁴ Moreover, under Article 27(6) of the Convention, “[t]he Supervisory Authority may waive the inviolability and immunity conferred by” Article 27(4).

(b) *Relations between the Supervisory Authority and the Registrar*

15. The basic rules governing relations between the Supervisory Authority and the Registrar of the future International Registry for space assets are contained in Article 17(2) of the Convention.

16. First, under Article 17(2)(a), it is the Supervisory Authority that will have the task of establishing or providing for the future International Registry for space assets.

17. Secondly, according to Article 17(2)(b), save as otherwise provided by the future Space Protocol, the appointment and dismissal of the Registrar of the future International Registry will be the responsibility of the Supervisory Authority. Sir Roy Goode notes in his *Official Commentary on the Convention and the Aircraft Protocol* that the “right of dismissal and the Registrar’s entitlements on the premature termination of its role are among the matters one would expect to be controlled by the terms of the Registrar’s appointment. In that context, the

¹³ Cf. Sir Roy Goode, *Convention on International Interests in Mobile Equipment and Protocol thereto on Matters specific to Aircraft Equipment: Official Commentary (revised edition)*, § 3.81.

¹⁴ Cf. also Article 27(5) of the Convention.

Supervisory Authority and the Registrar would no doubt wish to consider either the waiver of the Supervisory Authority's immunity from suit or some contractually agreed dispute resolution mechanism".¹⁵

18. Thirdly, under Article 17(2)(c), it will be for the Supervisory Authority to ensure that any rights required for the continued effective operation of the future International Registry for space assets in the event of a change of Registrar will vest in or be assignable to the new Registrar. Thus, on a change of Registrar, the new Registrar will be able to enjoy all the rights, including intellectual property rights, needed for the continued efficient operation of the future International Registry. The Supervisory Authority will, under Article 17(4) of the Convention, be able to ensure this not only by contract but by reason of its ownership of all proprietary rights in the data bases and archives of the future International Registry.¹⁶

19. Fourthly, according to Article 17(2)(d) of the Convention, it will be for the Supervisory Authority, following consultation with Contracting States, to make or approve and ensure the publication of regulations pursuant to the future Space Protocol dealing with the operation of the future International Registry for space assets. Article XXIX of the draft Protocol provides that "[t]he first regulations shall be made by the Supervisory Authority so as to take effect on the entry into force of this Protocol". The detailed requirements for the making of registrations in the future International Registry will, for example, be set out in the regulations. Moreover, it is envisaged that the future Space Protocol will leave it to the regulations to determine the case for the expansion of the sphere of application of the future Protocol by bringing new types of asset within the definition of "space asset" as and when such assets are considered to be bankable within the commercial space sector.¹⁷

20. Fifthly, under Article 17(2)(e), it will be for the Supervisory Authority to establish administrative procedures through which complaints concerning the operation of the future International Registry for space assets can be brought before it.

21. Sixthly, according to Article 17(2)(f), it will be for the Supervisory Authority to supervise the Registrar of the future International Registry and the operation of that Registry. While the Supervisory Authority will exercise supervisory powers over the Registrar and will be able to deal with complaints about the operation of the future International Registry, it will not be entitled to adjudicate on a particular registration or to give directions to the Registrar to change any data relating to a particular registration.¹⁸ This is a matter exclusively for negotiation between the Registrar and the party concerned and, failing agreement, for the courts of the place where the Registrar has its centre of administration.¹⁹

22. Seventhly, under Article 17(2)(g), it will be for the Supervisory Authority, where requested to do so by the Registrar, to provide such guidance to the Registrar as the Supervisory Authority may think fit.

23. Eighthly, according to Article 17(2)(h), the Supervisory Authority will have the power to set and periodically review the structure of the fees to be charged for the services and facilities of the future International Registry.

24. Ninthly, under Article 17(2)(i) of the Convention, the Supervisory Authority will have the power to do all things necessary to ensure that an efficient notice-based electronic registration system exists to implement the objectives of the Convention and the future Space Protocol.

¹⁵ Cf. Sir Roy Goode, *op. cit.*, § 4.127.

¹⁶ Cf. *idem*, § 4.130.

¹⁷ Cf. C.G.E./Space Pr./5/Report, § 17.

¹⁸ Cf. Sir Roy Goode, *op. cit.*, § 4.127.

¹⁹ Cf. Article 44 of the Convention.

25. Finally, according to Article 17(2)(j) of the Convention, the Supervisory Authority will have to report periodically to Contracting States on the discharge of its obligations under the Convention and the future Space Protocol.

