



April 15, 2010

Mr. Martin J. Stanford
Deputy Secretary-General
International Institute for the Unification of Private Law (UNIDROIT)
Via Panisperna 28
00184 Rome, Italy

Via e-mail at: mjstanford@unidroit.org

Re: Proposed Draft Space Assets Protocol to the Cape Town Convention

Dear Mr. Stanford:

Following our letter exchange late last year, the Satellite Industry Association (SIA)¹ wishes to reiterate our serious concerns regarding the draft Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Space Assets (the "draft Protocol") as revised during the Third Session of the UNIDROIT Committee of Governmental Experts, held in Rome from 7-11 December, 2009. At that meeting, certain delegations decided to give completion of the draft Protocol the highest priority. This was done despite the serious concern expressed by SIA and even stronger opposition from many important satellite industry representatives at the meeting.²

As acknowledged at the December meeting, industry support is critical for the development of any such Protocol. In light of industry objections, UNIDROIT prepared

SIA is a U.S.-based trade association providing worldwide representation of the leading satellite operators, service providers, manufacturers, launch services providers, and ground equipment suppliers. SIA is the unified voice of the U.S. satellite industry on policy, regulatory, and legislative issues affecting the satellite business. SIA Executive Members include: Artel, Inc.; The Boeing Company; CapRock Government Solutions; The DIRECTV Group; Hughes Network Systems, LLC; DBSD North America, Inc.; Echosat Satellite Services, LLC; Integral Systems, Inc.; Intelsat, Ltd.; Iridium Satellite, LLC; Lockheed Martin Corporation.; Loral Space & Communications, Inc.; Northrop Grumman Corporation; Rockwell Collins Government Systems; SES World Skies, Inc.; SkyTerra Communications, Inc; and TerreStar Networks, Inc. SIA Associate Members include: Arqiva Satellite and Media; ATK Inc.; Cobham SATCOM Land Systems; Comtech EF Data Corp.; DRS Technologies, Inc.; EchoStar Satellite, LLC; EMC, Inc.; Eutelsat, Inc.; Globecom Systems, Inc.; Glowlink Communications Technology, Inc.; iDirect Government Technologies; Inmarsat, Inc.; Marshall Communications Corporation.; Panasonic Avionics Corporation; SatGE, Inc.; Spacecom, Ltd.; Spacenet Inc.; Stratos Global Corporation; Telesat Canada; Trace Systems, Inc.; and ViaSat, Inc. Additional information about SIA can be found at <http://www.sia.org>.

² AON, Asia-Pacific Satellite Communications Council, Barclays Capital, Ciel Satellite Group, elseco limited, European Satellite Operators Association, Eutelsat, ING, Intelsat, ManSat, Marsh, O3B Networks, Satellite Industry Association, SES, Telesat, QuetzSat

a revised version of the draft Protocol with the aim of addressing concerns voiced by various parties and ensuring a commercially viable Protocol that would enhance opportunities for asset-based financing in space.

After reviewing the proposed revised text, SIA and our members are of the view that virtually all of the concerns we previously raised in our correspondence with UNIDROIT remain unresolved.³ We reiterate our view that this draft Protocol does not meet the goals it was designed to achieve and, given the significance of such issues, we still believe that it will actually hinder asset-based satellite financing. Moreover, the fundamental concern continues that this draft Protocol will impose an additional, unnecessary, burdensome, and vague layer of law through broad, unclearly defined rules on ownership, security interests and salvage rights in space assets.

The following issues remain as some of the most troubling to us:

1. The sphere of application of the Protocol with particular reference to the definition of “space assets”;
2. The priority of competing rights regarding components in the context of exercise of default remedies;
3. The public service exemption from default remedies;
4. The issue of salvage interests in space assets;
5. Criteria for identification of space assets for the purposes of registration; and
6. Debtor’s rights and the assignment of debtor’s rights.

We have outlined our detailed concerns for each of these points in Annex 1 (attached).

