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Preliminary United States views concerning the Draft Space Assets Finance Protocol

We appreciate the opportunity to provide our views to the Governing Council as to whether formal negotiations on the above-referenced draft protocol should resume and whether our views on policy have changed as a result of the two UNIDROIT meetings in Berlin this year, one in May and the other in October, hosted by the German Space Agency, the Ministry of Justice and others in the private sector.

After reviewing the results of the two Berlin meetings, United States views in general remain essentially the same as our previous statements on this draft protocol. We support conclusion of the Protocol, which may be achievable during 2010, but would support the Protocol itself only if agreement can be reached on provisions that can achieve actual economic and credit enhancement for this field of commerce. The benefits of such a Protocol would be greatest for manufacturers of space equipment and those who acquire space-based services, as it has been in the aircraft sector, as well as medium and smaller size space sector commercial operators, which would expand and deepen the long-term growth of that sector. In the space sector established larger operators may have less immediate need of secured finance, although that need may be different for non-telecommunications uses such as remote sensing and other uses. We consider expansion of the number of space-based commercial sector participant companies to be a policy objective this Protocol can achieve.

The U.S. at the 2008 April meeting of the Legal Subcommittee of the UN Commission on the Peaceful Uses of Outer Space (UNCOPUOS) stated its continued support for concluding this Protocol. Along with a number of states at COPUOS, we have concluded that there are no apparent conflicts between the UN outer space treaty system and the draft UNIDROIT Protocol, and we support retention of a provision that nothing in the Protocol would alter the international obligations of a state party to the UN outer space treaties.

To place our views in context, this would be the third Protocol to the Cape Town Convention of 2004 on international rights in mobile equipment. The first Protocol to the Convention, which the United States has ratified, on rights in aircraft, aircraft engines and helicopters has we believe been an important international success in promoting modern

law on secured finance as applied to transnational commerce. The Convention provides for the creation of international financing rights which when registered in a treaty-based new registry will provide specific creditor's enforcement rights in the event of default. It already covers over sixty percent of the world's transactions involving larger commercial aircraft, and is expected in the next several years to go considerably beyond that figure. A second Protocol was concluded in 2007 on railroad equipment which is expected to come on line by 2010.

The goal for negotiating a third Protocol on space asset financing, primarily at this stage satellites and satellite-based commerce and services, would be to bring to that area of activity the economic benefits of secured financing. This effort entails challenges somewhat greater than encountered for aircraft. The aircraft finance Protocol was able to build upon an already functioning treaty-based area of commerce, i.e. the regulation of commercial air transportation services under the Chicago Convention of 1944 and its progeny, as well the structure provided by the ICAO as a specialized agency of the United Nations. In addition, there were over forty years of experience in aircraft financing so that the effects of a treaty incorporating market-tested concepts from the Uniform Commercial Code were well understood.

None of these factors apply to the current effort to construct a Protocol on financing space assets. Space-based commercial activities are minimally addressed in the 1967 UN Outer Space Treaty and its related four additional treaties. Some aspects of telecommunications and satellite commerce are regulated in part by the International Telecommunications Union, but the ITU treaty-based structure and system for allocation of orbital rights do not pertain directly to and cannot resolve, and therefore cannot enhance, secured financing rights. Furthermore, there is limited experience with secured financing of assets in non-territorial outer space that are for a number of purposes outside of national jurisdiction and for which traditional secured rights may not be effective. Finally, there appear to be policy concerns about the reach of private party financing rights in outer space that have made consensus difficult to reach, in comparison to the agreements reached on commercial airspace.

We have stated previously that for the draft Protocol to be effective, it must enhance the economic advantages of secured finance interests in outer space assets, so that the economic benefits outweigh the higher risk of investing in satellite-based commerce in comparison to commercial air space. Unlike the Aircraft Protocol, there is general agreement amongst space-faring states that transfer of interests in commercial satellites, whether or not to a foreign creditor or operator must remain subject to national licensing, export, and other regulatory regimes including in our case operations and export controls for national security purposes. This necessarily creates greater uncertainty as to the likelihood of realizing enforcement rights in the event of default, so that the need for balancing economic incentives is also greater.

To meet that need the draft Protocol contains provisions on creditor's remedies, including some specific to space assets such as options for placing in escrow command and control data so that an enforcing creditor can, subject to regulatory approvals, assume

control. Additional economic enhancements are illustrated by U.S. proposals for protection of income streams from satellite operations pending licensing and export approvals. In addition, the U.S. and others have supported expanding the reach of the Protocol to cover associated rights more commonly covered by international project finance so as to make the Protocol more effective economically. A possible disconnect from this objective however may arise from current proposals to impose broad obligations on enforcing creditors to maintain undefined “public services”, which may create an large enough but unpredictable economic risk so as to fail to achieve the presumed goal of the Protocol, i.e. to realize sufficient predictable benefits from secured rights so as to attract that type of finance for outer space in the first place. The U.S. and like-minded states have emphasized that governments that choose to place public services on commercial satellites, rather than on satellites that they own or control, undertake the risk of non-performance, and that the Protocol should not be the vehicle to deal with that risk (outside of life-saving and comparable circumstances) if it also seeks to create a climate in which private sector secured finance becomes more available to boost outer space commercial activities.

Enforcement of rights as to aircraft under the aircraft finance Protocol can be taken upon landing of an aircraft and the attendant reach of national law. Enforcement of rights in an operational satellite however usually depend on access to and ability to use ground-station based command and control data (TTC) and in some cases specific facilities, which may raise jurisdictional and other issues that the Protocol will need to address. There remain other issues that have no direct parallel in aircraft finance, among them the issue of whether separate secured interests can be recognized for large-scale “components” such as operating systems within a satellite, and how conflicts between holders of such interests and that of the satellite itself or interests held in other components will be dealt with. New issues have arisen about the enforcement of rights as to one satellite of a satellite group or constellation, and whether space asset salvage and recovery rights should be given any priority for satellite insurers.

Finally, for the Protocol to be able to be implemented, questions must be resolved as to a new space asset finance registry, what types of assets would be covered and how they would be identified with sufficient certainty so as to allow computer-based searches for prior secured interests. To the extent that certainty of location of a satellite is necessary for purposes of enforcement of secured rights, the registry maintained by the UN Office of Outer Space Affairs (OOSA) would be insufficient, and political consensus is lacking as to authorizing such activity by the UN Secretariat in any event. Some space-faring states have available adequate tracking facilities but use of those for this purpose has not been considered at this stage in the context of these negotiations.

Taking the above into account, the United States as stated above supports continuing the effort to reach sufficient consensus so as to conclude the Protocol, as long as it is aimed at practical results that can enhance availability of and lower the costs of secured finance so as to broaden and deepen commercial activities in outer space. We welcome the resumption of talks next year aimed at restarting intergovernmental negotiations at UNIDROIT.