(c) *Cost-recovery basis principles for the function of the Supervisory Authority*

26. The future International Registry for space assets is not intended to be a for-profit operation.²⁰

27. However, Article XXXI(4) of the draft Protocol provides that “[t]he 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”. In particular, in setting the fees to be charged, the Supervisory Authority will be entitled to charge for reasonable setting-up costs - which will thus be recouped over a period rather than falling all at once on the States Parties to the Convention and the future Protocol - and the reasonable costs of establishing, operating and regulating the future International Registry and of supervising the Registrar and performing the other functions of the Supervisory Authority.²¹ Such costs may include provision for the servicing of equipment and the repair, replacement and maintenance of the system as a state-of-the-art registration system.²²

(d) *Function of the advisory commission of experts of the Supervisory Authority and its role to find expedient solutions to evolving issues regarding the future International Registry for space assets*

28. Article XXVIII(3) of the draft Protocol provides that “[t]he Supervisory Authority may establish a commission of experts, from among persons nominated by the negotiating 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”.

29. To appreciate the potential role of a commission of experts of the future Supervisory Authority, it is helpful to see, once again, what has happened pursuant to the Aircraft Protocol.

30. Under Resolution No. 2 adopted at the Cape Town diplomatic Conference, ICAO was invited to establish a Commission of Experts, consisting of not more than 15 members appointed by the ICAO Council from among persons nominated by the Signatory and Contracting States to the Convention and the Aircraft Protocol, having the necessary qualifications and experience, with the task of assisting the Supervisory Authority upon the entry into force of the Convention and the Aircraft Protocol.

31. With the entry into force of the Convention and the Aircraft Protocol, the Council of ICAO, having on 17 June 2005 converted into a definitive acceptance the acceptance in principle of the office of Supervisory Authority of the International Registry for aircraft objects that ICAO had given in Cape Town, established the Commission of Experts of the Supervisory Authority of the International Registry (CESAIR). There are currently 12 members of CESAIR, representing Canada, the People’s Republic of China, France, Ireland, Nigeria, Pakistan, Singapore, South Africa, Switzerland, the United Arab Emirates, the United Kingdom and the United States of America.²³

²⁰ Cf. Sir Roy Goode, *op. cit.*, § 5.97.

²¹ *Idem.*

²² *Idem.*

²³ The Registrar of the International Registry for aircraft objects (Aviareto) is, in its turn, assisted by the International Registry Advisory Board (IRAB), set up by that Registrar to provide it with advice on matters relating to the needs of users of the Registry. As noted in Sir Roy Goode’s Official Commentary (at § 3.30), the essence of such advice is made available to ICAO as Supervisory Authority

V. THE PROCEDURE FOR THE ESTABLISHMENT OF THE FUTURE INTERNATIONAL REGISTRY FOR SPACE ASSETS

32. It will be for the Berlin diplomatic Conference to decide on the procedure to be followed for the establishment of the future International Registry. However, it is useful to look at the precedent set by the procedure employed for the establishment of the International Registry for aircraft objects. The key elements of that procedure were set forth in Resolution No. 2 adopted in Cape Town; what is most important to bear in mind, in this context, is that ICAO, having accepted, in principle, the functions of Supervisory Authority conferred upon it by the Cape Town diplomatic Conference, a Preparatory Commission, composed of persons, having the necessary qualifications and experience, nominated by the Governments of 20 States, was set up to act with full authority as Provisional Supervisory Authority for the establishment of the International Registry for aircraft objects, under the guidance and supervision of the ICAO Council, pending the entry into force of the Convention and the Aircraft Protocol.

33. The Preparatory Commission was directed by the same Resolution, first, to ensure that the international registration system for aircraft objects be set up, in accordance with an objective, transparent and fair selection process, and that it be ready to be operated at the latest by the time of the entry into force of the Convention and the Aircraft Protocol, secondly, to ensure the necessary liaison and co-ordination with private industry representatives, as the future users of the International Registry and, thirdly, to work on such other matters relating to the Registry as might be required to ensure its establishment.

34. Negotiating States and interested private parties were urged by the Resolution to make available, on a voluntary basis, at the earliest possible date, the necessary start-up funding for the tasks of the Preparatory Commission and ICAO. ICAO was entrusted with the task of administering these funds.

35. Following the circulation of a Request for Proposals and the assessment by technical experts of the bids received, at the second session of the Preparatory Commission, held in Montreal on 27 and 28 May 2004, Aviareto was selected as Registrar of the International Registry for aircraft objects. The regulations for this Registry, prepared by a working group, were approved by the Preparatory Commission at its third session, held in Montreal on 17 and 18 January 2005. As mentioned earlier, the ICAO Council definitively agreed to assume the functions of Supervisory Authority on 17 June 2005. The regulations were completed by procedures in October 2005 and the combined regulations and procedures were published in 2006 in time for the entry into operation of the Registry. Whereas the regulations were designed to provide the rules for the operation of the Registry, the procedures were intended to implement such rules. It was thus that, with the entry into force of the Convention and the Aircraft Protocol on 1 March 2006, all aspects of the international registration system for aircraft objects were ready to go into operation.