Based on these remaining and unresolved concerns, SIA has concluded that the revised version of the draft Protocol simply does not address adequately the concerns raised by the satellite industry. The revisions indicate a drafting trend that is more responsive to the requirements and concerns of Governments, rather than those of the satellite and the financial community most affected by the proposed Protocol. The only justification for a legal instrument such as the Protocol is that it is intended to facilitate the fundamental capital-raising needs of the commercial space and financial communities. Without this, its ability to assist the satellite industry in attracting investment is inevitably compromised. We believe that the current draft Protocol does not satisfy this goal and, in fact, would cause confusion, add layers of bureaucracy and discourage investment.

Given the foregoing and our continued serious concerns, SIA does not believe that there is a compelling need for a new layer of supra-national law addressing ownership and collateral security issues relating to certain space assets. Many existing legal regimes already address adequately the granting of security in space based assets and no asset-

³ See Annex 2.

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based satellite financings have failed to proceed or been unduly burdened due to impediments over the granting and perfection of security interests. We see no need in adopting this Protocol and therefore we continue to oppose it.

SIA and its members respectfully request that you cease work toward the draft Protocol, considering the satellite industry's vigorous objections and the potential deleterious effect such a Protocol would wreak on sector worldwide.

Respectfully,

A handwritten signature in black ink, appearing to read "Patricia Cooper". The signature is fluid and cursive, with the first name "Patricia" being larger and more prominent than the last name "Cooper".

Patricia Cooper
President
Satellite Industry Association

cc: Ambassador Philip L. Verveer
Deputy Assistant Secretary of State and U.S. Coordinator for International
Communications and Information Policy
U.S. State Department

Mr. Ken Hodgkins
Director, Office of Space and Advanced Technology
U.S. State Department

Mr. Hal Burman
Executive Director, Office of Legal Adviser
U.S. State Department

ANNEX 1
Detail of SIA Specific Concerns with
Revised Version of Draft Space Assets Protocol

1. The Sphere of Application of the Space Protocol, with Particular Reference to the Definition of “Space Assets”

The previously-proposed definition of “space assets” took the approach of enumerating assets that are to be considered space assets, such as “satellite”, “satellite bus”, “satellite transponder”, “payload”, etc. (Article I.2(k) of the 2009 version of the draft Protocol). SIA’s primary concern with this approach was that, based on our experience, it is very difficult, if not impossible, to get universally-accepted definitions of such terms in the industry.

Industry has previously raised our concerns with regard to the criterion used to qualify “space assets”, *i.e.*, components that are not capable of independent control or of being independently owned or used. Our view was that there may be valuable components that do not fall under this criterion, components which may be of interest to creditors and which, under such definition of “space assets”, would not be governed by the Protocol.

The latest draft Protocol takes a slightly different approach by defining a space asset as “any man-made uniquely identifiable asset [capable of being independently owned, used or controlled,] in space or intended to be launched into space without losing its distinct identity, such as a satellite, space station, satellite bus, transponder, module, space vehicle, launch vehicle or space capsule [including any such asset in course of manufacture or assembly], together with all installed, incorporated or attached accessories, parts and equipment and all data, manuals and records relating to its ownership, use or control.” Although the “definition by enumeration” approach was abandoned, the criterion of “capable of being independently owned, used or controlled” is still present, albeit bracketed for now. A footnote in the UNIDROIT draft explains that the square brackets are not to suggest disagreement with the need for some language but rather the desirability of more appropriate language. Thus the concern we previously raised regarding the consequences of such limitation of the sphere of application of the Protocol remains.

Additional issues of concern that we previously expressed with regard to the definition of “space assets” are unresolved, such as, for example, with regard to the category of objects “intended to be launched into space [...], [including any such asset in course of manufacture or assembly]”, which in our view raises the question as to how the regime of the draft Protocol would interact with the regime under applicable national law of secured financing, since it is likely that a creditor having an interest in such an object would be advised to file a financing statement under domestic law, especially given the risk (and likelihood) that the object will not be launched within the proposed timeframe (*i.e.*, one year before possible registration discharge) and the creditor would have to de-register its interest under the Protocol losing its priority vis-à-vis other creditors with competing

interests in the same object. The benefit for creditors of adding the Protocol regime on top of the relevant domestic regime(s) applicable to assets on the ground is highly questionable and, more likely, will be viewed as potentially confusing and disadvantageous.

2. Priority of competing rights regarding components in the context of exercise of default remedies

Industry concerns were first raised by a proposal made during a UNIDROIT meeting in Berlin in 2008. During this meeting, language was proposed whereby creditors should only exercise default remedies in respect of a space asset if such exercise would not impair ownership rights in an independent component that was either physically or functionally linked to that space asset. This approach effectively provides non-disturbance or quiet enjoyment rights to owners or creditors of component parts and may, therefore, impair the ability of owners of the asset with the component parts from securing financing.

We understand that a provision is still under consideration regarding enforcement against a space asset that is functionally linked to another space asset in which another creditor has an interest. We remain doubtful that any alternative language will adequately address our concern that the financing of component parts of satellites, such as transponders and hosted payloads, and other space assets be recognized adequately and accurately. Therefore, industry's initial concerns remain.

We also object to an approach effectively providing non-disturbance or quiet enjoyment rights to owners or creditors of component parts that may, therefore, impair the ability of owners of the asset with the component parts from securing financing. Issues between and among creditors are usually dealt with as a matter of negotiation on a case-by-case basis. Our proposal then was, and still is, to allow creditors to settle potential conflicting rights as regards assets and their component parts that may be separately financed via intercreditor agreements.

3. Public Service Exemption from Default Remedies

One of the most significant issues of concern, the limitations on the exercise of creditors' remedies with respect to space assets performing a public service, remains outstanding in the draft Protocol. Despite UNIDROIT's declared aim to balance the interests of governments in the continuance of telecommunications services of public importance and the rights of creditors to be paid, the current proposal still incorporates the "public service" condition for creditor remedies, even where only a portion of a space asset may be considered to be serving a public purpose. As such, this creates uncertainty in the economic value of the security taken by creditors in space assets and thus may discourage financing.

The revised draft provides in Article XXVII*bis* (currently circulated for comments) that a State has the right to object to the exercise of default remedies in respect of a space asset needed for the provision or maintenance of a public service that is in the vital interest of that State if the exercise of those remedies would cause interruption in the provision or maintenance of that service. A mechanism is provided for the creditor to exercise the right to step in and assume responsibility for the provision or maintenance of the services or appoint a substitute entity for that purpose, once it has been notified by the State of its objection to the exercise of remedies by the creditor. If the creditor does not exercise such step-in right, the State that objects to the exercise of default remedies by the creditor has the option to either cure the debtor's default by paying the creditor "all sums outstanding for the entire period of default" or take or procure possession, use or control of the space asset and assume the debtor's obligations by stepping into the obligations of the debtor for the provision of a public service in the State concerned.

The proposed wording provides that a State has 90 days to exercise such rights after it objects to the exercise of default remedies by the creditor. A State may only invoke the right to object to the exercise of default remedies if it has registered in the International Registry a notice recording that the space asset is used for providing a public service in the vital interest of that State prior to the registration of an international interest in that space asset by a creditor "[or if it has registered such notice within six months of the launch of a space object, even if after the registration of an international interest by the creditor.]"

As a result, the concerns we expressed previously regarding the public service limitation on remedies remain and are even further amplified. These include:

1. The term "public service" is not defined by the Protocol and, under the current proposal, it will be subject to various interpretations by various Contracting States, adding another layer of uncertainty to the requirements for enforcement of default remedies by creditors;
2. Most countries already impose certain conditions or requirements on communications service providers related to matters of emergency, national security or related communications. Adding yet another, amorphous layer of limitation at the international level will create confusion and lack of uniformity;
3. satellites may offer "public service" communications to differing and varying degrees in a manner that would be difficult or impossible for any creditor to predict or control. It is possible that the use of a single transponder for occasional use emergency services, news gathering or live important events could "qualify" the entire satellite as one providing a "public service;"
4. By entitling a State to prohibit exercise of default remedies that would result in the interruption of a public service provided by the space asset, the revised wording is still extremely restrictive on default remedies;