VI. CONCLUSIONS

36. The adoption of the draft Protocol promises to be a landmark in the development of outer space law: it will be the first international commercial space law treaty in history. It will also stand as a singular achievement resulting from the close co-operation of Governments and industry. But it is important to realise that the adoption of the draft Protocol is not the end of the journey. Apart from the efforts that will be required to bring the future Protocol into force, it is not an exaggeration to say that, probably, the most important tasks to be accomplished for the implementation of the future Protocol will be, first, the decision to be taken regarding the Supervisory Authority of the future International Registry and, secondly, the establishment of the International Registry in which parties will be able to register their international interests in space assets. As happened at the Cape Town diplomatic Conference, with the invitation addressed to ICAO, it is to be hoped that the Berlin diplomatic Conference may be in a position to invite an Organisation with the same sort of prestige and credibility as ICAO to accept the functions of Supervisory Authority upon the entry into force of the future Space Protocol. There can be no doubt as to the link, in the minds of all, between the existence of an international registration

system under a Protocol to the Convention ready to go into operation and the willingness of States to become Parties to that instrument.

37. Given the interest manifested to date by I.T.U. in being considered as Supervisory Authority and with the Berlin diplomatic Conference just around the corner, it is, perhaps, important to clarify some of the key questions that members of the I.T.U. Council may be asking themselves regarding the implications for the I.T.U. of its assumption of such functions.

38. First of all, it is important to dispose of any potential liability concerns regarding the Supervisory Authority. As this Note has shown,²⁴ the Convention makes it quite clear that the Supervisory Authority shall enjoy such immunity from legal or administrative process as is specified in the relevant Protocol. The draft Protocol specifies that the immunity of the Supervisory Authority of the future international registration system is to be that provided under the rules applicable to it as an international entity or otherwise. Thus, for example, should the Supervisory Authority be a specialised agency of the United Nations, it would, together with its property, assets, premises and archives, be inviolable and enjoy immunity from every form of legal process, except, of course, so far as in any particular case it waived its immunity.

39. Secondly, it is appropriate to consider the funding issue. As this Note has sought to explain,²⁵ the Supervisory Authority, in setting the fees to be charged for use of the future International Registry, will be entitled to charge for reasonable setting-up costs and the reasonable costs of establishing, operating and regulating the future International Registry and of supervising the Registrar and performing the other functions of the Supervisory Authority. This is, precisely, what has happened with ICAO in its exercise of the functions of Supervisory Authority under the Aircraft Protocol. It is interesting to bear in mind that not a single extra member of staff has had to be recruited by ICAO as a result of its discharge of these functions. And the funding of those of its officials responsible for carrying out these functions is met out of the fees charged by the International Registry for aircraft objects.

40. Thirdly, it is also important to consider the technical implications for the Supervisory Authority. Again, it is useful to consider the experience of ICAO in this field. As has been shown, in line with the identical procedure envisaged under the draft Protocol, the Council of ICAO, having accepted the functions of Supervisory Authority, with the entry into force of the Aircraft Protocol, established the Commission of Experts of the Supervisory Authority of the International Registry (CESAIR). It is this Commission which has carried out all the technical work inherent in the ICAO Council's exercise of its functions as Supervisory Authority. And Article XXVIII(3) of the draft Protocol makes it clear that it is the intention for the future Supervisory Authority of the international registration system for space assets to be able to avail itself of similar technical assistance.

41. Lastly, it is appropriate to recall that, as already mentioned, the decision taken by ICAO at the Cape Town diplomatic Conference to accept the invitation it had received from the Conference to assume the functions of Supervisory Authority of the international registration system for aircraft objects was a decision taken in principle only. It was thus that, under the guidance of the ICAO Council, the Preparatory Commission was able to carry out its work timeously without compromising the right of the competent body within ICAO to take a final decision at the appropriate moment. It is, therefore, worth emphasising that all that is called for in this regard at the Berlin diplomatic Conference is a decision of principle sufficient to set in motion the procedure for the establishment of the future International Registry, leaving intact the right of the competent Authorities of the Organisation invited to act as Supervisory Authority to reach a final decision at the appropriate moment.

Rome, 10 October 2011

²⁴ Cf. §§ 11-14, *supra*.

²⁵ Cf. § 27, *supra*.