5. Allowing for a “step-in right” in favour of the creditor in the event of default by the debtor providing the public service, even if by appointing a substitute entity for such purpose, may not be a feasible option for some of the creditors since it entails taking over the operation of a space asset and would require assumption of costly and potentially long-term legal, regulatory, technical, commercial and financial rights and obligations and, even if it could do so, liabilities associated with such operation;
6. Since satellites services are inherently international in nature providing services across many borders, the many States served may have rights and differing interpretations of public service, resulting in potentially varying and conflicting requirements. This is true even assuming licences and authorizations to operate the satellite were timely obtainable by a substitute entity in each affected State;
7. There is no condition on any State registering its right to object other than its own determination that the asset is used for providing a public service in the vital interest of that State;
8. Allowing for a “step-in right” in favour of the Contracting State in the event of default by the debtor providing the public service appears to create an “open door” for a form of appropriation and, as such, may deter potential creditors especially if there are concerns as to whether compensation to be provided by the State for such appropriation (if any) would be “fair” and forthcoming in a timely manner;
9. As noted even by the drafters, the practical implications of the question as to how a State could exercise a step-in right in respect of an operator licensed in a foreign country or operating through equipment located in a third country needs to be considered; and
10. The right of a State to record a notice with the International Registry that will affect not only the rights of creditors that record their interests after such notice but also the rights of creditors that have already recorded their rights at the time of such notice adds a level of uncertainty as to the applicable regime that will likely be unacceptable to most creditors and would therefore likely discourage lending to the types of entities that UNIDROIT seeks to assist.

We reiterate our previously-stated belief that any provision that makes reference to a limitation on creditors’ remedies based on such an undefined and overly broad “public service” concept will sharply undercut the level of predictability needed to attract asset-based financing. We further reiterate that such a provision is unnecessary given existing national regulation and will deter, not facilitate, satellite financing. No public service exception should exist.

4. **Salvage Interests in Space Assets**

Certain insurers requested and obtained revisions to the Protocol to protect their salvage interests under launch and in-orbit insurance policies covering the risk of loss of, or damage to, satellites. The revised draft Protocol creates, in Article IV.5, a right of

subrogation to the interest of the creditor whose debt has been discharged. The provision further specifies that the insurers have the right of subrogation to the creditor's associated rights and related international interest and any recorded debtor's rights in the space asset to the extent of the insurer's salvage interest. This right of subrogation is intended to be in addition to and not affect any right of subrogation the insurer may have under national law or the insurance policy. Besides, it is a fundamental tenet of insurance law that an insurer cannot subrogate against its insured and so, indirectly permitting this against the insured's assets, is questionable.

Our previously expressed concern remains. In our view such salvage rights in favour of insurers create potential priority issues unacceptable to creditors with interests in the space asset (and whose debt has not been discharged at the time of the subrogation) that undermines the clarity financial institutions expect. Moreover, where more than one insurer exists (as is invariably the case) or more than one creditor exists (such as creditors of debtor's rights as well as other international interests), the relative priorities and rights of the universe of creditors will be very challenging to define and reconcile.

Recognition of insurers' rights to salvage is wholly unnecessary to facilitate satellite financing and would be an unprecedented right that is currently unavailable in aircraft or rolling stock financing, where salvage rights are and should be subject and subordinate to rights of secured lenders. Forcing upon satellite operators the need to address the rights of insurers relative to financial institutions as a condition of placing launch and in-orbit insurance will serve to delay or jeopardize the placement of insurance and likely force intercreditor arrangements between lenders, other creditors and insurers (which would involve numerous parties that tend to change over time).

It remains our belief that creating and elevating insurers' rights to salvage will result in significant impediments to satellite financing and a lack of clarity in relative rights of creditors.

5. Identification of Space Assets for the Purposes of Registration

The Cape Town Convention requires the unique identification of a space asset before an international interest can be constituted and registered. There has been much debate and confusion over how a space asset will be identified and defined. Uncertainty with regard to the applicable identification criteria is still present in the revised draft Protocol.

Article XXX of the revised draft Protocol distinguishes, in terms of identification of space assets for registration purposes, between space assets that have not been launched and space assets that have been launched. With regard to a space asset that has not been launched, Article XXX.1 provides that "a description of the space asset that contains the name of its manufacturer, its manufacturer's serial number, and its model designation 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.” With respect to a space asset that has been launched, Article XXX.2 provides that “a description of the space asset that contains the date and time of its launch, its launch site, the name of its launch provider and [...] 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.”

Many of the core identification criteria enumerated above are meaningless in providing certainty of identification both before and after launch. Moreover, our previously expressed concern regarding the need to satisfy “requirements as may be established in the regulations” in addition may undermine the level of certainty expected by creditors as to the identification of space assets for purposes of registration.

6. Debtor’s Rights and the Assignment of Debtor’s Rights

The revised draft Protocol maintains the approach that assignments to the creditor of debtor’s rights and related rights are themselves registrable as international interests. Article I.2(b) defines “debtor’s rights” as “all rights to payment or other performance due or to become due to a debtor by any person with respect to a space asset.” Article I.2(i) defines “rights assignments” as “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 to secure the performance of, or in reduction or discharge of, any existing or future obligation of the debtor to the creditor which under the agreement creating or providing for the international interest is secured by or associated with the space asset to which the agreement relates.”

The revised draft Protocol provides in Article IV.2 that the provisions of the Protocol applicable to rights assignments also apply to an assignment to the buyer of a space asset of rights to payment or other performance due or to become due to the seller by any person with respect to the space asset as if references to the debtor and the creditor were references to the seller and the buyer respectively. Note also that, according to Article IV.4, an interest in a space asset acquired by a satellite insurer as a salvage interest is deemed to have been acquired by way of sale. The priority as between an assignee of debtor’s rights under a rights assignment and an assignee under an assignment of rights deriving from the space asset but unconnected to an international interest is still under consideration.

Virtually all of the concerns we have previously raised remain unresolved. The scope of application of the concept of “debtor’s rights” remains unclarified. The reference to “all” in its definition (*i.e.*, “debtor’s rights’ means all rights to payment or other performance due or to become due to a debtor by any person with respect to a space asset”), for example implies that the assignment of less than all rights would not be recognized. Moreover, not all rights with respect to a space asset would necessarily extend just to the debtor, as opposed to other related parties. The provision of Article IV.2 raises the

question, and creates potential confusion, as to whether the draft Protocol is intended to apply to outright sale of debtor's rights and how such sale could be affected where an international interest exists with respect to the underlying space asset.

The addition of Article IV.4 raises questions as to newly created rights of insurers as "buyers" under the Protocol and how those rights affect the rights of other outright buyers that are not creditors as well as the rights of debtors relative to sellers of space assets. The extension of those rights for the benefit of insurers and, possibly, of assignees under arrangements unconnected with an international interest creates the prospect for confusion and ambiguity regarding the rights of creditors having, or expecting, an international interest in the underlying asset.

It is also not clear within the definition of "rights assignment" what obligation "associated with the space asset" means. This may be of particular concern where, for example, capacity agreements may relate to separate transponders or payloads but not to the satellite itself to which an international interest may have been first granted.

While it is well-understood that the International Registry is asset-based and that, as a result, any debtor's rights should derive from the underlying space asset, there may be instances where debtor's rights may be intended to secure the financing of a separately identifiable part of the international interest to which they first may have been associated. This may result in limitations on the flexibility of satellite financing otherwise currently available to prospective debtors.

We note that pursuant to Articles IV.1 and IV.3, an owner of a satellite may have to register in the International Registry the sale through which it takes title to the satellite, even if such sale is not part of a financing. Requiring every owner of a satellite to register its interest in order to protect internationally its ownership is an unnecessary administrative burden with potentially drastic consequences if not undertaken.

It is understandable that a decision was taken to eliminate related rights (essentially licenses) from the scope of the Protocol. However, Article XVI of the revised draft Protocol has not been changed, despite our expressed concerns and still imposes on the debtor an onerous and unqualified obligation to take all steps within its power to procure the transfer of its license to the creditor or the termination of its license and the grant of a new license to the creditor and must fully cooperate with the creditor to that end. We remain of the view that reconsideration of the obligation imposed on the license-holder to ensure the transfer or cancellation and reissuance of any license is essential. The unintended consequences for satellite operators would be severe.